ORIGINAL

No. S066939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent

versus

MICHAEL ALLEN and CLEAMON JOHNSON

Defendants/Appellants

APPELLANT'S OPENING BRIEF

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

HONORABLE CHARLES E. HORAN, Judge

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES, CASES, STATUTES:

United States Constitution:	**AOB Page:**
Fifth Amendment	29, 175, 186, 195, 201, 203, 277, 280, 328, 528, 648.
Sixth Amendment	189-90, 219, 245, 247,283, 557-60, 570-1, 648-9, 727-32, 735, 739, 747, 751.
Eighth Amendment	66, 246, 423, 427, 533, 536, 553, 591-4, 617, 647, 675-8, 705, 709, 712, 715-7, 729, 731, 742-8, 751-753, 761-4.
Fourteenth Amendment	1-2, 66, 68, 174, 190, 229, 231, 136, 245-8, 252, 283, 293, 320, 419-27, 491, 499, 527, 533-6, 552-4, 590-2, 617-9, 657-9, 673-9, 690-1, 702-12, 716, 721-3, 732-4, 739, 743-6, 751-3, 759, 761, 764.

Federal District Court Cases: **AOB Page**:

California Constitution: **AOB Page:**

California Statutes:
Code of Civil Procedure **AOB Page:**

Evidence Code

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	S066939
Plaintiff/Respondent	)	Los Angeles County Superior Court
versus	)	No. BA105846
MICHAEL ALLEN and CLEAMON JOHNSON	)	
Defendants/Appellants	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE:

On August 5, 1991Victims Donald Loggins and Payton Beroit were shot and killed while sitting in a car parked on Central Avenue near 88th Street in Los Angeles. A police investigation followed; however, no immediate arrests were made. [Clerk's Transcript, volume 1, pages 179-181, and pages 193-195][1] These killings are the basis for the instant case.

Approximately 1½ years later (March 9, 1993), Victim Chester White was shot and killed as he ran from a convenience store near 89th Street and Avalon Blvd. in Los Angeles. A police investigation followed. Appellant was arrested and charged with White's murder in case #TA023268. [CT, 5:933] Appellant was subsequently convicted by a jury of 1st degree murder. On December 22, 1993

[1] Hereafter, all citations will be abbreviated. The above citation, if abbreviated, would be [CT, 1:179-181, 193-195].

Appellant was sentenced to a term of 30 years to life in state prison. [CT, 5:933] This conviction and judgment is the basis for the Special Circumstance of Prior Murder [PC section 190.2(a)(2)] in the instant case.

One year later (December 16, 1994), a Los Angeles County grand jury indicted Appellant and co-defendant Cleamon Johnson on two counts of murder for the August 5, 1991 shooting deaths of victims Loggins and Beroit. Enhancement allegations of armed with a deadly weapon [PC 12022(a)], personal use of a firearm [PC 12022.5(a)], and personal use of an assault weapon [PC 12022.5(b)] were also filed against Appellant as to both counts. Additionally, two special circumstances were alleged against Appellant; prior murder (PC section 190.2(a)(2)] and multiple murders [PC section 190.2(a)(3). [CT, 1:179-181; 193-195, 196] Three days later, (December 19, 1994) the court ordered the original grand jury reporter's transcript to be sealed, and that redacted copies of the grand jury transcript be provided to counsel. The redacted copies omitted the names of three civilian witnesses who testified before the grand jury, and were simply referred to as Witness #1, Witness #2 and Witness #3, respectively. [CT, 1:197]

Attorney Joseph Orr was appointed by the Los Angeles County Superior Court to represent Appellant on December 27, 1994. [CT, 1:192, 200] On January 19, 1995 Appellant entered pleas of not guilty to the two counts of murder, denied the three enhancement allegations as to each count, and denied the special circumstance allegations. [CT, 1:210] Initial discovery materials were provided to Appellant. A copy of the redacted grand jury reporter's transcript was provided to Appellant's counsel; however, the names and other identifying information of civilian witnesses had been edited out of the reporter's transcript pursuant to a court order. [CT, 1:197, 210] The basis for this unusual prosecutorial request and court order was witness security and safety. Eventually, this information was to be disclosed to Appellant and co-defendant Johnson not less than 30 days before the start of trial. [CT, 3:445]

On October 27, 1995 the court granted Appellant's motion [CT, 2:338-43] to sever the "prior murder" special circumstance from the remainder of the counts and allegations contained in the indictment.. This special circumstance was to be resolved if, and after, Appellant was found guilty of 1st degree murder. [CT, 2:377, 383]

On August 26, 1996 Appellant's "Motion to Sever Defendants" and "Motion for Separate Juries", accompanied by counsel's declaration and points and authorities was filed with the court. [CT, 3:470-482] The prosecution filed its response to Appellant's Motion to Sever on November 4, 1996. [CT, 3:487-92] The following day (November 5, 1996) the court denied Appellant's "Motion to Sever Defendants" and "Motion for Separate Juries". [CT, 3:493; RT, 4:993] On August 11, 1997, Appellant renewed his Motion to Sever based on *Aranda/Bruton* grounds prior to witness Donnie Ray Adams testifying. The motion was denied. [RT, 18:3932, 4038]

Jury selection began on July 23, 1997. [CT, 3:635] By August 1, 1997, the jury and alternates were selected. [CT, 3:645-646] Opening statements were made, and witnesses began testifying for the prosecution on August 5, 1997. [CT, 4:780-781]

On the same day, a hearing was held regarding admissibility of gang evidence and gang monikers. The court ruled gang evidence would be admissible for specific reasons. Monikers would be admissible to establish identity when necessary. [CT, 4:780-781] An additional hearing was conducted on August 12, 1997 regarding admissibility of gang evidence. [CT, 4:816-817]

Just two weeks later (August 19, 1997), all parties rested. The jury was instructed. Closing arguments began [CT, 4:823] and they concluded the following day (August 20, 1997). [CT, 4:824]

Jury deliberations began about 11:00 AM on August 20, 1997 [CT, 4:824] and continued for three (3) more days. [CT, 4:828, 830, 833] At 10:15 AM on the fifth (5th) day of deliberations (August 27, 1997), a hearing was conducted, a juror

was removed over defense objection, and he was replaced with an alternate juror. The jury began deliberations anew at about 3:30 PM. [CT, 4:836-837] The next day (August 28, 1997) at about 4:00 PM, the jury notified the court that they could not reach a unanimous verdict re Appellant. [CT, 4:839-40] The following morning (August 29, 1997) Appellant moved for a mistrial. The court inquired of the jury foreman, who indicated the vote was 10-2. The court instructed the jury to resume deliberations. [CT, 4:842] Shortly before 2:00 PM the following court day (September 2, 1997), the jury notified the court that it had reached verdicts. Appellant was found guilty of 2 counts of 1st degree murder. The three weapons allegations were found to be true, and the special circumstance of "multiple murder" was found to be true. Co-defendant Johnson also was found guilty of the murders and the special circumstance of multiple murders. [CT, 4:916-928]

On September 4, 1997, Appellant waived his right to a trial on the bifurcated special circumstance allegation of "Prior Murder", and admitted that this special circumstance was true. The court found the special circumstance of "Prior Murder" to be true, and advised the jury thereof. [CT, 5:933]

The joint-defendant penalty phase of the trial began on September 11, 1997 with opening statements by the prosecutor and Appellant's counsel, with the same jury (absent the replaced juror) hearing the evidence. [CT, 5:955] On September 16, 1997 while the prosecution was presenting evidence in aggravation in the penalty phase (and after significant and frightening evidence had been admitted solely against co-defendant Johnson involving deadly retaliation against individuals who assisted in the investigation and prosecution of co-defendant Johnson), Alternate Juror #2 wrote a note to the court. It said, "Your Honor, I feel very uncomfortable being pointed at by Defendant Allan [sic.] and his lawyer. Could you please address this issue. Thank you, Alternate #2." The court advised the juror to not be concerned, and the presentation of penalty phase evidence continued. [CT, 5:975, 977]

The jury began penalty phase deliberations at about 3:20 PM on September 24, 1997. [CT, 5:994] On the third (3rd) day of deliberations (September 26, 1997), the jury told the court they could not reach a unanimous verdict as to Appellant. After inquiry, the court instructed the jury to continue deliberations. [CT, 5:995-996] On September 29, 1997 at about 3:25 PM, the jury indicated they reached a verdict. The court sealed the verdict until the following day. [CT, 5:998] On September 30, 1997, the jury verdicts of death against Appellant and co-defendant Johnson for both murders were announced. [CT, 5:1081-1083]

On December 12, 1997Appellant's Motion for a New Trial was heard and denied. The automatic Motion for Modification of the Verdict was denied. The court imposed the judgment of death as to Appellant, and Appellant was advised of his appeal rights. [CT, 5:1174-8, 1180-1197] Co-defendant Johnson was also sentenced to death. [CT, 5:1198-1203, 1228-1232] Appellant's Notice of Automatic Appeal was filed with the Supreme Court per Penal Code § 190.6 on December 31, 1997.

INTRODUCTION TO STATEMENT OF FACTS

On August 5, 1991 victims Donald Loggins and Payton Beroit were shot and killed by an Uzi-wielding assailant while they were sitting in a car on Central Avenue in Los Angeles. Both were shot multiple times and both died from these wounds.

Three years passed with no arrests. The City of Los Angeles publicized throughout the community rewards of $25,000 for information leading to the arrests and convictions of those individuals responsible for various murders in that community. At about the same time, the first of three (3) "informant witnesses"[2]

[2] Appellant uses the term "informant/witness" for an individual who is normally in custody, or believes the police can take him into custody at that time, and he then provides them with information regarding the criminal conduct of others. Because the individual has such a strong motive to obtain some benefit in exchange for his co-operation, his credibility is unusually suspect. Although Carl Connor would not be included in this generic definition, Appellant includes him in this

came forward who either identified Appellant as the killer or claimed Appellant had admitted that he was the killer. However, each of these witnesses, in his own way, had an extraordinarily strong motive to fabricate. Each of the three (3) witnesses also had the ability to fabricate a believable story: The basic facts of the shootings were well known in the community, as was the "rumor on the street" that "Fat Rat" [i.e., Appellant] may have been the shooter.

Since the prosecution presented *no* physical evidence at trial that linked Appellant to the killings, and since the prosecution presented *no* evidence that independently corroborated the fact that any of the three witnesses was actually present at the location each claimed to have been at, the necessity of allowing the defense to test the credibility of each of these three (3) witnesses was of paramount importance to Appellant at the trial.

The prosecutor was consciously aware of the necessity of proving these three witnesses were credible and believable. For example, in closing argument she emphasized again and again that the three witnesses were believable because *corroboration* existed that strongly suggested the three witnesses could not simply have made it all up. This corroboration came, the prosecutor argued, from various sources, including physical evidence and not merely other witnesses. The prosecutor argued vigorously that *corroboration* was key in determining if Connor, Jelks and James were believable or not. See, for example, RT, 25:5115-5116; 5127-5128] She emphasized that even though each of the three witnesses may have had motives to lie, they were believable because they *corroborated* each other; that when the jury deliberated the credibility of the witnesses, they should consider "[w]hether the mere fact that they had a criminal history, or that they had a case pending would direct them to tell facts *which are corroborated by the statements of other witnesses*." [RT, 25:5115-51166 (Italics added for emphasis.)]

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classification because of the potential hope or expectation he may have had to receive a reward or other consideration in exchange for his testimony.

Appellant claims he was deprived of a fair trial because a) the prosecution knowingly presented the false testimony of Carl Connor; b) the trial court did *not* allow Appellant to meaningfully confront and cross-examine two important prosecution witnesses to establish the falsity of their testimony, yet at the same time the trial court allowed the prosecution to improperly bolster and reinforce the credibility of these same witnesses; c) the trial court allowed the prosecution to improperly introduce highly prejudicial, harrowing and inflammatory evidence of gang violence and deadly revenge that not only suggested Appellant had a propensity to commit violent acts, but it also had an overwhelming tendency to frighten the jurors; d) the trial court allowed the prosecution's "gang expert" on numerous occasions to render his inadmissible and highly prejudicial personal beliefs as to how the jury should view the evidence; e) Appellant was tried jointly with co-defendant Johnson and the evidence introduced that was to be considered only against co-defendant Johnson was so voluminous, frightening and prejudicial that any limiting instructions were ineffective; f) the trial court allowed the prosecution to introduce an out-of-court admission by non-testifying co-defendant Johnson that facially incriminated Appellant as the shooter, g). during jury deliberations in the guilt phase, the trial court unlawfully removed one of three jurors who had expressed a reasonable doubt as to Appellant's guilt, yet the trial court refused to remove two jurors who intentionally had discussed the case out of the presence of other jurors, and h) after the newly reconstituted jury announced it was deadlocked, the trial court gave the jury a highly inappropriate, coercive and invasive jury instruction that had the effect of depriving Appellant of the independent decision of each individual juror..

In the subsequent penalty phase of the trial, the prosecution's introduction of evidence in aggravation against co-defendant Johnson was of such a harrowing and frightening nature that the jury, already inundated with similar evidence from the guilt phase, was not capable of considering it only as to the co-defendant,

thereby depriving Appellant of due process and his right to a fair trial in the penalty phase also.

GUILT PHASE STATEMENT OF FACTS:

A review of the trial exhibits is, Appellant believes, necessary to fully understand the testimony of various witnesses. For this reason and pursuant to California Rules of Court, #18 and #36.1, Appellant will file at the appropriate time a notice in Los Angeles County Superior Court requesting the original trial exhibits be transferred to the Supreme Court in order to augment the record on appeal. Until then, Appellant has included the following Attachments as a courtesy for use by this Court and counsel until the original exhibits are transferred and augmented to the record.

- Attachment "A": A not-to-scale drawing created by Appellant that illustrates the basic locations and geographic relationships of streets, alleys, houses, businesses and directions at and near the crime scene. It illustrates [i.e., A-1 through A-8] the directions in which various witnesses testified the shooter approached the victims, where he stood while shooting, and the direction he fled after the shootings. The drawing is similar to People's Exhibit #7.
- Attachment "B": A photocopy of People's Exhibit #1, an aerial photograph of the neighborhood where the murders occurred. Appellant has added labels for clarification.
- Attachment "C": A photocopy of People's Exhibit #17, a photograph that illustrates the position of the white Toyota on Central Avenue when the shootings occurred.

However, Appellant respectfully refers this Court and counsel to the actual trial exhibits that will subsequently be transferred for purposes of augmenting the record.

THE CRIME SCENE INVESTIGATION AND PHYSICAL EVIDENCE ANALYSIS:

On August 5, 1991, at about 3:30 p.m. [Reporter's Transcript, volume 18, pages 3999, 4156[3]], victim Donald Loggins was sitting in the driver's seat of his white Toyota Celica that was parked facing south on the west side of Central Avenue between 87th Place and 88th Street in Los Angeles. [RT, 17:3766] He was parked in front of Judge's Hand Car Wash, owned and operated by Eulas (aka "Judge") Wright [RT, 17:3784, 3868]. Immediately south of the car wash was an auto repair/auto body shop. [RT, 17:3773, 3784-5] The auto repair/auto body shop was on the northwest corner of Central Avenue and 88th Street. [RT, 17:3787-8][4]

Victim Payton Beroit was sitting in the right front passenger seat of the white Toyota Celica. Victim Beroit's flashy black Chevrolet was being cleaned at the car wash, and Beroit was waiting for his car's wash to be completed. Beroit's car had expensive Daytona rims for wheels. [RT, 17:3786; People's Exhibit #2 (photos of the black Chevrolet)]

Shortly before 3:41 P.M[5], multiple gunshots were fired in rapid succession. [RT, 17:3763-4] Loggins and Beroit were shot multiple times. Emergency medical personnel arrived. Loggins was already dead. [RT, 17:3770; 18:4015] Beroit was taken to Martin Luther King Hospital where he was pronounced dead. [RT, 17:3770-2, 3911, 3915; 18:4013; People's Exhibit #4 (coroner's photos of deceased victim Beroit) and People's Exhibit #5 (photos of deceased victim Loggins within the white Toyota)]

Police arrived at the crime scene, cordoned off the area as best they could, then conducted a crime scene investigation. [RT, 17:3766-3768, 3909-3910, 3918;

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[3] Hereafter, (RT, 18:3999, 4156)

[4] See Attachment "A" and Attachment "C".

[5] The initial 911 telephone call reporting the shootings came at 3:41 P.M. [RT, 18:3999; People's Exhibit #25]

18:4017-4018] The windows of the white Toyota were down and no broken glass was evident near the car. [RT, 17:3774-5, 3912] A bullet entry hole was located in the headrest of the driver's seat [RT, 17:3775; People's Exhibit #3, photo F] and a corresponding exit hole was observed at about the same height in the "upper quarter panel" on the driver's side of the car. [RT, 17:3774-5, 3803; People's Exhibit #3, photos D and F] An expended projectile was found in the street to the driver's side of the car. [RT, 17:3778] No other bullet holes were observed in the car, and the windshield was not damaged. [RT, 17:3775, 3803-4] Police located nine (9) 9-millimeter brass casings in close proximity to each other. All were found in or near the gutter to the right, and ahead, of the white Toyota Celica. [RT, 17:3778-84; People's Exhibit #17] [6]

Firearms expert Starr Sachs examined the collected evidence, and opined that all 9 casings had been discharged from the same weapon. [RT, 17:3833] She also testified that the recovered bullets from the victims and one of the bullet fragments collected at the scene were fired from the same weapon, and that weapon could have been an Uzi. [RT, 17:3836-8] Although the expert witness could not say the same weapon had fired the bullets *and* ejected the casings, she was of the expert opinion that they were all of the same caliber and all were proprietary to Winchester. [RT, 17:3833-4, 3839] Further, she explained that the ejection port of an Uzi is to the right, meaning she would have expected the shooter to have been standing to the left of where the casings were found. Upon looking at crime scene photos showing where the casings were located [People's Exhibit #17], and after looking at the photo of the exit bullet hole in the left side of the Toyota [People's Exhibit #3, photo F], she opined this evidence would be consistent with the shooter having been standing near the passenger door of the white car, or a little bit further away but facing the car. [RT, 17:3843-7, 3858-60;

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[6] See Attachment "C", *infra*. In this photocopy of People's Exhibit #17, chalk circles drawn around the shell casings can be seen where they were located between the white Toyota and the van parked south of the white Toyota.

People's Exhibit #17, the photograph illustrating the two possible locations with "S's".][7] The shooter, however, would *not* have been standing out in the street. [RT, 17:3804-3805, 3861]

Sachs displayed three live weapons to the jury for the purpose of establishing they appeared similar; an assault weapon called a MAC 10, an assault weapon called a Tech 9, and an Uzi carbine. [People's Exhibits #24, #25 and #26] The expert witness demonstrated how each weapon is loaded with a magazine containing bullets. The magazine could be of different sizes depending on the number of bullets contained in it. The bullets and casings were consistent with having been fired from an Uzi carbine. [RT, 17:3849-3854] Photos of the three weapons were subsequently substituted into evidence for the weapons themselves as People's Exhibits #35, #36 and #37, respectively. [RT, 21:4768-4769]

Dr. Christopher Rogers, an expert witness in forensic pathology reviewed the autopsy reports for both victims. He testified that Loggins had been shot twice in the right side of the head and once in the right side of the body. The trajectory of each bullet was basically horizontal. [RT, 18:4093-4099] Beroit had also been shot three times; twice into the right ear and once into the right shoulder. The trajectories were right to left and horizontal. [RT, 18:4100-4102] Dr. Rogers opined that if the two victims had been seated in a car, the shooter would have been standing to their right, on the passenger side of the car, and parallel to the passenger door. [RT, 18:4110, 4114]

CIVILIAN WITNESSES WHO SPOKE TO THE POLICE IMMEDIATELY AFTER THE SHOOTINGS:

WITNESS EULAS WRIGHT:

Witness Eulas Wright was one of only two witnesses presented by the prosecution who spoke to the police on the day of the shootings. [RT, 17:3901-

[7] See Attachment "C",. In this photocopy of People's Exhibit #17, some of the markings placed on the original People's Exhibit #17 can be seen, but are not clearly legible.

3902] Wright was known as "Judge" and he owned a small car wash on Central Avenue near 88th Street, so the car wash was known as "Judge's Car Wash." [RT, 15:3256-3259][8] He was washing victim Beroit's black Chevrolet when he heard several gunshots fired in rapid succession. He did not know where the shots were being fired from [RT, 17:3872-3873]. He ducked down in front of the car. When the shooting stopped, Wright slowly got up from in front of the black Chevrolet and observed a "short, chunky like guy" running north on Central Avenue [RT, 17:3873, 3895]. On the diagram marked People's Exhibit #7, Wright drew a yellow arrow that illustrated the direction he said the individual fled. [RT, 17:3891][9] He also described this individual as a "chubby guy" who was wearing a black Raiders jacket. He also described the individual as "a husky black male" who was wearing a coat that had "Raiders" or "Oakland Raiders" written on it. [RT, 17:3891][10] Because Wright could see the bottom of the individual's legs from the calf part down, he assumed the "chubby guy" was wearing some type of shorts [RT, 17:3875, 3887, 3891]. He did not see this individual running with a gun, however [RT, 17:3892].

Wright testified he could not see the individual's face as he ran northbound [RT, 17:3893]. He also could not see the individual's hair because the individual had on a "jacket hood" that went up over his head [RT, 17:3892-3893].

At the time of the shooting, Wright had one employee working with him whose name was Willie Clark [RT, 17:3869, 3885]. He did not know what Clark was doing at the time of the shooting [RT, 17:3871].

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[8] See Attachment "A".

[9] See Attachment "A-2". On this not-to-scale smaller drawing of People's Exhibit #7, the yellow line drawn by Wright on the original diagram is reproduced (and labeled) to show the direction in which the assailant fled.

[10] This testimony, taken in combination with the subsequent testimony of defense expert witness Galipeau, suggested inferentially that the shooter was a Crips gang member, not a member of Appellant's Bloods gang. [RT, 23:4944, 4956]

WITNESS WILLIE CLARK:

In August 1991 Clark worked for Eulas Wright's car wash near 88th Street on Central Avenue. [RT, 15:3256-3259] On the day of the shootings, Clark returned from lunch and began cleaning the wheels of a black Chevrolet at the car wash. He saw a white Toyota on the right side of the street [i.e., the west side] and next to the car wash.[11] Two people were sitting in the Toyota. The white Toyota and its occupants remained there while Clark and "Judge" Wright cleaned the black Chevrolet [RT, 15:3262-3, 3289].

Clark was on the passenger side of the black Chevrolet as he was cleaning it when he heard 20 to 30 shots fired close together. It sounded as though the shots were being fired from the sidewalk in front of the car wash. Clark immediately ducked down and lay on the ground on the passenger side of the black Chevrolet [RT, 15:3265] because "a bullet doesn't care who it hits" [RT, 15:3305]. After the shooting stopped, Clark remained on the ground for "about 20 minutes" [RT, 15:3295][12]. Both Clark and "Judge" Wright got up from the side of the black Chevrolet [RT, 15:3266-3268] and looked to see who was shooting; however, the shooter was gone [RT, 15:3294-3295]. When the police arrived and interviewed Clark, he told them he had been lying down and had not seen anything [RT, 15:3268, 3291-2, 3296].

Clark testified, however, that after the shooting ceased, he observed someone "walking" down the street in a northbound direction toward 87th Street or Manchester, the same direction that witness Wright later stated the individual had gone. [RT, 15:3266-3268]. He testified this individual was short, big, and wearing a blue short windbreaker. He only saw the back of the individual. Clark thought

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[11] See Attachment "C", *infra*.

[12] Witness Clark's testimony varied as to how long he remained hidden behind the black Chevrolet. It could have been less than 5 minutes, as that was about when the initial responding officers arrived [RT, 15:3297]. It could also have been as long as "an hour" [RT, 15:3298]. He was scared, and although he had a watch, he did not look at it [RT, 15:3299].

the individual was a male, but he could not tell what the individual's race was. [RT, 15:3266-3268] He could not see what the individual's hair was like because he was wearing a windbreaker and a cap; "one of them hoods which go on your head" [RT, 15:3266-3267]. With the acknowledgment of Clark, the prosecutor drew in blue ink on People's Exhibit #7, the path in which Clark testified he saw the assailant flee.[13] [RT, 15:3276-3278]

The prosecutor asked Clark if he could see anyone in the courtroom who looked like the person he had seen leaving the car wash area. In response, Clark stated, "Nobody." [RT, 15:3306]

In response to a series of leading questions by the prosecutor, Clark agreed he did tell a police officer on the day of the shooting that he had seen a guy running from a car parked out on the street; the guy was a male black, medium complexion, short, about 200 pounds or more, wearing a black jacket, and that he did not see the guy carrying a gun [RT, 15:3303]. Clark also testified that he spoke with the police again a couple months later at the 77th Street station.[14] On this latter date, Clark told the police he had heard 15 to 20 shots that sounded like they came from a machine gun, that the person he saw leaving the area northbound on Central Avenue had been standing near the passenger side of the white Toyota, that he was a heavyset black male, short, maybe 5-7, 5-8, 200 pounds, unknown age, with a wide forehead, that he could not see the individual's hair because he was wearing a black windbreaker with a hood, then said his hair was very short but not shaved. He also told the police that he never saw a gun in the individual's hands, but that when the individual turned to his left after going north on Central

[13] See Attachment "A-3". On this smaller not-to-scale drawing of People's Exhibit #7, the blue line drawn at Clark's direction on the original diagram is reproduced (and labeled) to show the direction in which the assailant fled. His testimony can be compared with other witnesses regarding the direction in which the assailant fled.

[14] Detective Mayasuma testified the date was November 18, 1991 [RT, 15:3324].

Avenue, Clark noticed he had a gold ring attached to his left ear. [RT, 15:3268-3269, 3272-3275, 3279-3280]

At the police station on November 18, 1991 [RT, 15:3324], the police showed Clark a photo line-up. Clark referred to the photo of Appellant [RT, 15:3321-23; People's Exhibit #10, photo #5] and stated to the police, "Photograph number 5 on card line A looks like the guy I saw do the shooting"; that "his face and complexion was the same, but he had an earring on his left ear"; and that "his hair was real short but not shaved" [RT, 15:3282-3; People's Exhibit #9].

Detective Masuyama of the Los Angeles Police Department subsequently testified that photo #5 was a picture of Appellant, and Clark told him that photo #5 "looks like the shooter, the face was the same, and the complexion was the same. There was [sic] some slight changes. I believe he said the hair was a little shorter, and he had an earring in the ear." [RT, 15:3321] Detective Masuyama also testified that Clark told him he [Clark] had seen the white Toyota when it pulled up to the curb on Central Avenue, that there were only 2 people in the car, and that he saw no one exit the Toyota. [RT, 15:3323]

EVIDENCE OF "RUMORS IN THE NEIGHBORHOOD" AS TO WHO THE SHOOTER WAS[15]:

Evidence was adduced at the trial that after the shootings, rumors abounded on the streets as to who the shooter may have been. Marcellus James testified he had heard that "Fat Rat" had been the shooter, although this same witness also testified that he had heard rumors that other individuals may have been the shooter. [RT, 18:4082-4]

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[15] Appellant includes this evidence in his Opening Brief to illustrate that anyone could have described the basic details of the shootings to the police, as well as identified Appellant as the shooter, even if the individual was not present at the scene when the murders were committed. This basic information, as well as rumors as to the possible identity of the shooter, was common knowledge in that neighborhood after the shootings.

Detective Sanchez of the Los Angeles Police Department stated during an interview that she was aware of a rumor in existence prior to 1994 that "Fat Rat" had been the shooter [RT, 18:3983; People's Exhibit #22 (tape recording played for the jury. The transcript of the recording is People's Exhibit #22A, located at Clerk's Transcript, Supplement IV, volume 2 of 5, page 379[16]] Additionally, the police had heard this rumor as early as November of 1991; hence, they had included a photo of Appellant when they displayed a photo line-up to witness Willie Clark on November 18, 1991. [RT, 15:3324; People's Exhibit #10 (copy of photo line-up)]

In other words, rumor on the street was that "Fat Rat" might have been the shooter. Anyone who wanted to ingratiate himself with the police could have done so by stating he had seen "Fat Rat" do the shooting, or he had heard "Fat Rat" admit that he had done the shooting.

CIVILIAN WITNESSES WHO CAME FORWARD SEVERAL YEARS LATER:

WITNESS CARL CONNOR:

Witness Carl Connor claimed that on August 5, 1991 he was visiting his friend Robert at the auto repair shop located next to "Judge's Hand Car Wash" on Central Avenue near 88th Street. [RT, 15:3340] Connor testified he was talking to Robert about an engine. [RT, 15:3397] He knew victim Donald Loggins and victim Payton Beroit. He grew up with them and went to school with them. He visited the neighborhood in which they lived that was on the east side of Central Avenue. [RT, 15:3336-3337] He claimed that on the day of the shootings, he observed Loggins parked on Central Avenue in his white Toyota Celica. There were two other individuals in Loggins' Toyota. One of them, an individual named "BaaBaa", exited the car while Loggins and the other individual, Payton Beroit, remained in the white Toyota Celica [RT, 15:3398-3399]. The Toyota was parked

[16] Hereafter, abbreviated as CT Supp IV, 2:379.

on Central Avenue in front of the auto repair shop and facing south.[17] Loggins was sitting in the driver's seat, and Beroit was sitting in the right front passenger seat. Beroit's car was the black Chevrolet with expensive and flashy Daytona rims that was being cleaned at Judge's Car Wash. [RT, 15:3337, 3340-3344] The prosecutor displayed People's Exhibit #3 (a poster board with photos attached). Connor pointed to photo C, and identified the white Toyota in the photo as being Loggins' Toyota. He also identified in the photo his friend Robert's van, and stated that the van was parked in front of (i.e., south of) the white Toyota, as shown in the photo. [RT, 15:3343, 3443][18]

Prior to August 5, 1991, Connor was familiar with a gang called "89 Family." He knew some of its members. [RT, 15:3363] One of those members was an individual he had previously seen in the neighborhood. Connor said he knew him by the moniker of "Fat Rat." [RT, 15:3346, 3363] He assumed "Fat Rat" was a member of that gang because Connor had seen "Fat Rat" hanging out at "Tam's", a hamburger stand where the gang members hung out. [RT, 15:3363] "Fat Rat" was "kind of chubby", had short hair and wore glasses. [RT, 15:3346]

Connor maintained that while visiting with his friend Robert at the latter's auto repair shop adjacent to the car wash on August 5, 1991, he thought he noticed an individual that he believed was "Fat Rat." [RT, 15:3344] This individual was walking east on 88th Street toward Central Avenue. [RT, 15:3344] When he got to a point on 88th Street between the motel and its driveway, but before its intersection with Central Avenue, the individual turned around.[19] [RT, 15:3344]

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[17] See Attachments "A" and "C" (a photocopy of People's Exhibit #17) *infra*. The white Toyota was not parked in front of the Auto Repair/Body Shop. It was just north of that shop, and parked in front of the car wash.

[18] The location of the white Toyota in relation to Robert's van is illustrated in Attachment "A" and Attachment "C", the photocopy of People's Exhibit #17.

[19] See Attachments "A-7". The motel was situated on the southeast corner of 88th Street and Central Avenue. The El Blanco Motel can also be seen in the photocopy of the aerial photograph of the neighborhood, Attachment "B".

Connor could not recall what the individual (whom he thought was "Fat Rat") was wearing. [RT, 15:3346]

The prosecutor asked Connor if the individual he knew as "Fat Rat" was in the courtroom. Connor identified Appellant as the individual he previously knew as "Fat Rat." [RT, 15:3349] Subsequently, Detective Sanchez testified that Connor had previously selected Appellant's photograph from among other photos as being the "Fat Rat" he previously knew, and even stated that "... he wears glasses" because the photograph that Connor had selected was one that displayed Appellant without glasses. [RT, 18:3986; People's Exhibit #10]

Connor testified that a few minutes later, he saw "Fat Rat" again. This time, he observed "Fat Rat" walking east toward Central Avenue (presumably on 88th Street where he saw him minutes before), then when "Fat Rat" had walked a little past the van parked in front of the white Toyota, he began shooting at the white Toyota. At that time "Fat Rat" was only about 10 feet away from the Toyota. [RT, 15:3346-3347, 3349] According to Connor, however, "Fat Rat" was standing *in the street* and was pointing the gun at the *driver's side* of the white Toyota. When "Fat Rat" began shooting into the *driver's side* of the Toyota, Connor ran to hide. [RT, 15:3350-3351]

This portion of Connor's on direct examination testimony was totally inconsistent with the uncontroverted physical evidence that established the assailant had been standing adjacent to the right passenger door of the white Toyota when he fired the weapon. [RT, 17:3843-3847, 3858-3860; People's Exhibit #17, wherein the prosecution's expert witness marked on the photograph with "S" markings the two possible locations where the shooter could have been standing.][20] It was also inconsistent with the statement Willie Clark made to the police that the shooter was standing on the sidewalk to the right of the white Toyota. [RT, 15:3268-3269, 3272-3275, 3279-3280]

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[20] See Attachment "C", a photocopy of People's Exhibit #17.

On cross-examination, Connor *confirmed* his direct examination testimony. He testified that "Fat Rat" was *in the street* when he fired the shots. He was *closer to the driver's side of the Toyota when he shot at it*, and it seemed like he was *shooting at the driver*. [RT, 15:3417-3422] During these initial observations, Connor related that he (Connor) was standing only about 7 or 8 feet from the curb line, and that there were about 20 other people standing around. [RT, 15:3439] Connor subsequently saw a photograph of the scene that depicted a van parked south of the white Toyota.[21] Connor identified the van as Robert's and then said that Robert's van was parked on Central Avenue in front of the white Toyota. [RT, 15:3443]

Connor's testimony did not conclude that day, however. [RT, 15:3333-16:3478] On re-direct examination the following day, the prosecutor asked Connor once again about the location of the shooter when he fired into the white Toyota. Connor's testimony then differed somewhat from his previous day's testimony. After a night of reflection, Connor testified that the shooter was facing the white Toyota and was "near the gutter" when he fired the shots [RT, 16:3469]; that the shooter had walked closer to the car "on the passenger side"; and that the shooter was "closer to the sidewalk" than to the middle of the street. [RT, 16:3470] Connor did not budge from his previous testimony, however, that the shooter was standing next to the back of the van when he began firing the shots. [RT, 15:3468]

After seeing "Fat Rat" shoot into the car and hit the car at least once, Connor said that he and everyone else ran and ducked for cover. Connor fled from the auto repair shop into the car wash area and hid behind a car [RT, 15:3351-3353, 3403-3404]. He heard about 20 shots all together, and for a split second or so, he saw a gun in "Fat Rat's" hands. It appeared to be an Uzi or a Mack 10 [RT, 15:3354]. Although he could not recall at trial whether he had seen a clip in the gun, his grand jury testimony was introduced which contained his "yes" answer as

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[21] See Attachment "C" a photocopy of People's Exhibit #17 in which Robert's van can be seen in relation to the white Toyota.

to whether he had seen a clip in the gun [RT, 15:3355-3356]. Connor estimated that the entire shooting lasted about 2 or 3 seconds [RT, 15:3357].

Connor testified that he and everyone else waited about "two minutes" after the shootings ceased before getting up. Connor said he walked towards the white Toyota, then looked to see where the shooter had gone. Rather than testifying that he saw the shooter walking northbound on Central Avenue as witnesses Eulas Wright and Willie Clark had done, Connor testified he observed the shooter walking west on 88th Street away from Central Avenue and towards Wadsworth [RT, 15:3357-3359, 3427-8].[22] He could not recall what the shooter was wearing or if the shooter was wearing a jacket or coat [RT, 15:3346, 3430-3431, 3448].

Connor testified that he peered into the white Toyota and saw victim Loggins and victim Beroit. Connor stated he then left the area [RT, 15:3360]. He never told anyone he had been present at the scene of the shooting deaths of Loggins and Beroit until he spoke to Detective Sanchez more than three years later after discussing the Nece Jones murder with her. [RT, 15:3450] Connor's initial contact with Detective Sanchez occurred at the same time Detective Sanchez was seeking to obtain reward monies for the homicides she was investigating. [RT, 18:3975-3977]

Finally, Connor admitted that he had received a $25,000 reward for his testimony in the Nece Jones murder case, although he quickly stated he was not testifying in this case in hopes of receiving a reward. [RT, 15:3386, 3389-90, 3449]

Subsequently, the prosecution played for the jury portions of the August 15, 1994 tape recording of the police discussion with Connor. [RT, 18:3983; People's

[22] Connor's description had the shooter fleeing in the *opposite* direction (i.e., southbound on Central Avenue to 88th Street, then right and westbound on 88th Street) than the direction that witnesses Wright and Clark described to the police and would thereafter testify to. [RT, 17:3843-3847, 3858-3860.]

Exhibit #22 (edited tape recording), People's Exhibit #22A (transcript of #22), located at CT Supp IV, 2:371-387]

Connor had initially told the police on August 15, 1994 that a 3rd person was in the back seat of Loggin's white Toyota when it was parked in front of the car wash. [CT Supp IV, 2:372, 374, 376] This 3rd individual was known by the moniker "BaaBaa"; that "BaaBaa" had exited the car to get his own car that he had left at the car wash to be washed, and that "they shot at the car because they thought he ['BaaBaa'] was in it." [CT Supp IV, 2:377]. Connor had also told the police that he had seen "Fat Rat" initially walk by the car [i.e., the white Toyota] while "BaaBaa" was still in the car, and that "Fat Rat" knew that "BaaBaa" was a Crip. [CT Supp IV, 2:373, 379] Connor stated that "Fat Rat" had then walked to "Evil's" house to get the gun. [CT Supp IV, 2:375] When Connor was asked specifically by the detectives if he had actually seen "Fat Rat" obtain the gun at "Evil's" house, Connor had responded, "Yeah, I seen that." [CT Supp IV, 2:377] He did not know, however, who had actually given the gun to "Fat Rat."[CT Supp IV, 2:380]

In that August 15, 1994 interview, Connor had told the police that when "Fat Rat" approached the white Toyota the 2nd time, "BaaBaa" was no longer in the Toyota. [CT Supp IV, 2:376] He saw "Fat Rat" walk up to the Toyota with the gun. "Fat Rat shot them with what appeared to be a Mac .10 or a black Tech .9 with holes on the barrel. [CT Supp IV, 2:371, 381] He then walked back to "Evil's" house. [CT Supp IV, 2:378] At that time, the detectives told Connor they wanted to show him some photos to see if he could recognize "Fat Rat." Connor selected the photo of Appellant and stated that photo was "Fat Rat." However, Connor told the detectives that when he had seen "Fat Rat" on previous occasions, "Fat Rat" had been wearing glasses. The photo did not show Appellant wearing glasses. Hence, Connor pointed to the photo and commented, "Yeah, (untranslatable) he wear glasses, too. This is him .... He wear glasses [sic]." [CT Supp IV, 2:383-387]

On cross-examination, Connor testified that in August 1991 he lived in Gardena, and *not* in the neighborhood where the two killings occurred. He worked as a porter for Don Kott Ford during the summer of 1991. He was responsible for driving new cars off the transport trucks, then parking them in the Don Kott parking lot. Don Kott Ford had a time clock for its employees. Connor would punch in when he reported for work and punch out when he left work. His hours varied but they were normally from about 8:00 A.M to 2:00 P.M. He was paid based upon the hours he worked, as reflected on his employee time card. [RT, 15:3390-3394] On August 5, 1991, the day of the shootings, Connor testified that he was *not* working at Don Kott Ford. [RT, 15:3394] Rather, he testified he was visiting a friend at Central Avenue, near 88th Street, in Los Angeles and had observed the shootings of Loggins and Beroit. [RT, 15:3340]

Without being confronted with his Don Kott time card, Connor was asked on cross-examination whether he would have punched in for work at the Don Kott time clock if he had not worked on a particular day. Connor responded that if he had wanted to cheat, he "would have got somebody to punch me in." [RT, 15:3394-3395] Upon further questioning by the defense as to whether he would cheat his employer in this manner, Connor responded, "Yeah. I might have. Yeah." When asked who would do this for him, Connor said that his friend "Jose" would do it for him, and he would occasionally do it for "Jose". Connor could not provide the last name of his friend "Jose", however. [RT, 15:3396] Connor then volunteered without being asked that he and "Jose" had both been fired for this conduct. [RT, 15:3396, 3465]

During the defense case, witness Jeffrey Childer was called to testify regarding Carl Connor. Childer explained that since 1988 he had been the General Manager for Don Kott Auto Center, and that Carl Connor worked at Don Kott Auto Center. [RT, 22:4855-8] All parties then stipulated that Defense Exhibit "E" was the Don Kott time card for employee Carl Connor for the date of August 5, 1991, the day of the shootings. The time card indicated that Carl Connor

punched in to begin work that day at 7:00 A.M.; he punched out at 1:30 P.M. for lunch; he punched back in for work at 2:12 P.M.; and he finally punched out for the day at 5:18 P.M. [RT, 22:4859-4860; Defense Exhibit E] In effect, Connor's Don Kott time card indicated he was at work at the Don Kott Auto Center the entire day when the Loggins/Beroit murders occurred. Connor's time card revealed he claimed to have worked 9.6 hours that day and had apparently been paid for those hours. [See Defense Exhibit E] Childer also contradicted the unsolicited self-serving statement by Connor about why he was fired. Childer testified that Connor had been fired at the conclusion of a DMV investigation in 1992, and not for employee time card fraud. [RT, 22:4855-4858]

Detective Rosemary Sanchez[23] was called by the prosecution to testify regarding Carl Connor. Prior to her initial interview with Connor on August 15, 1994, she had submitted the necessary paperwork to the Los Angeles City Council for approval of a reward to be offered for information pertaining to three criminal homicide cases that she was investigating. One of these was the Nece Jones murder case. [RT, 18:3975-3977] She testified that fliers regarding the rewards were distributed throughout the neighborhood where the Loggins/Beroit murders had occurred. [RT, 18:3975-3977; 35:7142-7143] The fliers contained the amount of the reward: $25,000. Detective Sanchez stated that because the fliers had been posted throughout the community, Connor could have seen them, but she claimed she never had any conversation with Connor about the reward until the spring of 1997. She also admitted that although she had not spoken to Connor about the reward, another officer could have. [RT, 35:7141-7144]

Detective Sanchez testified that shortly before August 15, 1994, she became aware that Carl Connor wanted to talk to her about one of the homicides

[23] Sanchez had been a Los Angeles City police officer for 16 years, and she had been a detective for 7 of those years. [RT, 18:3970-1]

she was investigating.[24] She related that on August 11, 1994 she drove in an unmarked patrol car through Connor's neighborhood. When she passed within about 5 feet of Connor, she dropped her business card on the ground next to him. She related that Connor "didn't want to be seen talking to the police." [RT, 18:3971-3972] The following day, Connor telephoned Detective Sanchez using the telephone number that was printed on her business card. They set an appointment for him to be interviewed about one of the cases she was investigating and seeking a reward for. [RT, 18:3972-3973]

On August 15, 1994 Sanchez testified she interviewed Connor for the first time. She tape-recorded this first interview. It pertained initially to the Nece Jones murder case; however, during this interview Sanchez explained that Connor also told her of his "knowledge" regarding the Loggins/Beroit murders. [RT, 18:3970-3976] She stated that a reward was approved on August 17, 1994. [RT, 18:3976] She testified that she subsequently helped arrange for Connor to receive a $25,000 reward for his assistance in the prosecution of the Nece Jones murder case because Connor had testified in that murder trial and it had resulted in a conviction.[25] [RT, 18:3977, 3992] Connor received the $25,000 reward in April or May, 1997, which was after he had testified before the Grand Jury in Appellant's case and just a few months before he testified in Appellant's trial. [RT, 18:3990]

On re-direct examination of Detective Sanchez, the prosecutor asked Det. Sanchez: "With respect to the information that was provided to you by Mr. Connor, was that information corroborated through other sources?" The defense objected that the answer would be hearsay and would call for a conclusion. The court overruled both objections and Sanchez answered, "Yes." [RT, 18:3991-2]

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[24] Sanchez did not testify as to how she became aware that Connor wanted to speak to her.

[25] Detective Sanchez testified that the issuance of the reward was "contingent" on the suspect being "convicted" for the murder! [RT, 18:3992]

The prosecution also asked Det. Sanchez, "How would you describe Mr. Connor's attitude about testifying in this case. The court overruled the defense objection, and Det. Sanchez was allowed to respond, "He didn't want to." [RT, 18:3987] Shortly thereafter, the prosecutor asked Det. Sanchez, "With respect to this particular case, has Mr. Connor's concern about his safety ever gone away to the best of your knowledge?" Det. Sanchez responded, "No." [18:3988]

WITNESS FREDDIE JELKS:

Prior to Jelks' testimony, the prosecutor brought a motion in limine to limit the scope of cross-examination of Jelks. Jelks was in custody and had been indicted for a gang related drive-by murder in which victim Tyrone Mosley had been killed. Jelks' indicted co-defendant in that case was Cleamon Johnson, the co-defendant in Appellant's case. According to the prosecutor, if the defense was allowed to confront and cross-examine Jelks regarding the details of his pending case, he might assert his 5th Amendment right against compulsory self incrimination and not testify. The prosecutor also warned that if the defense was allowed to inquire of Jelks about his pending case, Jelks might reveal the name of his co-defendant in that case, Cleamon Johnson. That, the prosecutor said, would be prejudicial to co-defendant Johnson in this case. After extensive argument, and over the objections of the defense, the trial court limited the scope of defense cross-examination of Jelks. [RT, 16:3495-3511, 3583-3617]. Jelks then began testifying. [RT, 16:3511]

The prosecution immediately "inoculated the jury" regarding Jelks' credibility by bringing out on direct examination that Jelks was in custody on a pending case, that no promises had been made to him on that case in exchange for his testimony in this case, and that he was testifying voluntarily in this case. He also claimed he had not been forced to come to testify [RT, 16:3514]. To further lessen the impact of his being impeached by the defense, the prosecution also brought out on direct examination what the court had previously held could also be used to "impeach" Jelks [RT, 16:3617-3619]; that while he was a juvenile, the

juvenile court had sustained petitions against him for joy riding (1980-1981) and robbery (1983); that he had been convicted as an adult for possession of cocaine (1985); and that he had misdemeanor convictions for receiving stolen property (1990) and sale of marijuana (1994) [RT, 16:3640-3641, 3681-3682].[26]

Jelks explained that in 1991 he was living at his mother's house on 88th Street in Los Angeles between McKinley and Wadsworth, about ½ block from co-defendant Johnson's house [RT, 16:3514, 3654-5]. He had known co-defendant Johnson and the Johnson family all his life, since he had grown up in that neighborhood. Jelks "hung out" at the Johnson house. Co-defendant Johnson went by the moniker "Big Evil." [RT, 16:3514-3516, 3531]

In 1991 Jelks was an active member of the street gang named "89 Family." It was a "bloods" gang whose territory extended from Central Avenue on the east to McKinley on the west, and from Manchester on the north to 92nd Street on the south [RT, 16:3517-3519, 3690-3691]. Co-defendant Johnson and his brothers were members of that gang [RT, 16:3518, 3643]. Jelks sold drugs in 1991 to support the gang's activities. [RT, 16:3544]

On August 5, 1991 Jelks claimed his uncle was repairing his car at his mother's house on 88th Street. He walked to the Johnson house, which he had done numerous times previously, where he met co-defendant Johnson, his brothers, and others in front of the house [RT, 16:3520-3521, 3646]. All of those present were members of "89 Family Bloods", as the Johnson house was where the gang members would typically meet and hang out daily. Jelks went there specifically to hang out with his "homeboys" [RT, 16:3523-3524]. At some point, the group began discussing a black low-rider Chevrolet fitted with hydraulics and Daytona rims. It was located at the car wash on Central Avenue, just north of 88th

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[26] On subsequent cross-examination, Jelks related that his pending case was for a serious offense and that the maximum penalty was life in state prison. He also admitted that he had been in custody pending trial for that offense since August 1995. [RT, 16:3682-3683]

Street. Between 88th Street and the car wash was an auto repair shop [RT, 16:3525-3527]. From the Johnson house, Jelks said he could see the trunk of the black Chevrolet at the car wash [RT, 16:3535]. For about 15 minutes, the gang members seriously discussed stealing the car. At that point, Jelks claimed that Appellant approached the group of gang members at the Johnson house [RT, 16:3528-3529]. Jelks identified Appellant in court, related he had known Appellant for several years, and stated Appellant's moniker was "Fat Rat." [RT, 16:3530-3531]

Jelks testified that co-defendant Johnson said the black Chevrolet belonged to an individual named "BaaBaa", whom Jelks claimed was an East Coast Crip named Brian. On cross-examination, Jelks admitted he never told the police, or the grand jury, that there was a discussion regarding an individual named "BaaBaa." Jelks explained that someone else in the group stated the car was Payton's (i.e., victim Beroit's) low rider, but then Jelks admitted he had testified before the grand jury that co-defendant Johnson had said the black Chevrolet was Payton Beroit's. [RT, 17:3698-3700]

Jelks said he was aware of an individual named Payton who claimed being an East Coast Crip [RT, 16:3537-3541]. The "East Coast Crips" were enemies of Jelks' "89 Family Bloods" gang [RT, 16:3538]. Jelks testified that he and the others felt the car's location in their territory was disrespectful. [RT, 16:3540]

At this point, Jelks claimed that co-defendant Johnson asked who would go "serve" the car's owner, or in other words, do a "shooting." Jelks asserted that Appellant volunteered to do so [RT, 16:3542-3543]. When the prosecution asked Jelks why he had not volunteered to do the shooting, Jelks responded, "I didn't want to go do it.... I didn't want to shoot nobody" [RT, 16:3543].

Co-defendant Johnson then went into the rear yard of his house. A couple minutes later, he returned with an Uzi with a foot long clip that came out of the bottom of the weapon [RT, 16:3544-3546]. Jelks testified he then saw Johnson give the weapon to Appellant. [RT, 16:3652] On cross-examination, however,

Jelks was confronted with what he initially told the police regarding how "Fat Rat" had obtained the weapon. Jelks admitted he told the police, "I think 'Evil' gave it to him." [RT, 16:3653]

The discussion among the gang members now shifted to how Appellant should approach the location of the car to do the shooting [RT, 16:3546, 3555]. One gang member suggested that Appellant simply walk up 88th Street to Central Avenue [RT, 16:3547]. This idea got "squashed", however [RT, 16:3559][27]

Co-defendant Johnson then took Appellant aside from the group and spoke to him, according to Jelks. Co-defendant Johnson told Appellant to walk north down the alley that runs between 88th Street and 87th Place. Appellant should then go on 87th Place to Central Avenue. This way, Appellant would not be seen by anyone on Central Avenue as he approached the car [RT, 16:3555-3558].[28]

It was as this point, according to Jelks, that a car pulled into the Johnson house's driveway. Johnson and Appellant spoke with the driver for a minute. Appellant then got into the car on the passenger side. He had the Uzi with him. The car then drove north through the alley [RT, 16:3562-3565, 3658]. On cross-examination, however, Jelks admitted he never mentioned that a car had transported Appellant away from the Johnson house. He admitted he had described in considerable detail to the police how Appellant had *walked* north through the alley, then *walked* east to Central, then *walked* south on Central to where the Toyota was located. [RT, 17:3703-3708]

After Appellant left, Jelks testified that Johnson returned to where the others were standing and, with a smirk on his face, stated: "He [Appellant] is going to go serve him" [RT, 16:3564].

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[27] According to Connor, however, this was the route "Fat Rat" allegedly took to do the shooting!

[28] See Attachment "A" and "A-8", the not-to-scale diagram of the neighborhood. The white Toyota Celica was parked south of 87th Place on Central Avenue. By walking toward the car from 87th Place, an individual would have approached the white Toyota Celica from the rear.

Within a minute or two, they heard 10 to 12 rapid gunshots coming from the direction of Central Avenue [RT, 16:3566-3568]. Jelks testified that after about two minutes he saw Appellant return to the Johnson house. His face was sweating and he was breathing heavily [RT, 16:3568-3569, 3575]. Appellant handed the gun to Johnson, and then took off his jacket and hat. Johnson handed the gun to "Louie" who promptly left with it [RT, 16:3570-3571]. Once again, on cross-examination, Jelks was confronted with what he told the police about the gun. Jelks admitted he told the police that the gun had remained with "Evil." Jelks acknowledged he never mentioned the name "Louie" to the police. [RT, 17:3725-3726]

Jelks claimed that Appellant then stated "he shot him", or "I got him", or "he served them, in that sort of language." [RT, 16:3572] And once again, on cross-examination Jelks was confronted with what he told the police on December 6, 1994. Jelks admitted that when the police asked him if Appellant had said anything about the shooting, he responded that "Fat Rat" said *nothing* upon returning. [RT, 17:3723]

Later, but still during *direct* examination, the following exchange took place between the prosecution and Jelks:

DDA: Would this shooting [of Loggins and Beroit] have constituted a mission?
FJ: Yeah.
DDA: What's a mission?
FJ: When you - - when you go out and commit murder."
. . .
DDA: Now, if Mr. Johnson ordered you to go on a mission, would you do it?
FJ: No.
DDA: What would happen if you didn't go on it?
FJ: Discipline.
DDA: What's – in the form of what?
FJ: Probably you'd get beat up, you know, beat

on and jumped on. [RT, 16:3624, 3626, Emphasis added][29]

Jelks' testimony on direct examination continued. He related that another car then stopped in front of the Johnson house. The driver was "Angie." Johnson spoke briefly with the driver, Appellant then entered the car, and they drove away traveling west and away from Central Avenue [RT, 16:3572-4]. Jelks was again confronted with what he told the police previously. He admitted that when the police asked him where "Fat Rat" went after the shooting, he told the police, "Shit, I don't know. He left. I guess he probably left with 'Evil' and them." [RT, 16:3651, 3724-3725] All parties stipulated that Jelks also never mentioned the name "Angie" when he spoke to the police. [RT, 24:5049]

Jelks stated he then walked back to his mother's house [RT, 16:3576]. Shortly thereafter, he left the area with his uncle, but on their way they drove slowly by the murder scene to look at the carnage. Jelks' uncle asked several questions of Jelks, but Jelks claimed he did not tell his uncle what he had seen and heard. [RT, 16:3578-3579]

When the prosecution asked Jelks what Appellant had worn on the day of the shootings, Jelks said Appellant was wearing the clothes that he normally wore every day: khakis, t-shirt and a black Ben Davis like jacket made of windbreaker material, a quarter length jacket. He was also wearing glasses, just as he was wearing in court. [RT, 16:3558] Later, on direct examination, Jelks added that Appellant was wearing a black baseball type cap. Jelks could not recall, however, if Appellant had an earring [RT, 16:3569]. On cross-examination, however, Jelks admitted that when he spoke to the police, his response to their question regarding the shooter's clothing was, "Shit, I don't know. Khakis all the time." [RT,

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[29] This is one of several examples in which the prosecution, because of the trial court's ruling regarding the scope of cross-examination, was allowed to present Jelks to the jury in a *totally false light*, and to ingratiate Jelks with the jury. See Appellant's Argument IV, *infra*.

17:3710] Jelks also admitted he never told the police that "Fat Rat" had worn a jacket or hat. [RT, 17:3710-3712]

Jelks claimed that "probably the next day" he spoke to Appellant about the shootings. Appellant allegedly told him that he "walked up and the guys never saw him"; that he "knelt kind of, like stooped down, and started firing at them"; that he "was hitting them and how their bodies was [sic] reacting"; that "like shit was popping off of them"; that he shot the passenger first and then the driver; and that he never hit the car when he shot. [RT, 16:3580-2, 3622-3]

Jelks admitted he never spoke to the police about this case until they interrogated him on December 6, 1994,[30] more than three (3) years after the shootings occurred. This was true, even though he had had numerous contacts with the police, including arrests, during those years. [RT, 16:3646, 17:3729]

WITNESS MARCELLUS JAMES:

In August 1991, witness Marcellus James lived on 88th Place, just west of Central Avenue. This street (88th *Place*) was the next street south of 88th *Street* and ran parallel to 88th *Street.* The "89 Family Bloods" gang existed in his neighborhood, but James stated he was not a member of the gang.[31] [RT, 18:4040-4041, 4046]

James related that at that time he knew an individual named "Fat Rat" who was a member of the "89 Family Bloods" gang. [RT, 18:4041, 4045] He did not know "Fat Rat's" true name, but he identified Appellant in court as being the "Fat Rat" that he knew. [RT, 18:4042-4043, 4163] James indicated he previously identified a photo of Appellant pursuant to a photo line-up conducted by Detective McCartin on September 21, 1994. [RT, 18:4160-4163]

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[30] All parties stipulated this was the date of Jelks' interrogation by the police. [RT, 17:3712]

[31] The prosecution's gang expert, Christopher Barling, contradicted James. It was Det. Barling's expert opinion that James claimed membership in "89 Family Bloods." [RT, 19:4321-4322]

James testified he recalled the shooting of two men in front of the car wash on Central Avenue in 1991. [RT, 18:4041] At some point in time after the shootings, James said he had asked "Fat Rat" who shot them. "Fat Rat" responded that he ("Fat Rat") had done the shooting. The prosecutor then asked James:

DDA: Did he tell you why he shot them?
MJ: I guess they was from the wrong 'hood. [RT, 18:4043]

Appellant's counsel vigorously objected. James immediately changed his answer:

ORR: No, no, no. I move that be stricken, "I guess."
MJ: They were from the wrong neighborhood.
ORR: Unless that's the actual statement this witness remembers, your honor, ask that it be stricken.
CRT: The first answer will be stricken. In terms of the second, is that what he told you, or is that what you are just coming up with on your own?
MJ: That's what he told me.
CRT: The answer will stand. Next question.
DDA: By "the wrong neighborhood", would that include "89 East Coast Crips"?
MJ: Sure. [RT, 18:4043-4]

James testified that although he could not recall exactly when he had this conversation with Appellant, it was sometime during 1991. [RT, 18:4073] He related that he was out on 88th Place when he met Appellant on the sidewalk. An individual named "Silent" (also known as Earl Ray Johnson, co-defendant Johnson's brother [RT, 18:4074, 4081]) was also present when James and Appellant spoke. [RT, 18:4073] He explained that he simply asked Appellant if he had done the shootings, and Appellant responded to him. [RT, 18:4078]

On cross-examination, James was impeached with his prior inconsistent statements to the police wherein he admitted that he told the police, "Well, I didn't actually hear it from him [Appellant]."[RT, 18:4069-4070, 4192] James acknowledged he also told the police, "Somebody said, I forget who it was, said 'Fat Rat' did it. 'Fat Rat' or 'Matt.'" [RT, 18:4070-4071, 4194] Further, James

admitted he told the police that no one actually admitted to him (James) that they had committed a crime. Rather, James admitted he told the police that he had been somewhere in the neighborhood, and he had *heard* that "Fat Rat" had done the shooting [RT, 18:4071-4072], and that "nobody ever really said anything to [me]." [RT, 18:4080]

On re-direct, James contradicted his testimony on cross-examination and stated that "Fat Rat" said "he walked up to them and shot them." [RT, 18:4083] Immediately thereafter, he responded to the prosecutor's question by reaffirming what he admitted to the defense on cross-examination; that Appellant *never* told him that he killed Loggins and Beroit. [RT, 18:4084-4085] James further muddied the water by testifying that he had heard various rumors that "Fat Rat" had been the shooter. [RT, 18:4082-4084]

WITNESS DONNIE RAY ADAMS:

The *Fletcher/Bruton* Evid. Code, § 405 Hearing:

Prior to witness Adams testifying, the court and counsel had a rather extensive discussion regarding a *Bruton*[32] issue that would arise during Adams' testimony. [RT 19:4222-30, 4373-94] Co-defendant Johnson had allegedly told Adams that had he sent "Fat Rat" down to do a mission, that he had given "Fat Rat" the gun for the mission, and that the victims of the mission for which "Fat Rat" had been sent were two "89 East Coast Crips." [RT, 19:4374] The court concluded the alleged statement by Johnson could be adequately redacted to eliminate any prejudice to Appellant and overruled Appellant's timely and specific objection. [RT, 19:4222-4230]

The testimony of Donnie Ray Adams:

Adams testified that in 1991, he lived in Los Angeles. He was a member of the "89 Family Bloods" gang, and had been a member since about 1980. [RT, 19:4408] He identified co-defendant Johnson in court, got to know him as a

[32] *US v Bruton* (1968) 391 U.S. 123. See also, *People v Aranda* (1965) 63 Cal.2d 518 .

fellow gang member in 1984, knew where he lived, and knew his moniker was "Evil." If someone wanted to find any of the gang's members, Adams related one would go to Johnson's house, or at least 88th Street where the Johnson house was located, because it was common for the gang members to hang out at that location. [RT, 19:4409-4411]

Adams stated he recalled the shootings at the car wash in 1991. At the time, the "East Coast Crips" were archenemies of his "89 Family Bloods" gang. He stated he was not in the immediate area at the time of the shootings, but he heard about the shootings within a very short period of time. [RT, 19:4412] Since the shootings occurred in his neighborhood, he went there. He saw the police tape at the crime scene, parked his car, and walked to the Johnson house. There, he saw co-defendant Johnson standing in front of his house. [RT, 19:4412] Adams approached Johnson and asked him what had happened. [RT, 19:4414]

DDA: Did Mr. Johnson tell you what happened?
DRA[33]: Yeah. He said someone got shot up there off Central.
DDA Did you ask Mr. Johnson who it was that got shot?
DRA: Yes.
DDA: And what did Mr. Johnson tell you about who it was that got shot?
DRA: Some guy named "BaaBaa", and someone else.
DDA: Now, did Mr. Johnson tell you that "BaaBaa" got shot?
DRA: That's who he thought it was, I guess.[34]
DDA: Now when you talked to Mr. Johnson both times, did Mr. Johnson both times tell you that the killing involved a mission?
DRA: Yes.
DDA: Did Mr. Johnson tell you that he had given – he had provided a gun and a ski mask?
DRA: Yes. [RT, 19:4414 (Emphasis added)]

[33] "DRA" is Donnie Ray Adams.

[34] On cross-examination, Adams looked at the FBI report that contained his statement, then admitted there was nothing in that report regarding Johnsopn referring to a "BaaBaa." [RT, 19:4434]

On cross-examination, counsel for co-defendant Johnson sought to impeach Adams with prior statements made by Adams to FBI agents that were inconsistent with his testimony, as well as to show the details of Johnson's alleged statement were contradicted by the testimony of other witnesses. These questions, combined with Adams' answers, "facially incriminated" Appellant:

> RJ[35]: Did you tell the agents that Mr. Johnson told you that the person who did the killing wore a ski mask?
> DRA: Yes.
> RL: Did you tell the agents that Mr. Johnson told you that the person who did the shooting went and got his own gun?
> DRA No. I didn't say whose gun he got. [RT, 19:4433]
> . . .
> RL: Did you tell the officers that interviewed you that what Mr. Johnson had told you was that he had sent the shooter to go get a gun and then go do the shooting?
> DRA: Yes. [RT, 19:4434 (Emphasis added)]

On re-direct examination the prosecutor attempted to rehabilitate Adams' credibility and further incriminate Johnson. In so doing, the prosecutor asked a leading question of Adams that, combined with Adams' answers, "facially incriminated" Appellant:

> DDA: Did you tell the agents back in February that Evil told you that he had given the shooter a gun and a ski mask for his mission?
> DRA: Yes. [RT, 19:4438-4439; Emphasis added]

Adams further testified that Johnson told him, "That's two crabs gone." Adams explained that a "crab" was a derogatory name that a "Blood" would use when referring to a "Crip," and that Johnson was referring to the two shooting victims when he made that statement. [RT, 19:4415-4416] Adams said he could not recall anyone else being present when Johnson allegedly made these admissions. [RT, 19:4432]

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[35] "RL" is Richard Lasting, trial counsel for Mr. Johnson.

Adams also testified that in 1991 he knew an "89 Family Bloods" gang member named "Fat Rat." He identified Appellant in court as being "Fat Rat." [RT, 19:4418] Adams stated that in 1991 Johnson had more gang "respect" than Appellant; that is, Johnson's gang "respect level" was greater than Appellant's. [RT, 19:4419-4420]

Adams admitted that when he initially spoke with law enforcement about these shootings, he was in custody. In January 1996 he had been arrested in Inglewood, California and transported to Shreveport, Louisiana on a federal warrant. A federal grand jury in Louisiana had previously indicted Adams. Since his arrest, Adams related that he had pled guilty to a dope conspiracy, in that he had been "knowingly and intentionally engaging in a continuing criminal enterprise." His potential minimum sentence was 20 years in federal prison and the maximum sentence was life. He had not yet been sentenced, however. [RT, 19:4422] Adams stated he was 31 years old at that time. [RT, 19:4418, 4420-2] Adams admitted that he was "attempting to work some kind of deal to lessen [his] sentence"; and he was "hoping that by this testimony [he was] giving here in this court that [he] can somehow reduce the punishment that [he] personally face[s]." [RT, 19:4422-4423]

Adams acknowledged that he never said anything about his knowledge of these 1991 murders until after he had been arrested. He also admitted that when he was interviewed at the time of his arrest in 1996, he declined to say anything about Johnson's admissions. [RT, 19:4424] It was only after Adams had pled guilty and was facing a life sentence in federal prison that he had "decided" to provide this information to law enforcement. He confirmed that he was doing so in his effort to try to lessen his punishment in his pending case. [RT, 19:4425]

At the conclusion of Adams' testimony, the court gave the jury a "limiting instruction" that they were to consider Johnson's statements only as to co-defendant Johnson. However, the jury could consider any other testimony of Adams as against both Appellant and Johnson. [RT, 19:4440-4442]

THE PROSECUTION'S EXPERT WITNESS ON GANGS:

The prosecution presented gang evidence through gang expert Detective Christopher Barling[36]) He testified that in 1991, a street gang existed in Los Angeles known as the "89 Family Bloods." It consisted of approximately 50 to 60 members. [RT, 19:4361] Its territory, or the "turf" it controlled, extended from Central Avenue westward to McKinley, and from Manchester on the north to 92nd Street on the south. [RT, 16:3517-9; 19:4292-3] He rendered his opinion that Appellant claimed to be a member of "89 Family Bloods", as did co-defendant Johnson. He testified that Appellant's gang moniker was "Fat Rat", and co-defendant Johnson's gang moniker was "Big Evil." [RT, 19:4299-4301]

During this same time period, a rival Crips gang that was hostile to the "89 Family Bloods" gang claimed territory directly to the east of Central Avenue. This gang was known as the "89 East Coast Crips." [RT, 19:4290, 4338; 22:4875] Although victim Loggins resided to the east of Central Avenue, he did not reside within the "89 East Coast Crips" territory.[37] Also to the east of Central Avenue, but to the north of the East Coast Crips neighborhood, was the territory of another Crips gang, the "Kitchen Crips."[38] [RT, 19:4290, 4338] The "89 East Coast

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[36] Barling had been with Los Angeles Police Department for 10 years. From January 1989 to July 1993 he was assigned to LAPD's gang unit. One of the numerous gangs he was assigned to monitor and investigate was the "89 Family Bloods." gang. The prosecution conceded that Barling would not be considered a gang expert "in a generic sense", but he had gained specific knowledge and experience with the "89 Family Bloods" gang. [RT, 19:4266, 4288-9]

[37] All parties stipulated that victim Loggins lived at 1151 East 88th Street, which was on the same street that co-defendant Johnson's house was located, but on the east side of Central Avenue. [RT, 17:3817] Det. Barling testified that this address was not within the territory claimed by the "East Coast Crips" gang. [RT, 21:4796]

[38] In the original diagram introduced into evidence as People's Exhibit #7, the words "Kitchen Crips" is written in black ink on the diagram, accompanied by an arrow pointing to that gang's territory.

Crips" and the "Kitchen Crips" were arch-enemies of Appellant's "89 Family Bloods" gang. [RT, 19:4339]

Barling explained that the "89 East Coast Crips" gang, like other Crips gangs in Los Angeles, normally wore the color blue for identification purposes, and to set themselves apart from various "Bloods" gangs that had chosen the color red as their "color." [RT, 19:4295, 4366; 23:4944]

Detective Barling explained that "respect" is the most important thing to a gang member. It is the basis for their authority within the gang, as well as the influence they exert over others in that gang. [RT, 19:4296] A gang member receives "respect" in different ways, such as who brought him into the gang, whether he makes a lot of money for the gang, or whether he commits acts of violence for the gang. [RT, 19:4296] Gang members participate in gang activities such as "drive-by shootings, walk-up shootings, [and] homicides" to gain respect. When someone with a lot of respect asks another gang member to "go on a mission", the other gang member will agree to "go on the mission" as a show of loyalty and respect for the person asking. A "mission" is being told to do something for the gang. It is "taking care of business" for the gang. [RT, 19:4298-4299]

Detective Barling related that Appellant had "rejoined" the gang during the summer of 1991 after being gone. According to Barling, the consequence of being gone was that the individual coming back usually had to "do something to show that you are still part of the neighborhood and still down for the hood and you are willing to do stuff for that gang." This would include "doing missions to show your loyalty." [RT, 19:4302-4303]

Det. Barling testified that gangs also have varying levels of "respect" between one gang and another, "like the 89 Family were known for committing homicides, for doing shootings." [RT, 19:4297]

Det. Barling was allowed to testify, over defense objection, that people who lived in the gang territory were afraid of the gang and the shootings that occurred

in the neighborhood. They were not normally co-operative with the police because of their fear of retaliation if they simply spoke to the police. Barling testified that fear of retribution by 89 Family gang members was a "legitimate" or real fear. The basis of this fear was retaliation by the gang members and not fear of the police. Even if a gang member were in custody, the fear did not end. The gang member could contact his fellow gang members and order things to be done. This would be called "going on a mission" for the gang. [RT, 19:4312-4313]

Barling related, over objection, that 89 Family gang members viewed people who spoke to the police about fellow gang members with disdain, and that members of the 89 Family gang would engage in various activities to keep people from talking to the police. The 89 Family gang members considered people who spoke to the police as "snitches", regardless of whether they were gang members or residents of the community. 89 Family gang members would "rather see them [snitches] dead than have somebody testify against them." [RT, 19:4317] It was Barling's opinion, therefore, that the fear people had of gang retaliation was a "legitimate" fear. Specifically as to the 89 Family gang members, Barling was allowed to testify that if a witness who provided information to the police involving an 89 Family gang member expressed fear of retaliation, their fear would be a "legitimate" fear. [RT, 19:4313-4]

EVIDENCE THAT WAS ADMITTED ONLY AGAINST CO-DEFENDANT JOHNSON, BUT NONETHELESS WAS HEARD BY THE JURY THAT DETERMINED APPELLANT'S GUILT:

Prior testimony of co-defendant Johnson:

On May 20, 1992 (9½ months after the Loggins/Beroit murders, and 2½ years before charges were filed), co-defendant Johnson testified as a defense witness in a jury trial in which three "crip" gang members were being

prosecuted.[39] The prosecutor was allowed to read to the jury a portion of Johnson's testimony at that earlier trial.

On that occasion Johnson testified that he was a "blood" gang member and that he and other "bloods" hated "crips". He related that during the Los Angeles riots, a "crip" had shot a "blood" in the head. People in the neighborhood had discussed a possible truce, but Johnson had made it clear that there would be no truce because one of his "homeboys" had been shot. He testified that gangs retaliate against other gangs. [RT, 19:4447-4456]

Co-defendant Johnson's statements to Detective McCartin:

Detective McCartin testified that in June of 1994 he and two other detectives spoke with Johnson about the murder of 89 Family Bloods gang member Albert Sutton, a case they were investigating. During the discussion Johnson related that Sutton should not have brought any "crips" into the "hood". The police asked Johnson if he was aware that one of the "crips" Sutton brought into the neighborhood was Sutton's brother? Johnson responded, "It doesn't matter. You don't bring 'crips' into the 'hood." Johnson further stated that Sutton had to be disciplined. Detective McCartin commented that Johnson seemed nonchalant when he said this. [RT 18:4173-4178]

Recordings of telephone conversations between co-defendant Johnson and others:

The prosecution presented evidence of four edited recordings of telephone conversations between co-defendant Johnson and others during the months of August and September 1995. This was after Johnson had been indicted and while he was awaiting this trial to begin. They were seized pursuant to a wiretap of telephone calls made from the Los Angeles County jail.

In the first telephone call, Johnson could be heard telling Bill Connor, the brother of Carl Connor, that he [Johnson] suspected that Carl Connor was one of

[39] The case was *People v. Glass, Mills and Carroll*, Los Angeles Superior Court case #BA019941. [CT, 4:676-717]

the individuals who had snitched him off before the grand jury. Johnson could be overheard telling Bill Connor to "school" his brother Carl Connor, to give him a "crash course." Johnson directed Bill Connor to tell his brother that even if Carl Connor had talked to the police or had testified, things could still be "worked out." Finally, Johnson told Bill Connor that he had to go to trial in this case; he had no choice because he had been offered the "death penalty plus life." Johnson could then be overheard at the conclusion of this conversation making a not-so-veiled threat that Bill Connor should tell his brother Carl Connor that, from Johnson's point of view, he (Johnson) really had nothing to lose. The inference was that if Carl Connor knew what was good for him, he would not testify against Johnson at the trial. [RT, 21:4779; People's Exhibits #38 (edited tape recording) and #38A (transcript of #38), located at CT Supp IV, 2:383-96]

In the second telephonic conversation, Johnson could be overheard speaking with a visitor at the jail. It pertained to Johnson's belief that Carl Connor was one of the witnesses who had testified before the grand jury. Johnson also mentioned that Connor was the person responsible for providing the information that allowed the police to arrest Reco Wilson in the Nece Jones murder. [40] [RT, 21:4780; People's Exhibits #39 (edited tape recording) and #39A (transcript of #39) located at CT Supp IV, 2:397-399]

In the third telephonic conversation, Bill Connor (the brother of Carl Connor) and Johnson can again be overheard discussing whether Carl Connor had testified against Johnson at the grand jury hearing. [RT, 21:4784; People's Exhibits #40 (edited tape recording) and #40A (transcript of #40) located at CT Supp IV, 2:400-404.]

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[40] Reco Wilson, a member of Johnson's gang, was arrested, prosecuted and convicted of the murder of Nece Jones. Jones was a witness to another murder for which Johnson's homeboy Charles LaFayette was alleged to have committed. Det. Sanchez testified that Connor had initially contacted her regarding his knowledge of Nece Jones' murder. Connor subsequently received $25,000 for his assistance in that case.

In the fourth telephonic conversation, Johnson was overheard talking to an individual about whether Bill Connor had "run into" his brother yet, the inference being that Johnson was trying to dissuade Carl Connor from testifying against him. [RT, 21:4785-4786]

Co-defendant Johnson's hand written note:

The prosecutor read to the jury a portion of a hand-written note that had been found on co-defendant Johnson's person on October 25, 1995 when he was in-custody at the Los Angeles County jail. The prosecutorial inference to be drawn from this letter was that Johnson was telling the intended recipient of the letter to relate to an individual who was in disfavor with him (Johnson) that he (Johnson) had the means to kill him at any time if he wanted to do so, but had chosen not to. ."[RT, 21:4803-5; People's Exhibit #44]

The prosecution thereafter rested its case-in-chief. [RT, 21:4805]

THE DEFENSE CASE-IN-CHIEF

WITNESS JEFFREY CHILDER

Witness James Childer, the general manager of Don Kott Ford testified, as indicated previously, to impeach the credibility of Connor by introducing Connor's time card for the day of the murders to show Connor was at work that day. [RT, 22:4854-4859]

WITNESSES JAMES GALIPEAU

The defense called gang expert Jeffrey Gallipeau[41], a deputy probation officer. [RT, 22:4868-4959] Galipeau testified specifically as to African-American gangs in south central Los Angeles. [RT, 22:4869-70] After explaining the historical origin of the Crips and Bloods gangs, he identified the various

[41] The prosecution stipulated that Galipeau, called as a defense witness, was an expert in gangs in south central Los Angeles. Galipeau had worked as a deputy probation officer for 32 years, and at the time of his testimony, he worked for the metropolitan specialized gang unit of the probation department in the south central Los Angeles area. [RT, 22:4869-4870]

locations that specific gangs claimed to occupy and control. [RT, 22:4872-3] Galipeau explained that the "89 East Coast Crips" gang, like other Crips gangs in Los Angeles, normally wore the color blue for identification purposes, and to set themselves apart from various "Bloods" gangs that had chosen the color red as their "color." [RT, 19:4295, 4366; 23:4944]

Galipeau related that during the summer of 1991, however, the Crips gangs had begun wearing black "Raiders" jackets or black "Kings" jackets. [RT, 23:4944-4945] At about the same time, Bloods gang members began wearing red "49ers" jackets. [RT, 23:4945] According to Galipeau, if a person was observed wearing a black Raiders jacket in a gang area in 1991, he would most likely have been a Crip, but no inference could be drawn if the individual was simply wearing a black windbreaker. [RT, 23:4956][42]

Galipeau related that during the summer of 1991, a Crips gang that was hostile to the "89 Family Bloods" gang claimed territory directly to the east of Central Avenue. This gang was known as the "89 East Coast Crips." [RT, 19:4290, 4338; 22:4875] The "89 East Coast Crips" and the "Kitchen Crips" were arch enemies of Appellant's "89 Family Bloods" gang. However, in 1991 the "Kitchen Crips" and the ""89 East Coast Crips" were also at war with one another. According to Galipeau, in the summer of 1991 it would have been "just as likely" that a "Kitchen Crip" would shoot an "89 East Coast Crip" as would a member of Appellant's "89 Family Blood" shoot an "East Coast Crip." [RT, 19:4339; 23:4958]

WITNESS ALLENE JOHNSON ... CO-DEFENDANT/ JOHNSON'S MOTHER:

Co-defendant Johnson called his mother Allene Johnson to testify. She related that on August 5, 1991 she drove home sometime in the afternoon. She noticed an emergency vehicle with lights on at Central near 88th Street, and a small

[42] Det. Barling was of the opinion that Bloods occasionally also wore Oakland Raiders jackets. [RT, 24:5034-7]

crowd was beginning to gather. She did not see any police cars nor police "crime scene" tape, however. She went home to see if her sons were safe. She saw her sons at her home. She did not see Appellant at her home, nor did she see Freddie Jelks at her home. She was certain Jelks was not at her house when she arrived. She also saw no weapons. She stated that from her house, one could not see the white Toyota. [RT, 23:4961-73]

On cross-examination, Allene Johnson testified she did not recall her son asking her to contact relatives or friends of "NaNa" (Marcellus James). She denied that her son ever asked her to find out where "FM" (Freddie Jelks) was located. [RT, 23:4976]

Appellant and co-defendant Johnson both rested their cases-in-chief, respectively. [RT, 23:4982]

THE PROSECUTION'S REBUTTTAL CASE:

In the prosecution's rebuttal case, the prosecution introduced the contents of three (3) telephone conversations that occurred on September 2, 5 and 8, 1995, wherein the jury could overhear Johnson (who was in custody at the time) and his mother talking about efforts to "contact" Freddie Jelks. [RT, 24:5028 and People's Exhibit #45A; RT, 24:5031-2 and People's Exhibit #46A; RT, 24:5032 and People's Exhibit #47A]

In addition to impeaching the credibility of Johnson's mother with these contradictions and prior inconsistent statements, the prosecutor read from the September 8, 1995 transcript of the recorded conversation. Therein, Johnson ominously told his mother that he was going to have someone else "talk to" Jelks, since she hadn't yet told "Ray" (Johnson's brother) to do it: [RT, 24:5031-2; People's Exhibit #46A]

Finally, the prosecution re-called Detective Barling to rebut testimony given by deputy probation officer Gallipeau. Gallipeau had testified that in 1991 the Crips gangs -- including the nearby "Kitchen Crips" gang which at the time was an enemy of the East Coast Crips gang [RT, 23:4946, 4958] -- had begun

wearing black Oakland Raiders' jackets in addition to blue clothing.[43] [RT, 23:4944-56] Gallipeau had also testified that Bloods gang members did not wear Oakland Raiders jackets. [RT, 23:4952]

To rebut this testimony the prosecution re-called Det. Barling, who testified that he had observed 89 Family Bloods, as well as other bloods gang members, wearing Oakland Raiders jackets. [RT, 24:5033-5034] Det. Barling agreed with Gallipeau, however, that black windbreaker jackets were worn by both Crips and Bloods, and that one could not infer anything concerning gang affiliation if an individual was wearing a black windbreaker. [RT, 23:4956; 24:5033-5034]

The prosecution then sought to introduce three photographs (People's Exhibits #47, 48 and 49) to corroborate Detective Barling's testimony and to contradict Gallipeau's testimony. Over defense objection [RT, 24:5018-5023], the court allowed Detective Barling to testify concerning the contents of the three photographs. Each photo showed at least one member of the 89 Family Bloods gang wearing a black windbreaker type jacket or a black shirt. *None* of the photos depicted a member of the 89 Family Bloods gang wearing a black Oakland Raiders jacket. However, one photo contained four (4) 89 Family Bloods gang members posing in front of gang-graffiti covered walls and fencing, each dressed in red and flashing various gang signs. Another photo displayed four (4) 89 Family Bloods gang members standing in their red colors, and two of the gang members were brandishing firearms! [RT, 24:5051; People's Exhibits #48 and #49]

CLOSING ARGUMENTS AND JURY INSTRUCTIONS:

After all parties rested, the jury was instructed on the law. [RT, 25:5054-98] Thereafter, the prosecution made its closing argument [RT, 24:5101-

[43] This was significant defense evidence because prosecution witness Eulas Wright had testified that the shooter was wearing a black Oakland Raiders jacket, suggesting inferentially that the shooter was a Crip, not a Blood. Of course, Appellant was a Blood.

5143]. Counsel for Johnson argued his case [RT: 24:5145+], Mr. Orr on behalf of Appellant argued his case [RT, 25:5190+], and the prosecutor rebutted. [RT, 25:5207-32] Jury deliberations then began. [RT, 25:5237]

JURY DELIBERATIONS:

During the 2nd day of deliberations (August 21, 1994), the jury sent out a note to the court. They wanted to know when it was that Jelks had fought with Johnson over the girl friend, was it before the Loggins/Beroit murders, and was it a physical fight. They also wanted to know when Jelks had left the gang in relation to the murders. [RT, 26:5245; CT, 4:829]

Another question posed by the jury on August 25, 1994 read: "Is there any reward monies in any way associated with this case?" [RT, 26:5262; CT, 4:831]

On the 5th day of jury deliberations, jurors 4 and 5 complained to the court that juror #11 was not participating in jury deliberations. [RT, 26:5283+] The court conducted a hearing, concluded that juror #11 was not deliberating, and over defense objection, the court excused juror #11. [RT, 26:5452] An alternate juror replaced juror #11. [RT, 26:5452; CT, 4:836-7]

The following day, the jury foreman wrote a note to the judge: "The jury is unable to reach a unanimous verdict re Mr. Allen." [CT, 4:840; RT, 26:5478] The jury reported that they were deadlocked 10-2, and requested direction from the court. [CT, 4:842; RT, 26:5482] Appellant moved for a mistrial. [RT, 26:5479] After the court inquired further, it instructed the jury to continue deliberating until they reached a verdict. [RT, 26:5488]

The jury thereafter asked that all of Freddie Jelks' testimony be read back to them. [CT, 4:842, 846]

The following day, the jury announced they had reached verdicts. Appellant was convicted of both counts of murder, the three firearms enhancement allegations, and the special circumstance of multiple murders. [CT, 4:916-930; RT, 27:5514-23]

ADMISSION OF "PRIOR MURDER" SPECIAL CIRCUMSTANCE BY APPELLANT.

Subsequently, Appellant waived his right to a jury trial on the bifurcated special circumstance allegation of "Prior Murder", and admitted that this special circumstance was true. The court found the special circumstance of "Prior Murder" to be true, and advised the jury thereof. [CT, 5:933; RT, 27:5545-5565]

PENALTY PHASE STATEMENT OF FACTS

EVIDENCE IN AGGRAVATION AS TO APPELLANT:

WITNESS RODERICK LACY

Roderick Lacy testified that he and Chester White belonged to the Avalon Gardens Crips gang in 1993 and that there was animosity between his gang and the 89 Family Bloods gang at that time. White's gang moniker was "Stupid." [RT, 32:6395-6396]

During daylight hours on March 9, 1993 Lacy and White walked to the C&D Market on 89th Street and Avalon to purchase a couple of items. It was close to where they lived. Neither individual had a weapon. [RT, 32:6396-6397] As they walked north on Avalon, Lacy heard numerous gunshots coming from behind them. Lacy stated that he was shot in the leg as he and White both began to run. The bullet penetrated the rear of his lower right leg and exited through the front of his leg. When he came to a safe place, he turned and saw White on the ground bleeding. [RT, 32:6399-6400] Lacy saw 3 or 4 individuals in the area. Two of them were heavy set. He observed one of the heavy set individuals stand over White, shoot him, then run off. The weapon used by that individual appeared to be a handgun. [RT, 32:6401-6402] Before he was taken to the hospital, Lacy explained he was aware that White had been killed. [RT, 32:6405-6406]

While at the hospital, the police told him that "Fat Rat" was the killer, and they asked him if he knew "Fat Rat." He responded that he did and he could pick

"Fat Rat" out of a lineup. He stated, however, that he told the police he personally did not know if "Fat Rat" was the shooter. Lacy stated that he and White had had no problems with "Fat Rat" or any other "blood" that day, and he does not know why someone would shoot at them. [RT, 32:6407, 6415, 6417-6418] Lacy subsequently did select Appellant's photo from among others. [RT, 32:6474-6476]

Detective Tizano testified, however, that Lacy told him that Appellant had what appeared to be an Uzi type weapon, that he saw Appellant get to within 3-4 feet of the victim, that the victim fell, and that Appellant then stood over the victim and fired additional rounds into the victim. [RT, 32:6479, 6490]

WITNESS EARL WOODS:

Earl Woods testified that in March 1993 he was living with his mother and son near Avalon and 94th Street. At about 2:00 PM on the day of the shooting, he was near the market with his son. Earlier, "Stupid" [i.e., victim Chester White] had told Woods that he was going to the market. "Stupid" was with another individual at the time. [RT, 32:6426-8]

As he and his son approached the market, he heard some shots being fired. When he got to the market, he saw "Stupid" lying on the ground.

Woods "could not recall" what else he may have seen that day. He did testify, however, that individuals he knew as "Fat Rat" and "Psycho" had approached the market at about the same time that "Stupid" did. He claimed he did not see any shooting, but that he did see 5 guys running away from the market, then split and flee in different directions. He also saw "Stupid's" friend limping as he ran northbound up the street, and he saw "Stupid" run part way across the street, then collapse. He also admitted he gave the police descriptions of 2 of the 5 individuals, but that the descriptions were lies. He related he saw no one with a gun, but he admitted he told the police that he had seen Psycho with a gun and "Fat Rat" with an Uzi. He also admitted that he selected "Fat Rat's" photo from other photos. [RT, 32:6429-6438]

Woods related that he still lives in the neighborhood, and he has a son. He did not want to testify because he would be known as a "snitch." A "snitch" must be placed in protective custody and Woods did not want to have that happen to him. Also, Woods admitted a "snitch" also makes himself a "target" on the street. [RT, 32:6438-6439]

Thereafter, the prosecution introduced various statements that Woods made to the police. Woods had selected Appellant's photo as the individual who had had an Uzi type semi-automatic weapon. People's Exhibits #74 and #75 are Wood's statements to the police, as well as the diagram he drew of the scene. [RT, 32:6477, 6480, 6483-5, 6490]

DETECTIVE TIZANO:

Detective Tizano testified that he was one of the Los Angeles Police Department investigators assigned to investigate the March 9, 1993 shooting death of Chester White that occurred at about 2:00 PM in the parking lot of a market located on the southeast corner of 89th Street and Avalon. [RT, 31:6287-6289] At the crime scene he recovered 9 shell casings that were located one after another in a northeasterly direction, as well as two spent bullets. The two bullets and 3 of the casings were .40 caliber, while 6 casings were 9mm. [RT, 31:6289-6290] The 2 expended bullets were found under the head and in the neck of victim White. [RT, 31:6293-6297][44] White's body was on its back. Detective Tizano could see a bullet wound to the left side of White's face. [RT, 31:6294] The face wound had stippling, indicating the bullet had been fired from within 18 inches of his face. [RT, 31:6297]

Two weapons were subsequently found by police officers: a 9mm semi-automatic hand pistol, which some people call an Uzi, and a .40 caliber semiautomatic. [RT, 31:4294] Both weapons were found the same day as the shooting in some ivy or bushes outside Appellant's uncle's house that was located

[44] Although Det. Tizano did not personally examine the bullets or casings, the subsequent stipulation by all parties to the firearms analysis resolved this issue.

a block from the crime scene, and both weapons were matched to the casings and expended bullets that were recovered at the crime scene.[45] [RT, 31:6295, 6298-6299]

Appellant entered into a stipulation that the expended shell casings recovered at the crime scene were fired from either the 9mm hand pistol (Uzi) or the .40 caliber semiautomatic handgun. Further, the "two coroner bullets" were fired from the 9mm hand pistol (Uzi). [RT, 32:6559-6560] Appellant also stipulated that Chester White had been shot five times, and that two of the bullets had lodged in his body and had been recovered during the autopsy. One of the bullets entered the victim's left cheek and was recovered in the right side of his neck. This entry wound had gunpowder stipulating that surrounded the entry wound. [RT, 32:6561-6563]

EVIDENCE IN MITIGATION AS TO APPELLANT

WITNESS ROSALIND ALLEN:

Rosalind Allen testified that she is Appellant's wife, that they were married on August 17, 1997, just prior to the beginning of the trial. She related she met Appellant about two years earlier while he was incarcerated. She said she loves him, wants to communicate with him wherever he is, and has sympathy for him. She told the jury she wants to continue her relationship with him and wants him to live. [RT, 33:6621-6623]

WITNESS REBECCA ALLEN:

Rebecca Allen testified that she is Appellant's mother. She explained that in 1971 she was living with her mother and stepfather, and she was dating an individual named Booker Cole. She became pregnant and gave birth on September 2, 1971 to Appellant when she was only 17 years old. Cole was in the service, however, and lived in San Diego. She returned to her mother's home and she and Appellant lived in a rear apartment. [RT, 33:6625-6631]

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[45]Appellant's counsel raised no objection to this portion of Tizano's testimony because of the subsequent stipulation that all parties entered into.

Mrs. Allen explained that she began dating Arthur King and became pregnant from this relationship also. In 1974 she gave birth to her 2nd son, Derek. Although she and King did not live together, she and he continued to date for several years. Whenever King's mother would invite her grandson Derek to her house, she always included Appellant. Appellant was included in family get-togethers. [RT, 33:6631-6632] Mrs. Allen related that her mother and stepfather also helped take care of Appellant and were kind to him. [RT, 33:6634]

When Appellant was 4 or 5 years old, the family moved to an apartment in a public housing tract named "Avalon Gardens." Here, Appellant attended a Catholic school in Compton through 2nd grade called St. Albert's school. Mrs. Allen paid for her son's tuition. [RT, 33:6637]

When Appellant was 5 or 6, she met and married Louis Jordan. The marriage lasted only 4 months, however, because Jordan would strike her. Because of this relationship, however, King told her not to send Appellant over to their house anymore. [RT, 33:6638]

In 1978, Mrs. Allen's mother unexpectedly died. Since her mother had helped her raise her sons, Mrs. Allen explained that she could no longer afford to keep Appellant in the Catholic school. He transferred to a public school and was doing well in school at the time. At one point, she discovered his vision was impaired. She was able to provide glasses for him, however. [RT, 33:6641-6647]

As Appellant matured, he grew larger and taller than most of the children his age. He was called "Fat Boy" and "Big Boy." The older boys would tease him. By the 6th grade, he had a 16 inch neck and began shaving. [RT, 33:6648-6649] At about this time, Mrs. Allen worked for the bus company. They needed a larger apartment, so she moved her family. She realized later that she had moved deeper into "Crip" territory. [RT, 33:6651-6652]

When Appellant began junior high school, she had him attend Sutter Junior High School because she thought he would get a better education there. However, Appellant continued to be harassed and to encounter problems with other kids,

partly because of his size. On one occasion he was playing with a curl of hair and his teacher commented, "Quit playing with your hair, Baby Refrigerator." Appellant became very upset and the teacher sent him to the principal's office. He was humiliated. Later, the teacher apologized to Appellant in front of the entire class. [RT, 33:6654-6656]

She tried to get him into a football program but he was too big for his age group and too young for the bigger teams. She finally had to move him out of Sutter Junior High School and tried to enroll him in a Catholic school. She could not afford the tuition, however. [RT, 33:6656]

She said that Appellant continued to have problems. When he was about 13 or 14, however, co-defendant Johnson befriended him. In 1988 Appellant left home and was in a "juvenile institution" until 1990. When he returned home, she had rules to live by and Appellant had difficulty abiding by them. Hence, Appellant was returned to the "custody" of others. When he returned again in June of 1991 at age 18, she was living on 89th Street. He lived with her, but he hung out with members of the 89 Family Bloods gang. She would see him at Johnson's house. [RT, 33:6657-6658] She said that about 6 weeks later, two young men were murdered. Two years later, Appellant was arrested for the murder of another person near her home. He was sentenced to 30 years to life in prison. He had been in prison since then. [RT, 33:6659-6660, 6666]

Mrs. Allen concluded her testimony by relating that Appellant had been a good boy until he began hanging out with 89 Family Bloods gang members. He spent time with his family and they all did things together. She related that Appellant was a good cook, had a good sense of humor, and he loved his family. There were a lot of good things he did, and that he is a good person. [RT, 33:6663-6666]

WITNESS ROBERT DOUGLAS:

Appellant's counsel called Mr. Robert Douglas to testify as an expert witness concerning gangs, gang psychology, and why Appellant did what he had done. However, Douglas had a difficult time qualifying as an expert witness in any of those areas.

By way of foundation, Douglas testified that he was the director of Outpatient Services for the "Inglewood Behaviorable (sic.) Health Sciences" in Inglewood, California. He was also a pastor. He claimed to have received his B.S. degree in "Life Assessment" from the "Ministerial Training Institute." He further testified he received a "Master's Degree" in "Christian Education" and he also received a "doctorate" in "Biblical Counseling" at Inglewood, California in 1996. At the time of his testimony, he was a 1st year law student at Abraham Lincoln University. From 1974 to 1996, he remained in the Inglewood area and became involved with crips and bloods gang members from that area. [RT, 33:6686-6687] On cross-examination, he admitted that he "maybe" had interviewed only one other member of Appellant's gang, other than Appellant himself, during his years of outreach. [RT, 33:6707] He further admitted that Appellant's 89 Family Bloods gang was a south-central Los Angeles bloods gang, and *not* one of the Inglewood gangs that formed the basis of Douglas' expert opinion. [RT, 33:6706-6707] He interviewed of Appellant in preparation for testifying at the penalty phase of the trial. He took notes of his interview on two pieces of paper. The two pages of notes[46] taken by Mr. Douglas were produced in discovery. [CT Supp.IV, 2:313-314]

Mr. Douglas continued to explain his experience as it pertained to gangs and gang psychology:

> RD: We have a contract with the office of alcohol program. In terms of we have an agenda of service items that we provide to those constituents in the community. And some of the

[46] One of the "pages" appears to be the front of a preprinted envelope. Apparently, Mr. Douglas forgot to bring any blank paper for note taking as he interviewed Appellant!

activities would include a personal outreach intervention, in terms of crisis situations and reporting. And if an agency of any type, department social services, children protective services, law enforcement, probation, parole, would give us a call to respond to an item, which is known as number 8 personal outreach and intervention, we will be dispatched to any particular locale that fits our contract or confines. [RT, 33:6687-8]

Mr. Douglas further testified:

RD: I do family assistance therapy and open recovery group counseling and recovery treatment planning, and I sit in on a majority of groups that are didactic as well as gestalt. [RT, 33:6692]

At sidebar and out of the presence of the jury, the prosecutor objected to Mr. Douglas testifying about "didactic and gestalt intervention." Judge Horan's comment as to Mr. Douglas' expertise in that field revealed how totally *unimpressed* the court was regarding Mr. Douglas. The court described Douglas' attempts to validate his expertise by stating, "This is just gobbledegook." [RT, 33:6693]

The court, however, ruled that Douglas would be allowed to testify as an expert on the subject of gangs. Prior to his rendering any opinions as to Appellant's involvement, Douglas was asked what a "shotcaller" was in a gang context. He responded to this question on several occasions:

RD: A shotcaller would be a centralized figure that would lead the activities of a particular gang or group that is exclusively operating on their own. [RT, 33:6694]

. . .

A shotcaller would be a person that would be the leading figure, or the commanding person within a particular group that would have subjects or subordinates that would respond to the dictates or the commands of whatever his thinking was for that particular group. [RT, 33:6695]

. . .

> Well, the shotcaller is the individual that is the guy that is given the autonomy in order to empower the other group subordinates to do whatever the objective is. [RT, 33:6695]
>
> . . .
>
> Well, a shotcaller has to be charismatic. He has have [sic.] been very manipulative. He has to be a cut above the edge, have more extreme behaviors and characteristics of maturity than as opposed to subordinates, who would be more less [sic.] subject to his commands or his influence. [RT, 33:6695]

Mr. Orr also asked Mr. Douglas what the term "serve" meant in gang vernacular. Mr. Douglas responded that "to serve" had at least three (3) definitions, not the least of which were "strawberries" who committed acts of prostitution to "serve" the gang by raising money [RT, 33:6696-7]:

Eventually, Douglas was allowed to render the following "expert" opinions regarding Appellant's involvement in this case:

- Co-defendant Johnson was a "shotcaller" on the day of the shootings, per the transcripts the witness had read. [RT, 33:6698-6699]
- Appellant was "under the domination of the gang from 1991 until he was taken into custody in 1993." [RT, 33:6703]
- Being a member of an 89th Family Gang was a "dominating factor" in a gang member's life to the exclusion of any other dominating factor, and Appellant was a member of "89th Street Family Blood." [RT, 33:6704]
- Appellant obtained the Uzi from Johnson and went out and did a "serving." [RT, 33:6698]

On cross-examination by the prosecutor, Douglas claimed that Appellant was being "cloned" as he grew up! His use of that term even brought a surprised response from the court.

> DDA: So, the fact that when he was an infant he might have lived in crip territory, that wouldn't impact his choices when he was 18 years old, necessarily, would it?
> RD: Yes.
> DDA: How?
> RD: He's being cloned.

CRT: He's being what?
RD: He's being cloned. He's being primed.
CRT: Cloned?
RD: Yeah. He's being primed. Michael is being primed. He doesn't have anyone in terms of – see his – his residential area has changed so much, it's been nothing but a series of u-turns in his life. [RT, 33:6713 (Emphasis added)]

On cross-examination, Douglas compared Appellant's role in these homicides to that of Luka Braza in *The Godfather,* as well as Tex Watson to Charles Manson, even though the court had ruled the witness would not be allowed to make these comparisons.

Q: You testified that Michael Allen was under the dominance of the 89 Family Bloods from '91 to '93. Could you tell us the basis of your opinion?
A: Okay. Without being facetious or funny, to synopsize it, Michael Allen is like a Luka Braza in *The Godfather*, or Tex Watson in Manson. [RT, 33:6709]

Thereafter, counsel for co-defendant Johnson moved for a mistrial, claiming that Douglas's comparing Appellant to Tex Watson meant he was comparing Johnson to Charles Manson, and the court had specifically told Orr not to develop that area. The court's response to the motion for mistrial was illustrative of the impact Mr. Orr's "expert witness" was having:

CRT: Your motion will be denied for the following reasons: The court is of the firm and honest opinion after listening to the testimony of the witness [Douglas] that it was meaningless and will be rejected by the jury. It was without substance, without foundation, without tremendous relevance, and it did no more than restate – where it did make sense at all, it did no more than restate what the jury has heard from other witnesses. I was less than impressed. If you want to be heard, if you have a different characterization, if you think that the witness had some major impact on the jury, I'll hear your assessment. [RT, 33:6718]

On re-direct examination, Douglas revealed to the jury that Appellant had been incarcerated prior to the double shootings [RT, 33:6714-6715], thereby

reminding the jury of the testimony of Appellant's mother that he had previously served time in a "juvenile institution." [RT, 33:6657-6658][47]

EVIDENCE IN AGGRAVATION BUT ADMITTED ONLY AGAINST CO-APPELLANT JOHNSON

The September 14, 1991 Tyrone Mosley Murder:

The prosecution introduced evidence that about five (5) weeks after the Loggins/Beroit murders, Johnson, Freddie Jelks and "Jelly Rock" drove into the rival 97 East Coast Crips gang territory to do a drive-by gang-related shooting at a large party that was being held in that neighborhood. As the car approached the party, the driver slowed and blinked the car's headlights, indicating they were friends of those at the party. One of the partygoers approached the car, leaned down to look in the window, and was shot and instantly killed. Johnson and his homeboys fired additional shots and two other innocent party-goers were seriously wounded. Johnson was later heard to be bragging about the shootings. [RT, 31:6227-6247 (Det. Johnson); 6264-6285 (Kim Coleman); 6304-6309, 6515-6540, People's Exhibit #84 and 84A at 6524 (Det. McCartin); 6313-6373, (Keith Williams).]

The jury also listened to two tape-recorded telephone calls a) between Johnson (at Ironwood State Prison) and Keith Williams, who was to be a witness against Johnson in the Mosley murder, and b) between Johnson and an unknown individual named "Sticks." In the first recording, Johnson can be heard instructing Williams to commit perjury when he testifies against Johnson before the grand jury. [People's Exhibit #80 (tape) and #80A (transcript of #80), located at CT Supp IV, 2:448-465)] The prosecution thereafter played for the jury another tape-recorded telephone call between Johnson (at Ironwood State Prison) and "Sticks." Johnson can be heard complaining that he had "schooled" Williams as to what to

[47] Appellant is not raising an "Ineffective Assistance of Counsel" in his direct appeal to this Court. That issue is more properly raised in a *habeas corpus* proceeding.

testify to before the grand jury, but Williams had "put it on thicker than what he did before [Johnson] was [unintelligible] the state"; that Williams had testified before the grand jury for four (4) hours; and that "Assassin" was supposed to be handling some "business" for Johnson; that is, "Assassin" was supposed to telephone Williams and have a talk with him (Williams). [People's Exhibit #82 (tape) and #82A (transcript of #82), located at CT Supp IV, 2:469-474)]

The 1994 Solicitation to Murder Nece Jones:

The jury listened to two tape recordings of Johnson that were made while Johnson was incarcerated at Ironwood State Prison, in which a) he could be heard soliciting Reco Wilson, an 89 Family Bloods gang member, to murder Nece Jones who was a witness in a murder trial involving Johnson's homeboy, Charles LaFayette. [RT, 30:5993-5994; People's Exhibits #51 (tape) and #51A (transcript of #51), located at CT SUPP IV, 2:437-442], and b) Johnson confirmed to another individual that he had spoken to Reco Wilson. [People's Exhibits #81 (tape) and #81A (transcript of #81), located at CT SUPP IV, 2:466-468]

The prosecution produced additional evidence that three days later, Reco Wilson was observed chasing and shooting at Nece Jones. When she fell to the ground, Wilson walked up to her and shot her execution-style in the back of the head at "contact" range. She was murdered because she was to testify against Johnson's homeboy, Charles LaFayette!

The 1994 Solicitation to Murder Detective Tom Matthew:

The jury listened to two tape recordings of telephone calls between Johnson (who was incarcerated at Ironwood State Prison) and another individual. In the first recorded call, Johnson can be overheard telling that individual that when he gets out of prison, "I'm gonna be able to have a scope [i.e., a telephoto lens or scope on a rifle] for old Matthews . . . and after, that motherfucker would be able to kick back, you know what I am saying?" [RT, 30:5997-5998; People's Exhibits #52 (tape) and #52A (transcript of #52), located at CT SUPP IV, 2:443] In the second recorded call, Johnson is overheard talking about obtaining a ".30-.30"

rifle so he can kill Det. Mathew. In rather chilling language, Johnson was overheard saying: "I don't want him to see me til its too late. (laughter) Yeah, he be talking about 'Why me?' (laughter), 'Why me?', you know what I'm saying? [RT, 30:5999-6000; People's Exhibits #53 (tape) and #53A (transcript of #53), located at CT SUPP IV, 2:444-447]

The 1995 Possession of a Deadly Weapon while in Jail:

Robert Mayberry testified that he was a jailer at the men's central jail in Los Angeles County. On Nov. 19, 1995 he and other sheriff's deputies did a random unannounced search of the cell in which Johnson was housed. They located a shank, or what Mayberry referred to as a "jail mate-stabbing device." The weapon was about 4 to 4 ½ inches long, ¾ inch wide, with a sharpened point at one end, and made of metal. It was found in Johnson's pants that were located in the cell. In the deputy's opinion, the shank could cause death. A photograph of it was taken, and the photo was introduced as People's Exhibit #50. [RT, 29:5935-5941]

JURY INSTRUCTIONS, CLOSING ARGUMENT, JURY DELIBERATIONS, AND JURY VERDICTS:

After all parties rested, the court read to the jury the relevant instructions, counsel argued and the jury retired to deliberate. After several days of deliberation, the jury told the court it could not reach a unanimous verdict as to Appellant. The trial court instructed the jury to continue deliberating. Thereafter, the jury returned with verdicts of death as to both Special Circumstances filed against Appellant.

GUILT PHASE ISSUES ON APPEAL:

ISSUES RELATING TO WITNESS CARL CONNOR

I.

The prosecutor committed prosecutorial misconduct that was material and prejudicial when she knowingly presented the false testimony of Carl Connor. As such, it violated Appellant's Constitutional Rights to Due Process, to a

Fair Trial, and to Fundamental Fairness, and it mandates that Appellant's convictions and judgment of death be reversed.

Page 64

II.

The prosecutor's misconduct in knowingly and affirmatively presenting false testimony to win a conviction and sentence of death violated Appellant's due process right to fundamental fairness because it was outrageous governmental conduct that shocks the conscience of the court. The prosecutor's conduct was such that any retrial is prohibited under California's double jeopardy clause. As such, Appellant's conviction should be reversed and the case dismissed *with prejudice* because this is the only effective way to deter this type of government conduct in the future.

Page 122

III.

The trial court erred when it allowed the prosecution to introduce irrelevant evidence and inadmissible opinion evidence that improperly "bolstered" the credibility of witness Carl Connor. The errors were prejudicial, and require reversal of Appellant's conviction.

Page 137

ISSUES RELATING TO WITNESS FREDDIE JELKS:

IV.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Freddie Jelks regarding details of his initial interrogation by the police, as well as the details of his pending murder case. The trial court's error denied Appellant his Fifth, Sixth and Fourteenth Amendment rights to confront and cross-examine his accusers, as well as to present a defense. The errors were prejudicial, and they require reversal of Appellant's convictions and sentence of death.

Page 174

V.

The prosecutor committed prosecutorial misconduct when she failed to disclose material evidence to the court upon the court's specific request. The prosecutor thereafter failed to correct the court's misunderstanding of the facts on five occasions. This misconduct was material, violated Appellant's Fourteenth Amendment Right to Due Process and a Fair Trial, and was prejudicial, thereby requiring Appellant's conviction and judgment of death be overturned.

Page 229

VI.

Appellant's constitutional right to due process and to confront and cross-examine his accusers was violated when the triaL court curtailed and limited Appellant's cross-examination of Freddie Jelks, Detective McCartin and

Detective Tapia, thereby making it impossible for Appellant to establish Jelks' testimony was false, involuntary, and the product of continuing police coercion.

Page 248

VII.

The trial court abused its discredtion when it refused to allow Appellant to confront, cross-examined and impeach Detective McCartin regarding details of his initial interrogation of Freddie Jelks, as well as details of Jelks' pending murder case. The trial court's eror denied Appellant his Fifth, Sixth and Fourteenth Amendment Rights to confront and cross-examine his accusers, as well as to present a defense. The errors were prejudicial, and they require reversal of Appellant's convictions and sentence of death.

Page 293

VIII.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Detective Sanchez regarding her conduct and state of mind as she escorted Freddie Jelks to and from court during the trial. The trial court's error denied Appellant his Constitutional Rights to Due Process and to a Fair Trial, the error was prejudicial, and it requires reversal of Appellant's conviction.

Page 319

IX.

The trial court erred when it allowed the prosecution to introduce irrelevant evidence and inadmissible opinion evidence that improperly "bolstered" the credibility of wiltness Freddie Jelks. The errors were prejudicial, and require reversal of Appellant's conviction and judgment of death.

Page 333

ISSUES RELATING TO WITNESS MARCELLUS JAMES:

X.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Marcellus James regarding his initial in-custody interview with the police on February 22, 1992. The trial court's error was an abuse of discretion and the error denied Appellant his due process right to confront and cross-examine his accusers under both the United States and California constitutions. It was prejudicial to Appellant's right to a fair trial and it requires his convictions and his judgement of death be reversed.

Page 356

ISSUES INVOLVING GANG EVIDENCE:

XI.

The trial court erred and abused its discretion when it allowed the prosecution to introduce extensive, inflammatory and highly prejudicial gang

California's death penalty statute, as interpreted by this Court and applied at Appellant's trial, violated the Due Process Clause of the 14th Amendment to the United States Constitution.

Page 711

ARGUMENTS:

I.

The prosecutor committed prosecutorial misconduct that was material and prejudicial when she knowingly presented the false testimony of Carl Connor. As such, it violated Appellant's Constitutional Rights to Due Process, to a Fair Trial, and to Fundamental Fairness, and it mandates that Appellant's convictions and judgment of death be reversed.

A. Introduction.

Carl Connor was one of three prosecution witnesses at trial who linked Appellant to the murders of Loggins and Beroit. He was the *only* eye witness presented by the prosecution who identified Appellant as being the actual shooter.

On August 5, 1991 victims Donald Loggins and Payton Beroit were shot to death as they sat in Loggins white Toyota waiting for Beroit's flashy black Chevrolet to be washed. No arrests were made until indictments were returned on December 16, 1994 that charged Appellant and Cleamon Johnson with the murders.

However, police investigation during the 6 years between the murders and the trial revealed three significant and uncontradicted facts:

- First, the shooter approached the victims' car from behind so as not to be seen. That is, the shooter walked *southbound* on the west side of Central from the direction of 87th Place until he was adjacent to the right side of the white Toyota.
- Second, the shooter stood immediately adjacent to the *right passenger door* of the white Toyota and fired multiple shots from an Uzi through the open passenger window into the car, the bullets penetrating into the right side of the victims' heads and bodies. Because of the trajectory of the bullets fired,

it was apparent the shooter squatted down or bent over slightly when he shot into the car.

- Third, the shooter fled *northbound* on Central Avenue immediately after the shootings, then turned to his left on 87th Place. In effect, the shooter retraced his steps and left in the same direction from which he approached. From the various witnesses' vantage points, the shooter approached from their *left* and fled to their *left*.

In late July or early August of 1994, and at a time when the Los Angeles City Council was being asked to authorize rewards for information on certain unsolved murders in the city, Carl Connor contacted the police and said he had information on homicides that had been committed in that neighborhood. Connor's information was astounding! He claimed that he was an eye witness to the shootings of Loggins and Beroit, and he also claimed he knew and could identify the killer! Further, he provided information that potentially linked the "shotcaller" of the infamous 89 Family Bloods gang to the murders

Appellant asserts, however, that to *anyone* who was familiar with the investigation of the deaths of Loggins and Beroit, there were obvious, substantial, and irreconcilable differences between Connor's statement to the police (as well as his subsequent grand jury testimony) and the remainder of the evidence. Portions of his original statement to the police were obviously speculative, and other highly significant details of the murders that he claimed to have witnessed were totally inconsistent with, and contradicted by, the known facts. Further, the inconsistent and contradictory details in his initial statement to the police, his subsequent grand jury testimony, and finally his trial testimony were *not* the type of details that an *actual* eye witness would have been mistaken or confused about. Unlike *every other witness* who described the shootings to the police, Connor said the shooter approached the victims from the *south*, or from Connor's *right*. Connor further insisted that the shooter departed in the same direction he had come; that is, the shooter left in a *southbound* direction, or to Connor's *right*. Finally, Connor

testified that the shooter stood in *front* of the victim's car when he shot, and that it appeared to Connor as though the shooter was shooting into the *driver's side* of the car. Connor's description of the shooting was, simply put, physically impossible. The physical evidence at the scene, as well as the opinions of both expert witnesses called by the prosecution, made it clear that Connor was wrong; the shooter was *not* standing where Connor testified he was, nor was the shooter standing anywhere close to where Connor insisted the shooter was standing when he shot into the white Toyota..

Appellant asserts it would have been *impossible* for the prosecutor to *not have been aware* of this contradictory information long *before* she called Connor to testify. Yet, from the appellate record, it appears the prosecutor and police *never* made any attempt to reconcile or clarify these inconsistencies. Appellant contends that the prosecutor willingly presented and argued those portions of Connor's testimony that helped fortify her case against Appellant, and she quite literally *turned a blind eye* to those aspects of Connor's testimony that clearly demonstrated he was *not present* at the murder scene and, hence, was *lying* when he identified Appellant as the shooter.

Even if the prosecutor insisted she was not aware of the above information prior to trial, she obviously was *aware of all of this evidence* at the conclusion of the guilt phase of the trial. Yet, the prosecutor *vouched for the credibility* of Connor during closing argument. She vigorously argued that Connor was truthful when he testified to Appellant's involvement. She simply *omitted* any reference to those portions of Connor's testimony that contradicted what she insisted to the jury was the truth. She made no attempt to reconcile the inconsistencies in Connor's testimony versus what she argued was the truth.

Appellant asserts that the trial testimony was tainted to such an extent by such prejudicial prosecutorial misconduct that certain of the rights guaranteed to him under both the California and United States Constitutions were violated. First, he was deprived of due process and a fundamentally fair trial in violation of

the Fifth and the Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution. He was also deprived of a reliable adjudication of guilt and penalty in violation of the Eighth and Fourteenth Amendment to the United States Constitution. As the following arguments will make clear, the prosecutorial misconduct involved the knowing presentation of false testimony that was *material* to the guilt or innocence of Appellant and, therefore, requires his conviction and sentence of death be overturned.

B. The Applicable Law.

1. The Unique Role of the Prosecutor in the Criminal Justice System.

The discussion of the issue of prosecutorial misconduct must begin with the unique role of the prosecutor in the criminal justice system. Prosecutors are held to an elevated standard of conduct. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Earlier, this Court wrote:

> The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented. [citations.] In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth. (*In re Ferguson* (1971) 5 Cal.3d 525, 531)

This court added that...

> ... a trial is not a game. It's ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal. (*In re Ferguson* (1971) 5 Cal.3d 525, 531)

The United State Supreme Court stated in similar fashion:

> For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." [Citations.] (*United States v. Agurs* (1976) 427 U.S. 97, 110-111.)

The circuit court of appeals wrote in *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315: "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (*Id.* at p. 1323.) The prosecutor is both a public servant and an advocate. (*Berger v. United States* (1935) 295 U.S. 78, 85-88.) In this role as public servant, the prosecutor's "interest ... in a criminal prosecution is not that he or she shall win a case, but that justice should be done." (*Id.* at p. 88.) As the United States Court of Appeals for the Fifth Circuit observed in *United States v. Murrah* (5th Cir. 1989) 888 F. 2d 24, 27:

> The Supreme Court and the several federal appellate courts have long recognized that the prosecutor has a distinctive role in criminal prosecutions. As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have not resulted from happenstance or indifference but are the product of measured, reasoned thought... that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free of undue passion and prejudice. (*United States v. Murrah* (5th Cir. 1989) 888 F. 2d 24, 27)

2. <u>The Prosecutor's Presentation of False Testimony That Was "Material" to Appellant's Guilt or Innocence Is a Violation of Appellant's Fourteenth Amendment Due Process Right to Fundamental Fairness and a Fair Trial</u>.

Due process is denied when a prosecutor knowingly uses perjured testimony to obtain a conviction. (*Napue v. Illinois* (1959) 360 U.S. 264, 269; *In re Imbler* (1963) 60 Cal.2d 554, 560.) At the time these cases were written, it was necessary for an accused to establish by a preponderance of the evidence a) that

perjured testimony was elicited at his trial, b) that the prosecutor knew or should have known of its falsity, and c) that the false testimony may have affected the outcome of the trial. (*In re Imbler* (1963) 60 Cal.2d 554, 560; see also Penal Code, § 1473, subd. b [writ of habeas corpus available when substantially material false evidence was presented at trial]; *People v. Gordon* (1973) 10 Cal.3d 460, 473, fn.7 [when alleged perjury appears from the record, same test applies on appeal as in habeas corpus proceedings].)

Penal Code, § 1473, subd. (b)(1) provides that a writ of habeas corpus may be prosecuted if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration...." Hence, recent California court decisions no longer require a showing that the false testimony was perjurious or that the prosecution knew of its falsity. (*In re Hall* (1981) 30 Cal.3d 408, 424; *In re Wright* (1978) 78 Cal.App.3d 788, 809, fn. 5.) This law should also apply to a defendant's direct appeal.

The Good Faith or Bad Faith of the Prosecutor Is Not Dispositive. Prosecutorial misconduct need not be intentional in order to constitute reversible error. (*People v. Hill* (1998) 17 Cal.4th 800, 823); *People v. Bolton,* (1979) 23 Cal.3d 208, 214.) According to the United States Supreme Court, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips* (1989) 455 U.S. 209, 219.) Therefore, a claim of prosecutorial misconduct is not defeated by a showing of the prosecutor's subjective good faith. (*People v. Price* (1991) 1 Cal.4th 324, 447.)

The Meaning of "Material Evidence." False evidence is "substantially material or probative" (Penal Code, § 1473) "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [Citation.]" (In re Roberts (2003) 29 Cal.4th 726, 742; *People v. Coddington* (2000) 23 Cal.4th 529, 589-590; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) This Court defined

"reasonable probability" as "a chance great enough, under the totality of the circumstances, to undermine our confidence in the outcome. [Citation] The [appellant] is not required to show that the prosecution knew or should have known that the testimony was false. [Citations]" (*In re Roberts* (2003) 29 Cal.4th 726, 742.)

This Court continued:

> False evidence is that which is substantially material or probative on the issue of guilt (Penal Code, § 1473, subd. (b)(1); it is evidence so significant that "with reasonable probability it could have affected the outcome...." (Citation) A reasonability probability is "such as undermines the reviewing court's confidence in the outcome." (Citation) The reasonable probability standard is an objective one, measure in light of all the relevant circumstances. (*In re Roberts* (2003) 29 Cal. 4th 726, 742.)

The governing principles of materiality were discussed by this Court in *In re Brown* (1998) 17 Cal.4th 873:

> First, ... materiality does not require demonstration by a preponderance that disclosure ... would have resulted ultimately in ... acquittal.... [T]he touchstone of materiality is a reasonably probability of a different result, and the adjective is important....
>
> Second, it is not a sufficiency of evidence test.... The possibility of an acquittal ... does not imply an insufficient evidentiary basis to convict....
>
> Third, once a ... court applying *Bagley* has found constitutional error, there is no need for further harmless-error review. The one subsumes the other
>
> Fourth, while ... undisclosed evidence is evaluated item by item, its cumulative effect ... must be considered collectively. . (*Id.*, at pp. 886-887)

3. Prosecutorial Misconduct that Involves Deceptive or Reprehensible Means Violates the California Constitution.

Even if the prosecutor's conduct did not render a trial fundamentally unfair, it violated the California Constitution if the misconduct involved the use of deceptive or reprehensible methods to attempt to persuade the court or jury.

(*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.)

4. Comments and Argument by the Prosecutor Increase the Prejudicial Effect of the False Evidence that Was Presented to the Jury.

This court has explained that prosecutors are generally viewed with special regard by the jury and, therefore, improper statements by the prosecutor may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*People v. Bolton* (1979) 23 Cal.3d 208, 213) Similarly, the United States Court of Appeal observed in *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399[48], that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." As will be seen below, the prosecutor in this case exacerbated the problem by vigorously arguing to the jury that Connor testified truthfully.

5. The Issue of the Prosecution's Knowing Use of False Testimony to Obtain a Conviction May Be Raised on Direct Appeal.

In *People v. Gordon* (1973) 10 Cal. 3d 460, 473, this Court explained that if the alleged perjury is apparent on the appellate record, it may be raised on direct appeal rather than in a habeas corpus proceeding. The same test is applied in either proceeding:

> The petitioner [i.e., Appellant] must show by a preponderance of substantial, credible evidence that perjured testimony was knowingly presented by the prosecution and that such testimony established an essential element of her conviction.

The court in *People v. Morales* (2003) 112 Cal.App.4th 1176, 1195-1196 cited *People v. Gordon, supra,* at pp. 464-466, and explained that the defense, to

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[48] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

prevail on a claim of prosecutorial misconduct such as this, must a) "show ... the testimony was, in fact, false", and b) show the prosecution did *not* make "full disclosure of the falsity."

6. The Test for Reversal on Appeal in this Case: If False Evidence Presented by the Prosecution Was "Material" to the Guilt or Innocence of the Accused, the Conviction Must Be Reversed Without Weighing the Degree of the Prejudice to the Accused.

Although this Court in *People v. Ruthford* (1975) 14 Cal.3d 399, 406-407, dealt with evidence that was withheld from the defense, its language regarding the test to be applied is pertinent to this case:

> We note preliminarily, that when the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the state bears directly on the question of guilt, our initial inquiry is whether such conduct resulted in denial of a fair trial. If so, the judgment of conviction must be reversed without weighting the degree of the prejudice to the accused. (Citations)" *People v. Ruthford* (1975) 14 Cal.3d 399, 406-407)

Federal law is in harmony with California law in this regard. Under the federal Constitution, the intentional or inadvertent suppression of *material* evidence, whether or not specifically requested by the defense, requires reversal of a conviction. (Giglio v. United States (1972) 405 U.S. at p. 153.). If the evidence affirmatively presented by the prosecution was false and it bears directly on the question of the defendant's guilt, the same rule applies.

C. Discussion of specific facts that demonstrate the prosecution knowingly presented false testimony in this case.

Appellant acknowledges that issues involving the credibility of witnesses are normally deemed questions of fact to be resolved by the jury. However, Appellant respectfully asserts that in certain circumstances, it is readily apparent that erroneous details in a witness' testimony are *not* honest mistakes of fact; that in certain circumstances the contradictory testimony of witnesses cannot be explained away as innocent misrecollection or confusion on the part of one of the

witnesses.[49] If the prosecutor *cannot reconcile* any of the witness' statements or anticipated testimony with the truth, her calling of that witness to testify is misconduct. In fact, occasionally the testimony of a witness can be so "inherently improbable" that a reviewing court may find the witness' testimony to be *unbelievable* as a matter of law ... regardless of whether the prosecutor claimed to believe the witness or not. Further, if the only properly admitted evidence is the "inherently improbable" testimony of a witness, the evidence is insufficient as a matter of law to support the conviction.

If the testimony of a witness is deemed "inherently improbable" by the reviewing court, the reasonable inference is that the witness was either mistaken or the witness intentionally presented false testimony. If the witness' "inherently improbable" testimony was of such a nature that it is clear the witness was *not* simply mistaken, Appellant submits the only other reasonable conclusion is that the witness intentionally testified falsely.

This issue is particularly insidious when the prosecutor argues those portions of the witness' testimony that are helpful to her case, yet at the same time actively obscures or ignores those portions of the witness' testimony which are clearly erroneous, deceptive and *irreconcilable* with other evidence presented by the prosecution.

Finally, Appellant respectfully contends that the absence of a defense objection to "inherently improbable" testimony of a witness does not waive this issue on appeal. It is often unclear to the defense beforehand that the witness'

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[49] In domestic violence or gang cases, for example, it is not uncommon for a witness' initial statement to law enforcement to be inconsistent with the witness' subsequent testimony. These inconsistencies are reconcilable. However, if a witness claims to have been at a particular location and it is obvious to the prosecutor he was *not* there because of other irreconcilable evidence in the possession of the prosecutor, it would be misconduct for the prosecutor to present the witness' testimony that he was present.

testimony will be "inherently improbable"; hence, to expect the defense to object to the witness' testimony prior to the witness testifying would not be reasonable.

In People v. Thornton (1974) 11 Cal.3d 738, this Court reiterated the rule that a conviction based upon "inherently improbable" evidence is *insufficient* to support a conviction. This Court made it clear, however, that the questionable evidence must be more than merely "unusual" or "justifiably suspicious." The falsity of the "inherently improbable" evidence must be *apparent* on the appellate record or the trial evidence must indicate the questioned testimony was "physically impossible":

> As to the second contention - that the testimony of Ottilia J. was inherently improbable - we apply the rules stated by this court in *People v. Huston* (1943) 21 Cal.2d 690. "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" [Citations] (*Id.*, at p. 754 -755.)

Moreover, in *Thornton*, as in the instant case, there was *no indication* the defense *objected* to the admission of the victim's testimony because it was false, nor did this Court state this issue had been waived on appeal for lack of an objection by the defense that the victim's testimony was false.

Therein, the victim testified that she had been raped ten different times over a period of three to four hours by the defendant. The inference from this testimony was that the defendant attained (or maintained) an erection such that he committed ten separate acts of sexual intercourse with her over a three to four hour period. In rejecting Thornton's claim on appeal that the victim's testimony was

"inherently improbable" and should therefore be deemed insufficient as a matter of law to support the conviction, this Court explained:

> Defendant's argument seems to be that it would have been "physically impossible" for him to perform ten acts of sexual intercourse and various other acts requiring erection within the space of three to four hours. However, no medical evidence was presented tending to demonstrate that such a performance was beyond the limits of masculine vitality and endurance, and we are not prepared to reach such a conclusion as a matter of judicial notice.
>
> Moreover, even if we were to assume the truth of the medical proposition which defendant advances, it would not follow that the whole of Ottilia J.'s testimony should be rejected as a matter of law - for in the circumstances of this case the accuracy of the victim's computations is peripheral to the thrust of her testimony, i.e., that defendant on the night in question raped her several times and performed various other grotesque indecencies upon her person. Even if the jury had considered that Ottilia J.'s testimony as to the number of acts involved was the result of deliberate falsehood rather than misapprehension or exaggeration, it was clearly free - after giving this consideration its appropriate impeaching effect - to conclude that the more vital portions of her testimony were true. (Id., at pp. 754 -755.)

In *People v. Huston* (1943) 21 Cal.2d 690, cited by this Court in *Thornton*, the complaining witness was an eleven year old girl who claimed that while attending various parties with other young children that were hosted by Huston, he molested her several times. (*Id.*, at p. 691-692.) On appeal, Huston claimed the victim's testimony was insufficient to support his conviction because it was "inherently improbable" (i.e., "false.") Similar to the instant case, as well as *Thornton*, there was no indication the defense in *Huston* objected to the victim's testimony as being false, nor did this Court state this issue had been waived because the defense failed to object and preserve the issue for appeal. In rejecting Thornton's claim on appeal that the victim's testimony was "inherently improbable" and should therefore be deemed insufficient as a matter of law to support the conviction, this Court cited the trial court's explanation as to why it found Huston guilty based on the young victim's testimony:

> Unquestionably the trial judge followed this rule when considering the evidence against the appellant for he analyzed the testimony of the little girl in determining whether reliance could be placed upon it. Generally speaking, he said, the statements which she made at different times did not vary particularly as to what Huston did, or the manner in which it was done. There are discrepancies in her story, he continued, but they are not such as to vitiate it. And the fact that some of the acts are said to have been committed when she visited him in a room where there was 'just the possibility of interruption' does not make it incredible that such a thing could happen. Upon a review of the entire record, there is no basis for a contrary conclusion by an appellate court. (*Id.*, at pp. 693-694.)

Although these two cases pertain to the sufficiency of the evidence on appeal to convict and not to prosecutorial misconduct in presenting the witness' testimony, it seems clear that a prosecutor who presents a witness' testimony that she knows is false (i.e., "inherently improbable" as a matter of law and of such a nature that clearly indicates the witness was not simply mistaken) has committed misconduct. It would follow that a reviewing court may consider whether the testimony of a particular material witness was false ("inherently improbable" as a matter of law and of such a nature that clearly indicates the witness was not simply mistaken) even though no objection was made by the defense, and even though the finder of fact may possibly have believed the witness.

Further, the defense's failure to object to a prosecutor's misconduct during trial in order to preserve that issue for appeal is not required if the objection, or the court's subsequent admonition to the jury to disregard the misconduct, would have been futile. *People v. Hill* (1998) 17 Cal.4th 800, 820 -823 [defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile.]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn.6 [same]; *People v. Arias* (1996) 13 Cal.4th 92, 159 [same]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [same]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333 [failure to request the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the

misconduct.]; *People v. Price* (1991) 1 Cal.4th 324, 447 [same]; *People v. Noguera* (1992) 4 Cal.4th 599, 638 [defendant must request a curative admonition "if practicable"].

Additionally, this Court has explained that it is within the discretion of the reviewing court whether it should consider issues not raised at the trial. (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 723, fn. 17 ["Respondents first raised this point at oral argument before this court. Although 'appellate courts will not ordinarily consider matters raised for the first time on appeal[,] ... whether the rule shall be applied is largely a question of the appellate court's discretion.' (citation)"]

Finally, this Court should be allowed to consider this issue, even if not raised by the defense at trial, if to do so would be in the interests of justice. (*Conservatorship of Waltz* (1986) 180 Cal.App.3d 722. [pertains to issues not raised on appeal, but by analogy should be applicable to issues not raised during trial].)

In *People v. Morales* (2003) 112 Cal.App.4th 1176, the court explained that for an appellant to establish on appeal the prosecutor presented false testimony, the appellant must show two factors: 1) The appellant must establish the evidence affirmatively presented by the prosecution was, in fact, false; and 2) The prosecutor knew it was false and failed to disclose the falsity of the evidence that was presented. (Id., at pp. 1195-1196, citing *People v. Gordon* (1973) 10 Cal. 3d 460, 464-466) And, as stated previously, the burden of proof is by a preponderance of evidence that the testimony affirmatively presented by the prosecution was false. (*People v. Gordon* (1973) 10 Cal. 3d 460, 473)

1. Evidence presented by other prosecution witnesses prove by a preponderance of evidence that Connor's testimony was false and the prosecutor knew it.

The following evidence demonstrated Connor's statement to the police and his subsequent testimony was *not truthful*.

a. <u>The Prosecution's Own Expert Witnesses R*efuted* Connor's testimony</u>:

Expert opinion, based on the physical evidence at the scene as well as the autopsies, established that the shooter stood *to the right of the white Toyota* and fired the Uzi multiple times directly into the lowered right passenger window. [See Appellant's Statement of Facts in this Opening Brief, pages 13 through 15.] Certainly, the prosecution was aware of this information shortly after the shootings occurred.

b. <u>"Robert" Brown's statement to the police and his grand jury testimony[50] *contradicted* Connor's statement and testimony</u>:

"Robert", who was the owner of the mechanic's shop [CT Supp.IV, 1:63] and with whom Carl Connor claimed to have been visiting [RT, 15:3340, 15:3397], testified before the grand jury that he was standing about 10 feet away from the white Toyota, and with his back to the white Toyota, when he suddenly heard numerous gunshots that seemed to come from *directly behind* him. [CT Supp.IV, 1:66] Robert related that he dove to the ground for protection. Moments later and after the shots ceased, he heard the footsteps of an individual leaving the scene. He stood up and observed the shooter, with an Uzi in his left hand, running *northbound* on Central Avenue to 87th Place. The shooter then *turned left* and ran westbound on 87th Place. [CT Supp.IV,1:67, 69, 70-71][51] Robert telephoned 911 immediately after the shooting, and was interviewed by the police on the day of the shooting. [CT Supp.IV,1:71]

Robert's grand jury testimony was consistent with the physical evidence as far as where the shooter was standing when the shots were fired. His grand jury testimony was also consistent with other witnesses as to the direction in which the shooter fled.

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[50] The prosecution did not call "Robert" to testify at Appellant's jury trial.
[51] See Attachment "A-4".

Obviously, the prosecutor was aware of Robert's statement to the police that was contained in the earliest police reports, as well as Robert's grand jury testimony dated December 12, 1994.[52]

c. <u>Willie Clark's statement to the police and his testimony *contradicted* Connor's version</u>:

Willie Clark was interviewed by the police on the day of the shooting. He told the police that the shooter had been standing *to the right of the white Toyota* when the shots were fired. Moments later, he observed the shooter flee *northbound* on Central Avenue. When Clark testified, he claimed he did not see where the shooter was standing, but he did state that the shooter fled *northbound* on Central Avenue, then *turned left* on an adjoining street. It was when the shooter turned left that Clark testified he observed a gold ring in the shooter's left ear. [See Appellant's Statement of Facts, pages 17 through 19 in this Opening Brief; also RT, 15:3256+]

Clark's statement to the police was consistent with the physical evidence as to where the shooter was standing when he began shooting. Further, Clark's statement to the police and his trial testimony were consistent with Robert's grand jury testimony as to the *direction* in which the shooter fled, and the fact the shooter then turned left on an adjoining street.

d. <u>Eulas Wright's statement and testimony *contradicted* Connor's version:</u>

Eulas Wright told the police, and testified at the trial, that after the shots were fired, the shooter fled *northbound* on Central Avenue, then *turned left* on an adjoining street. His statements to the police on the day of the shooting, as well as his trial testimony, were consistent with Willie Clark's statement to the police, Clark's trial testimony, and Robert's grand jury testimony as to the *direction* in which the shooter fled; northbound on Central Avenue, then westbound on 87th

[52] The prosecutor who tried this case, Jennifer Lentz, also presented the case to the grand jury. [CT, 1:5; CT Supp. IV, 1:32]

Place. [See Appellant's Statement of Facts, pages 15 through 16 in this Opening Brief; also RT, 15:3256+]

Wright's statement to the police and his testimony was consistent with the physical evidence as to where the shooter was standing when he began shooting. Further, Wright's statement to the police and his trial testimony were consistent with Robert's grand jury testimony, as well as Clark's statement, grand jury and trial testimony as to the *direction* in which the shooter fled, and the fact the shooter then turned left on an adjoining street.

Certainly, the prosecutor was aware of this.

e. <u>Freddie Jelks' Interrogation, his Grand Jury Testimony, and his Jury Trial Testimony *Contradicted* Connor's Statement and Testimony</u>:

Jelks testified that Appellant approached the group of gang members at the Johnson house. by walking northbound in the alley next to the motel and parallel to Central Avenue, then turned to his left on 88th Street to walk to Johnson's house. [RT, 16:3528-3530].[53]

Jelks also explained that after Johnson gave Fat Rat the Uzi to do the shooting, the gang members discussed how Fat Rat should approach the location of the white Toyota to do the shooting [RT, 16:3546, 3555]. One gang member suggested that Fat Rat simply walk up 88th Street to Central Avenue [RT, 16:3547]. This idea got "squashed", however [RT, 16:3559][54]

Jelks testified that co-defendant Johnson then told Appellant to walk northbound up the alley that runs parallel to Central Avenue between 87th Place and 88th Street. Appellant should then turn right on 87th Place, then turn right on

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[53] This testimony contradicted Connor's original statement to the police that Fat Rat walked southbound on Central, looked into the white Toyota's interior where he saw BaaBaa, then turned to his right on 88th Street to walk to Johnson's house to obtain the gun. See Statement of Facts in this Opening Brief, pp. 20-28.

[54] According to Connor, however, this was the route "Fat Rat" allegedly took to do the shooting! See Statement of Facts in this Opening Brief, pp. 20-28.

Central Avenue and walk southbound toward the white Toyota.. This way, Fat Rat would approach the white Toyota from behind and he would not be seen by the victims as he approached the car [RT, 16:3555-3558].[55]

Jelks than testified that a car pulled into the Johnson house's driveway. Johnson and Fat Rat spoke with the driver for a minute. Fat Rat then got into the car on the passenger side. He had the Uzi with him. The car then drove northbound through the alley [RT, 16:3562-3565, 3658, 3703-3708, 3742, 3752]. Jelks had previously told the detectives in considerable detail that Fat Rat *walked* north through the alley, then *walked* east to Central, then *walked* south on Central to where the Toyota was located. [RT, 17:3703-3708]

Jelks continued to testify on direct examination that about two minutes after the shootings, he saw Appellant return to the Johnson house by coming southbound down the same alley in which he previously had been driven northbound to do the shooting. His face was sweating and he was breathing heavily [RT, 16:3568-3569, 3575]. Jelks testified previously before the grand jury that after the shootings Appellant reappeared walking quickly southbound down the alley.[56][CT, 1:83]

Jelks testified that he subsequently spoke with Fat Rat, who told him that he (Fat Rat) had approached the victims in the car from the rear (i.e., Fat Rat walked southbound toward the car), the victims never saw him coming, and he stooped or

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[55] See the Diagram, Attachment "A", as well as Attachment "C", the photocopy of People's Exhibit #17. The white Toyota Celica was parked south of 87th Place on Central Avenue. By walking toward the car from 87th Place, an individual would have approached the white Toyota Celica from the rear.

[56] This is the same alley that just moments before, Jelks testified he had seen Fat Rat being driven northbound in that alley. In effect, according to Jelks, the shooter had returned to the Johnson house by retracing his steps. Connor's story, however, was that Fat Rat *never* went north, then west, then south down the alley that paralleled Central Ave. to Johnson's house. Rather, Connor's story was that Fat Rat immediately fled south on Central, turned right on 88th Street and went directly to Johnson's house.

knelt somewhat and shot into the right side of the car. Fat Rat said he shot the passenger first and then the driver. [RT, 16:3580-3581, 3622-3623; CT, 1:83-85]

2. Carl Connor's *Versions* of What Occurred Were Not Only Contradicted by *Every* Other Witness, But Connor's Various Versions Were Themselves Inherently Unbelievable.

a. Carl Connor's statement to the police on August 15, 1994.

On August 15, 1994, Connor told the police that on the day of the shootings, he was present. [CT Supp.IV, 2:372; CT Supp.IVA, p.68] He said that there were initially three individuals seated in the white Toyota: "Donovan", Payton and an individual named "BaaBaa". [CT Supp IV, 2:371, 373; CT Supp.IVA, pp. 67, 69] Connor initially told the detectives that BaaBaa was *not* a gang banger, that BaaBaa was at that time in custody, but that he (Connor) could not remember BaaBaa's actual name. Connor then somehow *provided* the detectives with Fat Rat's *motive* for killing the vehicle's occupants; "They wanted him because he was a Crip."

> CC: Yeah, first it was three of them. One guy [what's his] name? One name – they call him BaaBaa.
> SAN: BaaBaa?
> CC: Yeah.
> SAN: From 8-9?
> CC: No, he ain't a gangbanger. God, what's his name. He's in jail, too. They wanted him because he was a Crip. [CT Supp.IV, 2:373; CT Supp.IVA, p. 69. Emphasis added.)]

Obviously, Connor was speculating when he told the detectives what Fat Rat's motive for the shootings was. Yet as obvious as it was, there is no indication that the detectives or anyone else ever tried to clarify that issue.

Connor further stated BaaBaa was in the back seat of the white Toyota when it was parked in front of the car wash. BaaBaa exited the white Toyota to pick up his car that had been left at the car wash to be washed. [CT Supp IV, 2:372-376; CT Supp.IVA, pp. 68-73] Law enforcement knew this was not true. The Toyota belonged to Payton Beroit. Yet even with this obvious conflict

between Connor's statement and the truth, there is no indication that the detectives or anyone else ever tried to resolve this clear contradiction.

Connor explained that he knew an individual named Fat Rat because Connor had seen him in the neighborhood previously. On the day of the shootings, Connor first noticed Fat Rat as he walked *southbound* on Central Avenue towards the motel on 88th Street. [CT Supp IV, 2:374; CT Supp.IVA, p70] Connor told the police that he saw Fat Rat initially walk by the car [i.e., the white Toyota] while BaaBaa was still in the car, and that *Fat Rat knew that BaaBaa was a Crip*. [CT Supp IV, 2:373, 379] It should have been very apparent to the detectives that Connor was trying to embellish his story for them. Clearly, Connor had no idea what Fat Rat knew or didn't know. Yet as obvious as it was, there is no indication that the detectives or anyone else ever tried to clarify that issue.

Connor also told the detectives that after BaaBaa exited the white Toyota to get his own car, Fat Rat returned and "they shot at the car [i.e., the white Toyota] because they thought he [BaaBaa] was in it." [CT Supp IV, 2:377]. Once again, it should have been readily apparent to experienced investigators that Connor was simply speculating when he told them Fat Rat thought BaaBaa was still in the white Toyota. Connor came forward three years after the shootings and at a time when rewards were being publicized for information on homicides committed in the neighborhood! These experienced investigators should have viewed Connor's statement with considerable skepticism, particularly when it became obvious that he was embellishing his story with information that they knew Connor did not know! Yet, as obvious as it was, there is no indication that the detectives or anyone else ever tried to clarify this issue.

Connor explained to Detectives Sanchez and Mathew in considerable detail what he claimed happened before, during, and after the shootings. The *details* included in his statement refute any suggestion that the reason his version is so totally inconsistent with what others said was because he was mistaken, confused,

or was suffering from acute memory lapses! He provided this information to the detectives, and he obviously wanted them to believe it was true.

But Connor's recitation of facts of which he clearly had no personal knowledge continued, and these experienced detectives just as clearly did nothing to determine if Connor was telling the truth or lying. For example,

> SAN: But he [Baa-Baa] wasn't there when the shooting happened. Or was he [Baa-Baa]?
> CC: Okay, there was three guys in the car.
> SAN: Right.
> CC: He [Baa-Baa] got out to go get his car from the car wash. Because he [Baa-Baa] left it there. And they wash it. And he [Fat Rat] came back. He [Baa-Baa] went to get in his car. They [Fat Rat] seen him [Baa-Baa] before he [Baa-Baa] got out. And when he [Fat Rat] walked back — when Fat Rat walked back to shoot him [Baa-Baa], he [Baa-Baa] wasn't in the car. They shot the car. They [Fat Rat] thought he [Baa Baa] was in it.
> SAN: Wait. "They" – you keep saying "they". Is it just Fat Rat?
> CC: Big Fat Rat.
> SAN: Just Fat Rat did the shooting by himself?
> CC: Yeah.
> ...
> SAN: When he [Fat Rat] comes back, he, he, he just – he just come up on them and start shooting?
> CC: Yeah.
> SAN: Because he [Fat Rat] thought the guy was still in the car?
> MAT: That's actually who he [Fat Rat] wanted then, right? Or did he want all of them?
> CC: He [Fat Rat] just wanted him [Baa-Baa]. When they found out it was Donald, they beat him [Fat Rat] real bad.
> SAN: Fat Rat got beat up?
> CC: Yeah, they beat him real bad. And damn, but he did something else and went to jail. But they got him real bad (untranslatable). [CT Supp IV, 2:393; CT Supplemental IVA, 1:89]

Once again, it was apparent that Connor was telling the detectives things that he had no way of knowing. Yet, as obvious as it was, there is no indication that the detectives or anyone else ever tried to clarify this issue. It was

as if no one in law enforcement wanted to press the issue for fear they might discover that Connor was not telling the truth.

Overzealous investigators put words in Connor's mouth:

This portion of the interview of Connor is an example of two detectives who had become so excited about what the interviewee was saying that they practically stumbled over themselves trying to put words in his mouth. They didn't let him finish an answer before they would cut him off so they could tell him what they thought Connor was trying to say! Not surprisingly, Connor's story changed in response to the detectives' deplorable interview procedures

For example, Connor initially told Detectives Sanchez and Matthew that he wasn't sure when or where Fat Rat obtained the gun. Eventually, Connor *agreed with the detectives* that Connor obtained the gun at Evil's house. The following sequence illustrates this:

> SAN: The first time he [Fat Rat] walked by which direction was he going? Towards Manchester or towards Century?
> CC: Yeah, towards the motel.
> SAN: Okay, that'd be south.
> CC: Yeah, I guess he got his gun. And he shot it up.
> SAN: He shot it up?
> CC: Yeah. [CT Supp IV, 2:374; CT Supplemental IVA, p.70, Emphasis added.]

From this, we learn that when Connor first talked about the Loggins/Beroit murders in the interview, he said Fat Rat walked by the car, Fat Rat saw BaaBaa therein, and Fat Rat continued walking south. Connor then said, "I guess he got his gun" because when Fat Rat returned to the car, Fat Rat began firing into the car.

A short time later, Detective Matthew began putting words in Connor's mouth, words that Connor initially resisted saying.

> MAT: Did Fat Rat go to Evil's house and get the gun and come back and then –
> CC: Yeah, he went to Evil's house and came back.

MAT: He [Fat Rat] went to Evil's house, got the gun, because he [Fat Rat] had seen him [BaaBaa] get out of the car, right? So he went –-
SAN: No, he [Fat Rat] didn't see him [Baa-Baa] get out of the car.
CC: He [Fat Rat] didn't see him [Baa-Baa] get out of the car.
SAN: He [Fat Rat] saw him [Baa-Baa] in the car.
MAT: He {Fat Rat] saw him [Baa-Baa] in the car?
CC: Yeah.
MAT: So he [Fat Rat] goes to get the gun?
CC: He [Fat Rat] comes back –
MAT: When he [Fat Rat] comes back, he, he, he just – he just come up on them and start shooting?
CC: Yeah. [CT Supp IV, 2:377; CT Supplemental IVA, 1:73 (Emphasis added)]

Detective Matthew *twice* tried to get Connor to agree with him that Fat Rat obtained the gun at Evil's house. On both occasions, Connor's response was that Fat Rat went to Evil's house, then returned to the car and began shooting. Connor did *not* acknowledge that Matthew's expressly state where Fat Rat obtained the gun that he used to shoot the victims.

The *third* time the detectives tried to get Connor to acknowledge that Fat Rat got the gun at Evil's house, Connor finally acquiesced:

SAN: So you actually saw him [Fat Rat] go to Evil's house and get the gun?
CC: Yeah, I seen that. [CT Supp IV, 2:378; CT Supplemental IVA, 1:74. Emphasis added.]]

Later in the interview, the detectives returned to the subject of where Fat Rat had obtained the gun. The detectives got Connor to agree with them that Fat Rat did not have the gun when he first walked by the car, although Connor was *never* asked how he knew that Fat Rat did *not* have the gun when he first walked by the car. For all any of them knew, Fat Rat may have already had the gun when he walked by the car the first time. But if that were the case, the detectives would not have been able to get Connor to tie Johnson in to the murders. The detectives then asked Connor if he saw Johnson give the gun to Fat Rat. When Connor said

he had *not* seen that, the detectives continued to press Connor by getting him to at least say that Johnson was at the house when Fat Rat went there to get the gun.

MAT: He [Fat Rat] walks to Evil's house. You see him walk to Evil's house.
CC: Yeah, get the gun.
MAT: Okay. Now, who gave him the gun at Evil's house?
CC: I don't – I don't know.
MAT: Was Evil there?
CC: Was Evil – yeah, they all were there because they all was out of jail then.
MAT: Okay. Did you see Evil hand him the gun?
CC: I didn't see nothing like that.
MAT: Okay.
CC: I just seen he – when he was shooting the gun – I mean shooting the car.
MAT: Okay. So he comes back from Evil's house with the gun.
CC: Yeah.
MAT: Before that he [Fat Rat] didn't have the gun.
CC: No.
Det: He [Fat Rat] went to Evil's house to get the gun.
CC: Yeah.
MAT: Evil was standing out there?
CC: Yeah, they all were standing out there.
MAT: Okay. He [Fat Rat] comes back, right?
CC: Yeah.
MAT: And then he [Fat Rat] opens up on the car.
CC: Yeah. [CT Supp IV, 2:400-403; CT Supplemental IVA, 1:96-9 (Emphasis added)]

It seems rather apparent from these portions of the transcript of that interview that these detectives were "hell bent" on getting Connor to tie Johnson in to the murders. To suggest, however, that Connor was an unwilling interviewee and therefore, had to be pressured to talk cannot be said. Connor was not a hostile interviewee like Jelks would subsequently be. Connor had come forward "voluntarily" to tell them what he allegedly had observed. But the detectives needed Connor to say more.

At the conclusion of the interview of Connor, however, the detectives had finally found someone who a) would positively identify Appellant as the shooter,

and b) would provide evidence that Johnson, the gang's "shot caller" was an aider and abettor to the murders.

Neither the detectives nor the prosecutor confronted Connor about details of his statement that demonstrated he was embellishing his story or that he may have been lying about being present at the murder scene.

Having found someone who could provide those critical pieces of evidence, it was as though the investigators "turned a blind eye" to the issue of whether their newly found witness was actually telling the truth at all!

For example, one would think that trained and experienced detectives would have looked with caution at the statements of individuals who came forward with information three (3) years after the murders and, coincidentally, during the same summer when large financial rewards were being announced and publicized in the community for information that would lead to identifying and prosecuting those responsible for various murders that had been committed in that community. From the following illustrations, it is apparent that the detectives either didn't care about whether portions of Connor's statement were truthful or else they had a disingenuous motive for not asking. It was as though the detectives were in "a rush to judgment". Connor had provided them with information they needed to prosecute the case, and that seemed to be all that mattered. It was as though they did not want to ask him anything that would suggest he was *not* being truthful.

For example, a reading of the transcript of the interview reveals numerous questionable details; details that a trained investigator would be expected to look into. Each of the following issues begged for follow-up questions, but none were forthcoming:

- How did Connor know that Fat Rat had seen Baa-Baa in the car? [See CT Supp IV, 2:376; lines 20-21, p. 337, lines 17-19, p. 400, lines 17-18; CT Supp IVA, p. 72, lines 20-21; p. 73, lines 17-19; p. 96, lines 17-18 in transcript of interview] This information provided Fat Rat's motive to shoot into the car, *if* it were true. But the detectives didn't ask!

- How did Connor know that it was BaaBaa that Fat Rat had wanted to shoot rather than the other two individuals in the car? And how did Connor know that Fat Rat knew that Baa-Baa was a Crip? [See CT Supp IV, 2:373; lines 19-21, p. 400, lines 9-21; CT Supp IVA, p. 69, lines 19-21; p. 96, lines 19-21 in the transcript of the interview] This information also provided Fat Rat's motive to shoot into the car, *if* it were true. But the detectives didn't ask!

- How did Connor know that Fat Rat did not already have the gun when he first walked by the car and saw Baa-Baa in the car? [See CT Supp IV, 2:374, lines 14-15, p. 377, lines 6-12 and 20-21, p. 378, lines 13-15, p. 400, line 24 through p. 401, line 1, p. 401, lines 14-22; CT Supp IVA, p. 70, lines 14-15; p. 73, lines 6-12 and 20-21; p. 74, lines 13-15; p. 96, line 24 through p.97, line 1; p. 97, lines 14-22 in the transcript of the interview] This detail was crucial because if Fat Rat already had the gun in his possession, the proof that Johnson aided and abetted Fat Rat would have been missing. But the detectives didn't ask!

- How did Connor know that Fat Rat thought BaaBaa was still in the car? [See CT Supp IV, 2:373, lines 16-18, p. 376, lines 21-24, p. 378, lines 1-2; CT Supp IVA, p. 69, lines 16-18; p.72, lines 21-24; p. 74, lines 1-2 in transcript of the interview] Once again, this information provided Fat Rat's motive to shoot into the car, *if* it were true. But the detectives didn't ask!

- How did Connor know that Fat Rat had intended to shoot BaaBaa, rather than the others in the car? [See CT Supp, 2:376, lines 21-22, p. 378, lines 1-5; CT Supp IVA, p. 72, lines 21-22; p.74, lines 1-5 in transcript of the interview] Once again, this information provided Fat Rat's motive to shoot into the car, *if* it were true. But the detectives didn't ask!

- How did Connor know that Fat Rat got "beat up real bad" because he had shot "Donald"? [See CT Supp, 2:378, lines 5-11; CT Supp IVA, p. 74, lines 5-11 in transcript of the interview] This, too, went to prove Fat Rat's motive to shoot into the car, *if* it were true. Fat Rat's motive was to kill the Crip Baa-Baa, but he accidentally killed the wrong people. Why? Because unbeknownst to Fat Rat, the intended victim had exited the car while Fat Rat went to get the gun. But the detectives didn't ask!

But the incompetence of the investigation by the two detectives, or the disingenuous nature of the prosecution, becomes even more evident when the following is also considered:

- Connor stated that Baa-Baa exited the white Toyota to get his car that was being washed at the car wash. But, investigators had known from the initial interviews at the murder scene on August 15, 1991 that the car being washed was Payton Beroit's, and not an individual's named BaaBaa. The investigators knew, or should have known, that Connor was wrong. Yet, no one inquired of Connor how he came to that erroneous conclusion.
- When Connor first spoke of the Loggins/Beroit murders, he related to the detectives:

CC: Yeah, and then he [Fat Rat] walked back. I guess he [Fat Rat] got his gun. And he shot it [the white Toyota] up.
SAN: He shot it up?
CC: Yeah.
SAN: You saw him do that?
CC: Yeah, by his self.
SAN: And then where'd he go?
CC: To Evil's house.
SAN: You saw him going to Evil's house?
CC: Uh-huh.
SAN: Then what happened?
CC: Nothing happened. That was it. [CT Supp IV, 2:374-375; CT Supplemental IVA, 1:70-71]

The detectives knew right then that Connor was *not* telling the truth! *Every* other person interviewed on the day of the shootings stated the shooter fled *north* on Central Avenue and away from Johnson's house. Connor's version was that the shooter had gone *south* and toward Johnson's house! However, as the interview continued, it became even more obvious that Connor was lying to the detectives:

SAN: That [the shootings of Loggins/Beroit] was in broad daylight, too, wasn't it?
CC: About 12:00. About 12:00.
MAT: And he [Fat Rat] just ran back to Evil's house?
CC: Shit, he didn't run. He walked back. [CT Supp IV, 2:379; CT Supplemental IVA, 1:75 (Emphasis added)]

These false details are *not* the type of details a person would give if he were confused, mistaken, or couldn't remember. Connor intentionally emphasized to the detectives that Fat Rat didn't run back to Johnson's house, he "walked back" to Johnson's house. Such was Fat Rat's arrogant attitude! These details were either true or they were lies. And the detectives, aware of what the three initial witnesses had all previously stated, knew Connor was not telling the truth! Yet not a question was asked by them to probe the veracity of Connor's statements to them.

Connor's statement regarding what the shooter did after the shootings was so *blatantly wrong* and *irreconcilable with the truth* that the prosecution subsequently had to ignore that aspect of Connor's statement or it would undermine his ability to provide the prosecution with the information they needed to prosecute the case; namely, the positive identification of the shooter [Fat Rat], and Johnson's providing the murder weapon [Johnson as an aider and abettor]. After all, the prosecutor knew that if Connor lied when he said he was present, then his identification of Appellant as the shooter and his observations that linked Johnson to the shootings were also lies. And the prosecutor was certainly well aware she could not knowingly present false testimony. Hence, no follow-up questions were ever asked of Connor, and the irreconcilable portions of his statement to the police were ignored. An old saying seems to fit this situation well: "If you don't want to know the answer, then don't ask the question."

b. Carl Connor's testimony before the Grand Jury changed dramatically from his original statement to the detectives.

Connor's testimony *changed* when he testified before the grand jury. On this occasion, Connor testified that he first noticed Fat Rat when Fat Rat walked on 88th Street toward Central Avenue and toward the white Toyota when Fat Rat [CT 1:20-21; CT Supp.IV, 1:47-48] That is, Connor now said that Fat Rat was first seen approaching the white Toyota from 88th Street or in a *northbound* direction on Central, rather than from a *southbound* direction on Central that he told the police on August 5, 1994. In other words, Connor's story now was

completely opposite to the version he provided to the detectives less than four months earlier!

Further, in response to the prosecutor's leading and suggestive question, Connor said he saw Fat Rat "look specifically ... in the direction of the white car." Connor told the grand jury that when he first saw Fat Rat, he walked beside the white car because "there was three guys in there which used to be a former gang member from the opposite side." [CT, 1:17, 30; CT Supp.IV, 1:44, 56] Connor said that individual "used to be from the Crips." [CT, 1:30; CT Supp.IV, 1: 56]

Connor testified that Fat Rat then returned to Johnson's house that was located on 88th Street just two houses from the motel on the corner. [CT, 1:27; CT Supp.IV, 1:48-49] Connor repeated to the grand jury that Fat Rat "walked past the car and walked back to the house." [CT, 1:27; CT Supp.IV, 1:48-49] The house Connor referred to was Johnson's. [CT, 1:27; CT Supp.IV, 1:49]

Connor testified that "I seen him [Fat Rat] about two minutes more after that." He was walking on the sidewalk towards the front of the white Toyota, but the victims did nothing because they were not paying attention. [CT, 1:25; CT Supp.IV, 1:52] He then saw Fat Rat shooting at the car. While shooting, Fat Rat was standing "like by the van right here" and about 12 feet away from, and in front of, the white Toyota. [CT, 1:23-25; CT Supp.IV, 1:50-52] He referred to the van that was parked ahead of the white Toyota depicted in People's #3, a photograph of the location. [CT, 1:23-24; CT Supp.IV, 1:50-51] When the shooting started, Connor tried "to get out of the way." [CT, 1:27; CT Supp.IV, 1:54]

Connor testified that Fat Rat "ran after the shooting stopped" and he saw him return to Evil's house. [CT, 1:27; CT Supp.IV, 1:54-55, (unnumbered page after p. 55)] Connor stated he also ran in the same direction as Fat Rat, and he saw Fat Rat run to the back yard of Johnson's house. [CT, 1:29; CT Supp.IV, 1:(unnumbered page after p. 55)] Connor's testimony that he saw Fat Rat return

to Johnson's house after the shooting was consistent with his statement to the police on August 5, 1994.

When the prosecutor asked Connor if he told the police the truth when he talked to them on August 5, 1994, Connor testified that he did tell them the truth. [CT, 1:28; CT Supp.IV, 1: 55]

The prosecutor would now have been *well aware* that key portions of Connor's initial statement to the police and his grand jury testimony were *not truthful*.

The same prosecutor who represented the State in the grand jury hearing also represented the State in the jury trial. Appellant asserts the prosecutor ould therefore have *obviouslybeen aware* that Connor's version had serious flaws.

Connor's grand jury testimony flip flopped when he said he first saw Fat Rat as he approached the white Toyota from the *south.* He clearly told the detectives that he initially observed Fat Rat as he approached the white Toyota from the *north.*

Connor's grand jury testimony, as well as his statement to the police, regarding Fat Rat's *approach* to the white Toyota with the Uzi was also 180 degrees *opposite* to the version that Jelks testified to. There was no way that both could be correct. And both provided such detail that it flies in the face of common sense to suggest one or the other was simply mistaken or confused.

Further, Connor's version was dramatically contradicted by *every* witness regarding the direction in which the shooter fled after the shootings. Once again, Connor provided too many details to allow the government to argue he was simply mistaken.

Finally, the prosecutor *knew* that Connor was also wrong regarding where the shooter stood when he fired into the white Toyota. Connor related to the grand jury while under oath that when he fired into the white Toyota, Fat Rat was standing "like by the van right here" and about 12 feet away from, and in front of, the white Toyota. [CT, 1:23-25; CT Supp.IV, 1:50-52] He referred to the van that

was parked ahead of the white Toyota depicted in People's #3, a photograph of the location. [CT, 1:23-24; CT Supp.IV, 1:50-51] The prosecutor's own physical evidence and expert witness testimony proved that Connor guessed wrong when he placed the shooter in front of the car. It was physically impossible for Fat Rat to have stood in front of the white Toyota when shooting and have the trajectories of the various bullets enter the right passenger window at the angle they did.

Appellant asserts that at this point, the prosecutor had a *duty* to determine whether Connor was telling the truth or whether his entire story was fabricated *before* she called him to testify again.

This court grappled with the scope of the prosecution's duty to search for exculpatory information in *In re Brown* (1998) 17 Cal.4th 873. Commenting on the broad constitutional mandate, this court observed:

> "Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. [Quoting *Moore v. Illinois* (1972) 408 U.S. 786, 809-810, conc. and dis. opn. of Marshall, J.] This obligation serves to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*In re Brown (1998)* 17 Cal.4th at p. 883 [citations, internal quotation marks and fn. omitted].)

That mandate, however, has concededly proven somewhat difficult to implement. In *United States v. Auten* (5th Cir. 1980) 632 F.2d 478, the defense requested a new trial because the prosecution failed to disclose that one of its most important witnesses had been convicted more than once. The prosecution responded that it did not withhold or suppress evidence because it was unaware of the information. Significantly, the prosecutor chose not to run an NCIC check on the witness because of the shortness of time. The appellate court concluded that under those circumstances the prosecutor's claim of ignorance did *not* excuse the *Brady* violation. The court noted that "the prosecutor has ready access to a

veritable storehouse of relevant facts and, within the ambit of constitutional, statutory and jurisprudential directives, this access must be shared 'in the interests of inherent fairness ... to promote the fair administration of justice.' [Citation.] If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the [government]." (*Id.,* at p. 481. Emphasis added.)

In *United States v. Perdomo* (3rd Cir. 1991) 929 F.2d 967, the court reviewed the *Auten* decision and concluded that it stood for the proposition that "non-disclosure is inexcusable where the prosecution has not sought out information readily available to it." (*Id at p.* 971; see also *United States v. Brooks* (D.C.Cir.1992) 966 F.2d 1500, 1502-1503. Emphasis added.) This means that the prosecution is deemed to have knowledge of exculpatory information that can be revealed by a routine check of FBI and state criminal databases. (See *East v. Scott* (5th Cir. 1995) 55 F.3d 996, 1003.) More significantly for the issue presented here, the *Perdomo* court held that "the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." (Emphasis added. *United States v. Perdomo.* (1991) 929 F.2d 967, 971.)

Certainly there is no *Brady* obligation on the government to conduct an exhaustive open-ended investigation on a fishing expedition for the defense. (*See United States v. Joseph* (3d Cir. 1993) 996 F.2d 36, 41 [holding that general request for *Brady* materials does not require prosecutor to search unrelated case files for conflicting statements of government witnesses.] Nonetheless, an honest, reasonable search of evidence that is readily available to the prosecution is most assuredly within the ambit of *Brady.* (*United States v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1574; *United States v. Marrero* (5th Cir. 1989) 904 F.2d 251, 261).

It should be noted in Appellant's case that the identification of Connor was withheld from the defense until very shortly before trial. Yet the prosecution was

aware of the obvious inconsistencies and contradictions in Connor's version for the three (3) years that preceded the jury trial. Certainly the prosecutor and the police detectives were aware of the problem. Certainly the prosecutor and the police detectives could have made an attempt to reconcile Connor's version with what they knew to be the truth. Certainly they could have done so, *if* they had wanted to do so. However, by not looking into it, the prosecution arguably could avoid the potential problem of Connor admitting to them that he lied about seeing the murders. If that occurred, the prosecution could not call Connor as a witness. However, the prosecutor *needed* Connor's testimony.

Appellant asserts that the prosecutor was aware that, by doing nothing and, in effect, by looking the other way, she could argue she did not *know* Connor lied about being present at the scene of the murders because Connor never actually admitted that he had lied. Hence, she could call Connor as a prosecution witness and at the same time claim she did not knowingly present false testimony.

In *People v. Kasim* (1997) 56 Cal.App.4th 1360, the reviewing court addressed this issue. Therein, two witnesses testified falsely about not receiving any benefits before testifying at Kasim's trial. The court wrote:

> Assuming arguendo that Fitzpatrick, a prosecutor experienced in dealing with accomplice and informant witnesses, did not know about the full extent of benefits these witnesses had obtained because of prior cooperation with law enforcement, we can only conclude this is so because he adhered to an approach unlikely to uncover this information. (*Id.*, at p. 1386. Emphasis added.)

The *Kasim* court expressly rejected this attitude of "see no evil or hear no evil":

> Since it is not uncommon for an accomplice or informant witness to have suffered a prior criminal conviction or to have cooperated with law enforcement in return for lenience of some sort, a prosecutor cannot adopt a practice of "see no evil or hear no evil." Under these circumstances, the prosecution has an affirmative duty and cannot – by looking the other way – shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury. If the

prosecution knows or should know that testimony was false, the prosecution cannot allow the false testimony of its witnesses to stand uncorrected. (*Id.*, at p. 1386. Emphasis added.)

It makes no difference if the defense discovered some of the false evidence before the conclusion of the trial. In *People v. Kasim* (1997) 56 Cal.App.4th 1360, the Attorney General raised this issue. That court wrote:

> The Attorney General's arguments under a traditional "harmless beyond a reasonable doubt" analysis are unpersuasive. "[W]here a defendant himself discovers before the end of his trial favorable information which the prosecution has failed to disclose, it is very difficult for the defendant to show prejudice," writes the Attorney General. As we shall explain, it simply does not matter that Cotsirilos, Kasim's trial counsel—through his own initiative—had uncovered a good deal of the benefits bestowed on Gonzalez. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383)

The *Kasim* court concluded:

> In sum, had the jury learned that Gonzalez and Jara – the two key witnesses against Kasim – were in fact even more beholden to the prosecution than was shown at trial, it is reasonably probable that Kasim could have obtained a different result; our confidence in the verdict is sufficiently undermined to warrant reversal. [Citation]. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1384)

The fact that the defense discovers the falsity of some of the evidence does not in any way excuse the prosecutor from her constitutional duties to avoid presenting false testimony. This is particularly true when the prosecutor in closing argument argues, as the prosecutor did in this case, that the witness testified truthfully: The *Kasim* court continued:

> Here, there is an unusual wrinkle because defense counsel through his own enterprise uncovered the existence of some of these pretrial benefits and was able to at least partially impeach Gonzalez and Jara on cross-examination. Nonetheless, Fitzpatrick was able to vouch for the veracity of Gonzalez and Jara, the two key witnesses against Kasim as demonstrated by [his closing argument comments]. (*Id.*, at p. 1386)

c. Connor's Trial Testimony Once Again Changed Dramatically from his Original Statement to Detectives, as well as from his Grand Jury Testimony.

Before the first witness was sworn to testify at the trial, the prosecutor told the jury what she believed was the truth ... and it was *not* Connor's version. In her opening statement to the jury, the prosecutor made it clear what she believed the truth was: Co-defendant Johnson provided Appellant with a gun; then,

> DDA: Mr. Allen would go north in the alley, east on 87th Place and then walk down. He walked up behind the two men seated in the car.[57] That is what happened.
>
> . . .
>
> That uzi was retrieved by Mr. Johnson, given to Mr. Allen, and used when Mr. Allen took a stand along the passenger side and shot into that car hitting Mr. Beroit three times in the right – twice in the right side of the head and once in the back, through the eye, until Br. Beroit slumped forward. [RT, 15:3243-3244. Emphasis added.]

Knowing that Connor's version was completely *opposite* to the prosecutor's statement to the jury of "that is what happened", the prosecutor still insisted on calling Connor to testify at trial. She knew his testimony would be irreconcilable with her opening statement, she knew his testimony would be expressly and emphatically contradicted by *every* witness as to the shooter's approach and departure, and she knew his testimony as to the shootings could *not* have happened in the way Connor would describe. It was impossible. But, the prosecutor *needed* that portion of Connor's testimony wherein he would identify Appellant as the shooter and co-defendant Johnson as an aider and abettor, notwithstanding the fact it was apparent that Connor was *not* present at the murder scene.

However, at trial, Connor's testimony once again changed! His trial testimony omitted any reference to co-defendant Johnson, probably because

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[57] That is, the shooter walked *south* on Central Avenue to approach the car from the rear.

Johnson had been successful in persuading Bill Connor to speak to his brother Carl Connor and "warn" him of the danger of testifying against Johnson. [See Statement of Facts in this Opening Brief, pp. 44-45]

But Connor's testimony changed in other very significant particulars, too. Connor denied the version that he told the detectives in August of 1994 regarding when he first saw Fat Rat as he walked southbound by the white Toyota and looked at the occupants inside the car before walking to Johnson's house. Connor also contradicted his grand jury testimony that Fat Rat walked northbound to the white Toyota, looked at the car's occupants, then returned to Johnson's house. Rather, Connor now testified that he first observed Fat Rat as Fat Rat walked east on 88th Street, then stopped at the motel located on the corner of 88th Street and Central Avenue. Connor now said *nothing* about Fat Rat initially walking close to the white Toyota and observing those who were seated in the car. His most recent version had Fat Rat walking toward Central Avenue on 88th Street, then when he reached the motel near the corner, he turned around and walked westbound on 88th Street. But even though Fat Rat was now walking toward Johnson's house that was just a couple houses west of the motel, Connor insisted he didn't notice where Fat Rat went. The next time he saw Fat Rat was when Fat Rat approached the white Toyota from the south and began to shoot at the occupants in the car.

Connor's jury trial testimony was also *completely opposite* to that of Jelks as to how Fat Rat approached the white Toyota with the gun. Connor's testimony regarding the direction in which the shooter fled was *180 degrees opposite* from the testimony of *every other witness* called by the prosecution. But, it got worse ... for Connor and the prosecution!

In his statement to the police, Connor never stated where Fat Rat allegedly stood when he fired at the occupants of the white Toyota. In his grand jury testimony, again he was not asked specifically where the shooter was standing when he began shooting, although he did indicate Fat Rat stood between the white Toyota and the van. However, at trial, Connor was specifically asked that

question by the prosecutor on direct examination. According to Connor, Fat Rat was standing *in the street* and was pointing the gun at the *driver's side* of the white Toyota. [RT, 15:3350, 3351] On cross-examination, Connor confirmed that Fat Rat was *in the street* when he fired the shots. He was *closer to the driver's side of the Toyota when he shot at it*, and it seemed like he was *shooting at the driver*. [RT, 15:3417-3422] On re-direct examination the next day, the prosecutor asked Connor once again about the location of the shooter when he fired into the white Toyota. Connor now testified that the shooter was facing the white Toyota and was "near the gutter" when he fired the shots [RT, 16:3469]; that the shooter had walked closer to the car "on the passenger side"; and that the shooter was "closer to the sidewalk" than to the middle of the street. [RT, 16:3470] Connor continued to maintain, however, that the shooter was standing next to the back of the van when he began firing the shots. [RT, 15:3468] Connor had been too specific and concrete in his previous day's testimony. He could not simply reverse himself, because he had been too firm. He had marked the location of the shooter on exhibits! All he could do the following day was to "fudge" a little on the location of the shooter. But he was still wrong! Too wrong to have been telling the truth!

Anyone who *actually* witnessed the murders would *not* have said what Connor claimed happened! Appellant asserts the *only* reasonable and rational explanation was that Connor was *not* present at the location when Loggins and Beroit were murdered. This would explain why Connor was so completely wrong in these major and significant details. And, if he was not present at the murder scene, then his identification of Appellant as the shooter was a complete fabrication! His trial testimony, as well as his prior statements, were simply irreconcilable with the truth as the prosecutor presented and argued the evidence.

This would explain why: (1) Connor's initial statement to the police contained numerous items that were obviously speculative embellishments on his part. (2) Each time Connor spoke, *very significant* details of his story changed; yet if he were an actual eye witness, none of these details would have changed and

certainly not to the extent that Connor changed them. (3) His explanation as to where the shooter stood when firing the Uzi was, simply put, an impossibility. (4) The details he provided for each of his versions obviously demonstrate he was *not* confused or mistaken as he provided his varying stories of what happened. (5) Many of the details he provided directly contradicted details he subsequently provided when he changed his story. (6) Each of his versions was blatantly contradicted at some part by *every* other witness, as well as the physical evidence.[58] In sum, Connor's *constantly changing versions* as to what happened *cannot* be reconciled with the true facts that the prosecutor herself presented and argued to the jury.

In further support of this conclusion, the defense introduced at trial Connor's employee time card for the date of the murders. That time card clearly established that on August 5, 1991, Connor was at work at Don Kott Ford for the entire day. It was *physically impossible* for Connor to have been at work and at the same time have been at the location where Loggins and Beroit were murdered.

3. The Inconsistent Portions of Connor's Testimony Can *Not* Be Reconciled With the Truth; Hence, the *Only* Reasonable Inference Is That Connor Lied When He Stated He Was Present When the Murders Occurred. And, If Connor Wasn't Present, then He Lied Under Oath When He Testified He Saw Appellant Shoot and Kill Loggins and Beroit.

The Shootings From Connor's Vantage Point. Simply reviewing Connor's versions of what happened *from his vantage point* at the scene clearly illustrates he was *not* mistaken nor was he confused when he spoke. Since he was completely wrong regarding so many significant aspects of the shootings, and since his story as to these details changed each time he spoke, the *only reasonable inference* to be drawn is that he was lying.

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[58] Connor's statements and ever changing testimony bring to mind the comment of the doting mother who watches who son marching in a parade: "It's a great parade but why is everyone out of step except my son?"

Connor testified that on August 5, 1991 he was visiting his friend Robert at the auto repair shop located next to "Judge's Hand Car Wash" on Central Avenue near 88th Street. [RT, 15:3340] Connor testified he was talking to Robert about an engine.[59] [RT, 15:3397] He testified the white Toyota was parked on Central Avenue in front of the auto repair shop and facing south.[60] [RT, 15:3337, 3340-3344] During his initial observations, Connor related that he (Connor) was standing only about 7 or 8 feet from the curb line, and that there were about 20 other people standing around. [RT, 15:3439] Connor saw Robert's van in a photograph and "confirmed" that Robert's van was parked on Central Avenue in front of the white Toyota. [RT, 15:3443]

From Connor's vantage point, if Connor looked toward Central Avenue, Robert's van would have been parked directly in front of him and only about ten feet away. The white Toyota would have been about 15 feet north of the van and somewhat to Connor's left.

a. <u>The *initial observation* of Fat Rat from Connor's vantage point</u>.

In Connor's original statement to the police, he stated he observed Fat Rat walking southbound on Central Avenue in the direction of the motel located on the southwest corner of Central Avenue and 88th Street. Connor would have seen Fat Rat approaching the white Toyota from his *left*. Continuing to look to his *left*, Connor would have observed Fat Rat look into the white Toyota, see "BaaBaa"

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[59] At the grand jury, Connor testified he was at the scene with a friend to whom he had sold a car that was being washed. Connor did not mention anything about Robert. When confronted with this prior inconsistent statement, Connor denied having made it because it wasn't true. When confronted with a transcript of his grand jury testimony, Connor's memory suddenly failed him and he "couldn't recall" what he said before the grand jury. [RT, 15:3324]

[60] See Attachment "B" which is a photocopy of People's Exhibit #17. It illustrates that the white Toyota was not parked in front of the Auto Repair/Body Shop. It was north of that shop, and parked in front of the car wash. Robert's van was parked in front of Robert's auto repair shop.

whom he (Fat Rat) knew was a Crip. Fat Rat would then have walked from Connor's *left* to Connor's *right*, passing within just a couple feet of Connor as he walked between Connor and Robert's van. Connor would certainly have been aware of this because, as he told the detectives, he *anticipated a violent confrontation* because he knew that Fat Rat, a Blood gang member, had seen "BaaBaa", a Crip gang member, in the white Toyota, and Fat Rat was going to get a gun!

Approximately four months later, when Connor testified before the grand jury, his story changed rather significantly. This time Connor claimed he first saw Fat Rat when Fat Rat approached the white Toyota, but now Fat Rat approached the Toyota from the completely *opposite* direction! Connor told the grand jury that Fat Rat walked northbound from 88th Street toward the Toyota, saw the Crip inside the Toyota, then turned around and walked back to Johnson's house. For this to have occurred, Fat Rat would have been to Connor's *right*. Fat Rat would then have walked from Connor's *right* to his *left*, stopped, then reversed himself and returned in the direction from which he came.

At trial, Connor's story changed again! This time, Connor testified that Fat Rat *never did* initially approach the white Toyota from either his left or his right! Rather, Connor now claimed he first observed Fat Rat as Fat Rat walked east toward Central Avenue on 88th Street. Since Connor claimed that Fat Rat stopped when he reached the location of the motel and then turned around and walked back in the direction from which he had come, Fat Rat would have been on the south or far side of 88th Street, the same side of the street as the motel. From Connor's vantage point, all of Fat Rat's conduct would have been at least 90 degrees to Connor's *right*! Further, in this latest version, Connor said nothing about Fat Rat seeing BaaBaa, or for that matter any other Crip, in the white Toyota ... apparently because in this latest version Fat Rat *never* approached the white Toyota so he could see inside.

Somehow, Connor's initial sighting of Fat Rat went from 90 degrees to Connor's *left* to 90 degrees to Connor's *right*! Somehow, Connor saw Fat Rat approach the *rear* of the white Toyota from the *north*, then Connor saw Fat Rat approach the *front* of the white Toyota from the *south*, then Connor saw that Fat Rat *never did approach* the white Toyota from the rear or the front, from the north or from the south!

Finally, each of Connor's three versions was *inconsistent* with the testimony of Freddie Jelks, the prosecution's other key witness! Jelks testified that Fat Rat initially was seen walking northbound in the alley that ran parallel with Central Avenue. When Fat Rat came to where the alley opened onto 88th Street, Fat Rat turned left and walked to Johnson's.house.[61] According to Jelks, Connor was wrong regardless of the version given!

Did Connor testify truthfully? If so, which version was the truth? To suggest Connor was simply confused or mistaken as to this detail, Appellant asserts, would be to ignore common sense completely.

b. <u>Fat Rat's approach to the white Toyota with the Uzi from Connor's vantage point.</u>

Jelks testified that the plan was for Fat Rat to approach the white Toyota from the *rear* (i.e., from the *north*) so the victims would not see him coming. In her opening statement, and later in her closing argument, the prosecutor stated the same thing. If the shooter approached the white Toyota in this fashion. it would all have occurred to Connor's *left*.

However, in all three of his versions, Connor stated that Fat Rat approached the white Toyota from Connor's *right*. Further, from Connor's vantage point, Fat Rat would have passed between Connor and the van as he approached the Toyota. Since Connor testified he knew Fat Rat had obtained a gun for the purpose of killing the Crip (BaaBaa) in the white Toyota, Connor would undoubtedly have

[61] See the diagram, Attachment A-8.

been watching Fat Rat's every move! To suggest Connor was simply confused or mistaken as to this detail would be to ignore common sense completely.[62]

One wonders who it was that Connor saw approach the white Toyota with the Uzi as he described it! It obviously could *not* have been the shooter.

c. <u>The location of the shooter in relation to the white Toyota from Connor's vantage point</u>.

Connor testified that after Fat Rat walked a little past Robert's van parked several feet in front of the white Toyota, Fat Rat began shooting at the white Toyota. Fat Rat was only about 10 feet away from the Toyota at this time. [RT, 15:3346, 3347, 3349] and Connor estimated he (Connor) was only about seven to eight feet from the curb line of Central Avenue while he was talking to Robert at the auto repair shop. In other words, Connor stated he and Fat Rat were only about 20 feet apart. According to Connor, however, "Fat Rat" was standing *in the street* and was pointing the gun at the *driver's side* of the white Toyota. [RT, 15:3350, 3351] According to Connor, "Fat Rat" then began shooting into the *driver's side* of the Toyota, at which time Connor ran to hide. [RT, 15:3350, 3351]

On cross-examination, Connor confirmed that "Fat Rat" was *in the street* when he fired the shots. He was *closer to the driver's side of the Toyota when he shot at it*, and it seemed like he was *shooting at the driver*. [RT, 15:3417-3422]

Since Fat Rat, according to Connor, walked northbound along the sidewalk until he walked "a little past the van", Fat Rat would have walked from Connor's *right* to Connor's *left*, passing within a few feet of Connor as he walked between Connor and Robert's van. Then Fat Rat would have stepped out into the street

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[62] Since Connor insisted when speaking to the detectives initially that Fat Rat was returning with a gun to kill one of the occupants in the white Toyota, Connor would have been transfixed on Fat Rat! The mere fact that Connor said he was still standing next to Robert just feet away from the white Toyota when Fat Rat approached with the gun demonstrates Connor was not telling the truth. His statement to the police and his subsequent testimony as to how the shootings occurred and inherently unbelievable.

between the van and the white Toyota. When Fat Rat pointed the gun at the white Toyota, Fat Rat would have been in front of Connor, slightly to his left, more than a car width into the street, and probably no more than twenty feet away from Connor.

On re-direct examination the next day, the prosecutor asked Connor once again about the location of the shooter when he fired into the white Toyota. Connor now testified that the shooter was facing the white Toyota and was "near the gutter" when he fired the shots [RT, 16:3469]; that the shooter had walked closer to the car "on the passenger side"; and that the shooter was "closer to the sidewalk" than to the middle of the street. [RT, 16:3470] Connor continued to maintain, however, that the shooter was standing next to the back of the van when he began firing the shots. [RT, 15:3468]

Connor's testimony on re-direct examination would not have changed the direction Connor had to look to see Fat Rat. According to this testimony, Fat Rat was still in the street; only now he was nearer the curb. Fat Rat would have still been *in front* of the white Toyota and between the Toyota and the van. Connor was still standing next to Robert at the auto repair shop. Hence, Fat Rat testimony on re-direct simply simply placed Fat Rat several feet closer to Connor than Connor had placed him the day before.[63]

However, the physical evidence at the scene, the autopsy evidence, and the opinion of two experts presented by the prosecution all *refuted* Connor's version. The shooter was adjacent to the right passenger door when he began firing the Uzi.

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[63] Once again, Appellant asserts, Connor's testimony is inherently unbelievable. Since Connor told the police he knew Fat Rat was returning to kill an occupant in the white Toyota, Connor would not have remained standing just feet from this assassin! It must be recalled that although Connor told the police this was Fat Rat's intent, Connor had no way of knowing that was Fat Rat's intent. For all Connor knew, Fat Rat was returning with a weapon to kill any number of people at that location, including Connor. Would Connor have remained standing at that location and just feet from Fat Rat knowing that Fat Rat intended to kill someone with an automatic weapon at that time? Hardly.

The shooter was *not* standing in front of the white Toyota! To someone who was actually standing where Connor claimed he was standing, there would have been no confusion as to where the shooter was standing. To suggest otherwise is to ignore commonsense.

One wonders who it was that Connor saw standing to the rear of Robert's van when he began shooting into the white Toyota. Unless Fat Rat had "magical" bullets that could make 90 degree right turns in mid-flight so as to properly enter the right passenger window of the white Toyota, the individual Connor claims he saw firing the Uzi could *not* have been the shooter!

d. <u>The shooter's path of departure from Connor's vantage point</u>.

Connor testified that when Fat Rat began firing into the white Toyota, he (Connor) ran from the auto repair shop into the car wash area and hid behind a car [RT, 15:3350-3353, 3403-3404]. Since the white Toyota was parked in front of the car wash, when Connor looked toward Central Avenue from this vantage point, the white Toyota would have been almost directly in front of him.

It would have been from this vantage point that Connor described what Fat Rat did after the shootings. It is also obvious that Connor was not mistaken or confused as he told the police, the grand jury, and finally the jury what the shooter then did. Connor insisted that the shooter fled (i.e., "walked" in Connor's initial version) to Connor's *right*, then right again on 88th Street. Connor said he knew this because he followed the shooter briefly!

However, *every other witness* told the police on the day of the shooting and subsequently testified that the shooter fled in the completely *opposite* direction Rather than fleeing in a direction to Connor's right, the shooter fled in the direction to Connor's *left*. At trial the prosecutor *certainly must have wondered* who it was that fled in a direction to Connor's right, especially since Connor claimed he followed the individual in that same direction!

Connor was either telling the truth and *every* other witness, as well as the physical evidence, was wrong or Connor was lying and the other witnesses were truthful. Connor's version could not be reconciled with the other testimony, and it was obvious from the details of Connor's statements and testimony that he was not confused nor mistaken. In other words, Connor was either present at the scene and told the truth as to what happened, or he was *not* present at the scene and made up the various details to "fit" what he thought occurred. No one who was actually present at the scene of the murders would have provided such an obviously incorrect description of what happened as did Connor.

4. Appellant Has Established by a Preponderance of the Evidence From the Appellate Record that a) Connor's Testimony Was In Fact False, and b) the Prosecution Did Not Make Full Disclosure of the False Testimony.

The court in *People v. Morales* (2003) 112 Cal.App.4th 1176, 1195-1196 cited *People v. Gordon* (1973) 10 Cal. 3d 460, at pp. 464-466, and explained that the defense, to prevail on a claim of prosecutorial misconduct such as this, must a) "show ... the testimony was, in fact, false", and b) show the prosecution did *not* make "full disclosure of the falsity." Based on the above discussion, Appellant submits he has proven well beyond a preponderance of evidence that the prosecution knowingly presented false testimony and failed to make full disclosure of that false testimony.

5. Appellant's Failure to Object Did Not Waive This Issue on Appeal.

Appellant's trial counsel did not object to the presentation of Connor's testimony on the basis that it was false testimony. Generally, in order to preserve the issue for appellate review trial counsel must not only object to prosecutorial misconduct but also request an admonition to cure the harm. (See, e.g., *People v. Montiel* (1993)5 Cal.4th 877, 914.) This rule, however, "applies only if a timely objection or request for admonition would have cured the harm." (*People v.*

Hamilton (1989) 48 Cal.3d 1142, 1184, fn. 27.) If it is likely that the objection and admonition would *not* have cured the harm, the appellate court must determine "...whether on the whole record the harm resulted in a miscarriage of justice within the Constitution." (*People v. Green,* (1980) 27 Cal.3d 1, 34-35, fn. 19.)

Once Connor completed his testimony on direct examination and the falsity of his testimony became so readily apparent, it was highly unlikely that either an objection or an admonition would have cured the harm caused by the misconduct.

Even if the trial court had struck Connor's testimony completely and told the jury to completely ignore what Connor said, that task would have been impossible for any of the jurors to comply with. As Justice Jackson aptly observed in *Krulewitch v. United States* (1949) 336 U.S. 440, "[t]he naive presumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

6. The Prosecutorial Misconduct Was Exacerbated When the Prosecutor Urged the Jury in Closing Argument to Consider the Evidence She Knew to be False.

Prosecutors are viewed with special regard by the jury and, therefore, improper statements by the prosecutor may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*People v. Bolton* (1979) 23 Cal.3d 208, 213) Similarly, the United States Court of Appeal observed in *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399[64], that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

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[64] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

In *Brown v. Borg* (1991) 951 F.2d 1011, the prosecutor was aware that a wallet and jewelry had *not* been stolen. She did not inform the defense of this material exculpatory evidence, however. She allowed a detective to testify to an opinion based in part on the allegedly stolen items, and in so doing, she violated the duty of a prosecutor to correct false evidence when it is offered. The prosecutor aggravated the existing problem, however, when she argued to the jury that the items were missing.

> Finally, by arguing to the jury that the items were missing, she violated the duty not to argue false or inadmissible evidence to the jury. *Miller v. Pate* (1967) 386 U.S. 1; *United States v. Brown* (9th Cir. 1989) 880 F.2d 1012. *(Brown v. Borg* (1991) 951 F.2d 1011, 1015. Emphasis added.)

Limits on prosecutorial conduct have been developed to ensure defendants could receive fair trials. When exculpatory evidence is withheld from the defense, a defendant's due process rights may be violated. (*Brown v. Borg* (1991) 951 F.2d 1011, 1015.) However, the prosecutor's misconduct is even more egregious if the prosecutor knowingly introduces and then argues to the jury that they should consider the false testimony in their deliberations:. The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. This circuit has acknowledged that prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized." *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1550; *United States v. Agurs* (1976) 427 U.S. 97, 110; *Thomas v. Caldwell* (9th Cir. 1980) 626 F.2d 1375, 1382, fn. 24, cert. denied, 449 U.S. 1089 (1981). (*Brown v. Borg* (1991) 951 F.2d 1011, 1015.

> The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence.... *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1550; *United States v. Agurs* (1976) 427 U.S. 97, 110; *Thomas v. Caldwell* (9th

Cir. 1980) 626 F.2d 1375, 1382, fn. 24, cert. denied, 449 U.S. 1089 (1981). (*Brown v. Borg* (1991) 951 F.2d 1011, 1015.)

The United States Supreme Court has found due process violations in several cases where prosecutors knowingly introduced and argued from false testimony. *See Mooney v. Holohan* (1935) 294 U.S. 103, 112 [prosecution based on perjured testimony); *Miller v. Pate* (1967) 386 U.S. 1 [prosecutor proffered men's undershorts allegedly stained with murder victim's blood, when stains were actually paint]; *Napue v. Illinois* (1959) 360 U.S. 264 [prosecution witness falsely testified that he had not received consideration for his testimony]; *Giglio v. United States* (1972) 405 U.S. 150 [same].

Finally, a prosecutor's argument to a jury can, of itself, be sufficient to violate a defendant's due process right.

> We note again the prosecutor's repeated references in closing argument to the false evidence. Improprieties in closing arguments can, themselves, violate due process. *Chapman* itself was such a case. 386 U.S. at 18 [prosecutor's urging improper inference of guilt from defendant's decision not to take the stand held not harmless error]. The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence. E.g., *Miller v. Pate* (1967) 386 U.S. 1, 6 [decrying prosecutor's "consistent and repeated misrepresentation" that paint stains were actually blood]. Our court's description of the effect of the prosecutor's argument in *United States v. Brown* applies equally to this case: "Despite the other evidence against [the defendant], the continued references to [the inadmissible evidence] at the Government's closing arguments make it impossible for us to say it is more likely than not that [it] did not affect the jury's verdict." (*Brown v. Borg* (1991) 951 F.2d 1011.)

a. The Prosecutor's Closing Argument as to How the Shooter Approached the White Toyota

Did Connor testify truthfully when he stated Fat Rat approached the front of the white Toyota? His testimony was contradicted by Jelks' testimony. At least one of these witnesses lied under oath. The prosecutor *rejected* Connor's version! Over and over she urged the jury to believe the version told by Jelks

when he testified that Johnson rejected Woodmore's suggestion Fat Rat simply go up 88th Street, then turn left and approach the white Toyota from the front:

> DDA: The killer in this case walked down Central for one reason. If you walk behind people who are looking forward, you will not be detected. And when that person arrived at the side of that Supra and knelt down with an Uzi in hand, there could be no doubt about what that person's intentions were, and what the crime was that was about to be committed. Standing within close proximity of the car, the shooter fired not once, but many times, horizontally, through an open car window, shooting first at the passenger, and then at the driver's head. All wounds to the upper body. And only one stray bullet to the side of the white Supra. [RT, 25:5103]
>
> DDA: The killer approached them [victims] from behind, thereby precluding the victims from escaping. RT, 25:5104]
>
> DDA: And Mr. – Mr. Johnson will tell – told him that Mr. Woodmore's idea was thwarted in part because you couldn't take advantage of the victims, and you might be seen. There were businesses on the corner. It makes absolutely no sense to go walk by the very people that might be called upon to be witnesses against you. If there's an easier way to go where you won't be detected. [RT, 25:5156]

b. The Prosecutor's Closing Argument as to Where the Shooter Stood When He Fired Into the White Toyota.

Did Connor testify truthfully when he stated the shooter was standing in the street and ahead of the white Toyota, by the van? Was Connor testifying truthfully when he stated the shooter fired into the driver's side of the car? Or did the physical evidence demonstrate unequivocally that the shooter was standing near the right passenger door of the white Toyota, the same location that Clark had told the police the shooter had been standing? Had Connor attempted to fill in the details by guessing, since he had not been present? And had he guessed wrong? Which version did the prosecutor believe and argue to the jury?

> DDA: Each [victim] sustained multiple gunshot wounds to their head from an Uzi, shots fired from the sidewalk adjacent to

the passenger side of the car. Multiple shots. Gunshots which have conclusively been proven were fired from an Uzi, a weapon of death. [RT, 25:5101-2]

DDA: In this particular case you have multiple gunshot wounds all deriving from the right side to the left of these two individuals. You have a car parked southbound on Central. And you have a shooter adjacent to a sidewalk. [RT, 25:5103]

From the location of the shell casings and other ballistic and firearms evidence, the prosecutor told the jury that the shooter used an Uzi, shot several times at the unsuspecting victims, and from where? The prosecutor asserted that, based upon the physical evidence, the shooter had been standing adjacent to the right passenger side of the white Toyota when he began firing. [RT, 25:5104-5105]

The prosecutor continued, confirming that the shooter had approached from the rear and had stood to the right side of the Toyota Supra, both times squarely rejecting Connor's story as to what happened.

DDA: The shooter crouched and knelt down. He pointed the gun at the passenger side of the Supra. He fired multiple times. He took advantage of an ambush. He approached from the rear. He took advantage of the intended targets. He took aim at their heads. At their heads. And he landed those shots all in the upper body. [RT, 25:5105-6 (Emphasis added)]

DDA: The shooter was in front of the business [Wright's car wash], and when Mr. Wright heard shots he hit the ground. [RT, 25:5121]

And finally, the prosecutor eliminated any doubt as to where she believed the shooter stood:

DDA: In this particular case there are plenty of circumstances which corroborate the testimony of the witnesses. The location of the shooter, for instance, is corroborated in many different ways, by the casings, by the descriptions from several different sources. On that point, ladies and gentlemen, there should be little controversy. Mr. Allen stood on the

sidewalk and shot into the car. You have physical evidence, and you have the statement of many witnesses.[65] [RT, 25:5116 Emphasis added)]

c. The Prosecutor's Closing Argument as to Where the Shooter Fled After the Shootings.

Did Carl Connor testify truthfully when he stated he turned to his right and followed after the shooter? Did Connor actually see the shooter turn to his right on 88th Street and continue fleeing? The prosecutor certainly did *not* believe Connor. Once again, the prosecutor rejected Connor's testimony even though Connor's testimony was clear and unambiguous. She knew his testimony was false. She argued to the jury that the shooter fled in the opposite direction.

DDA: Afterwards the shooter left the area traveling northbound on Central and traced his steps back. [RT, 25:5103-5104 (Emphasis added)]

DDA: Mr. Wright's general description of the shooter was a heavyset male black who left going northbound on Central. He is corroborated in that by Willie Clark. Here are two people who have little baggage, only working there on the street, who witnessed a truly horrifying event. They gave their statements to police, and they testified to the best of their abilities. [RT, 25:5122 (Emphasis added)]

The prosecutor *never* addressed the glaring inconsistencies in Connor's version of what happened. The prosecutor *never* suggested to the jury that Connor was mistaken or confused. The prosecutor never tried to reconcile them with the evidence provided by the other witnesses. The prosecutor simply *omitted any reference* to those portions of Connor's version that were so conspicuously at variance with the prosecution's belief as to how the killings occurred. The reason, Appellant asserts, why the prosecutor avoided any mention of the contradictory

[65] The prosecutor opted to omit any reference to Connor at this point. The reason, Appellant submits, was that she could not reconcile his testimony with the testimony of "the many witnesses" and the physical evidence.

portions of Connor's testimony was because there was no logical and reasonable explanation as to why he was wrong ... except to admit Connor *lied* about being present, and therefore, he also *lied* when he identified Appellant as the shooter.

d. The prosecutor urged the jury to find Connor testified truthfully when she spoke of those portions of his testimony that were *helpful* to her case.

Appellant contends that the prosecutor wanted to have her proverbial cake and eat it, too. Even though the prosecutor personally rejected much of Connor's testimony, she was more than willing to urge the jury to believe those portions of Connor's testimony that bolstered her case or corroborated another prosecution witness.

For example, the prosecutor needed Connor's testimony to identify Fat Rat as the shooter. Hence, she urged the jury to believe Connor's testimony in that regard.

> DDA: In this case both the defendants were identified from a number of different sources. ... [Appellant] was identified by Carl Connor as the shooter who had an Uzi. [RT, 25:5117-5118.]

She argued that Connor was truthful when he told the police on August 15, 1994 that Appellant went to Johnson's house to get the gun.

> DDA: Mr. Johnson was also identified by Carl Connor in a previous statement as a person to whose house Mr. Allen went and then returned. [RT, 25:5119.]

The prosecutor argued to the jury that they could find Jelks was a credible witness because his testimony was corroborated by Carl Connor's testimony:

> DDA: It's one thing for the police to pressure a witness into telling the truth, but what the defense attempted to do with Mr. Jelks was to try to lead you to believe that the pressure resulted in Mr. Jelks lying. What are the chances of Mr. Jelks being able to tell the same story ... as Carl Connor, ...? [RT, 25:5124. Emphasis added.]

DDA: While Mr. Connor doesn't say that he saw the defendant [Johnson] hand Mr. Allen a gun, and in fact nobody does, the circumstantial evidence is that Mr. Allen received the gun while he was over at Mr. Johnson's house. Connor's testimony corroborates that. [RT, 25:5141. Emphasis added.]

Most egregious, however, was the prosecutor's closing argument wherein she specifically urged the jury to believe the portion of Connor's original statement to the police which clearly was false; the version that even she, in her closing argument, rejected as having happened [i.e., that Fat Rat approached the victims' car from the *south*, then after shooting them "walked" *south* on Central back to Johnson's house.]! When Connor testified at the trial, he omitted any reference to co-defendant Johnson's involvement in the murders. The prosecutor responded by introducing Connor's prior inconsistent statements to the detectives in which he said Fat Rat got the Uzi at Johnson's house, approached the Toyota from the south, then fled south directly back to Johnson's. She provided the jury with a transcript [People's Exhibit #22A] as she played the tape recording [People's Exhibit #22] of those portions of Connor's original statement to the detectives. Thereafter, in her closing argument the prosecutor argued that Connor's testimony in which he avoided incriminating Johnson was a) so false it was "transparent"; b) that in his trial testimony Connor had omitted "for the first time" any reference to Johnson; c) that Johnson had been successful in having Connor's brother give him a "crash course" in the dangers of testifying against Johnson, and d) that the jury had as exhibits the tape recording and transcript of Connor's original statement to the detectives which was consistent with his grand jury testimony and that these statements contained the truth. [RT, 25:5131-5132]

The prosecutor continued to argue to the jury that Connor was a truthful witness, and that the only falsehood in his testimony at trial was when he *denied* that Appellant went to Johnson's house to get the gun. She argued again that Johnson had been able to get to Connor, probably through his brother Bill Connor, to not say anything that would incriminate Johnson. [RT, 25:5131-5135] Other

than that, the prosecutor argued, the jury could believe the remainder of Connor's testimony. She *vouched for Connor's credibility*, arguing that when he spoke to the detectives about the murders, he told them the truth:

> DDA: So when you look at somebody like Mr. Connor who sits up on the witness stand, a little jittery, with – again, sat with his back to the judge looking at you or the display board or anything. Who, if you recall, looked over his left shoulder when asked by the court to look at the defendants. Ask yourself, what did his body language tell you? What did his demeanor tell you? What did the tapes tell you, and how is it that Carl Connor would know the kinds of things that he knew if he wasn't there?.[RT, 25:5134. Emphasis added.]

After discussing the evidence regarding the murders, the prosecutor shifted to the enhancement allegations. It was here that the prosecutor once again urged the jury to consider those portions of Connor's taped statement that she *knew* were false:

> DDA: There is also an allegation that Mr. Johnson furnished a firearm. On that you have the testimony of Mr. Donnie Ray Adams, including the defendant's [Johnson's] own admission, the statement of Freddie Jelks. And you have the circumstantial evidence provided by Mr. Connor's statement, the taped statement, wherein he says he sees Mr. Allen coming up the street and then going over to Mr. Johnson's house. Then he sees Mr. Allen do the shooting and return and then he sees him back at Mr. Johnson's house. [RT, 25:5140-5141. (Emphasis added)]

It would appear that the prosecutor's use of words in this argument was done with great care.! She seemingly walked a tightrope, knowing she needed to remind the jury of Connor's statement to the police wherein a) he identified Appellant as the shooter, and b) he tied Johnson to the murders; but also knowing that she could not urge the jury to consider evidence that she knew was not true! She carefully *avoided* mentioning from what direction Connor claimed Appellant came to begin shooting. She also carefully *avoided* mentioning what Connor

claimed was the direction Appellant fled after the shooting. She simply leaped over those "details." Appellant submits that the prosecutor's intentional omissions speak volumes about the trial tactics that were used. The prosecutor needed Connor's testimony to convict each defendant, but she also was aware she could not urge the jury to consider evidence that she knew to be false.

The prosecutor found herself in a difficult position during closing argument. She desperately needed Connor's testimony regarding Appellant because a) Connor was the only "eye witness" who positively identified Appellant as the shooter; and b) Connor was the *only* other witness who *corroborated* another potentially unbelievable informant/witness (i.e., Freddie Jelks) that Fat Rat obtained the gun at Johnson's house.[66] The prosecution also needed Connor's testimony if they were to convict Johnson of being the "shot caller" for the murders and the individual who provided the Uzi.

However, as stated previously, the prosecutor should not be allowed to "have her cake and eat it, too." Either Connor testified truthfully about everything because he was present[67], or Connor *lied* about everything because he was simply not present.

7. The Prosecutorial Misconduct in Knowingly Presenting False Testimony Was "Material" and Since It Pertained Directly to Appellant's Guilt or Innocence, his Convictions and Sentence of Death Must Be Overturned..

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[66] Donnie Ray Adams also corroborated Jelks' testimony when he testified that Johnson admitted to him that he gave the shooter the gun to kill the two "crabs." However, Adams' testimony was not to be considered by the jury against Appellant. See Appellant's argument XVI, *infra*, regarding whether Adams' testimony was admitted at trial in violation of *U.S. v. Bruton*.

[67] The irony of Connor's trial testimony is that the prosecutor argued Connor was not truthful when he omitted mentioning that Johnson was involved in the murders. Appellant argues that that is the only part of Connor's testimony that was truthful because, not being present at the scene, Connor would not have observed whether Johnson was involved or not.

The facts and discussion in *U.S. v. LaPage* (9th Cir. 2000) 231 F.3d 488 are instructive. LaPage was prosecuted in a second trial after the initial trial resulted in a mistrial. At the retrial, the prosecutor introduced evidence that Manes, its star witness, testified that in the original trial, a woman named Pinkston entered the courtroom and he identified her. The prosecutor knew this testimony was false because when Pinkston entered the courtroom at the original trial, Manes could *not* identify her. However, in the retrial LaPage's attorney was not aware of this because the transcript of the original trial did *not* indicate who it was that entered the courtroom that Manes could not identify. The prosecutor never revealed to the defense that the individual who entered the courtroom in the previous trial was, in fact, Pinkston. (*U.S. v. LaPage* (9th Cir. 2000) 231 F.3d 488, 490-491) To aggravate the misconduct, the prosecutor argued that Manes was credible. (Id., at p. 490.) Only during rebuttal argument did the prosecutor admit that Manes had *not* identified Pinkston in the original trial, but the prosecutor then downplayed and minimized this evidence as it pertained to Manes' credibility.

The *LaPage* court found that the testimony of Manes was false, the prosecutor knew it was false and the prosecutor did nothing to correct the false testimony until it was too late for the defense to respond. The court found the false testimony was "material" and reversed the conviction.[68]

Further, there was other evidence in *LaPage* that indicated Manes had lied about Pinkston on other matters, and the defense knew as plainly as the prosecutor that Manes had lied. In spite of this, the *LaPage* court held:

> But the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may

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[68] Because the false testimony pertained to the credibility of a witness, rather than to the guilt or innocence of LaPage, the appellate court found the false testimony was material *and* also that the misconduct was not harmless beyond a reasonable doubt. (*U.S. v. LaPage* (9th Cir. 2000) 231 F.3d 488, 491) Because Connor's false testimony in the instant case pertains directly to the guilt or innocence of Appellant, the reviewing court need *not* also determine whether the "materially" false testimony was harmless beyond a reasonable doubt.

> figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts." (*U.S. v. LaPage* (9th Cir. 2000) 231 F.3d 488, 491-492.)[69]...

In the instant case, the prosecutorial misconduct was more egregious than the misconduct in *LaPage*. The false testimony rendered by Connor was "material" because he was the *only* eye witness to the murders presented by the prosecution. Further, the prosecutor in the instant case *never* admitted Connor was untruthful in his testimony. Rather, she argued Connor's statement to the police and his testimony was, in fact, truthful. And as the court in *LaPage* indicated, the fact that the defense in the instant case may have known, and the jury may have figured out, that Connor's testimony was not truthful, does *not* change or alter the materiality of the prosecutor's misconduct.

D. <u>Conclusion</u>.

Evidence in the Record on Appeal reveals that long before Appellant's jury trial for the murders of Loggins and Beroit began, the prosecution was well aware that serious problems existed with Carl Connor's statement to the police. The details of the murders were common knowledge in the community; hence, Connor's ability to say two men in a white Toyota were shot to death by an assailant wielding an Uzi was not unusual and did not provide corroboration that he was telling the truth. Further, many of the significant details in his statement were simply not accurate and *could not be reconciled* with the physical evidence and the statements of others who were known to be present when the murders occurred. Cautionary flags should have been waiving everywhere. The concern that Connor was not present at the murder scene and that he had simply fabricated the details of his statement to the police would have been obvious to anyone who read the police reports or read the grand jury transcripts.

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[69] The *LaPage* court explained that the prosecutor, by waiting until rebuttal argument to disclose the falsehood, did not comply with his constitutional duty to disclose the falsity of the testimony.

As discussed above, the prosecution made absolutely no effort to resolve this looming conflict. In effect, the prosecution intentionally turned a blind eye to the very real probability that Connor would commit perjury if called to testify. At the conclusion of his testimony, it was even more obvious that Connor had, in fact, committed perjury while testifying ... and the prosecutor was aware of it. Yet, the prosecutor continued to do nothing to correct the false testimony she had presented.

In fact, the prosecutor did just the opposite. In closing argument, she vouched for Connor's credibility, and claimed that he testified truthfully!

Appellant submits that Connor's false testimony was "material" on the issue of Appellant's guilt. He was the only eye-witness presented by the prosecution who identified Appellant as the shooter. False testimony is "substantially material or probative" (Penal Code, § 1473) "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [Citation.]" (In re Roberts (2003) 29 Cal.4th 726, 742; *People v. Coddington* (2000) 23 Cal.4th 529, 589-590; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) A "reasonable probability" is defined as "a chance great enough, under the totality of the circumstances, to undermine our confidence in the outcome. [Citation] The [appellant] is not required to show that the prosecution knew or should have known that the testimony was false. [Citations]" (*In re Roberts* (2003) 29 Cal.4th 726, 742.) Appellant asserts that Connor's false testimony was "material" on the issue of Appellant under any definition used by the courts.

Federal law is in harmony with California law in this regard. (Giglio v. United States (1972) 405 U.S. at p. 153.). [Under the federal Constitution, the intentional or inadvertent suppression of *material* evidence, whether or not specifically requested by the defense, requires reversal of a conviction.]

However, even if this Court were to disagree and find that the prosecutor's conduct was *not* material or that it did *not* render Appellant's trial fundamentally unfair, the prosecutor's conduct did violate the California Constitution since it

involved the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.)

Accordingly, and for all the above reasons, Appellant respectfully urges this Court overturn Appellant's convictions and sentence of death.

II.

The prosecutor's misconduct in knowingly and affirmatively presenting false testimony to win a conviction and sentence of death violated Appellant's due process right to fundamental fairness because it was outrageous governmental conduct that shocks the conscience of the court. The prosecutor's conduct was such that any retrial is prohibited under California's double jeopardy clause. As such, Appellant's conviction should be reversed and the case dismissed *with prejudice* because this is the only effective way to deter this type of government conduct in the future.

A. Introduction.

America's criminal justice system is founded in no small part on the principle that the government's interest in a criminal case is to seek justice. If this principle is undermined or held in disrepute, our nation's entire criminal justice system will flounder. California courts have consistently been vigilant to ensure this principle is not threatened or imperiled.

> A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. . . . [T]he prosecutor represents a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *People v. Hill* (1998) 17 Cal.4th 800, 820, citing *Berger v. United States* (1935) 295 U.S. 78, 88 (internal quotation marks omitted).

> Prosecutors have a special obligation to promote justice and the ascertainment of truth. ... The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present ... evidence.... (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

> While district attorneys are expected to prosecute their cases with considerable vigor and dispatch, they "may strike hard blows, [but are] not at liberty to strike foul ones." *Berger v. United States* (1935) 295 U.S. 78, 88; *People v. Daggett* (1990) 225 Cal.App.3d 751, 759. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1262)

Furthermore, "the prosecutor is not only the defendant's adversary, but is also the '...guardian of the defendant's constitutional rights....' [Citation]" (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1254; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 660.)

The 9th Circuit Court of Appeals is in accord: *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["The prosecutor's job isn't just to win, but to win fairly, staying well within the rules."]; *United States v. Escalante* (9th Cir. 1980) 637 F.2d 1197, 1203 ["As an officer of the court, the prosecutor has a heavy responsibility both to the court and to the defendant to conduct a fair trial...."]

This principle, however, is perhaps in greatest jeopardy when "well meaning" prosecutors, vigorously seeking to hold dangerous and violent individuals accountable for their actions, step over the line and "insidiously encroach" upon these liberties provided to individual citizens by the Constitution. It is in these situations that society searches for a justification or excuse to rationalize why it is *not* going to penalize the offender (i.e., the government)). Why? Because criminal case reversals and dismissals carry a heavy price tag, and if the motivation for the government's wrongdoing was "benign", why should society pay such a steep price for the prosecutor's "well-intentioned" misconduct. Justice Brandeis, in his dissenting opinion in *Olmstead v. United States* (1928) 277 U.S. 438, addressed this issue more than 75 years ago[70], using words that

[70] In *Olmstead* the defendants were convicted of conspiring to violate the National Prohibition Act. Federal officers paid a telephone lineman of long experience to tap into the home and office phone lines of the defendants. Government agents then listened to the conversations captured in these wire-taps. A significant issue

ironically have greater application today than perhaps even Justice Brandeis could have imagined.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. (*Olmstead v. United States,* (1928) 277 U.S. 438, 483-5; J. Brandeis Dissenting Opinion. Footnotes omitted; Emphasis added.)

Justice Brandeis continued, analogizing governmental misconduct to a party's "unclean hands" in courts of equity.

> Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong (i.e. allow the government to convict an accused of a crime) when he (the government) who invokes its (the court's) aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.
>
> The door of a court is not barred because the plaintiff [i.e., criminal defendant] has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he [i.e., the government] who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff [i.e., the government] comes with unclean

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on appeal, and the issue addressed by Justice Brandeis in his dissent, pertained to whether the government should be a party to criminal wrongdoing.

> hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself. (*Olmstead v. United States* (1928) 277 U.S. 438, 483-5; J. Brandeis Dissenting Opinion. Footnotes omitted; Emphasis added.)

The very integrity of the courts, as well as the public's "respect for law" and its "confidence in the administration of justice", is placed at risk whenever a court allows the government to prosecute an individual by any unlawful means. In this case, Appellant asserts the prosecutor *knowingly* and *affirmatively* presented false testimony for the specific purpose of obtaining a conviction and a sentence of death against Appellant and his co-defendant Cleamon Johnson.[71] Her interest was in winning the case; she was not seeking justice. Her focus was on convicting the accused, not to fully and fairly present evidence. She was indeed "the defendant's adversary", but in the process she *failed* to serve as "guardian of the defendant's constitutional rights." Because her "purposes [were] beneficent", the courts must be " on our guard to protect liberty...." After all, according to Justice Brandeis, "[t]he greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but without understanding."

When the government invokes the court's aid to convict and punish an individual who is alleged to have committed a wrong, the "court [should] not redress [the] wrong when he who invokes its aid has unclean hands." "The court's aid [should be] denied ... when [the government] who seeks it has violated the law in connection with the very transaction as to which [the government] seeks legal redress." The courts should provide no aid to a prosecutor who has unclean hands. The court's aid should be "denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."

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[71] A detailed discussion of the prosecutor's misconduct is found in Argument I of Appellant's Opening Brief.

B. The Law Regarding the Remedy for *Egregious* Prosecutorial Misconduct.

1. The Proper Remedy for Outrageous Prosecutorial Misconduct Is Reversal and Dismissal with Prejudice.

In *Barber v. Municipal Court* (1979) 24 Cal.3d 742, an undercover police officer participated in confidential attorney-client conferences. This Court held that, under those facts...

> [t]he intrusion through trickery, of the law enforcement agent in the confidential attorney-client conferences ... cannot be condoned. The right to confer privately with one's attorney is "one of the fundamental rights guaranteed by the American criminal law – a right that no legislature or court can ignore or violate." (Citation.) The only effective remedy is the dismissal of the underlying charges. (*Id.*, at pp. 760-761. Emphasis added.)

The *Barber* Court discussed three different reasons that would, under appropriate circumstances, justify reversal of a conviction and dismissal of the underlying case with prejudice.

1) When the government's conduct has completely eliminated the possibility of a fair retrial. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 756; see also *People v. Kasim* (1997) 56 Cal.App.4th 1360)

2) When enforcement of an exclusionary rule would involve exceedingly difficult problems of proof for the defendant. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 757.)

3) When the exclusionary remedy is inadequate to deter future government misconduct "since there would be no incentive for state agents to refrain from such violations. Even when the illegality is discovered, the state would merely prove its case by the use of other, untainted evidence. The prosecution would proceed as if the unlawful conduct had not occurred." (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 759.)

Reason #4 that provides a basis for prohibiting retrial of a case that was reversed on appeal (i.e., governmental conduct that "shocks the conscience of the

court") was discussed in *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252. Therein, the prosecutor *herself* directed her investigator to eavesdrop on the confidential conversations between the defendant and his attorney that were being conducted *in the courtroom*. That court held:

> Where the prosecutor uses the courtroom as a place to eavesdrop upon privileged attorney-client communications, which results in the acquisition of confidential information, the conscience of the court is shocked and dismissal is the appropriate remedy. The sanction is severe but ... it pales when compared to the conduct which compels this court to so hold. (*Id.*, at p. 1255. Emphasis added.)

Although the facts in *Barber* and *Morrow* both involved law enforcement eavesdropping on confidential attorney-client conversations, the *Barber* court did *not* involve an *officer of the court* committing misconduct in the *courtroom*, as did the prosecutor in Morrow; hence, Morrow established an additional basis of conduct that would "shock the conscience of the court." The *Morrow* court, clearly indicated these additional facts justified the extraordinary remedy of dismissal with prejudice because the government's conduct "shocked the conscience" of that court. (See also *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 432-435.)

The *Morrow* court explained why the additional factors in that case "shocked the conscience of the court' and justified the remedy of dismissal with prejudice:

1) The prosecutor, an officer of the court, *personally* orchestrated the eavesdropping on privileged communications between the defendant and his attorney. In *Barber*, the offender was a police officer who was not acting under the direction of the prosecutor.

2) The prosecutor's misconduct occurred within the court room itself, or as the court described it, the "temple of justice."

3) The prosecutor's conduct violated the defendant's state and federal constitutional rights to due process, the privilege against self-incrimination, the right to counsel and the right to privacy.

4) A civil cause of action against the prosecutor under USCA § 1983 and disciplinary proceedings by the California State Bar were insufficient remedies; those proceedings were an insufficient deterrent to future prosecutorial misconduct of that nature.

Appellant argues that his convictions and sentence of death should be overturned and his case dismissed with prejudice. This remedy, albeit extreme, is appropriate in a case of this magnitude because of the extreme nature of the prosecutor's misconduct. The bases for this extreme remedy can be articulated as follows:

1) The prosecutor's conduct in knowingly and affirmatively presenting materially false testimony was conduct that shocks the conscience of the court in violation of the Due Process Clause of the United States Constitution. The case must be reversed and dismissed with prejudice.

2) The Double Jeopardy Clause of the California Constitution requires this case be reversed and the retrial barred; and

3) Dismissal with prejudice is the only adequate and effective remedy to deter future government misconduct of this nature.

Appellant acknowledges that some California case decisions do not support this argument. (See *Barber v. Municipal Court* (1979) 24 Cal.3d 742; *In re Martin* (1987) 44 Cal.3d 1, 53; *People v. Kasim* (1997) 56 Cal.App.3d 1360.) However, Appellant asserts that the prosecutorial misconduct in this case is too extreme for other less serious remedies. The facts of this case warrant this requested remedy, particularly when they are compared with facts that have warranted this remedy in other cases in the past.

2. Outrageous Prosecutorial Misconduct that Shocks the Conscience of the Court Justifies Reversal and Dismissal with Prejudice.

The power of a court to dismiss a criminal case for outrageous conduct is based on the due process clause of the United States Constitution. (*Rochin v. California* (1952) 342 U.S. 165, 168; *People v. McIntire* (1979) 23 Cal.3d 742,

748, fn. 1; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1259-1260; *People v. Wesley* (1990) 224 Cal.App.3d 1130, 1141-1142.)

> When conduct on the part of authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper. (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429.)

The Prosecutor's Personal Involvement Aggravates the Misconduct Significantly.

Prosecutors, as officers of the court, are entrusted by society with awesome power and authority. However, concomitant with that power comes a responsibility to guard against its abuse. Having been given great authority to impact the lives of so many, the prosecutor must be held to a much higher standard of conduct than others.

Although the courts expect high expectations from anyone involved in law enforcement as agents of the People, the courts expect even higher ethical standards from prosecutors. (E.g., *People v. Herring* (1993) 20 Cal.App.4th 1066, 1077; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 426, 432.) This is "... because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820) "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (*Olmstead v. United States* (1928) 277 U.S. 438, 485 (dis. opn. of Brandeis, J.) .)

The Misconduct Is Further Aggravated When It Occurs Within the Courtroom, the "Temple of Justice."

In *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, the prosecutorial misconduct in eavesdropping on the confidential communications between defense counsel and the accused occurred within the courtroom. In the instant case, the

prosecutorial misconduct of presenting false testimony occurred within the courtroom. In both situations, it was the prosecutor who orchestrated the misconduct. Hence, the language of *Morrow* is appropriate in the instant case:

> ...[H]ere the misconduct took place within the hallowed confines of the courtroom where the rule of law and fairness should be revered. "So far as I know, the courthouse is the only place on earth where the vicious and the virtuous may contend upon perfectly equal terms, receive the same patient and impartial hearing, and have their respective dues, whatever they may be, meted out in the decision. It is this characteristic, more than any other, which entitles the courthouse to be called a temple of justice." *Gilham & Brown v. Wells* (1879) 64 Ga. 192, 194 [Shapiro, Oxford Dict. of American Legal Quotations (1993) p. 230, col. 2]. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261.)

The *Morrow* court continued to explain why prosecutorial misconduct that occurs in the courtroom undermines the very fabric of our society. It betrays the trust and confidence the public must have in the courts when attorneys, as officers of the courts "utilize deceit or collusion with the intent to deceive any party.".

> Our justice system will crumble should those, in whose hands are entrusted its preservation and sanctity, betray its fundamental values and principles. ... It is also true today, as it was 100 years ago, that an attorney " '... owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court-a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception or permits his clients to do so." *People* ex rel. *Attorney General v. Beattie* (1891) 137 Ill. 553, 574 [27 N.E. 1096, 1103]. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261.)

Appellant submits it is practically impossible to conceive of a form of prosecutorial misconduct that would be more egregious than that which occurred in this case. The prosecutor charged Appellant with committing the most serious crimes in our society. She sought to impose the most severe and permanent penalty; Appellant's loss of life. No other criminal charge carries with it anything

that even approaches the magnitude of the sentence. Accordingly, society expects any prosecutor who seeks this ultimate of all criminal penalties to exercise the greatest degree of caution and circumspection, and to be certain that everything about her case is lawful and fair. It is almost inconceivable that in our society a prosecutor would knowingly and affirmatively present false evidence in an effort to successfully impose this greatest of all penalties. Appellant asserts if there is anything that should "shock the conscience of the court", this would be it. Appellant submits that a police officer's "pumping of a suspect's stomach" (*Rochin v. California* (1952) 342 U.S. 165, 168) or a prosecutor's eavesdropping on the confidential communications between attorney and client (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252), as serious as these are, simply *pale in comparison* with the misconduct that occurred in this case. It is difficult to conceive of any greater violation of an individual's right to due process of law than in a capital case where the prosecutor knowingly and affirmatively presented false testimony for the specific purpose of obtaining a conviction and sentence of death. Appellant respectfully asserts his convictions and judgment of death should be overturned and dismissed with prejudice on this basis.

3. The Double Jeopardy Clause of the California Constitution Requires this Case Be Reversed and Dismissed with Prejudice.

In discussing double jeopardy, the United States Supreme Court has enunciated two types of prosecutorial *overreaching* (in contrast to prosecutorial error). First there is the prosecutorial misconduct which is designed to *provoke a mistrial* in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against

In *Oregon v. Kennedy* (1982) 456 U.S. 667, the United States Supreme Court held that when a defendant successfully moves for a mistrial based upon prosecutorial misconduct, the double jeopardy clause of the Fifth Amendment bars a retrial only if "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. (*Id.*, at p. 679.)

This Court addressed a closely related issue in *People v. Batts* (2003) 30 Cal.4th 660.

> Had the prosecutors intentionally committed their misconduct *not* to cause a mistrial, but instead to improperly prejudice the jury to convict in order to avoid a likely acquittal, the prosecutor's misconduct clearly would implicate defendant's double jeopardy interests....(*Id.*, at p. 689. Emphasis in original.)

In *Batts*, the prosecutorial misconduct involved the prosecutor's instructing his police officer witness to answer truthfully even though the response would be in direct violation of the court's previous order, as well as a violation of Evid. Code, § 1231.4. According to the prosecutor, the question and answer were *not* designed to prod the defense into moving for a mistrial so that the prosecution might avoid a probable "not guilty" verdict. Rather, the prosecutor's purpose was an attempt to bolster the prosecution's case in order to avoid a "not guilty" verdict. If the prosecutor's explanation was found to be true, the prosecutorial misconduct would be proper grounds for granting the defense's motion for a mistrial, but it would *not* implicate the defendant's federal constitutional double jeopardy interests. Explaining that the California Constitution's double jeopardy grounds are not limited to this narrow interpretation given by the Supreme Court in *Kennedy*, this Court established a broader test for determining if prosecutorial misconduct that results in a mistrial implicates the defendant's double jeopardy interests under the California Constitution. This Court held:

> Without attempting to articulate a double jeopardy test that will be applicable in all circumstances, we conclude that the double jeopardy clause of California Constitution article I, § 15 bars retrial following the grant of a defendant's mistrial motion (1) when the

> prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal – and a court, reviewing the circumstances as of the time of the misconduct [i.e., the trial court], determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal. [Citations.] (*People v. Batts* (2003) 30 Cal.4th 660, 695. Emphasis added.)

Batts pertained to a mistrial motion granted by the trial court because of the prosecutor's misconduct. However, this Court in *Batts* specifically left open the question that Appellant raises in this argument on appeal; that is, whether a reversal by an appellate court for similarly motivated prosecutorial misconduct can trigger the double jeopardy clause of California's Constitution:

> Because we need consider in the present case only the proper standard under the state double jeopardy clause for prosecutorial misconduct that triggers a defendant's successful *mistrial* motion, we need not, and do not, determine whether *Wallach II*[72] articulates a proper test -- under *either* the federal or state constitutional double jeopardy clauses – for misconduct that results in *reversal on appeal* or in relief on habeas corpus. (*Id.*, at p. 694. Italics in original.)

In *U.S. v. Wallach* (2d Cir. 1991) 935 F.2d 445 (*Wallach I*), the prosecutorial misconduct involved the presentation of evidence that the prosecutor knew, or should have known, was false. A key government witness testified falsely, and the false nature of his testimony, evidence that would have reflected negatively on his credibility, was not discovered by the defense until after Wallach had been convicted. Wallach's subsequent motion for a new trial was then granted based on the ground of prosecutorial misconduct. (Id., at p. 457.) Wallach then moved to dismiss the case on double jeopardy grounds, asserting that retrial was barred. The trial court denied the motion, and Wallach appealed.

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[72] U.S. v. Wallach (1992) 979 F.2d 912.

In *U.S. v. Wallach* (2d Cir. 1992) 979 F.2d 912 (*Wallach II*), the reviewing court "considered the double jeopardy consequences not of *a mistrial* based upon prosecutorial misconduct, but instead of *a reversal of a conviction on appeal* because of prosecutorial misconduct at trial." (*People v. Batts* (2003) 30 Cal.4th 660, 692. Italics in original.) This Court then cited the language of *Wallach II:*

> "The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction." (*People v. Batts* (2003) 30 Cal.4th 660, 694.)

In the instant case, if the prosecutor introduced Connor's false testimony in an attempt to avoid a probable acquittal (and *not* to goad the defense into making a mistrial motion), it would duplicate the facts in *Wallach I*, except the false testimony in the instant case was far more egregious. Its scope was far more extensive, and it pertained directly to the guilt or innocence of the defendant, *not* the credibility of a key government witness. Appellant submits there is *no difference* between the prosecutor knowingly and affirmatively introducing false testimony at the *beginning* of a trial for the purpose of obtaining a conviction (i.e., to avoid an acquittal) versus the prosecutor knowingly and affirmatively introducing false testimony *near the end* of a trial to avoid an acquittal.

Returning to the question left open in *People v. Batts* (2003) 30 Cal.4th 660, 694, this Court's reasoning provides support for Appellant's position that the California Constitution's due process clause bars retrial of Appellant's case:

> *Wallach II* recognizes that a defendant's double jeopardy rights are implicated not only when a prosecutor intends to and does provoke a

> mistrial, but also when a prosecutor intentionally commits misconduct in order to deprive the defendant of an acquittal that the prosecutor believed, in light of the events at trial (including reactions and demeanor of the jury), was likely to occur in the absence of the misconduct. Because we believe the decision in *Wallach II* accurately identifies the scope of interests that the California double jeopardy clause is intended to protect, we find that opinion useful in crafting an appropriate state double jeopardy standard. (*Id.*, at. p. 695. Emphasis added.)

In the instant case, Appellant was indicted on December 22, 1994. The prosecution knew that, without Connor's testimony, the likelihood that a jury would convict Appellant based on the testimony of two police/informant fellow-gang-member witnesses was remote. Hence, the prosecutor in this case knew that "an acquittal ... was likely to occur in the absence of the misconduct" (i.e., Connor's testimony). (*Id.*, at. p. 695.) Hence, the "prosecutor intentionally commit[ed] misconduct in order to deprive the defendant of an acquittal." (*Id.*, at. p. 695.) Hence, "the California double jeopardy clause is intended to protect" against this type of prosecutorial abuse. (*Id.*, at. p. 695.)

The Pennsylvania Supreme Court, in a case factually very similar to Appellant's case, reached the conclusion that Appellant argues in this case; that the Pennsylvania State constitution's "double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through" the use of false testimony. In *Commonwealth v. Smith* (1992) 532 Pa. 177, 615 A.2d 321, the prosecution *withheld* from the defense two items of evidence. One went to the credibility of a key prosecution witness. The other item was evidence that suggested the defendant's version of what happened was true and would conceivably led to an acquittal. (*Id.*, at pp. 322-323.).

The Pennsylvania trial court found as fact that both incidents of misconduct were committed by the Commonwealth. That State's Supreme Court then stated:

> Such misconduct, standing alone, would suffice to implicate the protection of the double jeopardy clause. But further examination of the record establishes the bad faith of the prosecution beyond any possibility of

doubt; indeed, it would be hard to imagine more egregious prosecutorial tactics. (*Id.*, at p. 323. Emphasis added.))

The Pennsylvania Supreme Court's holding in *Smith* is consistent with "the scope of interests that the California double jeopardy clause is intended to protect...." (*People v. Batts* (2003) 30 Cal.4th 660, 695.)

Accordingly, Appellant urges this Court find that, under the facts of this case, Appellant's convictions and sentence of death be overturned. Further, the double jeopardy clause of the California Constitution should bar retrial of this case.

4. Reversal and Retrial of Appellant's Case Is an Inadequate Remedy to Deter Future Government Misconduct of this Nature Since There Is No Incentive for Prosecutors to Refrain from such Misconduct.

The government typically responds to this type of remedy for prosecutorial misconduct by claiming that the people of the State of California should not be punished because of the conduct of its attorney. The government generally argues that a cause of action based on 42 United States Code, § 1983 , and disciplinary proceedings by the California State Bar, are sufficient remedies. Although these remedies are available, Appellant insists they are insufficient in this particular case.

In *Morrow*, the court spoke of an appropriate remedy for serious presecutorial misconduct and explained the importance of an adequate remedy to deter similar conduct in the future:

> We, ourselves, have warned prosecutors in the past. (See, e.g., *People v. Herring*, (1993) 20 Cal.App.4th 1066, 1077; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-759; *Boulas v. Superior Court* 1986) 188 Cal.App.3d 422, 435.) Yet some prosecutors do not seem to be listening. This court has an obligation to support and defend the United States and California Constitutions. Vindication of constitutional rights should not be dependent upon filing a civil rights lawsuit or upon the State Bar instituting disciplinary proceedings.

> Here the trial court found that confidential matters were discussed and overheard. In this situation, the harm is apparent and the substantial threat of demonstrable prejudice is inherent. There must be an "... incentive for state agents to refrain from such violations." *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 759. The instant violation is not a "no harm no foul" situation. Past cases recognize that per se dismissal may be appropriate under certain circumstances. *People v. Benally* (1989) 208 Cal.App.3d 900, 910, collecting the cases.[73] (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261.)

C. Conclusion.

The United States Supreme Court in *Rochin v. California* 1952) 342 U.S. 165 wrote about the facts in that case, then stated: "We would be remiss in our oaths of office were we to discount or trivialize what occurred here. (*Id.*, at p. 169.) "The judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process of law, and basic fairness. What has happened here must not happen again. The prosecutor '... used methods that offend a sense of justice.'" (*Id.*, at p. 173) This is conduct which "... shocks the conscience." (*Id.*, at p. 172.) "a responsibility that the government in this case has abdicated. Were we to tolerate the government's conduct in this case, we would participate in that abuse." (*U.S. v. Solario* (9th Cir. 1994) 37 F.3d 454, 461.)

Appellant asserts the same conclusion is applicable in this case, and respectfully urges this Court reverse his convictions and sentence of death, then dismiss his case with prejudice.

III

The trial court erred when it allowed the prosecution to introduce irrelevant evidence and inadmissible opinion evidence that improperly "bolstered" the credibility of witness Carl Connor. The errors were prejudicial, and require reversal of Appellant's conviction.

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[73] Cases of outrageous conduct and the appropriate sanctions therefore are *sui generis*. Each case must be decided on its own facts.

A. Introduction:

1. The importance of Carl Connor's testimony to the prosecution.

Carl Connor was one of three prosecution witnesses at trial who linked Appellant to the murders of Loggins and Beroit. He was the *only* eye witness presented by the prosecution who identified Appellant as being the actual shooter. As such, he was one of the legs of the prosecution's 3-legged stool upon which the prosecution's entire case rested.[74]

Connor's testimony [RT, 15:3349], along with the testimony of Freddie Jelks [RT, 16:3540] and Marcellus James [RT, 18:4042-4043], constituted the prosecution's evidence that linked Appellant to the murders of Loggins and Beroit.

2. The defense's assault on Connor's credibility.

The nature, quality and quantity of the evidence introduced to impeach Connor was formidable. For example:

a. Connor and perjury:

First, there was ample evidence from which it could readily be inferred that Connor lied when he testified he had been present at the scene of the double murders. If he was not present, his entire testimony would have been intentionally false and a series of pernicious lies. Appellant respectfully requests this Court consider the arguments made by Appellant in his discussion in Issue I in Appellant's Opening Brief

b. Connor and his time card:

Second, the defense introduced Connor's time card for the day of murders. The time card clearly reflected Carl Connor was at work at Don Kott Ford the entire day and physically could *not* have been present at the scene of the murders. It was a clear, unambiguous and persuasive contradiction to Connor's alleged "eye-witness" testimony. [See RT, 22:4859-4861; CT, 4:821; Defense Exhibit

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[74] Appellant respectfully refers the Court to the Statement of Facts in this Opening Brief for details of Connor's incriminating testimony.

#E.] The Reporter's Transcript indicates the jury discussed this issue extensively during deliberations. [See, for example, RT, 26:5350, as well as Argument XVIII herein.]

c. Connor's character for dishonesty/untruthfulness:

Third, Connor admitted under oath that if his Don Kott time card indicated he was at work that day, the time card would have been fraudulently prepared by an associate of his named "Jose" who would have "punched" his time card for him. Connor also admitted that he had done this same dishonest act for "Jose", and that they had cheated Don Kott Ford on several occasions with this unethical conduct. [RT, 16:3391-3396, 3465] In effect, through his own testimony, Connor admitted that he had a character trait that involved untruthfulness and dishonesty. Hence, when he testified at trial, his testimony was accompanied by his tendency or propensity to be untruthful and dishonest, especially if it would lead to financial gain for himself.[75]

d. Connor and the $25,000 reward:

Fourth, after saying and doing nothing for three (3) years, Connor "just happened" to contact Detective Sanchez at the same time that "reward fliers" were being circulated and posted in that area of Los Angeles. These fliers promised $25,000 rewards to individuals who provided information regarding unsolved murders that had been committed in that area of Los Angeles. Connor subsequently received a $25,000 reward for cooperating in another case. Although Connor claimed he did not expect a reward for testifying in this case, he had already received $25,000 just three months earlier as a reward for his testimony in another gang related case. The inference that he hoped for a reward in exchange for his testimony in this case was patent. [RT, 15:3389-3390, 3349;

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[75] This evidence would have been admissible for impeachment purposes and any objection by the prosecution would have been overruled. Evidence Code sections 786 and 787 were abrogated by Proposition 8's "Truth in Evidence" constitutional amendment. See *People v. Harris* (1988) 47Cal.3d 1047.

18:3975-3978] The Reporter's Transcript indicates the jury discussed this issue extensively during deliberations. [RT, 26:5265-2572]

e. Connor's embellishments to the police:

Fifth, Connor's *initial* statement to the police contained information for which Connor clearly had no personal knowledge, yet neither the police investigators nor the prosecutor made any effort to clarify if the testimony would be admissible over objection. For example, Connor told the detectives during his initial interview:

a. Fat Rat observed an individual named "BaaBaa" seated in the rear seat of the white Toyota. [See CT Supp IV, 2:376; lines 20-21, p. 337, lines 17-19, p. 400, lines 17-18; CT Supp IVA, p. 72, lines 20-21; p. 73, lines 17-19; p. 96, lines 17-18 in transcript of interview. How would Connor have known who, if anyone, Fat Rat saw in the white Toyota?

b. Fat Rat knew "BaaBaa" was a gang member of the rival East Coast Crips gang. [See CT Supp IV, 2:373; lines 19-21, p. 400, lines 9-21; CT Supp IVA, p. 69, lines 19-21; p. 96, lines 19-21 in the transcript of the interview.] How would Connor have known that Fat Rat knew this?

c. Fat Rat's purpose for walking to Johnson's house was to obtain a firearm so he could kill "BaaBaa." [See CT Supp IV, 2:374, lines 14-15, p. 377, lines 6-12 and 20-21, p. 378, lines 13-15, p. 400, line 24 through p. 401, line 1, p. 401, lines 14-22; CT Supp IVA, p. 70, lines 14-15; p. 73, lines 6-12 and 20-21; p. 74, lines 13-15; p. 96, line 24 through p.97, line 1; p. 97, lines 14-22 in the transcript of the interview.] How would Connor have known what Fat Rat was thinking as he walked away?

d. Fat Rat began firing the Uzi into the white Toyota in an effort to kill "BaaBaa." [See CT Supp, 2:376, lines 21-22, p. 378, linrd 1-5; CT Supp IVA, p. 72, lines 21-22; p.74, lines 1-5 in transcript of the interview] How would Connor have known who Fat Rat was intending to kill?

e. Fat Rat's motive was to kill "BaaBaa" because "BaaBaa" was "in the wrong neighborhood [See CT Supp, 2:376, lines 21-22, p. 378, lines 1-5; CT Supp IVA, p. 72, lines 21-22; p.74, lines 1-5 in

transcript of the interview] How would Connor have known what Fat Rat's motive was?

f. Fat Rat fired multiple shots into the white Toyota even though it was apparent that his intended victim was no longer in the white Toyota. [See CT Supp IV, 2:373; lines 19-21, p. 400, lines 9-21; CT Supp IVA, p. 69, lines 19-21; p. 96, lines 19-21 in the transcript of the interview.] Agani, how would Connor have known who Fat Rat's intended victim was?

g. Connor told the police that Fat Rat "shot the guys because he thought they were Crips." [RT, 15:3379] How would Connor have known why Fat Rat shot the two victims?

As to these items for which Connor clearly had no personal knowledge, it appears rather apparent that Connor was attempting to "embellish" on details that he claimed to have seen. Connor told the investigators who the shooter was, but he also wanted to provide them with the shooter's motive for killing Loggins and Beroit. Since Connor claimed to be in fear for his life if he cooperated with the police and testified against members of the 89 Family Gang, Connor's own motive to provide this information became very significant. A reasonable inference as to why Connor embellished, or fabricated, this information as he spoke to the police -- indeed, arguably the *only* reasonable inference -- was Connor's belief that if he provided the police with sufficient information, it would maximize his chances of receiving one or more of the publicized rewards.

f. Connor and his reason for being at the crime scene:

Sixth, Connor contradicted himself and could not keep straight his reason for being at the crime scene in the first place. During his grand jury testimony, he testified he was present with a friend to whom he had recently sold a car, and the two were watching the car being painted there. [CT, 1:17; RT, 15:3323-3324] At trial, Connor denied that he ever said that because it wasn't true. That is, he inferentially testified he would have been lying under oath in his testimony before the grand jury if he had said that. In his new version at trial, he testified he was

visiting his friend Robert, a mechanic who worked at the location, and he was talking to Robert about mechanical problems he (Connor) was having with his car. [RT, 15:3396-3397] On both occasions, Connor was testifying while under oath, and he gave no indication that he was confused or mistaken. Common sense intimates it is much easier to simply recall the truth when later asked about it. It is much harder to remember a fabrication that was created in an effort to conceal the truth. Indeed, the prosecutor in her closing argument referred to this concept.[76]

g. Connor's story was contradicted by other evidence:

Seventh, Connor told the police [CT Supp IV, 2:375-379], and he also testified, that "Fat Rat" approached the *front* of the white Toyota as he walked *northbound* on Central towards the Toyota. [RT, 15:3416-3417] Using this approach, the victims seated in the white Toyota would have seen him coming. Connor's testimony was *directly and irreconcilably contradicted* by the prosecution's other key witness, Freddie Jelks, who testified that Johnson had specifically rejected that very idea for an approach route. Rather, Jelks testified that Johnson arranged for Fat Rat to be driven north down the alley that ran parallel with Central Avenue, but behind the businesses. [RT, 16:3564] At that point, according to Jelks, "Fat Rat" walked east to Central Avenue, then walked *southbound* and approached the white Toyota from the rear. In this manner he would not be observed by the victims seated in the white Toyota. [RT, 16:3557-3558]

Because both Connor and Jelks testified in considerable detail to this part of the plan of attack (i.e., the surprise element, the direction of approach, etc.), it seems obvious that one or the other was *not* simply mistaken. Rather, one or the other *lied* about how the shooter approached the white Toyota. The two versions are simply not reconcilable. Obviously, if Connor was working at Don Kott Ford that day, this attempt by him to "fill in this detail" to make it consistent with the

[76] See RT, 24:5129.

rest of his original statement to the police would have been "a good guess." The strong and reasonable inference was that Connor "guessed wrong".

h. Connor's story was contradicted by the physical evidence *and* the opinions of two prosecution expert witnesess:

Eighth, at trial, Connor was asked on direct examination where the shooter was standing in relation to the white Toyota when he opened fire with the Uzi.[77] Connor, who claimed he was only a few feet away from the white Toyota [RT, 15:3346, 3347, 3349], testified clearly and succinctly on direct examination that "Fat Rat" was standing in the street, that "Fat Rat" was ahead of the white Toyota and shooting into the driver's side of the car. [RT, 15:3350, 3351] Connor confirmed on cross-examination that the shooter was to the left of, and in front of, the white Toyota. [RT, 15:3417-3422, 3439, 3443] Only after Connor had a night to "reflect" on the day's testimony did he "modify" his testimony somewhat the next day to say the shooter was closer to the right curb than he had originally stated.[78] However, Connor still maintained that the shooter was standing ahead of the white Toyota when he fired into the car. [RT, 16:3468-3470]

Connor's description of where the shooter was standing when he fired into the white Toyota was dramatically *contradicted* by the *uncontroverted* physical evidence and expert opinions presented by the prosecution witnesses. [RT, 17:3843-7, 3858-60; People's Exhibit #17] The shooter was standing directly to the right of the white Toyota and the bullets traveled at a right angle to the length

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[77] There is no indication that Connor was ever asked this question during his initial interview with Detective Sanchez, nor is there any indication that at the grand jury hearing he was asked to testify where the shooter was standing in relation to the white Toyota when he began firing.

[78] Unfortunately, neither defense attorney asked Connor during the following day's testimony if he had spoken to the prosecutor or the detectives the previous evening or that morning, and if so, was there any reference to where the shooter was standing when he fired the gun.

of the car. It would have been impossible for the shooter to be standing in front of, or to the left of, the white Toyota.

i. Connor's story was contradicted by *every* other witness:

Ninth, three witnesses (i.e., Wright, Clark and "Robert") told the police on the day of the shootings that the shooter fled *north* on Central Avenue after the shootings, then turned *left* on 87th Place. [RT, 17:3873, 3891, 3895; RT, 15:3266-8, 3276-8; and CT, 1:37-49 for "Robert's" grand jury testimony]. Freddie Jelks's testimony was consistent with these three witnesses. [RT, 16:3547, 3555-3559, 3562-3265, 3658] Once again, Connor was simply flat out wrong! Connor told the police, and later testified, that the shooter immediately after the shootings "walked" *south* on Central, then turned *right* on 88th Street . . . exactly the opposite direction from that described by every other witness who provided information regarding the shooter's flight!

j. Connor's story was internally inconsistent and contradicted itself:

Tenth, Connor's initial statement to the police in August 1994 differed significantly from his grand jury testimony in December 1994, and his grand jury testimony differed substantially from his jury trial testimony in August 1997.

In Connor's initial statement to the police in August 1994, he stated he first observed Fat Rat as Fat Rat walked by the white Toyota that was parked on Central Avenue in front of the car wash. Connor stated Fat Rat looked inside the white Toyota, and saw "BaaBaa" a rival Crip gang member. There were two others in the white Toyota. Fat Rat then walked to Johnson's house to obtain a weapon so he could return and kill "BaaBaa." [CT Supp IV, 2:372-380] Connor specifically stated he saw Fat Rat obtain the gun at Johnson's house, although he could not tell who gave it to him. [CT Supp IV, 2:377] Fat Rat then returned to the white Toyota, approached it from the front, and began firing into the car in an attempt to kill BaaBaa. Fat Rat was not aware, however, that "BaaBaa" had exited

the Toyota just a few moments before. After firing numerous rounds into the white Toyota, Fat Rat "walked" back to Johnson's house and returned the automatic weapon. [CT Supp IV, 2:377-380]

During Connor's grand jury testimony, he related he observed three people in the white Toyota that was parked on Central Avenue. One of those individuals exited the Toyota because he was waiting for his car at the car wash. The two who remained in the Toyota were waiting for him to get his car, which was a low-rider 1965 or 1966 Chevy with Dayton wire rims on the wheels. [CT, 1:17-18] Connor testified he observed Fat Rat walk by the Toyota, then he walked to 88th Street. He turned and walked to a house that was about two houses from the motel. This house was co-defendant Johnson's house. [CT, 1:20-22] About two minutes later, he saw Fat Rat again standing next to the van in front of the white Toyota. Fat Rat was about 12 feet from the white car and next to the van when he began shooting. Everyone ducked for protection. Connor heard about 17 shots. [CT, 1:23-27] Connor said he saw Fat Rat run to Johnson's house after the shootings and go into the rear yard. [CT, 1:27] He saw a couple more gang members there, including Johnson. [CT, 1:29] During his grand jury testimony, Connor omitted any reference to Fat Rat's state of mind; that is, that Fat Rat had seen "BaaBaa" in the white Toyota, that Fat Rat knew he was a rival Crip, that Fat Rat went to get the gun so he could kill "BaaBaa", etc.

Connor's jury trial testimony was quite different from his initial statement to the police, as well as his grand jury testimony. Connor testified that he initially saw Fat Rat when Fat Rat was standing next to the motel on the corner of 88th Street and Central. [RT, 15:3344] He denied having seen Fat Rat walk by the white Toyota and look at the occupants therein, including "BaaBaa." Fat Rat then walked west on 88th Street, but he did not see where Fat Rat went. [RT, 15:3344] Connor said he next saw Fat Rat approaching northbound toward the front of the white Toyota. While in the street and near the rear of the van, Fat Rat opened fire on the two occupants in the white Toyota with an Uzi weapon. [RT, 15:3346-

3347] When the shooting stopped, Connor testified he saw Fat Rat go south on Central Avenue, then west on 88th Street. Connor testified he did not see where Fat Rat went or what he did with the Uzi. [RT, 15:3358-3359] Connor's trial testimony was conspicuous in what he declined to say. He refused to say anything that would link Johnson to the murders. He declined to even mention Johnson's name. He denied that he saw Fat Rat go to Johnson's house before the shooting, he denied that he saw Fat Rat obtain the gun at Johnson's house, and he denied that he saw Fat Rat return to Johnson's house after the shooting. [RT, 3364-3366]

Connor's trial testimony contradicted itself as to when he initially observed Fat Rat, and whether Fat Rat looked into the white Toyota, saw the rival Crips, then went to get a gun to kill them, etc. These details are not the type of insignificant details one would forget or become confused about. Connor either lied to the police, or he lied to the jury, or both. One can only assume that Connor initially tried to "embellish" his story to the police about Appellant's involvement, then "learned" to be more cautious as he spoke of Appellant's involvement. In any event, it is evident that Connor was not truthful when he initially spoke to the police about Appellant's involvement.

Connor's story contradicted itself even more obviously when he spoke of co-defendant Johnson's involvement, or lack thereof. It was obvious to everyone at trial that Connor lied under oath about Johnson's involvement in the murders. Either Connor lied to the police when he described Johnson's involvement, or he lied to the jury when he declined to testify as to Johnson's involvement. Or he lied on both occasions! In any event, it was clear to everyone that Connor lied about Johnson's involvement on at least one occasion, and he was willing to lie if he thought it would in some way benefit him.

The defense challenged the prosecution, claiming that Connor lied when he said he was present when Loggins and Beroit were murdered. In spite of this obvious challenge to the credibility of the star witness, the prosecution failed to call a single witness who could testify that Connor was even present at the murder

scene, much less that his description of events was accurate! Certainly Connor's friend Robert could have testified that Connor was with him at the time of the shootings, yet the prosecution chose to not have Robert testify at the trial.[79]

k. Connor was not confused or mistaken.

Because Connor described in considerable detail Fat Rat's conduct before, during and after the shooting, it cannot be said with any degree of reason that Connor was simply mistaken when he initially spoke to the detectives. With the degree of detail Connor provided, there was no mistake or confusion in his mind. He either told them the truth or he lied to them but intending to sound like the truth. For example,

a) Connor must have been consciously aware of Fat Rat when he first saw him, because he told the detectives he saw Fat Rat look into the white Toyota and saw "BaaBaa", a rival Crip sitting in the car.

b) Connor apparently was expecting some type of deadly confrontation to take place right in front of him because he told the detectives that Fat Rat's intent was to shoot and kill "BaaBaa" as he sat in the white Toyota. This type of detail is simply not something Connor would "accidentally" have said or that he would have been confused about. If he was expecting Fat Rat to be involved in a deadly confrontation within a few feet of him, Connor's complete attention would have been literally "riveted" on Fat Rat's movements.

c) Connor claimed that he observed Fat Rat walk to Johnson's house, where he specifically stated he saw Fat Rat obtain an Uzi automatic weapon at Johnson's house for the express purpose of killing "BaaBaa."! To even suggest Connor was confused or mistaken about these facts approaches absurdity.

d) Because Connor was expecting a violent and deadly confrontation to occur directly in front of him when Fat Rat returned with the Uzi, Connor's

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[79] The prosecution did call "Robert" to testify before the grand jury. [CT, 1:37-49] The appellate record is silent as to why "Robert" was not called to testify at the jury trial.

attention would have been totally focused on Fat Rat's approach to the white Toyota. Connor would not have been mistaken or confused about the direction in which Fat Rat was approaching the white Toyota!

e) Since Connor claimed to the detectives he was aware Fat Rat had the Uzi, and because he also claimed he was aware Fat Rat intended to kill "BaaBaa", Connor would not have been "mistaken" or "confused" as to where Fat Rat stood when he opened fire on the victims

f) Connor told the detectives that after the shootings, he saw Fat Rat "walk" away, not "run" away. Further, Connor claimed he saw Fat Rat go *southbound* rather than northbound (the direction that every other witness said the shooter went!). Connor might have claimed that because of the shock of seeing this senseless and violent act, he became disoriented and confused. However, because Connor emphasized to the detectives he had the presence of mind to see Fat Rat "walk", not "run", from the scene, any suggestion he was "in shock", bewildered or confused would have made no sense whatsoever.

To any reasonable and rationale thinker, these details are not the type of details that any individual would be mistaken or confused about. Appellant asserts the *only* reasonable inference is that Connor "made up these facts" because he was *not* present when Loggins and Beroit were murdered. Connor falsely claimed he was present because he wanted to provide the police with information that he thought they would want to hear . . . inferentially suggesting he wanted to increase his chances of receiving a substantial reward in exchange for his "cooperation."

l. Connor's initial statement to the police contains proof that he learned of the details of the shootings from other individuals, and not from personal observation.

Finally, the prosecution's position at trial was that Connor's source of information was personal knowledge. In his original statement to the police, Connor stated he observed Appellant walk past the white Toyota and saw an individual named "BaaBaa" inside the car. Connor stated that "BaaBaa was a

Crip, and this was the reason Appellant then went to Johnson's house to get a weapon. Appellant wanted to kill "BaaBaa" because BaaBaa was a Crip. However, when Appellant returned with the Uzi to shoot and kill Uzi, Appellant did not realize "BaaBaa" had exited the white Toyota while Appellant went to get the weapon. Hence, Appellant mistakenly shot and killed Loggins and Beroit because he intended to kill an individual named "BaaBaa."

Completely *independent* of Connor, Freddie Jelks subsequently related that that the name "BaaBaa" was *first* mentioned by co-defendant Johnson while members of the gang were discussing who owned the flashy car being washed at the car wash. [RT, 16:3525-3527, 3537, 3540] Jelks then explained that someone mentioned the flashy car was owned by someone named Payton, not "BaaBaa." [RT, 16:3540-3541] From that point on, the name "BaaBaa" was no longer mentioned. This made Jelks' story "fit" the undisputed facts that the flashy car was Payton's. That was why Donald Loggins and *Payton* Beroit were waiting in Loggins' white Toyota for *Payton* Beroit's flashy car to be washed. In other words, according to Jelks, the source of the mistaken use of the name "BaaBaa" originated *prior* to the murders when Johnson said the flashy black car was "BaaBaa's."

Since the name "BaaBaa" was mistakenly used by Johnson while at his house and prior to the murders, there would have been *no reason* why anyone who was at the crime scene and witnessed the murders would have referred to an individual named "BaaBaa" as being in some way related to the flashy black Chevrolet.

Why, then, did Connor initially tell the police that the flashy black Chevrolet belonged to an individual named "BaaBaa"? And of all the gang monikers in existence at that time, why would Connor have selected the *exact same moniker* that Jelks said Johnson had also used. The likelihood that Connor and Jelks would *independently* mention the same gang moniker, then both *independently and mistakenly* refer to "BaaBaa" as the owner of the flashy black

Chevrolet is simply unbelievable. The odds of that happening are too astronomical. Either Connor or Jelks or *both* had some other source as the basis for this information.[80]

In summary, and simply put, the quantity and quality of the evidence introduced to impeach Connor, one of the key prosecution witness, was formidable. Appellant asserts any juror would have had an extremely difficult time being convinced beyond a reasonable doubt that Connor's testimony was truthful.

Appellant asserts any juror would have had an extremely difficult time being convinced beyond a reasonable doubt that Connor's testimony was truthful.

3. The prosecution's efforts to rehabilitate and support Connor's credibility.

It was in this setting that the prosecution sought to rehabilitate and bolster the beleaguered credibility of their star witness. Detective Rosemary Sanchez, an experienced and respected police detective, was called to testify in an effort a) to rehabilitate Carl Connor's credibility generally, b) to provide possible explanations for inconsistencies and contradictions in Connor's trial testimony, his grand jury testimony, and his prior statements to the police, and c) to present a plausible reason for Connor's three-year delay in contacting the police. [RT, 18:3970-3989; People's Exhibits #14, #22 and #22A]

Defense cross-examination of Detective Sanchez was very brief; the entire transcript of the cross-examination consisting of approximately two (2) pages

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[80] It was another rather peculiar "coincidence" that witness Donnie Ray Adams testified at the trial that Johnson also mistakenly told him that the car was owned by someone named "BaaBaa", yet for some reason the FBI agent's report that reflected his interview with Adams 8 months earlier contained no indication that Adams ever mentioned the name "BaaBaa." The inference, of course, was that Adams also had a source for his information other than Johnson. Otherwise, Adams would have told the FBI agent that Johnson said the car was owned by "BaaBaa" and that name would have been included in the FBI report. [See RT, 19:4413-4416, 4434]

total. [RT, 18:3989-3991] At the conclusion of this brief cross-examination, the prosecutor was erroneously allowed by the trial court to ask questions and solicit responses in three distinct areas that, Appellant asserts, amounted to improper and highly prejudicial "bolstering" of Connor's credibility.

Appellant asserts that these errors in the admission of evidence were prejudicial to Appellant under both state and federal standards of review. As such, Appellant's convictions and sentence of death should be overturned.

B. The Prosecution Was Allowed to Improperly "Bolster" Connor's Credibility by Having an Experienced and Respected Detective Testify that in Spite of the Evidence of Impeachment, It Was her *Opinion* that Connor Was Truthful Because his Testimony Was Corroborated by Information She Had Received from Other Sources.

1. Introduction.

On re-direct examination of Detective Sanchez, the trial court allowed the prosecution to introduce evidence that improperly bolstered the credibility of Carl Connor;

> DDA: With respect to the information that was provided to you by Mr. Connor, was that information corroborated through other sources?
> RL[81]: Objection, your honor. Calls for hearsay.
> ORR[82]: Conclusion.
> CRT: Overruled.
> SAN: Yes. . [RT, 18:3991-3992]

This question and answer was simply a disguised method of having Detective Sanchez render her opinion as to the credibility of Carl Connor. In effect, Detective Sanchez testified that *in her opinion* "the information that was provided to [her] by Mr. Connor" was truthful because it was "corroborated through other sources." The inferential basis for her opinion was that she allegedly had been able to *independently corroborate* the content of Connor's

[81] "RL" refers to Attorney Richard Lasting, lead trial counsel for co-defendant Johnson.
[82] "ORR" refers to Attorney Joseph Orr, lead trial counsel for Appellant.

statements regarding the shootings with information provided to her and other police officers by various *unnamed* individuals and other *anonymous* sources.

Defense counsel interposed specific and timely objections to this testimony.[83]

2. The Applicable Law:

Unless some other evidentiary rule applies, witnesses must have personal knowledge of the matter about which they testify; otherwise their testimony is inadmissible. (Evid. Code, § 702) Further, when any witness renders a lay opinion, it must be "[r]ationally based on the perception of the witness" and it must be "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800) For several reasons, the objections of defense counsel should have been sustained, and Detective Sanchez's lay opinion should not have been admitted into evidence:

3. Discussion:

a. Detective Sanchez's testimony was inadmissible lay opinion because i) it was not based on her personal knowledge of the underlying facts; ii) it was not "helpful to a clear understanding of [her] testimony"; and c) it was offered for the purpose of bolstering the credibility of witness Carl Connor.

i) The prosecution presented no evidence that Detective Sanchez was present when the murders occurred, that she was involved in the crime scene

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[83] Appellant's attorney properly objected when he insisted the question called for a "conclusion", since an opinion and a conclusion are synonyms for purposes of their use in §§ 800 through 870 of the California Evidence Code. (See the Law Revision Commission Comment to Division 7. Opinion Testimony and Scientific Evidence.). "The objection that the testimony should not have been admitted because it was in the form of an opinion or conclusion rests on a misconception concerning the proper function of the so-called opinion rule as it affects testimony of non-experts. (Evid. Code, § 800.) That rule merely requires that witnesses express themselves at the lowest possible level of abstraction. (Citation) Whenever feasible "concluding" should be left to the jury; however, when the details observed, even though recalled, are 'too complex or too subtle' for concrete description by the witness, he may state his general impression. (Citation)." *People v. Hurlic* (1971) 14 Cal.App.3d 122, at 127 (Emphasis added).

investigation, or that she was present during the autopsies of Loggins and Beroit. Her knowledge of the details of the crime was based solely on what others told her and what she read. Since she had *no personal knowledge* of any of these details[84], her testimony regarding them was inadmissible. (Evid. Code, §702.) Finally, since her lay opinion was *not* "rationally based on [her] perception" of the underlying facts, her lay opinion, based solely on hearsay, was also *not* admissible. (Evid. Code, §800[a].)[85]

ii) Detective Sanchez's testimony was also inadmissible lay opinion because it was not "helpful to a clear understanding of [her] testimony." (Evid. Code, §800[b].) This Court explained in *People v. Melton* (1988) 44 Cal.3d 713 the reason why lay opinion is admissible *only* when it is "[h]elpful to a clear understanding of [the witness'] testimony.":

> A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. (Citation) "Whenever feasible, 'concluding' should be left to the jury; however, when the details observed, even though recalled, are 'too complex or too subtle' for concrete description by the witness, he may state his general impression. [Citation.]" *People v. Hurlic* (1971) 14 Cal.App.3d 122, 127. Both these officers were able to describe their interviews with the girl in concrete detail and their opinions or conclusions as to her truthfulness were not "helpful to a clear understanding of [their] testimony." (Evid. Code, § 800, subd. (b).)

There is *no* indication that Detective Sanchez could *not* have expressed the details of her "other sources" that she claimed corroborated Connor's statement to

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[84] If a witness' personal knowledge of a particular fact is challenged by the opposing party, the party calling the witness (the prosecution in this case) has the burden of producing evidence sufficient to sustain a finding that the witness does have personal knowledge. (Evid. Code, §403[a][2]) If the party calling the witness fails to meet this burden, the witness' testimony on that issue is *not* admissible. (Evid. Code, §403[a])

[85] This error concerning the admission of evidence was *not* the type in which the court exercises its discretion when deciding on admissibility. Hence, the reviewing court does not review it using the "abuse of discretion" standard.

her because they were "too complex or too subtle" to lend themselves to "concrete description." Hence, the prosecution's request that she render her opinion *in lieu* of testifying about her personal observations was inadmissible on this basis also.

iii) Finally, Detective Sanchez's testimony was inadmissible lay opinion because it was offered for the purpose of enhancing the credibility of witness Carl Connor.

In *People v. Melton* (1988) 44 Cal.3d 713, this Court held that "lay opinion about the veracity of particular statements by another is inadmissible on that issue." observed:

> Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained [*People v. Sergill* (1982) 138 Cal. App. 3d 34, 39-40], the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. ... A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. (Citations) Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (id., § 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (Citations) (*People v. Melton*, supra, 44 Cal.3d at 744-5)

Numerous California cases have held a police officer's opinion testimony regarding the truthfulness of a *suspect's confession* is generally deemed inadmissible. (*People v. Anderson* (1990) 52 Cal.3d 453, 478; *People v. Cole* (1956) 47 Cal.2d 99, 103; *People v. Arguello* (1966) 244 Cal.App.2d 413, 421.) In *Anderson*, an investigating officer testified for the prosecution regarding the results of his investigation of several murders. Responding to the prosecutor, the officer "stated his further belief that defendant's confession to the [victims'] killings ... was true." (*People v. Anderson* (1990) 52 Cal.3d 453, 478) This Court

held the trial court erred when it allowed into evidence the officer's opinion that the defendant's confession was true. (*Id.*, at p.478.) The identical reasoning should apply when the officer renders his opinion that a *witness*' statement or testimony was true, as in the instant case.

Appellant asserts the defense's inadmissible opinion or conclusion objection was specific, timely, and proper. Based on each of the above three reasons, the trial court erred when it overruled the objection of Appellant's counsel and allowed Detective Sanchez to render her lay opinion regarding Connor's credibility.

b) Detective Sanchez's testimony was also inadmissible as "expert opinion" testimony because i) she was not qualified as an expert witness in the subject matter of "witness credibility"; ii) the "expert opinion" was offered for the purpose of enhancing the credibility of witness Carl Connor; and iii) the subject matter of "witness credibility" was *not* "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (California Evidence Code § 801[a][and [b]).

If Respondent were to contend that Detective Sanchez qualified as an expert witness on "witness credibility", this Court has also made it clear that, except in rare circumstances, expert opinion testimony is *not* admissible for the purpose of bolstering the credibility of another witness. Quoting again from *People v. Melton, supra,* (but substituting the names of the witnesses in the instant case in place of those in *Melton*), this Court explained that i) detectives normally do not qualify as expert witnesses in the subject matter of witness credibility, ii) except in rare circumstances, expert opinion testimony is *not* admissible for the purpose of bolstering the credibility of another witness, and iii) the subject matter of witness credibility is normally *not* "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

> The instant record does not establish that [Detective Sanchez] is an expert on judging credibility, or on the truthfulness of persons who provide [her] with information in the course of investigations.

> [Detective Sanchez] knew nothing of [Connor's] reputation for veracity. [Detective Sanchez] was able to describe [her] interviews with [Connor and her "other sources"] in detail, leaving the factfinder free to decide [Connor's] credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to [Detective Sanchez] had the essential "ring of truth." The trial court thus erred insofar as it admitted [Detective Sanchez's] testimony to indicate [her] assessment of [Connor's] credibility. (*People v. Melton*, *supra*, 44 Cal.3d at 744-745)

See also, *People v. Smith* (2003) 30 Cal.4th 581, 628; *People v. Anderson* (2001) 25 Cal.4th 543, 576; *People v. Smith* (1989) 214 Cal.App.3d 904, 914-915; *People v. Miron* (1989) 210 Cal.App.3d 580, 583; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39.

The defense's inadmissible opinion or conclusion objection was specific, timely, and proper. Appellant asserts, therefore, that the trial court erred on this basis also when it overruled the defense objection and allowed Detective Sanchez to render her expert opinion that Connor's statements and testimony were independently corroborated by other information obtained during the investigation.

c) Detective Sanchez's testimony consisted of inadmissible hearsay evidence.

If Detective Sanchez had been asked to relate the particular information that her "other sources" had provided her, her response would have included inadmissible hearsay evidence.

Detective Sanchez had *no* personal knowledge of the facts of the Loggins/Beroit murders. What information she did possess consisted of out-of-court oral and written statements by others. If the prosecutor had asked Detective Sanchez what each "other source" had said, the prosecution would have been offering these various out-of-court statements to "prove the truth of the matter

stated."[86] Her testimony as to the content of each out-of-court statement would have constituted inadmissible hearsay. Evid. Code, § 1200(b) and (c).

Likewise, if the prosecutor's question to Detective Sanchez, by its terms, asked her to relate in summary form the contents of the various out-of-court statements provided to her by her "other sources", her response would still have constituted inadmissible hearsay.

The defense's hearsay objection was specific, timely, and proper. Appellant asserts, therefore, that the trial court erred on this basis also when it overruled the defense objection and allowed Detective Sanchez to testify in summary form to inadmissible hearsay.

C. The Trial Court Erred when It Allowed Detective Sanchez to Improperly "Bolster" Connor's Credibility by Testifying that, in her Opinion, Connor's Fears of Retaliation and Concern for his Safety Had Never Gone Away.

1. Introduction.

Carl Connor testified that he feared retaliation by members of the 89 Family Bloods gang against himself, as well as members of his family, if he cooperated with the police and if he testified against the gang members. He testified that he was fearful when he initially spoke with Detective Sanchez on August 15, 1994, and he testified he was still fearful while he was testifying at trial. [RT, 15:3334, 3360-3363, 3381-3385]

Thereafter, the prosecution called Detective Sanchez to further bolster Connor's credibility:

> DDA: How would you describe Mr. Connor's attitude about testifying in this case?

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[86] California Evidence Code § 1200(a). Detective Sanchez's "other source" out-of-court statements would, of necessity, have been offered by the prosecution "to prove the truth of the matter stated" or they would have had no relevance. That is, if Detective Sanchez's "other source" information was not the truth, the fact that Connor's statement was consistent with the "other source" statements would have been meaningless.

ORR: Asked and answered.
CRT: Overruled. Go ahead.
SAN: He didn't want to.
DDA: On the day that he was in court, were you present in court that day?
SAN: Yes.
DDA: Before coming into court, did Mr. Connor make any statement to you about his willingness or unwillingness to testify?
SAN: Yes.
DA: What did he tell you?
SAN: He said I will testify against Fat Rat but not Evil because Evil has too many followers.
DDA: With respect to this particular case, has Mr. Connor's concern about his safety ever gone away to the best of your knowledge?
SAN: No. [RT, 18:3987-8]

The prosecutor's questions impliedly inquired of Detective Sanchez if, in her opinion, Connor's fear of retaliation and concern for his safety had "ever gone away." The relevance, of course, was to bolster the credibility of Connor and provide a reasonable explanation for a) why he waited three years before contacting the police, b) why his testimony differed from his prior statements to the police, and c) why his testimony was truthful (i.e., Connor would not continue to risk his life if he were simply "making up facts.").

2. The Applicable Law.

Appellant respectfully incorporates by reference his discussion of the erroneous introduction of opinion testimony to bolster the credibility of another witness, found at III. B. 1. and 2. in Appellant's Opening Brief, *supra.*

3. Discussion:

a. Detective Sanchez's testimony was inadmissible lay opinion because i) it was not based on her personal knowledge of the underlying facts; ii) it was not "helpful to a clear understanding of [her] testimony"; and c) it was offered for the purpose of bolstering the credibility of witness Carl Connor.

Detective Sanchez obviously had no personal knowledge as to what Connor's *subjective* mental state was at the time he testified. Additionally, any statement by Connor in which he directly stated he was still fearful of retaliation, and any statements by others regarding Connor's state of mind would have been hearsay for the same reasons as expressed previously. Only from Connor's outward manifestations and statements could the detective form an opinion as to his actual *subjective* concerns. Hence, Detective Sanchez' opinion was *not* "rationally based on [her] perception" of the underlying facts, her lay opinion was also *not* admissible. (Evid. Code, §800[a].)[87]

Further, the detective's lay opinion was not "helpful to a clear understanding of [her] testimony." (Evidence Code section 800, subd. (b).) There was *no* indication that the facts on which Detective Sanchez based her opinion regarding Connor's state of mind were "too complex or too subtle for concrete description...." (*People v. Melton* (1988) 44 Cal.3d 713; *People v. Hurlic* (1971) 14 Cal.App.3d 122, 127) California's courts have made it clear that it is the jury's responsibility to draw inferences from facts and form conclusions and opinions from the facts:

> The objection that the testimony should not have been admitted because it was in the form of an opinion or conclusion rests on a misconception concerning the proper function of the so-called opinion rule as it affects testimony of non-experts. (Evid. Code, § 800.) That rule merely requires that witnesses express themselves at the lowest possible level of abstraction. (Citation) Whenever feasible "concluding" should be left to the jury; however, when the details observed, even though recalled, are "too complex or too subtle" for concrete description by the witness, he may state his general

[87] Detective Sanchez could have been asked what Connor said that reflected, directly or indirectly, on his state of mind since it was relevant to his credibility. At that point, however, it would have been for the jury to draw whatever inference it wanted to draw from Connor's our of court statement. The error here was that the prosecutor solicited the fact that Connor had never indicated he was no longer fearful, then asked the detective what her personal belief was regarding Connor's state of mind.

impression. (Citation.) *People v. Hurlic* (1971) 14 Cal.App.3d 122, at 127 (Emphasis added).

Additionally, and as discussed, *supra,* the opinion of a lay witness that a another witness' testimony or prior statements was truthful is not admissible when offered for that purpose. (*People v. Melton* (1988) 44 Cal.3d 713, 744-745; People v. Sergill (1982) 138 Cal. App. 3d 34, 39-40)

D. Detective Sanchez' testimony regarding Connor's receipt of a $25,000 reward for his testimony in the Reco Wilson murder trial that resulted in a conviction was not relevant, and the natural inferences of that testimony were speculative and highly prejudicial to Appellant's right to a fair trial.

1. Introduction.

Carl Connor testified that he received a reward at the conclusion of the Reco Wilson murder trial. He indicated that he received the money in April or May of 1997, just a few months before Appellant's trial began. [RT, 15:3389] On cross-examination, he admitted the amount of the reward was $25,000. [RT, 15:3449]

When Detective Sanchez was subsequently called to testify, she responded to questions by the prosecutor (RT, 15:3386-3390) and the defense (RT, 15:3449) regarding the $25,000 reward received by Connor in the Reco Wilson murder case, and that no reward had been discussed with, or promised to, Connor in exchange for his testimony in the Loggins/Beroit case.[88]

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[88] Because the defense intended to confront Connor with this evidence on cross-examination (RT, 15:3449), the fact that the trial court overruled Appellant's relevance objection and allowed the prosecution to initiate inquiry about the reward during direct examination of Connor (RT, 15:3386-3390) would, although arguably error, probably be deemed "harmless error". Hence, Appellant does not raise that ruling in this appeal. The prosecutor wanted to prove Connor received a reward in a different case, then establish Connor was not expecting a reward in this case; however, he was still testifying truthfully in Appellant's case. Although these questions at that point in the trial were not relevant, the prosecutor's purpose in pursuing this series of cases on direct-exam of Connor was to "inoculate" the

On re-direct examination of Detective Sanchez, the prosecutor pursued the following series of questions:

DDA: Detective, is it common for L.A.P.D. homicide to seek rewards for cases that have remained unsolved for periods of time?
SAN: Absolutely.
DDA: In your experience as an investigator, is it a useful tool?
SAN: Yes.
. . .
DDA: With respect to the issuance of the reward, was the granting of the reward to Mr. Connor contingent upon conviction or upon him testifying in court?
ORR: Irrelevant.
CRT: Overruled.
SAN: Conviction.[89]
DDA: Was that conviction achieved?
SAN: Yes.
DDA: Did Mr. Connor testify in that case?
SAN: Yes. [RT, 18:3991-3992. Emphasis added.]

2. The Applicable Law:

Only relevant evidence is admissible. (Evid. Code, § 350) Relevant evidence is defined as evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." If the credibility of a witness is a "disputed fact", evidence that tends to impeach or support that witness' credibility is relevant. (Evid. Code, § 210)

If the proffered evidence is *not* relevant, the provisions of Evid. Code, §352 are not applicable. However, if the proffered evidence has some relevance, the trial court has the discretion to exclude the relevant evidence "if its probative

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jury ahead of time to this impeachment evidence. It was a trial tactic employed by the prosecutor to minimize the impact of the upcoming defense impeachment. (RT, 15:3386-3389)

[89] Detective Sanchez' testimony at this point regarding the terms and conditions necessary for Connor to receive the $25,000 reward unwittingly provide convicted murderer Reco Wilson with a basis for challenging his conviction pursuant to a writ of *habeas corpus*!

value is substantially outweighed" by the probability of substantial danger of undue prejudice, of confusing the issues, of misleading the jury, or whose admission necessitates an undue consumption of time. (Evid. Code, §352)

3. Discussion:

These questions posed by the prosecutor were simply *not* relevant, and Appellant's objection should have been sustained on that basis.

Both Connor and Detective Sanchez previously testified that there had been no discussions with Connor about his receiving a reward in this case. Connor also testified that he was not expecting to receive a reward in this case. [(RT, 15:3389; 18:3975-3978)] Hence, the fact that it was "common for L.A.P.D. homicide to seek rewards for cases that have remained unsolved for periods of time" had *no* "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of" Appellant's guilt in the deaths of Loggins and Beroit. (See Evid. Code, § 210.) That testimony was not relevant.

Detective Sanchez's opinion that offering financial rewards to individuals was "a useful tool" in solving murder cases was also not relevant because it, too, had *no* "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of" Appellant's guilt in the deaths of Loggins and Beroit. The fact that "Connor testif[ied] in [the Reco Wilson] case" was not relevant for the same reason. Finally, the fact that in the unrelated Reco Wilson case the "granting of the reward to Mr. Connor [had been] contingent upon conviction" also had *no* "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of" Appellant's guilt in the deaths of Loggins and Beroit, and was, accordingly, not relevant. Appellant's objection to this latter testimony was timely, specific, and legally appropriate. Accordingly,

the trial court erred when it overruled Appellant's objection and allowed Detective Sanchez to answer the questions.[90] .

However, after the trial court failed to sustain Appellant's objection, the prosecutor was allowed to *improperly* and *prejudicially* tie Connor's receipt of the reward in the Reco Wilson case to his credibility in Appellant's case. The prosecutor accomplished this when Sanchez was allowed to tell the jury that the $25,000 reward received by Connor was conditioned on the jury convicting Reco Wilson, and since Connor testified in that case, the "Wilson jury" found that Connor had testified truthfully. The *prejudice* suffered by Appellant because of the trial court's erroneous ruling involved the *inferences* that any reasonable juror would have drawn from those facts. That is, a) the "Wilson jury" must have concluded Connor was a credible, truthful witness or the "Wilson jury" would not have convicted Wilson; and b) since Connor was a credible, truthful witness in the Reco Wilson murder case, the jury could be assured that Connor was a credible, truthful witness in Appellant's case, also. Each of these inferences, however, was not based on any fact presented to the jury; each inference was based on speculation.

For example, when a person testifies under oath, there is *no* presumption that his testimony is truthful. Similarly, when Connor testified in the Reco Wilson case, there was no presumption that his testimony was truthful. In Appellant's case, the prosecution presented *no* evidence that Conner testified *truthfully* in the Reco Wilson murder case. The prosecution also presented *no* evidence that the "Wilson jury" concluded Connor was a credible, *truthful* witness in that case. No evidence was presented to explain *why* the "Wilson jury" voted to convict Wilson.

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[90] Appellant asserts that because the trial court erroneously overruled his timely, specific and legally correct relevance objection to one of these questions, it would have been useless for Appellant's counsel to object to each of the other questions. Hence, Appellant argues the lack of an objection on relevance grounds to some of these questions should not be deemed a waiver of the issue on appeal.

Hence, the inference that Connor testified truthfully in the Reco Wilson case because the "Wilson jury" convicted Wilson was simply speculative and improper.

The 2nd inference was also based on speculation. To illustrate, if Connor had *lied* in the Reco Wilson murder case, there would have been no logical inference that he was truthful in the Loggins/Beroit case.[91] *Only* if Appellant's jury concluded that Connor testified truthfully in the Reco Wilson case (i.e., the first inference) would the jury have drawn the inference that Connor was also testifying truthfully in the Loggins/Beroit case. Since the prosecution presented *no evidence* to prove Connor testified truthfully *or untruthfully* in the Reco Wilson case, any inference as to Connor's credibility in Appellant's case based on the fact he testified in the Reco Wilson case was wholly speculative, irrelevant and inadmissible.

Appellant submits that if this Court omits these two speculative and improper inferences from consideration, it becomes rather obvious why the trial court erred when it failed to sustain the defense objections.[92] "On some prior occasion involving some unrelated case, Connor received $25,000 for some unknown reason." Those facts are probative of nothing in Appellant's case. Any inferences drawn from those facts are also not probative of anything in dispute in Appellant's case.

However, when the trial court allowed the jury to hear that the "unrelated case" was a murder case involving a member of Appellant's gang, that Appellant's homeboy (co-defendant Johnson) solicited Reco Wilson to murder the victim, and that the motive for this other murder was to eliminate a witness in still another

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[91] In fact, if that had been the case, the prosecution would never have pursued this line of questions because the jury would have drawn the negative inference that he was probably not telling the truth in the Loggins/Beroit case either.

[92] Since no evidence was presented that Connor testified truthfully in the Reco Wilson case, it could have been argued just as readily to the jury that Connor received $25,000 for committing perjury in the Reco Wilson case. The prosecution obviously would *not* have wanted that inference to be drawn by the jury.

murder committed by another of Appellant's homeboys, the unfair *prejudice* to Appellant was exacerbated significantly. This rather obvious "undue prejudice", Appellant argues, would conceivably have been a sufficient basis pursuant to § 352 to exclude Connor's testimony about the Reco Wilson trial, *except* that if Connor's testimony about the Reco Wilson trial was not relevant, there would have been no probative value to balance against the potential prejudice pursuant to § 352. Therefore, *any* undue prejudice to Appellant would have *substantially* outweighed the non-existent probative value.

Appellant respectfully asserts, therefore, that Connor's testimony regarding the Reco Wilson case and his subsequent receipt of a reward because of Wilson's conviction had no "tendency in reason to prove or disprove any disputed fact" in the instant case. (Evidence Code, § 210).) It was not relevant, and therefore not admissible. (Evid. Code, §§ 350, 351.) It should also have been excluded under the provisions of § 352.

Since Appellant's relevance objection was specific, timely and proper, the trial court erred when it overruled the objection and admitted the testimony.

E. The Erroneous Admission of these Portions of Detective Sanchez' Testimony Was Prejudicial to Appellant under both State and Federal Standards of Review.

1. State Standard of Review.

In determining whether the erroneous admission of portions of Detective Sanchez' testimony was prejudicial to Appellant, the Court must examine the entire record and determine whether it is reasonably probable that a result more favorable to Appellant would have been reached had this evidence not been admitted. [*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Gurule* (2002) 28 Cal.4th 557, 625 [". . . we conclude it is not reasonably probable that the admission of the [evidence] affected the jury's verdict."]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [same]; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [same]. Evid. Code § 353(b).

2. Federal Standard of Review.

Further, this Court has held that if the erroneous admission of evidence "lightens" the prosecution's burden of proof below the "proof beyond a reasonable doubt" standard, admission of such evidence violates the defendant's due process rights under the United States constitution. In *People v. Garceau* (1993) 6 Cal.4th 140, the accused was tried for the murders of Maureen and Telesforo Bautista. The jury was erroneously instructed that it could consider the defendant's prior murder conviction for any purpose, not just "other acts evidence" to prove intent, identity, motive, etc. (See Evid. Code, § 1101[b].). This Court expressed concern that the jury may have improperly considered the evidence "for the purpose of establishing defendant's propensity to commit murder"; that Garceau had a propensity to kill, so he probably killed the Bautista's. (See Evid. Code, § 1101[a].) This Court further explained:

> If the jury drew that inference, the prosecution's burden of proof as to the central issue in the case, the identity of the Bautistas' slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired. [93] (*People v. Garceau* (1993) 6 Cal.4th 140, 186-187.)[94]

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[93] This Court in Garceau did not resolve the issue of whether that particular instructional error "lightened" the prosecution's burden of proof because it concluded under either the *Chapman* or *Watson* standard, the error was harmless.

[94] Cases that have held that the erroneous admission of evidence "lightened" the prosecution's burden of proof and thereby violated the defendant's due process rights include *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246] [admission of an involuntary confession]; *Satterwhite v. Texas* (1988) 486 U.S. 249, [108 S.Ct. 1792, 100 L.Ed.2d 284] [admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause]; *Crane v. Kentucky* (1986) 476 U.S. 683, 691, 106 S.Ct. 2142, 2147, 90 L.Ed.2d 636 [erroneous exclusion of defendant's testimony regarding the circumstances of his confession]; *Delaware v. Van Arsdall,* (1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 [restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause]; *Moore v. Illinois* (1977) 434 U.S. 220, 232, 98 S.Ct. 458, 466, 54 L.Ed.2d 424 [admission of identification evidence in violation of the Sixth Amendment Counsel Clause]; *Brown v. United States* (1973) 411 U.S. 223, 231-232, 93 S.Ct. 1565, 1570-1571, 36 L.Ed.2d 208 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause]; *Milton v. Wainwright* (1972) 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 [confession obtained in

Under these circumstances, the defendant's conviction must be reversed unless the state can establish that the erroneous admission of evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246]; *People v. Garceau* (1993) 6 Cal.4th 140

3. The trial court's errors in admitting portions of Detective Sanchez' testimony were prejudicial and lightened the prosecution's burden of proof.

For Appellant, "the central issue in the case"[95], indeed the *only* material issue in dispute at his trial, was the *identity* of the shooter. There was no dispute as to whether someone murdered Loggins and Beroit that afternoon. There was no dispute as to whether the killer premeditated and deliberated the killings prior to pulling the trigger of the Uzi. Although the defense presented some circumstantial evidence from which it could be inferred that a rival Crip gang member was the shooter,[96] in reality Appellant's defense rested on his ability to undermine the credibility of witnesses Connor, Jelks, and James. All of the major disputed evidentiary battles in this trial pertained to the credibility of the witnesses who linked Appellant (and co-defendant Johnson) to the killings.

Therefore, properly admitted evidence that had any tendency to support or impeach the credibility of Connor was highly probative. At the same time, *erroneously* admitted evidence that *improperly* bolstered Connor's credibility was

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violation of *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 ; *Chambers v. Maroney* (1970) 399 U.S. 42, 52-53, 90 S.Ct. 1975, 1981-1982, 26 L.Ed.2d 419 [admission of evidence obtained in violation of the Fourth Amendment].

[95] *People v. Garceau* (1993) 6 Cal.4th 140, 186-187

[96] Prosecution witness Eulas Wright testified the shooter wore a black Raiders or Oakland Raiders jacket. Defense expert witness Gallipeau testified that during 1991, Crip gang members wore black Raiders or Oakland Raiders jackets, but Blood gang members did not. Galipeau also testified the neighboring Kitchen Crips gang was a hostile rival Crip gang at the time. The inference was that a Kitchen Crip, or some other rival Crip gang member, shot and killed Loggins and Beroit.

highly prejudicial to Appellant. Appellant asserts that Detective Sanchez's erroneously admitted testimony did just that; it *improperly* bolstered Connor's credibility and was, therefore, *highly prejudicial* to Appellant. The following are some of the reasons why Sanchez' inadmissible testimony could readily have influenced the jury in favor of believing Connor, and thereby prejudicing Appellant's right to a fair trial:

- Even though the defense clearly contended that Connor was not present at the murder scene (i.e., Defense Exhibit E indicated he was working at the Don Kott auto dealership that entire day), the prosecution produced no evidence, other than Connor himself, that Connor was even present at the shooting scene that day! Yet Detective Sanchez was convinced Connor told the truth when he said he was present, and she was a respected and experienced police investigator whose entire career was dedicated to serving others. She had no "apparent" motive to fabricate. Hence, as far as the jury would have been concerned, she was one of the few prosecution witnesses whose testimony the jury could reliably believe..

- Detective Sanchez testified that, notwithstanding the extensive nature and scope of the impeachment evidence presented against Connor, it was still her opinion as an experienced and respected police homicide detective that Connor had testified truthfully.

- Based on her improper testimony, the jury could reasonably have decided that Carl Connor had the same motive to lie and to embellish his testimony to please the prosecution in the Reco Wilson murder trial that he had in Appellant's trial. Yet the "Wilson jury" determined that Connor testified truthfully in that case. Why, then, would Connor lie and embellish the truth to please the prosecution in Appellant's case?

- Based on her improper testimony, the jury could reasonably have decided that Carl Connor feared for his life when he testified in the Reco Wilson murder trial just as he was still in fear for his life when he testified in Appellant's trial. Yet the "Wilson jury" determined that Connor testified truthfully in that case. Why, then, would Connor lie in Appellant's case simply because he feared for his life?

- Based on her improper testimony, the jury could reasonably have decided that Carl Connor had the same character trait for truthfulness/untruthfulness when he testified in the Reco Wilson murder trial that he had when he

testified in Appellant's murder trial. The "Wilson jury" determined that Connor testified *truthfully* in that case. Why, then, would Connor testify *untruthfully* in Appellant's case?

- Based on her improper testimony, Appellant's jury could reasonably have concluded that Connor testified truthfully in the Wilson case. Why, then would Connor continue to jeopardize his life as a witness in Appellant's case if his testimony against another member of the same gang was false? Most people do not intentionally place their lives in jeopardy unless there is a good reason to do so (i.e., self defense, defense of others, in times of war, etc.). It would be counter-intuitive for a witness, who was in fear of deadly retaliation when he testified truthfully, to thereafter testify falsely while facing the same threat of retaliation. Hence, "logic" would persuade the jury to conclude that Connor testified truthfully in Appellant's case because he previously testified truthfully in the Wilson case.

But perhaps the most egregious and prejudicial aspect of her testimony regarding Connor's credibility was the following testimony:

> Detective Sanchez testified that even though the defense had presented a substantial amount of evidence that suggested Connor may *not* have testified truthfully, she was convinced he testified truthfully because she was able to *corroborate* his testimony by comparing it with other information that had been independently gathered by detectives from various other sources during the investigation.

The jury was never told what information Detective Sanchez possessed that "corroborated" what Connor told her. This question and its answer created the very prejudicial scenario in which the jury would assume that Detective Sanchez possessed *additional* information that corroborated the credibility of Connor; evidence of which the jury was not aware. This *improper* inference drawing process is the very basis, analogy-wise, for the evidentiary rule that prohibits a prosecutor from rendering her opinion as to whether a particular witness told the truth or not!

> A prosecutor may not express a personal opinion or belief in a defendant's guilt "where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." (Citation) *People v.*

Adcox (1988) 47 Cal.3d 207, 236. See also *People v. Fauber* (1992) 2 Cal.4th 792, 822.

This conclusion testified to by Detective Sanchez also improperly implied that the faith and integrity of the Los Angeles Police Department, as well as that of the Los Angeles County District Attorney's office, were pledged in support of the veracity of Connor's testimony. See *People v. Adams* (1960) 182 Cal.App.2d 27, 34-35.

For all of these reasons, Appellant asserts that Detective Sanchez's inadmissible testimony significantly prejudiced Appellant's right to a fair trial, regardless of the standard of review.

4. The prosecutor's closing argument exacerbated the prejudicial nature of Detective Sanchez's testimony.

Prosecutors are viewed with special regard by the jury and, therefore, improper statements by the prosecutor may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*People v. Bolton* (1979) 23 Cal.3d 208, 213) Similarly, the United States Court of Appeal observed in *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399[97], that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

With these judicial comments in mind, the prosecutor's closing argument took on added significance because the battle over the credibility of Connor continued unabated. The prosecutor vigorously argued to the jury that Connor testified truthfully; that the jury could justify convicting Appellant based on Connor's testimony. She had Connor in mind when she initially told the jury that they should not reject his testimony because he "didn't testify perfectly." [RT, 25:5115]

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[97] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

Shortly thereafter, she urged the jury to convict Appellant because "he was identified by Carl Connor as the shooter who had an Uzi." [RT, 25:5117-5118] In other words, the prosecutor clearly argued that Connor was, in fact, present at the scene at the time of the murders.

The prosecutor zealously argued that Connor told the truth during his initial statement to the police, he testified truthfully before the grand jury, and his trial testimony was truthful with one very "transparent, yet "understandable" exception. Because co-defendant Johnson was apparently able to have someone "school" Connor, Connor "categorically refuse[d] to testify against Mr. Johnson." [RT, 25:5131-5135, 5140-5141] She also *vouched* for Connor's credibility when she argued that Connor's original statement to the detectives, like those of the other witnesses, was truthful, just as his testimony was truthful:

> DDA: I submit to you that in the context of this case, given the discussions that each of these witnesses provided you with respect to their state of mind and with respect to where they were at the time that they made those statements that those statements, like their testimony in court, is credible, valuable and absolutely compelling evidence of the guilt of Mr. Allen and Mr. Johnson. [RT, 25:5139]

The prosecutor concluded her closing argument by again addressing the credibility of the witnesses, including Connor: "There is *compelling evidence* from *each* of the witnesses of the guilt of the defendants, Mr. Allen and Mr. Johnson." [RT, 25:5143. Emphasis added.] In effect, she argued there was no question but that Connor testified truthfully. His testimony was "compelling." She concluded her closing argument by stating "when you put the statements of each of these witnesses in their appropriate place, I'm confident that you will render a verdict of guilty as to all counts,...." [RT, 25:5143]

The prosecutor's improper argument to a jury can, of itself, be sufficient to violate a defendant's due process right.

> We note again the prosecutor's repeated references in closing argument to the false evidence. Improprieties in closing arguments

> can, themselves, violate due process. *Chapman* itself was such a case. 386 U.S. at 18 [prosecutor's urging improper inference of guilt from defendant's decision not to take the stand held not harmless error]. The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence. E.g., *Miller v. Pate* (1967) 386 U.S. 1, 6 [decrying prosecutor's "consistent and repeated misrepresentation" that paint stains were actually blood]. Our court's description of the effect of the prosecutor's argument in *United States v. Brown* applies equally to this case: "Despite the other evidence against [the defendant], the continued references to [the inadmissible evidence] at the Government's closing arguments make it impossible for us to say it is more likely than not that [it] did not affect the jury's verdict." (*Brown v. Borg* (1991) 951 F.2d 1011.)

In the instant case, the prosecutor's position throughout the entire trial was consistent and adamant: Carl Connor had consistently told the truth, and the jury could rely on this in their deliberations. She *never* conceded that Connor may have been "mistaken" at one point or another, much less that he ever "intentionally" changed his story. Yet, the prosecutor was fully aware that significant portions of Connor's story had changed. She knew that each of his various versions could not all be true.

5. <u>Conclusion:</u>

Because Connor's credibility was undermined so extensively, Appellant asserts his testimony by itself would *not* have been sufficiently persuasive to convince all twelve jurors that Appellant was the shooter "beyond a reasonable doubt." In fact, the jury may have completely discounted Connor and his testimony because of the nature and scope of the impeachment evidence. Certainly it can be inferred from the record on appeal that the jury discussed Connor's credibility extensively, perhaps for as much as two full days during the deliberations.[98] However, when

[98] RT, 26:5246-5259 suggests the jury began deliberations by discussing the testimony of Freddie Jelks. Throughout the third full day of deliberations, the jury's discussions appear to have centered on the credibility of Carl Connor. When the jury left for the day, they gave the bailiff a note with a question

the trial court allowed the *inadmissible* portions of Detective Sanchez' testimony to be presented to the jury, the jury was given *additional and very persuasive reasons* to conclude that Connor had, in fact, testified truthfully; reasons that the defense was *unable* to rebut.

Finally, Appellant argues the trial court's erroneous admission of evidence was not harmless. Conceivably, Respondent could argue that Connor's entire testimony could be removed from the case and there would still be sufficient evidence to prove beyond a reasonable doubt that Appellant was the shooter. However, the credibility of both Jelks and James was extremely suspect; they were both arguably witnesses who were seeking favorable treatment from law enforcement on their own cases in exchange for their "information"[99], they were witnesses who waited three years before "deciding" to tell detectives what they "knew" about the murders, etc. Further, because Appellant insists he was also deprived of his right under both state and federal law to confront and adequately

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regarding Connor and whether he received any reward related to this case. The following day, the court and counsel discussed for over an hour how to respond to the question. During this time, the jury continued deliberating. Portions of the testimony of Connor and Detective Sanchez regarding the reward were then read-back to the jury. There was further discussion between the court and the jury regarding rewards. [RT, 26:5262-5276] The jury appears to have continued discussing Connor's testimony because at the end of the 4th full day of deliberations, jurors #4 and #5 initiated their complaint that juror #11 was not participating in discussions. According to jurors #4 and #5, one of juror #11's comments pertained to Connor's testimony regarding his Don Kott time card. [RT, 26:5276, 5282-5286, 5350, etc.]

[99] California Penal Code § 1127(b) and CALJIC 3.20 explain what should be obvious to every juror concerning an "in-custody informant", or any other witness similarly situated, when they talk to the police, then testify:

> "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case."

cross-examine Freddie Jelks and Marcellus James[100], their testimony should *not* be considered by this Court in determining whether the trial court's errors in admitting portions of Detective Sanchez's testimony was prejudicial when applying either the *Watson* or *Chapman* standard on appeal.

Appellant respectfully concludes this argument by urging this Court to find that "it [would have been] reasonably probable that a result more favorable to Appellant would have been reached had this evidence (Detective Sanchez's improper testimony) not been admitted." *People v. Watson* (1956) 46 Cal.2d 818, 836. And under the *Chapman* standard, Respondent would not be able to establish "beyond a reasonable doubt" that the result of Appellant's trial would have been the same if the trial court had not admitted the erroneous portions of Detective Sanchez's testimony. *Chapman v. California* (1967) 386 U.S. 18, 24.

Appellant respectfully urges this Court reverse his convictions and sentence of death on this basis.

IV.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Freddie Jelks regarding details of his initial interrogation by the police, as well as the details of his pending murder case. The trial court's error denied Appellant his Fifth, Sixth and Fourteenth Amendment rights to confront and cross-examine his accusers, as well as to present a defense. The errors were prejudicial, and they require reversal of Appellant's convictions and sentence of death.

A. Introduction.

Freddie Jelks was a key prosecution witness. He claimed he was present at the Johnson house when Appellant agreed to "serve" Loggins and Beroit. He insisted he saw co-defendant Johnson obtain a gun from the rear yard, give it to Appellant, then tell Appellant how to accomplish the killings. Jelks maintained he saw Appellant leave with Uzi in hand, heard shots minutes later, then saw

[100] See Issues IV through X of Appellant's Opening Brief, *infra*.

Appellant return to the Johnson house breathing heavily and perspiring. Jelks testified that a couple days later, Appellant admitted he shot and killed Loggins and Beroit. (See the Statement of Facts for additional detail.)

Jelks was one of only three prosecution witnesses at trial who provided evidence that Appellant was the shooter. As such, he was one of the legs of the prosecution's 3-legged stool upon which the prosecution's entire case rested.

Prior to Jelks' testimony, however, the prosecutor brought a motion *in limine* and requested the trial judge foreclose defense cross-examination of Jelks regarding the details of the interrogation involving his pending case in which he had been indicted for the murder of victim Tyrone Mosley. It was during this same interrogation that Jelks, for the first time, provided information regarding the Loggins/Beroit murders. The prosecutor explained that Jelks might assert his 5th Amendment right and refuse to testify if the defense was allowed to question him as to the details of his pending murder case. Further, the prosecutor related that Jelks' indicted co-defendant in the Mosley murder was Cleamon Johnson, Appellant's co-defendant in the instant case. The prosecutor asserted that if Jelks were to be questioned regarding the interrogation and/or the facts of his case, Cleamon Johnson's name might be mentioned, much to the unfair prejudice of co-defendant Johnson.

Appellant asserts that the following additional information must be considered to gain an understanding of the significance of the trial court's ruling as it pertained to the credibility of Jelks, as well as the credibility of Marcellus James and Detectives McCartin and Sanchez.[101]

1. <u>The facts known to the prosecution regarding Jelks' involvement in the 97 East Coast Crips murder (i.e., the Mosley murder).</u>

a. <u>The Mosley murder.</u>

[101] The following additional information taken from the appellate record pertains not only to Issue IV, but also to Issues V through X, *infra*.

On September 14, 1991, about five weeks after the Loggins/Beroit murders, victim Tyrone Mosley, a member of the 97 East Coast Crips gang, was shot and killed in a drive-by gang-related shooting while at a party on 97th Street near Central Avenue in Los Angeles. Two other individuals were seriously wounded in the attack. Witnesses reported that during this evening, members and friends of the 97 East Coast Crips gang were partying in their neighborhood. A car drove slowly down the street in front of the party, then occupants of the car began firing into the crowd. There were three people in the car from which the shots were fired; the driver, as well as two people who were seated on the passenger side of the car that faced the party. One person (Tyrone Mosley) was killed and two others were seriously wounded. Crime scene investigators located .45 caliber shall casings at the scene, as well as a .380 caliber shell casing. [RT, 31:6227-6247 (Det. Johnson); 6264-6285 (Kim Coleman); 6304-6309, 6515-6540, People's Exhibit #84 and 84A at 6524 (Det. McCartin); 6313-6373, (Keith Williams).][102]

b. <u>The February 27, 1992 interview of Marcellus James regarding Jelks' involvement in the Mosley murder:</u>

On February 27, 1992 Marcellus James, an in-custody informant, told detectives what he knew about the September 14, 1991 Mosley murder. [See references to this interview in the Appellate Record at RT, 31:6199, 6202, 6210, 6240-6243[103], 6247; CT SuppIVA, 1:124-125][104]

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[102] Citations are from prosecution evidence offered against co-defendant Johnson in the penalty phase of the trial.

[103] During his penalty phase testimony, Det. Johnson indicated his memory of the James interview in February 1992 was not good. The prosecutor referred to the alleged existence of a tape recording of the interview, as well as a handwritten statement of the interview, then without showing the witness either writing, or marking either writing as a court exhibit, she simply asked the detective the leading question: "And did he identify an individual by the name of Freddie – F.M. – as the driver of the car?" Johnson responded, "Yes."

[104] To further illustrate that Detective Johnson appeared confused when he testified at the penalty phase, on cross-examination he was shown a document to see if that refreshed his recollection as to the date that he interviewed James. Although the record is not clear if reading that document refreshed his recollection or if he simply read the date on the document, the detectives said "*September* 27, 2002, 1700 hours." [RT, 31:6246]

c. The July 11, 1994 interview of Marcellus James regarding Jelks' involvement in the Mosley murder:

On July 11, 1994, detectives re-interviewed James regarding the September 14, 1991 Mosley murder. Detective Tapia told James at the beginning of that interview that he and Detective McCartin "want to go over that statement that you [James] made" when "you [James] talked to the police back on February 27, 1992." [Clerk's Transcript Supplemental IVA, volume 1, pages 124-125; hereafter, abbreviated as CT SuppIVA, 1:124-125.] James identified photographs of Cleamon Johnson as "Evil" and Freddie Jelks as "FM" at the beginning of the interview. [CT SuppIVA, 1:128-129]

James told the detectives that he was standing with others in front of Johnson's house between 9:00 and 11:00 that evening. [CT SuppIVA, 1:125-128, 132, 136] He observed Johnson ("Evil"), Jelks ("FM") and "Jelly Rock" get into a black, 4-door Mazda Protégé. [CT SuppIVA, 1:129, 131] Johnson had a .45 caliber handgun and Jelks had a .38 caliber revolver. "Jelly Rock" was the driver, Jelks sat in the right front seat, and Johnson sat in the rear seat. [1:130-131] James said the three were leaving to "[k]ill somebody" from the "9-7 East Coast Crips" gang because "one of their friends got shot." They told James it was a "perfect opportunity" because the "9-7's" were having a block party. [CT SuppIVA, 1:133-134] "And then they went and did what they had to do and came back," James told the detectives. [CT SuppIVA, 1:136]

James told the detectives he heard no gun shots because he was standing on 88th Street and the "9-7's" party was "way down there on 97th where they was." [CT SuppIVA, 1:136]

James explained that they returned about 10 minutes later. They were in the same positions in the Mazda as when they left. That is, "Jelly Rock" was still driving, Jelks was still seated in the right front passenger seat, and Johnson was in the rear seat on the driver's side. [CT SuppIVA, 1:137, 139-140]

James related to the detectives that both Johnson and Jelks talked about what happened after they returned. The driver ("Jelly Rock") "didn't say too much." [CT Supp IVA, 1:137-139] "When they got there they flicked the light[s] on and off to let them know they –they was perpetrated like they was their homies. And then when they got up on them, they shot them." [CT SuppIVA, 1:136-137] According to James, they said that three people got shot.[105] [CT SuppIVA, 1:138]

d. <u>The September 21, 1994 interview of Marcellus James regarding Jelks' involvement in the Mosley murder</u>:

Marcellus James testified during the guilt phase of Appellant's trial, and James was re-called to testify against co-defendant Johnson in the penalty phase of the trial. During the penalty phase, James provided information regarding his interview with the police on September 21, 1994.

James testified that Detective McCartin, the same investigator who interviewed him on July 11, 1994, showed him some photographs during the September 21, 1994 interview. James said he identified photos of "Evil" [co-defendant Johnson] and "FM" [Freddie Jelks], whom he knew as "Freddie Mac."[RT, 31:6203] James then testified regarding the following People's Exhibits:

- People's #59, a photo ID report, and People's #60, a 6-photo line-up display: James testified these photos were shown to him on September 21, 1994. He admitted that he selected a photo from #60, identified the photo as "Jelly Rock", then wrote "*Jelly Rock is the person that I saw driving the black car when Evil and F.M. did the drive by on 97 East Coast.*" [RT, 31:6205-6206 (Emphasis added)]

- People's 61, a photo ID report, and People's 62, a photocopy of a 16-photo line-up display: James testified these photos were shown to him on September 21, 1994. James said he identified a photo of "F.M." (Jelks) from this larger display and wrote, *"I saw him get in the black car with the .38."* [RT, 31:6205-6207 (Emphasis added)]

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[105] The transcript is ambiguous as to who shot at the victims. Detective McCartin's response to James' "(Untranslatable)" answer suggests that both Johnson and Jelks admitting shooting at the victims. [CT SuppIVA, 1:138]

- People's 61, a photo ID report, and People's 62, a photocopy of a 16-photo line-up display: James testified these photos were shown to him on September 21, 1994. James identified another photo from this larger display, identified it as "Evil" [co-defendant Johnson], and told the police that he "saw Evil get in the black car with the .45 to do the drive-by on 97 East Coast" [i.e., the Mosley murder]. [RT, 31:6205-6207]

2. The interrogation of Jelks on December 6, 1994 regarding his involvement in the Mosley murder (i.e., the 97 East Coast Crips murder), as well as the Loggins/Beroit murders.

On December 6, 1994, the *same* two detectives who interviewed Marcellus James on July 11, 1994 and on September 21, 1994 interrogated Freddie Jelks about his involvement in the September 14, 1991 97 East Coast Crips murder involving victim Tyrone Mosley. [CT SuppIV, 4:833-836]

a. Jelks' Story #1: He knew *nothing* about the Mosley murder.

When the detectives first asked Jelks about the Mosley murder [CT Supp IV, 4:871] Jelks' initial story was he knew nothing about the Mosley murder. [CT Supp IV, 4:871] The detectives told Jelks that witnesses they interviewed had identified Jelks' photograph. The detectives told Jelks: "They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay?" [CT Supp IV, 4:872; see also 4:873] Jelks stuck with Story #1, however, and continued to deny any knowledge of the Mosley murder. [CT Supp IV, 4:873]

At this point, the detectives told Jelks what was going to happen because he insisted on denying he was involved in the Mosley murder. He would ultimately be "booked for murder" in the Mosley case. Detective McCartin then reminded Jelks of his desire to be with his young children for Christmas, the rather obvious inference being that if Jelks admitted to being the driver of the car in the Mosley drive-by murder, Jelks might not be arrested or charged with that murder. Significantly, the detective added that if Jelks admitted being "*the driver*" (rather

than admitting to being one of the shooters) in the Mosley murder, then the detectives would know Jelks was telling the "*truth*" and was "*cooperating*" with them because he was "*giving us information that we want to hear . . . .*":

McC[106]: Anyway, well, we have people that have picked you out. Picked you out on a – in a murder case. They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay? So, what we want to know is what happened?

FJ: I don't know nothing about that.

McC: Because what's going to happen is ultimately you're going to get booked for murder, okay? Because that case is still open. Nobody's been booked for that yet.

FJ: Uh-huh.

McC: And I know you said you want to go – you want to be home for Christmas, right?

FJ: Right. (Untranslatable)

McC: You want to see your family?

FJ: Right.

McC: So we need to hear what happened out there. We got witnesses that have come out, looked through all the stuff, and identified you, as well as other people.

TAP[107]: Freddie –

McC: And I'm not going to tell you who they were. I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear, okay? [CT SuppIV, 4:872-874 (Em;phases added)]

The "truth", according to what Jelks heard the detective say, was synonymous with "what we want to hear" about the Mosley case; and only if Jelks told them "what they wanted to hear" would he be "cooperating" with the detectives. The inherent danger with Detective McCartin's interrogation tactic was now apparent: These same two detectives had previously interviewed the witness (Marcellus James) who identified Jelks as being in the car that was used to commit the Mosley drive-by murder. James explained to these same two detectives on two

[106] "McC" is Detective McCartin.
[107] "TAP" is Detective Tapia.

separate occasions, however, that Jelks was *not* the driver; rather, Jelks was sitting in the right front passenger seat with a .38 caliber handgun as the three assailants left for, and returned from, the drive-by shooting. These same detectives were aware that .45 and .38 caliber shell casings had been recovered at the murder scene, suggesting there had been two separate shooters in the assailant's car.! What the detectives "wanted to hear" from Jelks was *not* the "truth", and they knew it. Yet, only by admitting a falsehood would Jelks demonstrate he was "cooperating" with the detectives.

Both detectives then continued to use this interrogation tactic on Jelks, apparently thinking that it would be easier to get Jelks to admit he was merely the driver in the Mosley drive-by shooting, rather than to admit he was one of the shooters:

> McC: We got witnesses that have come out, looked through all the stuff, and identified you, as well as other people. And I'm not going to tell you who they were. I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear, okay?
> TAP: I don't think you were the shooter, Freddie.
> McC: Okay. Now, I don't think that. Otherwise we wouldn't be messing with you.
> TAP: But Freddie, I know who the shooter was. At least I think I know who it was. But I wanted your version, Freddie. [CT SuppIV, 4:873-874 (Emphasis added)]

Almost as an afterthought, the detectives also inquired of Jelks as to how many "strikes" or felony convictions he already had, thereby further implying that it would be in Jelks' best interest to "cooperate" with them. [CT SuppIV, 4:874-875]

But Jelks continued to stick with his Story #1, at least for the moment. Suddenly, Detective Tapia told Detective McCartin that they might as well end the interrogation because Jelks was unwilling to cooperate, present the Mosley murder case to the district attorney's office, and arrest and book Jelks right then. With that, Jelks panicked.

TAP: Well, why don't we – let's just send this in, Brian [McCartin]. And we'll do our thing. And we'll just book you [Jelks].
FJ: Wait a minute, man. Wait a minute.
TAP: Okay?
McC: Is that what you want?
FJ: Wait a minute, man. I don't – I don't – don't -- don't do my life like that, man.
McC; We need the truth.
FJ: Don't do my life like that.
McC: We're not fucking around here, Freddie.
TAP: Talk to me, Freddie.
McC: We're not missing around. There's people that are dead out there. And we're trying to figure this out and goddamn clear them. And, so, you know, if you end up getting steam-rolled, and you're involved, that's the breaks. If you want to cooperate and clear this shit up for us, then let's hear it. We don't have time to listen to your bullshit. [CT SuppIV, 4:876-877 (Emphasis added)]

Once again, the detectives told Jelks that they wanted to hear the "truth", even though they knew that what they insisted Jelks admit to was *not* the truth. But, by admitting a falsehood – that Jelks was the driver of the car – he would demonstrate to the detectives that he was "cooperating" with them.

In spite of their urging, Jelks continued to deny any involvement in the Mosley murder. He told the detectives he didn't want his life ruined by going to jail for a crime he didn't commit. "God as my witness, I haven't never killed nobody, man," he exclaimed. Detective Tapia reminded Jelks that "[l]ike I said, I don't think you were the shooter." Jelks responded to them, however, by stating that even though he was not involved in the Mosley murder, he was willing to help them clear "stacks of files" as long as they didn't arrest him and would let him go home. [CT SuppIV, 4:875-880] This was a significant concession, Jelks told them, because he knew people that had been killed merely for talking to the police. Jelks added that if he talked to the detectives about 89 Family crimes, his life would be in danger. "I've seen OG's come down and shoot." [CT SuppIV, 4:880-883]] A few minutes later, Jelks added, "I – I can't even do this to my friends. I

can't turn my back on them guys over there." When asked why, Jelks retorted, "Because they going to kill me." [CT SuppIV, 4:887]

The interrogation continued. Jelks tried to exact a promise from the detectives that if he talked to them regarding the Mosley murder, he would be allowed to go home that day. The detectives responded by stating that if Jelks told them the "truth", they would allow him to go home that day. The detectives added that they would work with the district attorney to keep Jelks out of jail. [CT SuppIV, 4:888-889] In response, Jelks re-emphasized he was *not* involved in the Mosley murder, that the witnesses were *not* telling the truth, and that the witnesses identified Jelks simply because they thought he was a "weak" individual [CT SuppIV, 4:889-893]

The detectives then brought Jelks back to the 97 East Coast murder involving Mosley. They reassured him that neither of them thought he was the shooter; that if he was "just in the car or whatever, that's okay." [CT SuppIV, 4:895] With that, Jelks finally abandoned his Story #1.

b. Jelks' Story #2: All he knew about the Mosley murder was what he had heard others say about it.

Jelks then admitted to the detectives he had heard about the Mosley murder, but it was all hearsay. When the detectives accused Jelks of not being truthful, Jelks insisted "I'm telling you the truth, man." [CT SuppIV, 4:896-897] The detectives applied more pressure on Jelks, telling him they knew he had been there.

c. Jelks' Story #3: He had been present at Evil's house that night, but he left to go see a girl before the assailants (Johnson, "Jelly Rock" and "Little Evil" drove off to do the shooting.

Jelks then came up with Story #3, and tried to make it "fit" what the detectives had told him. Jelks knew the detectives thought he was present because that was what the witnesses had apparently told them. Jelks told the detectives

that he and a girl friend were going to meet that night. Jelks was at Johnson's house prior to going over to the girl friend's house. Jelks said "Little Evil" and "Jelly Rock" drove up and confirmed there was a party in the 97 East Coast Crips territory. Jelks said he saw co-defendant Johnson climb into the car and "they left. I got in my car. I went down to the girl house who lived on Colden. When I come back – when I got ready to go up Avalon, I heard the – some shooting, you know, I went back to my mother house. By the time I got to my mother house, it was – they was — Evil and them was back." [CT SuppIV, 4:898-902]

The detectives again accused Jelks of continuing to lie. The detectives then *lied* to Jelks in an attempt to get Jelks to at least admit he was involved in the Mosley murder. They told Jelks the witnesses said that Jelks "drove the car down there to 9-7 hood." [CT SuppIV, 4:903] The detectives told Jelks they could prove he was in the car, that he was the *driver*. Detective McCartin then suggested to Jelks that if he was "just driving the car", then to continue lying "was just going to dig a deeper grave for yourself." The detectives thereafter admonished Jelks to "be honest" with them. [CT SuppIV, 4:904]

d. Jelks' Story #4: Jelks "agreed" with the detectives that he was "the driver" of the car.

Jelks knew at that time it was in his best interests to admit to the detectives what they wanted to hear. It did not matter whether it was the truth or not. The detectives had said they believed he was the driver, not one of the shooters. The detectives had said being the *driver* was *not* as serious as being one of the shooters. So Jelks "admitted" he was the driver of the car. [CT SuppIV, 4:906-907]

However, the detectives told Jelks that he had to continue "cooperating" with them by telling them what he "knew" about other criminal homicide cases before they decided if they would allow him to go home for Christmas. One of these cases they eventually discussed was the Loggins/Beroit murders. [See

Argument VI, *infra,* for numerous citations from Jelks' interrogation by McCartin and Tapia.]

Subsequently, the detectives told Jelks they "knew" he was "cooperating" with them, and they would tell the district attorney about his cooperation. They could give him no promises as to whether the district attorney would file murder charges against Jelks, but they would convey that Jelks was "cooperating." They then allowed Jelks to return home. [[See Argument VI, *infra,* for numerous citations from Jelks' interrogation by McCartin and Tapia.]

3. On December 16, 1994 Jelks testified before the grand jury about the involvement of Appellant and co-defendant Johnson in the Loggins/Beroit murders. [CT, 1:68-98]

4. Jelks' indictment and arrest for his involvement in the 97 East Coast Crips murder case (i.e., the Mosley murder).

Jelks and co defendant Johnson were indicted for the Mosley murder on August 14, 1995 [RT, 16:3590-3591] or August 17, 1995 [CT, 2:329; RT, 16:3497], and thereafter arrested.

5. The prosecution's motion *in limine* to limit the scope of cross-examination of Jelks during the jury trial of Appellant and co-defendant Johnson.

Prior to Jelks testimony, the prosecution requested a hearing outside the presence of the jury [RT, 16:3495]. The prosecution advised the court that Jelks was facing a murder charge in a pending case in which Appellant's co-defendant, Cleamon Johnson, was a charged co-defendant! Jelks and Johnson had been indicted for this murder on August 17, 1995. [[CT, 2:329; RT, 16:3497]. The prosecutor stated, however, that Jelks was "willing" to testify in the instant case [RT, 16:3496-7].

According to the prosecution, Jelks and Johnson were facing a murder charge for killing victim Tyrone Mosley, a "97 East Coast Crip." The prosecutor represented to the court that Jelks had admitted to being the driver in this drive-by shooting, and co-defendant Johnson was alleged to have been one of the shooters

[RT, 16:3496-3497]. It occurred on September 14, 1991 [CT, 2:329; RT, 16:3497, 3501], approximately five weeks after the Loggins/Beroit murders. The prosecution requested an *in limine* ruling by the court regarding the scope of cross-examination by the defense as to the facts of Jelks' pending murder case. The prosecution was concerned that if the defense were allowed to ask about the facts of Jelks' pending murder case, he would assert his 5th Amendment right not to incriminate himself [RT, 16:3496-3511].[108]

Attorneys for Appellant and Johnson advised the court that they both wanted to question Jelks on cross-examination about his pending murder case in an attempt to impeach him. [RT, 16:3498+] However, counsel for co-defendant Johnson intended to object to any reference to Johnson as being the charged co-defendant in Jelks' pending murder case [RT, 16:3507-8]. The court wanted to read the lengthy transcript of Jelks' interrogation by the police before it ruled on the matter, but the court did not want to keep the jury waiting any longer. Hence, the court indicated it would rule at the conclusion of direct examination. [RT, 16:3509-11] Jelks then began to testify on direct examination. [RT, 16:3511-82]

6. The Prosecutor's Intentional Failure to Disclose Relevant Information to the Court.

At an ensuing break the court indicated it had read the rather lengthy transcript of Jelks' taped statement to the police. The court inquired if there was any other evidence that linked Jelks to the Mosley murder. [RT, 16:3584] The prosecutor informed the court that another witness had identified both Jelks and Johnson as being involved, and that witness was one of the witnesses in the instant case whose name was being withheld from the defense for his protection. That

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[108] Attorney Larry Forbes, who was not present but had been in contact with the prosecution, represented Jelks in his pending murder case. Attorney Forbes had advised the prosecution how he could be located, if his presence were needed [RT, 16:3496]. Based on the court's ultimate ruling on the issue, attorney Forbes was apparently not needed to be present to advise his client as to his pending murder case.

individual had, however, testified before the grand jury in the instant case. [RT, 16:3583-6][109]

The prosecutor, however, conspicuously *omitted* any reference to the *content* of that witness' (Marcellus James') statements regarding the nature of Jelks' participation in the Mosley murder. She failed to tell the court that, if James were to be believed, then Jelks was still *lying* to the detectives when he agreed with their statements that he was *only* the driver of the car in the drive-by shooting. In other words, Jelks' Story #4 was simply another lie as Jelks struggled to tell the police only what he had to in his effort to avoid being arrested that day. The prosecutor did affirmatively intimate, however, that Jelks told the detectives the truth when she told the court that the detectives said he could go home if he (Jelks) told them the truth, and they eventually did let him go home. [RT, 16:3587-3589]

Furthermore, on five (5) additional and separate occasions, the trial court's comments made it obvious that its ruling was based on its *misunderstanding* that Jelks had been truthful when he confessed to being the driver in the Mosley drive-by murder. At no time did the prosecutor make any effort to correct the court's erroneous understanding. Had she done so, the court's ruling would undoubtedly have been different. (The issue of Prosecutorial Misconduct regarding the prosecutor's failure to inform the court of this falsehood is addressed in detail in Appellant's Issue V, *infra*, in this Opening Brief.)

7. The Trial Court's Ruling that Limited the Scope of Defense Cross-Examination of Jelks.

The court had an extended discussion with counsel. [RT, 16:3584-3617] Practically all of the discussion was between the court, the prosecutor, and counsel for co-defendant Johnson. The discussion focused on the scope of cross-examination regarding the facts of Jelks' pending murder case and the

[109] The individual the court and the prosecutor were discussing was subsequently determined to be Marcellus James.

consequences of co-defendant Johnson's name being mentioned. [RT, 16:3584-3612].[110] Appellant did briefly and strenuously object to any limitation the court might impose on his right to cross-examine Jelks.[111] [RT, 16:3601-3603] Appellant also reminded the court of his motion to sever based on prejudicial association that the court earlier had denied [RT, 16:3601].

The trial court ruled the defense could ask Jelks on cross-examination if Jelks' pending case involved a potential life sentence if he were to be convicted [RT, 16:3609]; if Jelks had been made any offers by the government regarding his case [RT, 16:3609]; if Jelks had any expectations that his testimony would assist him in his pending case [RT, 16:3609]; and if Jelks had previously been "convicted" of juvenile and misdemeanor offenses. The defense could also ask Jelks if had had been previously convicted of possession of cocaine, a felony. [RT, 16:3617-3619] Finally, the court also ruled the defense could inquire of Jelks about certain statements made by the detectives to Jelks early in the interrogation that may have caused Jelks to respond in the manner he did. [RT, 16:3610];

Continuing to discuss the matter with counsel for co-defendant Johnson, the court gave Johnson's attorney a "choice":

> If you [counsel for Johnson] want to get into the nature of the case, I'll allow you to, but then we are going to get into the facts of the case as well, and I'll allow him [Jelks] to testify to the jury as to what the facts were, or at least I'll allow a tape to be played to the jury, assuming he'd want to invoke his right against self-incrimination. We'd determine that, and assuming so, then the court would allow the jury to hear the facts of that case, and his [Jelks'] involvement, and your client's [co-defendant Johnson's] involvement.[112] [RT, 16:3609]

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[110] It was as though Mr. Orr (counsel for Appellant) was not even present!

[111] Specifically, Mr. Orr stated: "I think it's an outrageous decision by the court"

[112] This particular comment by the trial court is "troubling." If Jelks refused to testify, his prior statement to the detectives on December 6, 1994 would have been inadmissible hearsay. This supports Appellant's assertion that the court's comments to Mr. Lasting were intended to be a "veiled threat" to dissuade Mr. Lasting from pursuing the issue.

Shortly thereafter, the court responded to an additional query by Appellant's attorney by stating:

> No. We are not going to talk about the fact it's [Jelks' pending case] a murder case. Because if we do, if we discuss the facts – I told you what I'm going to let you have, which is that he's got a pending case wherein he is facing a potential life sentence. If anybody wants to elicit that it's a murder case, go ahead and do it, but then what we're going to do is we're going to hear the murder case -- and how he found himself in the situation of facing that murder case. And the way he did was to confess his involvement as the driver of the car in which Mr. Johnson allegedly acted as a shooter and passenger. [RT, 16:3611 (Emphasis added)]

Obviously, counsel for co-defendant Johnson did not want to risk inquiring into Jelks' pending case based on this comment and ruling by the court. And it was just as clear that Appellant would not be allowed to delve into that area on cross-examination, although counsel for Appellant tried. [RT, 16:3644-3645]

The trial court *never did* address Appellant's objection based on Appellant's right to confront and cross-examine Jelks regarding the facts of his (Jelks') pending case.

B. The Applicable Law.

1. Federal Constitutional Law.

This Court explained in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137:

> The Sixth Amendment guarantees the right of an accused in a criminal prosecution " 'to be confronted with the witnesses against him.' " (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 1435, 89 L.Ed.2d 674].) "The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas* 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923] (1965), 'means more than being allowed to confront the witness physically.' *Davis v. Alaska*, [*supra*], 415 U.S. at p. 315 [94 S.Ct. at p. 1110]. Indeed, ' "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" ' (*Id.*, at pp. 315-316 [94 S.Ct. at p. 1110] (quoting 5 J.

> Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)." (*Delaware v. Van Arsdall, supra*, 475 U.S. 673, 678 [106 S.Ct. 1431, 1435].) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, ... to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405 [85 S.Ct. 1065, 1068, 13 L.Ed.2d 923].)

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22-23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Presenting the jury with substantial material evidence impeaching the credibility of prosecution witnesses, particularly their motivation to testify, can be critical:

> We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347 [a defendant was entitled to present evidence of a witness's juvenile records despite a state policy of sealing such records]. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679. Emphasis added.)

Further, "[t]he Sixth Amendment requires at a minimum, that criminal defendants have ... the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40.) The court's refusal to permit the jury to hear all relevant evidence was inimical to the three-fold purpose of confrontation: (1) to ensure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh the witness' demeanor. (*California v. Green* (1970) 399 U.S. 149, 158, 90 S.Ct. 1930, 1946, 26 L.Ed.2d 489.) The Confrontation Clause includes the right to cross-examine adverse witnesses on matters reflecting on their credibility. *People v. Quartermain* (1997) 16 Cal.4th 600, 623.

In *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1178, the Ninth Circuit reversed because the trial court excluded evidence that would have tended to undermine a main prosecution witness's credibility. The court reiterated that "where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." (*Id* at p. 1178*; DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.) The court also held that the limitation of Deputy Fancher's cross-examination implicated the defendant's Confrontation Clause rights under *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680. (*Thomas v. Hubbard, supra,* 273 F.3d at 1178-1179.) Similarly, in *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 873-879, the Court reversed the habeas petitioner's conviction because the trial court erred in excluding impeachment evidence of an important prosecution witness.

The trial court's exclusion of impeachment evidence pertaining to the credibility of Freddie Jelks, particularly as it pertained to his motivation to testify or to his bias, also denied Appellant his constitutional right to present a defense and thus is reversible unless the state can show the error was harmless beyond a reasonable doubt. Due process requires that the accused have a reasonable opportunity to present his defense. (*People v. Wright* (1989) 209 Cal.App.3d 386, 392-393.) Every criminal defendant has a constitutional right to present all favorable relevant evidence of significant probative value. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) Few such rights are more fundamental than that of the accused to "present his version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Further, the right of an accused to due process of law "is, in essence, the right to a fair opportunity to defend against the State's accusations." (Chambers v. Mississippi (1973) 410 U.S. 284, 294.) Jurors, in fulfilling their duty to decide what the truth is, are "entitled to have the benefit of the defense theory before

them...." (Davis v. Alaska (1974) 415 U.S. 308, 317.) And as this Court has stated,

> [When] a defendant voluntarily testifies in his own defense the People may "fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." [Citation.] (People v. Harris (1981) 28 Cal.3d 935, 953.)

It goes without saying that the same rules of evidentiary law would apply if it is a key prosecution witness, rather than the criminal defendant, who testifies.

2. California Law Independently Guarantees The Right To Put On A Defense, And Does Not Favor The Exclusion Of Relevant Evidence

The right to compulsory process and confrontation are independently guaranteed by the California Constitution. (Art. I, § 15.) "The defendant in a criminal cause has the right ... to compel attendance of witnesses in the defendant's behalf ... and to be confronted with the witnesses against the defendant." (*In re Martin* (1987) 44 Cal.3d 1, 29-30; *People v. Riser* (1957) 47 Cal.2d 566, 571.) This includes the right to attack and support the credibility of witnesses. Impeachment evidence has always been relevant. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; *People v. Memro* (1985) 38 Cal.3d 658 [particular defendants allowed to present evidence undermining the credibility of police officers, given the special position of trust they hold with the public at large from which juries are chosen].) California's Penal Code, § 686 provides this same right for an accused to confront witnesses.

3. Evid. Code, § 352 Considerations.

Although the trial court is granted discretion under Evidence Code § 352 to reject evidence that creates a substantial danger of undue consumption of time or prejudicing, confusing, or misleading a jury (See *People v. Quartermain* (1997) 16 Cal.4th 600, 623.), "§ 352 must bow to the due process right of the defendant to a

fair trial and his right to present all relevant evidence of significant probative value to his defense." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 594; *People v. Cunninhgam* (2001) 25 Cal.4th 926, 999.) In *People v. Hall* (1986) 41 Cal.3d 826, 834, this Court cautioned that the balancing required under § 352 must be weighed carefully in order to avoid a hasty conclusion that deprives the jury of the chance to consider the relevant evidence.

The modern tendency has been to remove procedural barriers to the jury's consideration of evidence of both the prosecution and the defense. Article I, § 28, subdivision (d) of the California Constitution now provides in pertinent part that "relevant evidence shall not be excluded in any criminal proceeding ...." This "truth-in-evidence" provision of an initiative enacted in 1982 was intended to "to expand the range of admissible evidence." (*People v. Armbruster* (1985) 163 Cal.App.3d 660, 665.) For example, the court in *People v. Taylor* (1986) 180 Cal.App.3d 622, 628-634 held that section 28, subdivision (d) had abrogated Evidence Code § 790 [inadmissibility of evidence showing good character except in rebuttal] in regard to criminal cases. Section 28(d) was not designed to liberalize the rules of admissibility only for evidence favorable to the prosecution while retaining restrictions on the admissibility of evidence tending to prove a defendant's innocence, but to ensure that those actually guilty do not escape conviction through restrictions on the admissibility of relevant evidence. (*In re Lance W.* (1985) 37 Cal.3d 873, 887, fn. 7; see also *People v. Harris* (1988) 47 Cal.3d 1047, 1081-1082.)

Moreover, the California legislature, in enacting Evid. Code, §352, created a *de facto* presumption that relevant evidence should routinely be admitted when the opposing concerns are that the evidence may also create undue prejudice, cause confusion, mislead the jury, or when the admission of the evidence may consume extra time. That is, relevant evidence should be admitted even if its probative value is *outweighed* by the probability that its admission would be unduly prejudicial to the opposing party. Only when there exists a probability that

the admission of the evidence creates "a substantial danger of undue prejudice" that "substantially outweighs the probative value" should the relevant evidence be excluded. The legislature's decision to use the word "substantial" twice in the same section underlies the legislature's intent that relevant evidence should be admitted when balanced against the listed competing interests.

Appellant does acknowledge, however, that California courts have also held that §352 rulings made by trial courts that restrict or limit defense cross-examination relating to a witness' credibility will be deemed error only if "a reasonable jury might have reached a significantly different impression of the witness' credibility had the excluded cross-examination been permitted. [Citations]." *People v. Ayala* (2002) 23 Cal.4th 225; *People v. Quartermain* (1997) 16 Cal.4th 600, 624 (Emphasis added). And, the trial court's ruling to limit an accused's right to confront and cross-examine witnesses under §352 is reviewed for an abuse of discretion. *People v. Valdez* (2004) 32 Cal.4th 73, 109; *People v. Hillhouse* (2002) 25 Cal.4th 469, 496; *People v. Lewis* (2001) 26 Cal.4th 334, 372-373. A conviction should be reversed if the trial court's ruling was "arbitrary, capricious, or patently absurd" and caused a "manifest miscarriage of justice." *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.

If the trial court's §352 ruling pertains to "the routine application of state evidentiary law", and it results in a "manifest miscarriage of justice", the *Watson* "reasonable probability" test is used to determine if the error was prejudicial and requires reversal. *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Brown* (2003)31 Cal.4th 518, 545; *People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Humphrey (1996)* 13 Cal.4th 1023, 1089; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.

If, however, the trial court's ruling that limited the cross-examination of a witness was error that violated Appellant's constitutional rights to due process and a fair trial, then the applicable standard of review on appeal is *the Chapman "harmless beyond a reasonable doubt" test. Chapman* v. California (1967) 386

U.S. 18, 24; *People v. Brown* (2003) 31 Cal.4th 518, 545. In applying the *Chapman* test, "an appellate court may find an error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 7-10.)" *People v. Bolden* (2002) 29 Cal.4th 515, 560. See also *Carella v. California* (1989) 491 U.S. 263, 266; *Rose v. Clark* (1986) 478 U.S. 570, 576-582; *People v. Cummings* (1993) 4 Cal.4th 1233, 1314.

The Supreme Court has emphasized that a "thorough review of the record" must assume that "the damaging potential of the cross-examination [was] fully realized."

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680. Emphasis added.). See also *People v. Rodriquez* (1986) 42 Cal.3d 730, 750-751; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 349-350.

C. Discussion.

1. The prosecutor's claim that Jelks might assert his 5th Amendment right and decline to testify if the defense was allowed to question him about his pending murder case should have been ignored.

The prosecutor's comment that Jelks might assert his 5th Amendment right to not answer questions on cross examination that would tend to incriminate him was, Appellant asserts, a *wholly inappropriate ground* for the court to consider in

determining whether the defense' right to confront and cross-examine perhaps the most important prosecution witness in the trial should be limited. In *People v. Price* (1991) 1 Cal.4th 324, this Court addressed a similar situation.

> If a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or part of the witness's testimony. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 760.) From this rule it follows logically that if, as here, the court determines in advance that the witness will refuse to answer such questions, the court may decline to admit the testimony in the first instance. (*Id.* at p. 421.)

Had the trial court abided by the holding in *Price,* the remedy would have been for the prosecutor to a) grant immunity to Jelks as to his pending murder case, b) resolve Jelks' pending murder case before he testified, or c) agree to a disposition in Jelks' pending murder case that would be contingent on his testifying truthfully in Appellant's (and anyone else's) case. Each of these remedies was uniquely within the purview of the prosecutor. She could choose any of them. Neither the trial court nor Appellant could force the prosecutor to choose one of these remedies. Rather, it appears the prosecutor "wanted her cake and she wanted to eat it, too." The prosecutor wanted the benefit of having Jelks testify against Appellant and co-defendant Johnson, but she also wanted to be in a position to fully prosecute Jelks and Johnson for the Mosley murder, if she subsequently chose to do so. And the trial court's ruling allowed her to do so, much to the prejudice of Appellant.

2. The prosecution's arrangement with Jelks (i.e., no promises or deals on Jelks' pending murder case in exchange for Jelks' cooperation and testimony) *increased the inherent need* to explore on cross-examination Jelks' possible bias or motive to testify for the prosecution.

Appellant contends that this very arrangement "smacked" of hidden or implied agreements between the prosecutor, the police, Jelks' defense counsel and Jelks. Jelks had independent trial counsel in his pending murder case. Jelks'

defense counsel would literally have abandoned his legal representation of Jelks if he allowed this arrangement to proceed without some understanding of how it would benefit his client. What defense attorney would allow his client, who was charged with a gang related murder, to testify as the key witness for the prosecutor in an unrelated gang murder case without knowing in advance that his client would receive consideration in exchange for helping the prosecution in such a dramatic fashion as Jelks did in the instant case? What defense attorney would allow his client to jeopardize his very life by testifying against his extremely violent homeboys, if there was any realistic possibility his client would be convicted and sentenced to prison where those same "homeboys" would be awaiting the client?

Jelks' defense counsel may not have had any control over the situation, however, if Jelks had decided to ignore his attorney. If this were the situation, it would take no imagination to determine who it was that Jelks was willing to "trust"! Only by cooperating with the prosecutor could Jelks expect consideration in his own murder case. After all, the prosecutor assigned to prosecute Jelks' for the Mosley murder was the *same* prosecutor who was prosecuting Appellant and co-defendant Johnson in the Loggins/Beroit murders. The *same* detectives (McCartin and Tapia) were involved in the investigation of both cases. In fact, Jelks' murder case was pending in the *same* courtroom with the *same* judge presiding.

The Supreme Court has recognized "the inherent motivation to lie created by bargained for testimony." (*Hoffa v. U.S.* (1966) 385 U.S. 293, 311. See also *U.S. v. Cervantes-Pacheco* (5th Cir. 1987) 826 F.2d 310, 315 ["It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."] Despite the dangers which these types of inducements create[113], the courts have

[113] A study by the Project Innocence group at CardozoLaw School found that in 67 cases in which wrongfully convicted defendants were exonerated because of DNA evidence, false testimony by a prosecution witness contributed to the wrongful

held that "the established [procedural] safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." (*Hoffa, supra*, at p. 311.)

Promises made by the state to a witness in exchange for his testimony relate directly to the credibility of the witness, and when the credibility of the witness is an important issue in the case, the "promises, understandings, or agreements" made by the state must be provided to the defense if cross-examination of the witness is to have any real meaning. (*Giglio v. U.S.* (1972) 405 U.S. 150, 154-155.) However, *Giglio*'s language has created an incentive for prosecutors to *avoid* making *express* "promises, understandings, or agreements" with informant/witnesses in order to avoid having to disclose this information to the defense. Rather, prosecutors often resort to "implied" inducements in which nothing is *expressly* promised to and agreed upon with informant/witnesses. This practice has generally been supported by the courts. (See, Cassiday, Nw. U.L.Rev. at p. 1130. [Discusses the ineffectiveness of *Giglio* and proposes solutions]; Eli P. Mazur, Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice, 51 Duke L.J. 1333 (Feb. 2002) [Discusses implied inducements and responses by courts.].

However, implied inducements increase the probability that a witness' reliability and veracity will be compromised; hence, the need for cross-examination of these witnesses *becomes even greater* when there exists no express agreement between the state and the informant/witness. Through affirmative behavior, office policy, or a past course of conduct, prosecutors can create a rational expectation of a benefit within the mind of the informant/witness. When this happens, "research shows that witnesses are more likely to lie, more likely to

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conviction in 21% of the cases. R. Michael Cassidy, Essay: "Soft Words of Hope": *Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements, Nw. U.L.Rev. 1129, 1130 (Spring 2004).

cooperate and more likely to fabricate when agents of the state make implicit rather than explicit promises" of inducements. (See Mazur, 51 Duke L.J. at p. 1334-1335.)

The courts generally have held that a prosecutor is not required to disclose a deal that has *not* been expressly offered, even though a witness may have a rational expectation that he will likely receive a benefit based upon the prosecutor's office policies, or past course of conduct. In *Darden v. U.S.* (9th Cir. 1969) 405 F.2d 1054, the defendant argued that a co-conspirator's testimony was bargained for because she "could have reasonably believed that she would receive lenient treatment if she testified against the defendant" because the U.S. Attorney's office had an undisclosed policy of bringing charges for lesser offenses if the co-conspirator testified against "bigger fish." (*Id.*, at p. 1055.) The court recognized that because of this policy the witness' testimony was inherently unreliable, but the court held that because there was not an express promise or agreement and "there [wa]s only reliance on the past policy of the U.S. Attorney's office, ... the fact of a bargain, or of the hope or expectation of leniency affected only the *weight* of the testimony, not its admissibility." (*Id.*, at p. 1056.) Hence, the need to cross-examine this type of witness is even greater than an informant witness who has reached an express agreement with the prosecution.

Delaware's highest court, however, recognized the problem with implied inducements and held that prosecutors could not deny criminal defendants a fair trial through the use of implied inducements. In *Jackson v. Delaware* (Del. 2001) 770 A.2d 506, 508, the defendant argued that the prosecutor did not disclose an implied leniency agreement with a key witness. The prosecutor stated that he "would never have somebody come into the court to testify on behalf of the State where the State had given that person some kind of deal because whatever deal that would be, would go against the credibility of the witness." (*Id.*, at p. 510.) The Delaware Supreme Court found that the prosecutor had an "offensive policy of eschewing plea agreements to avoid damage to witness credibility in favor of

'implicit' future leniency." The court noted that the jury may have been "troubled, as are we, by an acknowledge and disingenuous prosecutorial practice of implicitly suggesting future possible leniency while maintaining that no actual promise of leniency had been made in order to avoid tainting a witness' credibility because of self-interest." The court added that the propensity of a witness to embellish his testimony, hopeful of leniency if his testimony meets with the prosecutor's approval, was to be expected. The prosecutor's practice was "insidious" and was error. (*Id.*, at p. 516-517.)[114]

It was because of this very arrangement *insisted* upon by the prosecution (i.e., there existed absolutely no promises or deals with Jelks, even though Jelks was represented by counsel and he was endangering the lives of his young family as well as himself!) that the trial court should also have *insisted* that Appellant, charged by the *same* prosecutor with capital crimes, have every opportunity to explore into the reasons why Jelks was so willing to testify against him.

In *People v. Brown* (2003) 31 Cal.4th 518, this Court addressed a similar situation. Therein, a juvenile witness admitted that he was the 4th person in a car used in a drive-by type shooting. He testified at the defendant's preliminary hearing that he saw the defendant shoot the victim.[115] Several months after the defendant's preliminary hearing, the juvenile witness was charged with an unrelated rape. The juvenile witness' rape case was pending when he was called to testify at the defendant's trial.

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[114] Despite the disclosure violation, the Delaware court affirmed the conviction because the non-disclosure was not "material" due to the overwhelming evidence of guilt from sources other than the witness' testimony. (Jackson v. Delaware, supra, at p. 517.)

[115] At the preliminary hearing the juvenile witness in Brown asserted his 5th Amendment right not to incriminate himself during his testimony. He was granted immunity by the prosecution for his involvement in the shooting case for which the defendant was charged. The juvenile witness then testified against the defendant at the preliminary hearing. *People v. Brown* (2003) 31 Cal.4th 518,543, fn. 8.

As happened in Appellant's case with Jelks, in *Brown* the "question arose at the beginning of defendant's trial whether [the juvenile witness] could be impeached on cross-examination by asking him whether he expected some benefit in his juvenile rape case as a result of his favorable testimony for the prosecution in defendant's case." (*Id.*, at p. 543.) The trial court in *Brown* was sufficiently concerned about the juvenile's motivation to testify for the prosecution that it conducted a hearing in which several witnesses testified before ruling on this issue pursuant to Evid. Code, §352. The following factors influenced the *Brown* trial court's decision to limit cross-examination of the juvenile witness regarding the details of his pending rape case:

1) The rape case was completely independent of the shooting case. It occurred *after* the shooting and *after* the juvenile testified at the preliminary hearing regarding the shooting. That is, the juvenile had *no* bias or motive of receiving consideration in his rape case when he testified at the preliminary hearing because the rape had not yet occurred.

2) The juvenile was represented by independent counsel when he testified at the preliminary hearing. Separate counsel represented the juvenile on the rape case.

3) The prosecutor in the shooting case testified he was *not* the prosecutor handling the juvenile's rape case, and he had intentionally *not* said or done anything that would indicate to the juvenile that he might receive a benefit in his pending rape case in exchange for his testimony in the shooting case. The prosecutor also expressly testified that he had told this to the juvenile's attorney in his rape case.

4) If the juvenile asserted his 5th Amendment right and refused to testify against the accused in the shooting case, the prosecutor was prepared to introduce the juvenile's "prior recorded testimony" from the preliminary hearing.

5) The juvenile" defense counsel in the rape case advised the trial court that the prosecutor had said nothing to him regarding the juvenile's testimony in the shooting case, and that no deals, express or implied, existed. Counsel did state, however, that if he thought it would help

his client (the juvenile) in the rape case, he would advise the juvenile court of his client's testimony in the shooting case.

6) The juvenile testified in the shooting case that a) he had received no promises regarding his rape case in exchange for his testimony in the shooting case, b) he did not think his testimony in the shooting case would harm him in his pending rape case if he *declined* to testify against the defendant, and c) he said he did not expect to receive any benefit in his pending rape case in exchange for his testimony against the accused in the shooting case.

Based on the existence of these six (6) factors, this Court in reviewing Brown's conviction held the trial court did not abuse its discretion in limiting the scope of cross examination to questions regarding the juvenile witness' expectations of leniency in his pending case without going into details regarding the juvenile's pending case.

Those same factors that justified the trial court's exercise of discretion in *Brown*, however, did *not* exist in Appellant's case. First, Jelks' pending murder case was committed long *before* his interrogation or grand jury testimony in the instant case. Indeed, the very reason why the detectives interrogated Jelks on December 5, 1994 was to extract a confession in the Mosley murder, the case that eventually was filed against Jelks. During that interrogation and at the grand jury, Jelks knew that the detectives knew of his involvement in the Mosley murder case. Jelks had the *same* bias or motivation to "please the prosecution"; that is, to receive protection from retaliation and to receive a benefit if the prosecution filed charges against him for the Mosely murder in exchange for his cooperation in the Loggins/Beroit murder case.

Second, Jelks was *not* afforded an attorney when he testified for the prosecution at the Loggins/Beroit grand jury hearing because the prosecution opted to indict Jelks at a later date on the Mosley murder. He had no legal counsel to advise him as to the consequences of cooperating or not cooperating with the prosecution, as did the juvenile in the *Brown* case.

Third, Jelks' pending murder case was being handled by the *same* prosecutor, investigated by the *same* detectives, and trailing in the *same* courtroom as the Loggins/Beroit murder case. The inference that there was some type of understanding between law enforcement and Jelks (and/or his defense counsel) was much more likely to have existed in Appellant's case than in the *Brown* case. The trial judge, however, *refused* to allow the defense to any meaningful inquiry of the prosecutor, the detectives, Jelks or Jelks' defense counsel as to any *specific* details regarding deals, promises, or threats made to Jelks during the interrogation in exchange for his cooperation in the Loggins/Beroit murders.[116] This was so even though the interrogation transcript contained numerous references to express or implied deals, promises, and threats made to Jelks to get him to talk and, subsequently, to testify.[117]

Fourth, because of the prosecutor's *choice* to use the grand jury, rather than a preliminary hearing, for the prescribed probable cause hearing, she was *unable* to introduce Jelks' prior recorded testimony at the grand jury if he asserted his 5th Amendment right to not testify. However, this problem was the *knowing* result of the prosecutor's *intentional* choice to proceed by a grand jury indictment. Because the prosecutor in this case did not have the option of using the witness' prior recorded testimony, the inference that there existed a promise, threat or express/implied deal involving Jelks was even greater than there was in the Brown case.

Fifth, the court declined to take the time to have the prosecutor, the detectives or defense counsel for Jelks testify regarding any promises, threats, or express/implied deals involving his client. Had the trial court allowed this, the

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[116] See Appellant's discussion of the trial court's ruling at IV.A. subdivision 7, *supra* in this Opening Brief, as well as RT, 16:3609-3610.

[117] The trial judge read the interrogation transcript and should have been well aware of its contents.

numerous examples of promises, threats and/or express/implied deals contained in the interrogation tape and transcript would have been revealed.

Sixth, although Jelks subsequently testified and told the jury he had not been threatened or promised anything in exchange for his testimony, the defense was *prohibited* from confronting Jelks on cross-examination with the numerous implied threats and express promises made to him during the interrogation. The tape recording and the related transcript clearly reveal numerous examples that would have directly contradicted his testimony. Many of these are discussed, *infra*.

Hence, Appellant asserts the instant case is readily distinguishable from this Court's holding in *People v. Brown* (2003) 31 Cal.4th 518. Appellant asserts the instant case should be used as an example by this Court of when the trial court *must* allow the defense to explore a key witness' potential bias for testifying against the accused, if the trial court is to avoid violating an accused's constitutional rights to due process.

3. Reasons why the trial court abused its discretion when it limited the scope of defense cross-examination of Jelks.

In the instant case there existed four (4) separate and distinct reasons why the trial court *abused its discretion* when it limited the scope of defense cross-examination of Jelks: 1) The defense was prevented from dramatically *contradicting* much of Jelks' testimony on direct examination; 2) The defense was prevented from presenting significant evidence of Jelks *character trait for dishonesty and for moral turpitude*; 3) The defense was prevented from introducing strikingly probative evidence of Jelks' *motive to ingratiate* himself with the prosecution, regardless of whether his testimony was truthful or not; and 4) The defense was prevented from proving that Jelks' testimony was false, involuntary, and the product of continuing police coercion. (This specific issue is raised separately at Issue VI in Appellant's Opening Brief, *infra*.)

a. In an Effort to Enhance his Credibility with the Jury, Jelks Made Several *False* Statements to the Jury that Could Have Readily Been Contradicted by his Statements to the Detectives in his December 6, 1994 Interrogation.

During direct examination of Jelks, the prosecutor did *more* than just have Jelks testify as to what he claimed to have seen and heard on August 5, 1991. She asked numerous questions in an effort to *bolster Jelks' credibility* as a witness. Many of Jelks' answers, however, were direct contradictions to what he told the detectives during his interrogation on December 6, 1994. By intentionally soliciting those answers from Jelks, the prosecutor increased the probative value of those portions of Jelks' interrogation that the court had previously ruled were off-limits to defense cross-examination. In other words, the prosecutor's choice of trial tactics placed Appellant in an even more unfair and prejudicial position, since the trial court refused to alter its ruling. A few examples illustrate this:

Example #1: Jelks *Falsely* Testified that He *Never* Would Have Performed a "Mission" (i.e., a Murder) for the Gang.

During direct examination, Jelks was asked by the prosecutor what a "mission" was, and whether the Loggins/Beroit killings would have constituted a mission:

> DDA: Would this shooting [of Loggins and Beroit] have constituted a mission?
> FJ: Yeah.
> DDA: What's a mission?
> . . .
> FJ: When you – when you go out and commit murder.
> [RT, 16:3624-3625]

The prosecutor then asked Jelks if he would have ever gone on a "mission" for Johnson. Jelks responded that he would *never* have "gone on a mission", *even* if Johnson had *ordered* it. Jelks added that he would have undergone the gang's disciplinary penalty for refusing Johnson's order before he would have gone on a "mission":

DDA: Now, if Mr. Johnson ordered you to go on a mission would you do it?
FJ: No.
DDA: What would happen if you didn't go on it?
FJ: Discipline.
DDA: What's – in the form of what?
FJ: Probably you'd get beat up, you know, beat on and jumped on.
DDA: Would Mr. Johnson actually carry out the discipline?
FJ: In some cases, yeah.
DDA: If he didn't do it, who would?
FJ: The next person in line.
DDA: Does Mr. Johnson – did Mr. Johnson in 1991 have any followers?
FJ: Yeah.
DDA: Would those people do what he said?
FJ: Yes. [RT, 16:3626-3627][118]

This testimony by Jelks, elicited by the prosecutor, undoubtedly had a positive impact on the jury. In effect, Jelks told the jury he would have subjected himself to a physical beating by Johnson or members of the 89 Family Bloods gang before he would ever have agreed to kill someone!

Jelks' answer was a lie, however. The prosecutor *knew* it. The trial judge should have known it. Just five weeks *after* the Loggins/Beroit murders, *Jelks went on a mission with Johnson* into 97 East Coast Crips territory. A rival gang member, Tyrone Mosley was murdered. Two other individuals were seriously wounded. Jelks "admitted" during the interrogation that he was the driver. Marcellus James said Jelks had a .38 caliber revolver and was one of the two shooters! In fact, during her penalty phase closing argument against co-defendant Johnson, the prosecutor told the jury that Jelks had "served" a "mission" *with* Johnson just five weeks after the Loggins/Beroit murders; that co-defendant Johnson "hops in the car with two other homeboys, F.M., known as Freddie Jelks,

[118] Jelks also told the detectives the same lie during his interrogation on Dec. 6, 1994, that he had *not* done "missions" with "Evil" in the past. [CT Supp IV, 4:865-866]

and Jelly Rock, Leondre Hewitt, and they do the drive by." [RT, 37:7441 (Emphasis added).] The prosecutor further told the jury during the penalty phase that Jelks was the *driver* of the car, that he drove the killers into the rival gang's territory, that he flicked the lights on and off to attract the party-goers' attention, and then people "walking up toward the car and getting blasted by men who went over there with the intent to kill, with the intent to seek revenge against 8 – against 97 East Coast Crips simply for being there." [RT, 37:7441 (Emphasis added).] The prosecutor also told the jury minutes later, "But there was nobody in that car that did not intend that person [Tyrone Mosley] to die." [RT, 37:7451][119]

However, when Appellant's attorney sought on cross-examination to confront Jelks and establish he had lied to the jury on direct examination about never serving a mission for Johnson, the prosecutor immediately objected:

> ORR: Did you [i.e., Jelks] ever participate into seeking out enemies of the Bloods and destroying them?
> DDA: Objection.
> RL[120]: Your honor – could we approach the bench, your honor?
> CRT: Yes. Come on up. [RT, 16:3644 (Emphasis added).]

At the ensuing bench conference, the court asked Mr. Orr to address why he asked that question. Mr. Lasting added his objection to that of the prosecutor,

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[119] Of course, this argument by the prosecutor came *long after* she had Jelks testify on direct exam that he had *never* served a mission for Johnson, nor would he have ever served a mission for Johnson. Her argument came *long after* the jury deliberated the guilt of Appellant based to a large extent on the "credible" testimony of Freddie Jelks. Her argument, coming when it did, could *not* be considered by the jury in determining that Jelks had lied while testifying during the guilt phase. In fact, because that argument, and the evidence upon which it was based, was introduced as aggravating evidence solely against co-defendant Johnson, the jury was legally prohibited from considering it on behalf of Appellant, even if they had wanted to! However, her penalty phase argument does illustrate in very clear terms that she *knew* Jelks' testimony was not truthful. Appellant asserts that the prosecutor knew she was presenting false testimony, yet she did nothing at the time to correct it (and because of the court's ruling, she knew the defense could also do nothing to refute it.)

[120] "RL" is Richard Lasting, co-defendant Johnson's trial counsel.

fearing that if Jelks was allowed to answer Mr. Orr's question, the court would permit Jelks to testify that co-defendant Johnson was involved in another murder. Mr. Orr's response was to acknowledge his recollection of the trial court's previous ruling:

> CRT: Yes. Maybe you ought to address your objection (sic), Mr. Orr.
> RL: I object.
> ORR: I know what he's talking about. Forget about it.
> CRT: You want to withdraw the question?
> ORR: Forget about it. [RT, 16:3645]

Back in front of the jury, the trial court spoke to the jury, then addressed Mr Orr in a manner that seemingly could only be described as embarrassing and intimidating:

> CRT: I believe Mr. Orr wants to withdraw the question, ladies and gentlemen. Is that right, Mr. Orr?
> ORR: Yeah.
> CRT: Next question. [RT, 16:3645][121]

On cross-examination, Appellant had sought to demonstrate to the jury that Jelks had lied to them on direct examination, that the prosecution had presented Jelks to the jury in a false light. Appellant's question was in *direct response* to the questions asked by the prosecutor that were intended by the prosecutor to enhance Jelks' credibility. Appellant could have then demonstrated that Jelks had also lied to the detectives during his initial contact with the police. If Appellant had been allowed to confront Jelks with just some of the details of the September 14, 1991 gang-related drive-by shooting, it would have been readily apparent to the jury that Jelks had lied to them on direct examination and that he had also lied to the detectives during his initial interrogation. The rather obvious inference for the

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[121] During the interrogation, Jelks also told the detective that he would never have served a mission for Johnson. [CT Supp IV, 4:865-866] Of course, this statement by Jelks to the detectives occurred *before* Jelks "admitted" to the detectives that he was the driver in the Mosley murder.

jury to draw would have been that Jelks was very willing to lie if he thought it would in some way benefit him.

This proposed cross-examination of Jelks may have been sufficient to cause the jury to discount Jelks testimony, or even reject it outright. However, the trial court's previous ruling prohibited Appellant from impeaching Jelks in this manner.

Example #2: Jelks Falsely Testified that He Was *Not* the Type of Gang Member Who Would Shoot Someone.

Continuing to present Jelks in a false light to the jury, the prosecutor asked Jelks a series of questions about what it meant to "go serving" or "go shooting" for the gang. [RT, 16:3542] After Jelks explained that Appellant eventually volunteered to do the "serving" of Loggins and Beroit [RT, 15:3543], the prosecutor asked Jelks "Why didn't you volunteer?" Jelks' responded that he "didn't want to shoot nobody."

DDA: Well, you didn't like 89 East Coast, right?
FJ: No.
DDA: Why didn't you volunteer?
FJ: I didn't want to go do it.
DDA: Why not?
FJ: I didn't want to shoot nobody. [RT, 16:3543 (Emphasis added)]

Jelks had also told the detectives on December 6, 1994 that he was not the type of person who "goes out and hurt[s] people" or "fucks over people"; that he was "one person, that's trying to bring the positive message across" to residents of the gang-infested community. [CT SuppIV, 4:852-853]

Later in the interrogation, Jelks repeated to the detectives that he was "not that type of guy" who "want[s] to hurt somebody for no reason."

FJ: Listen. ... I'm not – I'm not that type of guy, man. And for some reason you feel like I am. But I'm not, man. I – I'm not. I'm not even – I'm not even that type of guy, man, that just want to hurt somebody for no reason, man. Even when I lived over there. [CT SuppIV, 4:989-990 (Emphasis added)]

But for the trial court's ruling that prohibited the defense from cross-examining Jelks about the details of the interrogation or of his pending case, Appellant's counsel could have "reaffirmed what Jelks told the jury on direct exam, counsel could have asked Jelks to confirm the self serving comments he made to the detective, then counsel could have confronted Jelks with his damning admission made to the detectives: Only five weeks after the Loggins/Beroit murders, Freddie Jelks admitted on tape that he intentionally "drove" Johnson and "Jelly Rock" into a rival gang's neighborhood at night for the sole purpose of killing someone and for apparently no particular reason!

Appellant argues that the jury would have seen Jelks in a different light, if the court had allowed this cross-examination. The jury would have realized Jelks was not forthright and honest when he testified under oath on direct examination. They would have known that Jelks again lied to the detectives and that he was constantly trying to minimize his gang involvement. It would have been clear to the jury that Jelks, even at his initial meeting with the detectives, was willing to lie, and lie, and lie, when he thought it was in his best interests to do so.

At the trial, it was clearly in Jelks' "best interest" to mislead the jury, if necessary, by testifying in a manner that assisted the prosecution in this case. Only by assisting the prosecution would he have had any hope that his "co-operation" with law enforcement would be in his "best interest"; that is, result in beneficial treatment regarding his pending case. This is another illustration of a direct and rather dramatic example of Jelks' less-than-truthful testimony that would have caused the jury to view his credibility very differently.

This proposed cross-examination of Jelks may have been sufficient to cause the jury to discount Jelks testimony, or even reject his testimony outright. Once again, however, the trial court's previous ruling prohibited Appellant from impeaching Jelks in this manner.

Example #3: Jelks Falsely Minimized his Gang Involvement by Suggesting He Was only a "Four" on the Gang Respect Gauge.

On direct examination, the prosecutor had Jelks testify that Appellant's motive for "serving" Loggins and Beroit was to increase his "respect" level or "reputation" within the 89 Family Bloods gang, as well as among other gangs. [RT, 16:3550-3554, 3559] Jelks testified that during the summer of 1991, Appellant "was just another member" of the gang. [RT, 16:3550] His "respect level" was "average" [RT, 16;3559], but he could increase his "status" or "respect" in the 89 Family Bloods gang through his "performance", such as "eliminating [the gang's] enemies." [RT, 16:3551] Appellant could increase his "respect level" if he shot and killed Loggins and Beroit. [RT, 16:3553-3554]

Thereafter, the prosecutor asked Jelks to gauge co-defendant Johnson as far as gang "respect" in that gang territory. She then asked Jelks where he would gauge himself on that same "gang respect" scale:

> DDA: On a scale of one to ten, how would you gauge the respect in the neighborhood for defendant Johnson?
> FJ: About an 8, 9.
> DDA: Anybody higher than him that you knew of?
> FJ: Not on the streets.
> DDA: Anybody of similar respect on the streets – Strike that. Anybody of that caliber on the streets that day when you were over at the Johnson house?
> FJ: No.
> DDA: Where were you on the scale of one to ten?
> FJ: About a 4, or something like that. [RT, 16:3560-3561]

But for the trial court's ruling that prohibited the defense from cross-examining Jelks about any details of the interrogation concerning Jelks' pending case, Appellant's counsel could have confronted Jelks with his *modest* estimate of his own gang "respect" level. According to Jelks, Appellant was an "average" gang member who sought to increase his "respect" level by "serving" and killing enemy Crips. By confronting Jelks with his admission that he also had "served" and killed an enemy Crip, Jelks' "respect" level could also have increased accordingly. Appellant would have been able to demonstrate to the jury that Jelks

was intentionally minimizing his gang activity and loyalty, and at the same time maximize Appellant's gang activity and loyalty, all in an effort to ingratiate himself with the jury and please the prosecution.

This is another example of the prosecution's, and Jelks', efforts at being less-than-candid with the jury. Appellant asserts that if this had been revealed to the jury, they would have viewed Jejlks' credibility as a witness in a much less favorable light.

> Example #4: Jelks Falsely Implied in his Direct Examination Testimony that He Had "Gotten Away From the Gang" Because of the Unnecessarily Violent Loggins/Beroit Murders, Violence in Which He Did Not Involve Himself.

Near the close of direct examination, the prosecutor again sought to enhance Jelks' credibility by having Jelks once more deny ever being involved in violent gang activity. However, the prosecutor and Jelks were careful not to be too specific. After referring the Loggins/Beroit murders, the pronoun "things" was used. Although arguably ambiguous as to what Jelks meant when he used the word "things", the natural inference was that "things" referred to violent gang activity, such as the Loggins/Beroit murders that he referred to in the previous question. Jelks' response to the prosecutor's question also suggested Jelks decided to abandon his gang affiliation because of the senseless violence involved in the Loggins/Beroit murders:

> DDA: Now, since this – since this shooting [i.e., the Loggins/Beroit murders], you said that you have gotten away from the gang, is that right?
> FJ: Yes.
> DDA: Why did you do that?
> FJ: More or less I just having come to grips with myself, as far as all the things that I've seen.
> DDA: And all the things – Have you done any of those things, too?
> FJ: No. I – no. I've participated in some things, but a lot of things I just want to get away from.
> DDA: Have you gotten away from those things?

FJ: Yes. [RT, 16:3627 (Emphasis added. Words within the brackets are Appellant's for this appeal.)]

But for the trial court's ruling that prohibited the defense from cross-examining Jelks about any of the facts of his pending case, Appellant's counsel could have confronted Jelks with what he meant when he used the word "things." The natural and reasonable inference would have been that the gang related "things" Jelks had "seen" but not "done" were the violent "things" perpetrated by the gang. Jelks had previously admitted that he had participated in some "things" on behalf of the gang, such as selling drugs. However, Jelks would have been viewed in a completely different light had the jury known Jelks had lied to them. [RT, 16:3626]. It would have been extremely difficult for Jelks to reconcile his direct examination testimony with his damning admission made to the detectives in his December 6, 1994 interrogation that he was "the driver" in the violent September 14, 1991 murder of Tyrone Mosley.[122]

This is yet another example of Jelks' less-than-truthful testimony on direct examination that would have caused the jury to view his credibility as a witness in a different light. This proposed cross-examination of Jelks, taken in conjunction with the other above mentioned examples, would have been sufficient to cause the jury to discount Jelks testimony, or even reject it outright.[123]

Example #5: Jelks Falsely Implied to the Jury that He Was Truthful with the Detectives when He Spoke to Them on December 5, 1994.

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[122] These various illustrations raised by Appellant in this Issue assume that Jelks was the driver in the Mosley murder. They do not address the additional disrepute that would have been heaped on Jelks' credibility had the jury heard what James said was Jelks' involvement.

[123] The irony of this entire issue is that during the penalty phase of Appellant's trial, the prosecutor presented evidence to the jury that Jelks *was involved* in the Mosley murder. That testimony by James, however, was too late to be considered by the jury in evaluating Jelks' credibility in the guilt phase. Further, it was admissible only as to co-defendant Johnson in the penalty phase. Even if the jury wanted to consider it on behalf of Appellant, it was too late and they were instructed not to.

Perhaps the *ultimate unfairness*, however, occurred at the end of direct examination when the prosecutor made a final attempt to portray Jelks in as favorable a light as possible to the jury. She asked him if anyone had told him what to say, was he being paid, was he telling the truth, did he tell the truth to the grand jury, and finally, "When you talked to the police in December of 1994, were you telling the truth?" Jelks responded as expected, "Yes." [RT, 16:3640] One only need ask, "Which of his *lies* to the police was he referring to during the interrogation when he testified under oath that he told them the truth?" Was it Story #1? Was it Story #2? Was it Story #3? Was it Story #4? The defense could have proven they were *all lies*, if the trial court would have allowed it. Appellant argues it would have been incredibly probative of Jelks' credibility for the jury to hear that Jelks lied to the police over and over and over about his own gang involvement. In fact, the jury could have found that Jelks never did tell the police the truth about his own gang involvement! Why then would the jury have believed him when he told them about someone else's involvement in a gang crime? Appellant should have been allowed to prove this to the jury. By disallowing it, the court abused its discretion and prejudicially erred.

2. The Defense Could Readily Have Proven Jelks Had a Character Trait for Dishonesty, as well as for Moral Turpitude if the Defense Had Been Allowed to Confront Jelks with his Statements to the Detectives in his December 6, 1994 Interrogation.

Evid. Code, § 780, subd. (e) expressly authorizes a jury, in determining a witness' credibility, to consider that witness' "character for honesty or veracity or their opposites." On June 8, 1982, this State's electorate amended California Constitution Article I, § 28(d) to read, "Except as provided by statute ... relevant evidence shall not be excluded in any criminal proceeding. In response, this Court in *People v. Harris* (1988) 47 Cal.3d 1047stated that the amendment to § 28(d) abrogated the restrictive provisions of Evid. Code §§786, 787 and 790. Hence,

specific instances of conduct, other than felony convictions, are admissible to impeach the credibility of a witness by establishing that a witness has a character trait for dishonesty or untruthfulness.[124] (*People v. Wheeler* (1992) 4 Cal.4th 284.)

The defense was entitled to prove, therefore, that Jelks had a character trait for dishonesty or untruthfulness. The defense could have proven this character trait circumstantially by establishing Jelks would lie on various occasions if he thought he could avoid trouble or if he thought he could benefit from lying. The most probative illustration of Jelks' character trait for untruthfulness was his interrogation by detectives on December 6, 1994 when he lied, then lied, then lied again. From that interrogation alone, the defense could have proven that Jelks had a propensity to fabricate, lie or try to mislead whenever he thought he could avoid trouble, or when he thought it would be in his best interests. And it was obviously in his best interests to tell the detectives, and later the prosecutor, what he thought they wanted to hear, regardless of whether it was the truth or not. The trial court's ruling, however, prohibited Appellant from establishing Jelks propensity to lie.[125]

In *People v. Lankford* (1989) 210 Cal.App.3d 227, 234, the appellate court held that the defendant placed his character at issue by embellishing his credibility with specific acts of his good conduct and character. Accordingly, the prosecution

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[124] § 28(d) was made applicable in cases in which the charged offense was committed on or after June 8, 1982. (*People v. Smith* (1983) 34 Cal.3d 251, 262) Hence, it applies to this case.

[125] Since unlawfully trying to kill another human being with malice aforethought is an act involving moral turpitude (*People v. Castro* (1985) 38 Cal. 3d 301, 314), or a willingness to do evil (*Gerty v. Fitchburg Railroad* (1884) 137 Mass. 77, 78; *People v. Lepolo* (1997) 5 Cal.4th 85, 89; *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.), evidence underlying Jelks' pending murder case was also relevant to prove his character trait "to do evil" whenever he thought it would be of benefit to him. After all, anyone who would unlawfully kill another human being for reasons that benefited him would certainly be willing to lie, if he thought it would be of benefit to him. However, the trial court's ruling also disallowed Appellant from establishing this fact also. See People v. Lankford (1989) 210 Cal.App 3d 227, 234 defendant's pending robbery case was admissible to refute his claim of recent good moral and law-abiding character].

was allowed to introduce impeachment evidence of his *pending* robbery case to directly dispel the false and misleading evidence of credibility introduced by Lankford. Similarly in this case, the prosecution did the same through Jelks' testimony. Jelks repeatedly testified to specific conduct in order to downplay and minimize his gang involvement and enhance his credibility. For example, Jelks testified that he stopped his membership in the gang because he had a family to support[126]; that he didn't want to shoot anybody[127]; he was only a level 4 (out of 10) in gang participation[128]; he would never be involved in a "mission"[129]; that his only participation in the gang was to contribute money[130]; that his reason for testifying was to simply tell what happened[131]; that he left the gang after the senselessly violent Loggins/Beroit murders[132]; and finally, that he had *never* participated in any gang related murder[133]. The court erred when it disallowed the defense the opportunity to place Jelks in the proper light by rebutting his direc examination testimony.

However, when the trial court limited the scope of defense cross-examination of Jelks, however, it also attempted to mitigate the prejudice of its ruling to the defense by "throwing the defense a bone."[134] In effect, the trial court told the defense it could establish Jelks' character trait for dishonesty/moral turpitude by having him admit that a) he had been "convicted" as a juvenile for

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[126] RT, 16:3518.
[127] RT, 16:3543.
[128] RT, 16:3561.
[129] RT, 16:3626.
[130] RT, 16:3626.
[131] RT, 16:3628.
[132] RT, 16:3627.
[133] CT Supp IV, 4:1-338.
[134] When someone "throws the dog a bone", the dog is enthused as he anticipates a scrumptious dinner of meat and fat. Realization sets in quickly, however, when the dog realizes he has actually been given nothing of any real value. Such was the case, Appellant argues, with the trial court's attempt to mitigate the prejudice it knew its ruling would cause to the defense.

"joyriding"; b) he had been "convicted" as a juvenile for a robbery that occurred 14 years earlier, c) he had been convicted as an adult for a misdemeanor "receiving stolen property", d) he had been convicted as an adult for a felony "possession of cocaine", and e) he had been convicted three years earlier of selling marijuana. [RT, 16:3618-3620, 3640-3641]

With the exception of the sale of marijuana, none of the other "convictions" were legally admissible for impeachment purposes![135] Of course, the defense did not object because even this was better than nothing! However, they hardly match or come close to refuting the extensive evidence of good character elicited by the prosecutor on direct examination. It was the ultimate irony, however, when the defense sought to impeach prosecution witness Donnie Ray with *his* felony conviction for *possession of cocaine*. The trial court's comment in disallowing it? It was inadmissible because "*[t]hat's not a moral turpitude crime*"! [RT, 19:4347 (Emphasis added)]

3. The Defense Was Not Allowed to Prove Jelks Had a Motive or Bias to Say Anything that He Thought Would Please the Prosecution, Regardless of Its Truth or Falsity.

A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to

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[135] Misdemeanor convictions are inadmissible hearsay. (*People v. Wheeler* (1992) 4 Cal.4th 284; *People v. Ray* (1996) 13 Cal.4th 313; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1380;) Juvenile adjudications are civil in nature, not felony convictions, and, therefore, inadmissible hearsay. *People v. Sanchez* (1985) 170 Cal.App.3d 216, 218; *People v. Olivencia* (1988) 204 Cal.App.3d 1392, 1403 [juvenile adjudications are not criminal convictions]; *People v. Weidert* (1985) 39 Cal.3d 836, *People v. Lee* (1994) 28 Cal.App.4th 1724, *People v. Jackson* (1986) 177 Cal.App.3d 708, 711-713 [Proposition 8 did not change the rule that juvenile adjudicatons are not criminal convictions.] Possession of cocaine/heroin is not a crime involving moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 317; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1380.)
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expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. (*In re Ryan* ( ) 92 Cal.App.4th ___, 1385, citing *Delaware v. Van Arsdall*, 475 U.S. at pp. 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 318.) The cross-examiner must be allowed the opportunity to place the witness in his or her proper light, and to put the weight of the witness' testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, subject of course to the protective provisions of §352.[136] (*Davis v. Alaska* (1974) 415 U.S. 308, 318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 634.)

a. A Comparison of *Davis v. Alaska*[137] and the Instant Case.

The Supreme Court has held that even if cross-examination of a witness in general was allowed, not allowing impeachment of that witness on cross-examination can violate the Confrontation Clause. In *Davis v. Alaska* (1974) 413 U.S. 308, Richard Green, a seventeen year old on probation for burglarizing two cabins as a juvenile, was the prosecution's primary witness in a burglary prosecution against Joshua Davis. Green testified that he had seen Davis and another man standing with a crowbar at the side of a road near his home, where a safe from the burglary was later found.[138]

Davis wanted to cross-examine Green about his juvenile record. He intended to argue that Green "might ... have made a hasty and faulty identification of [Davis] to shift suspicion away from himself" as the burglar, and that "Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation."[139]

Pursuant to Alaska's statutory law, the trial judge prohibited any reference to Green's juvenile record. Davis attempted to cross-examine Green about his state of mind at the time of the identification. "Shielded from traditional cross-

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[136] § 352 is designed to protect against undue harassment, expenditure of time or confusion of issues.
[137] 415 U.S. 308 (1974)
[138] *Davis v. Alaska, supra*, at p. 309-311.
[139] *Id.*, at p. 311.

examination," Green testified he was not concerned whether the police suspected him in the burglary and categorically denied ever having been interrogated by police officers before – answers "highly suspect at the very least."[140] The trial court ruled that "the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury."[141]

The Supreme Court rejected the trial court's ruling:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. [Davis] was thus denied the right of effective cross-examination "which would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis* (1966) 384 U.S. 1, 3. (Id., at p. 318. Italics in original.)[142]

The Supreme Court held that limiting the defendant's cross-examination of Green in this manner was a violation of the Sixth Amendment Confrontation Clause. Recognizing that cross-examination was "the principal means by which the believability of a witness and the truth of his testimony are tested," the Court remarked that "it would be difficult to conceive of a situation more clearly illustrating the need for cross-examination" than this one.[143] The Court explained

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[140] *Id.*, at pp. 311-314.
[141] *Id.*, at p. 318.
[142] The Supreme Court later qualified the language "no amount of showing of want of prejudice", and explained that harmless error analysis is applicable to Confrontation Clause violations. See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 682-683.
[143] *Id.*, at pp. 314-319.

that the right to cross-examination has traditionally included the right to impeach the witness.[144] "Introduction of evidence of a prior crime" intended to suggest to the jury that "the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" was a general means of impeachment. The exploration of "biases, prejudices, or ulterior motives" for a witness' testimony was a more specific means of impeachment.[145] The Court stated that regardless of whether the jury would have believed it, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony."[146]

Although *Davis v. Alaska* involved witness Green's prior juvenile adjudications for burglary, the *identical analysis* would apply if the accusing witness had a pending murder case when cross-examined. The defendant (Davis) would still want to show that the witness' testimony may have been a lie *in an attempt to deflect suspicion from himself.* The defense would also have wanted to show that the witness may have been subject to *undue police pressure resulting from fear of arrest just before Christmas* or *reprisal at his impending trial.* The similarity of the defense' need to cross-examination the accusing witness in *Davis v. Alaska* and the instant case is obvious. Appellant submits there was no less a violation of Appellant's' confrontation rights than those in *Davis*.

The following testimony elicited from Jelks by the prosecutor is illustrative of the prejudicial error that resulted from the trial court's ruling. On direct examination, the prosecutor presented Jelks to the jury in an extremely favorable light. To begin, Jelks assured the jury that he was there to testify "voluntarily" even though he had a pending criminal case himself. He emphasized he had been given "no deals" in his pending case in exchange for his testimony. He swore that no one was forcing him to come to court and testify. [RT, 16:3514]:

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[144] *Id.*, at pp. 316-317, fn. 4.
[145] *Id.*, at p. 316.
[146] Id., at p. 317.

The prosecutor conveyed to the jury that Jelks came forward voluntarily and talked with the police about the Loggins/Beroit murders. Jelks did this because he felt "he ought to . . . tell what happened" after seeing "all the chaos that goes on" while he lived in that community. The prosecutor brought out that Jelks spoke to the police, and was now testifying, even though he was "in custody" in his pending case, he was "facing a lot of time" in his pending case, and no one had promised him anything regarding his pending case in exchange for his testimony. He did admit, however, that he "hopes something good happens to" him. [RT, 16:3627-3629]

Jelks affirmed that he was "telling the truth", that he was not required to testify in a particular manner nor had anyone told him "what to say." Jelks finally testified that he also had "told the truth" when he was interrogated by detectives on December 6, 1994, just as he was telling the truth while testifying. [RT, 16:3639-3640]

At the conclusion of direct examination, the prosecution had succeeded on presenting Jelks to the jury in an extremely favorable light. The jury must have been impressed with Jelks' based on his testimony on direct examination.

On cross-examination, counsel for co-defendant Johnson asked Jelks the same question the prosecutor previously asked Jelks. Jelks' response was different, however. Rather than having a "hope that something good happens to" him on his pending case, Jelks now asserted to the jury that he was "not expecting anything" in exchange for his testimony. He denied have been told anything about his pending case. [RT, 17:3684] Jelks was evasiveness when responding to questions that pertained to the status of his pending case. He continued to minimize, if not deny, any expectation of favorable treatment he might receive in exchange for his testimony. [RT, 17:3727]

On re-direct examination, Jelks answers became responsive and lucid as he further explained his reasoning for coming forward with information regarding the Loggins/Beroit murders. He explained to the jury that he "felt better" being able

to finally "release the information" that he previously had kept inside him. [RT, 17:3746-3747]

The prosecutor continued on re-direct examination to elicit information from Jelks that undoubtedly placed him in a favorable light with the jury. Jelks explained it was his "hope" that by speaking out against the gang, he was "providing a break" for those people who still lived in that gang-dominated community. That was why he was voluntarily testifying, that no one was "forcing" him to testify, and that he had no ulterior motive for testifying:

DDA: Are you testifying today because somebody is forcing you to?
FJ: No.
DDA: Are you testifying today because somebody else has told you what to say?
FJ: No.
DDA: Are you testifying because you have something against Mr. Johnson or Mr. Allen?
FJ: No.
DDA: Why are you testifying?
FJ: I'm – it's time for something different, you know. You've got a lot of people – you know, I got kids. A lot of people in the community needs another break, you know, and –
DDA: Are you providing a break?
FJ: I would hope so. [RT, 17:3747-3748 (Emphasis added)]

The prosecutor took a considerable amount of time and effort to present Jelks as an individual whose motivations for testifying were the same as any law-abiding citizen who had witnessed a terrifying crime. In fact, the prosecutor succeeded in showing the jury that Jelks' motivations for testifying were nothing short of exemplary, even for a normal law-abiding citizen.

The prosecutor's presentation of Jelks as a witness whose credibility was the same as any good, law-abiding individual, however, was absolutely *false*. It was extremely important that Appellant be allowed to confront and cross-examine Jelks to present Jelks to the jury in a totally different light; that Jelks had not been forthright and honest with the jury. Appellant asserts that facts show that Jelks was not only disingenuous in his testimony, but he also lied to the jury. Jelks was

not motivated to testify as any other "good citizen." Jelks' testimony was as "voluntary" as the robbery victim who, with a gun to his head, "voluntarily" gives the store's proceeds to the robber.

That the prosecution presented Jelks in a totally false light became very apparent when Jelks finally agreed with the detectives that he was the driver of the car in the Mosley murder. He told the detectives that Cleamon Johnson and "Jelly Rock" were the shooters. [CT Supp IV, 4:906-907] Immediately thereafter, Jelks began to say over and over that the 89 Family gang members were going to kill him because he told the police about their involvement in the Mosley murder. [CT Supp IV, 4:908] Detective McCartin tried to calm Jelks down, saying "They don't know where you live. If you have to, we could relocate you somewhere, Freddie." [CT Supp IV, 4:908]

b. Jelks Was Told What the Requirements Would Be for Him to Gain Entry into the Witness Protection Program. The Detectives also Told Jelks that They Wanted to Work Out a Deal with Him if He Co-operated; hence, Jelks Had an Extreme Motive or Bias to Co-operate with the Prosecution.

Jelks continued to lament to the detectives that his life was in extreme jeopardy, that he couldn't go to jail because of the danger, etc. [CT Supp IV, 4:909-912] The detectives continued trying to get Jelks to commit to testifying against Evil in the Mosley murder. Jelks directed the discussion back to the witness protection program and asked the detectives to explain it to him. It was here that the detectives, in effect, told Jelks that if he wanted to have any hope of getting into the witness protection program, he would have to "please" the DA with his testimony. That is, his testimony in the Mosley murder case, or any other murder case for that matter, would have to be such that the DA would decide he was a good witness, that the DA would want to use him as a witness at the trial, and that his testimony would have to be "vital" in convicting the charged defendants. Jelks then inquired what would happen to him if the DA decided he

was not a good witness, or the DA decided she didn't want to use his testimony, or the DA decided his testimony was not vital to the case? Since his "homeboys" would know that he had "snitched them off", would he just be discarded because the DA didn't want to deal "with that asshole"? Detective McCartin's response was very clear and re-assuring to Jelks; that things would work out okay. They wanted to work out a deal with him, otherwise they wouldn't have been talking to him:

TAP: So either, -- either you're with us or you're not. There it is.
. . .
FJ: Okay. Now, let me say this to you. So if I – is that going to be – is that – what is that supposed to be like; a witness protection program or something?
McC: Yeah, we'd have to put you in a witness protection program. . . . What happens is – no, if the DA decides that you're a good witness and they want to use you, and that you're vital to our case, funding will come down and you could be moved to another town, another city somewhere to protect you from anybody ever coming after you. And when you're needed for these hearings, we go down, we pick you up, we bring you in, and then we take you back.
FJ: And this is going to work?
McC: Yeah, why wouldn't it work?
FJ: I'm asking you. I mean –
McC: No, we've done it (Untranslatable)
FJ: (Untranslatable) I don't – see, I don't want to get you all upset, and then you be like "fuck it, I don't want to deal with this asshole", and –
McC: No, no, no, no, no. I don't want either. I want us to keep on a good rapport basis with you. I don't want to — I don't want things to not work out. That's why we got you.
FJ: All right.
McC: And that's why we're talking to you. If we didn't want to work something out with you, we would have – we wouldn't even be in he room here sitting with you for so long.
FJ: Right. [CT Supp IV, 4:913-915]

At this point, Jelks knew the police "wanted to work something out with" him. He had confessed to being the driver in the Mosley murder. He had

"snitched off" fellow gang members Cleamon Johnson and "Jelly Rock." His life was in danger because of this. Jelks was fully aware at this point that his freedom, as well as his life, depended on his doing whatever the police and prosecutor wanted him to do.

And up until this point in the interrogation, there had been absolutely *no mention of the Loggins/Beroit murders*. As far as Jelks' state of mind at that time, everything he was expected to do for the prosecution pertained to the Mosley drive-by murder.

The detectives continued discussing the Mosley murder with Jelks for another 15 pages of transcript (to CT Supp IV, 4:930) Finally, the detectives asked Jelks about the Loggins and Beroit murders. [CT Supp IV, 4:934]

On cross examination, Mr. Orr tried to rebut Jelks' magnanimous responses by establishing the existence of a substantial bias on Jelks' part. He wanted to prove Jelks was trying to please the prosecution and ingratiate himself with the jury; that Jelks' *real reason* for testifying was totally different and a lot less "noble" than what Jelks stated on direct examination. In effect, Jelks had no choice. He either testified in a manner that pleased the prosecutor or he knew he would a) receive no benefit in his pending case in return for his testimony, and b) he would also not receive any witness protection or relocation assistance from the prosecution. Mr. Orr wanted the jury to understand that Jelks believed he would spend the rest of his life in prison without protection from those who would seek to kill him if he *did not* testify in a manner that pleased the prosecutor.

However, Mr. Orr could *not* prove this because to do so, he would have to question Jelks regarding the details of Jelks' pending murder case. The court had already embarrassed him in front of the jury previously when Orr sought to do just that. (See RT, 16:3644-3645.) Orr's cross-examination was, of necessity, benign.

4. The Court's Error Was Prejudicial.

Appellant asserts the trial court's error was *not* harmless beyond a reasonable doubt because Jelks' credibility would have been severely undermined

and impeached, and the remaining evidence against Appellant was *not* overwhelmingly persuasive of Appellant's guilt.

Whether a denial of a defendant's constitutional right of confrontation requires a reversal is evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Id.*, at p. 24.) Accordingly, a conviction tainted by constitutional error must be set aside unless the error complained of "was harmless beyond a reasonable doubt." (*Id.*)

Under that test, an appellate court may find an error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*People v. Bolden* (2002) 29 Cal.4th 515, 560.) The beyond a reasonable doubt standard of Chapman "require[s] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Thus, the focus is what the jury actually decided and whether the error might have tained its decision. That is, the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error. (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

When cross-examination is designed to impeach a witness, "the trial judge is expected to allow a wide-ranging inquiry as to any factor which could reasonably lead the witness to present less than reliable testimony." (*In re Anthony* (1985) 167 Cal.App.3d 502, 507.) As discussed above, Appellant's constitutional rights were violated when the trial court prohibited a full cross-examination of Jelks that would have 1) demonstrated numerous areas where Jelks' direct

examination was contradicted by his statements to the police; 2) revealed Jelks' had a distinct propensity to lie when he thought it was in his best interests, and 3) established Jelks' bias or motive to please the prosecution was so substantial that he would say anything if he thought it would lead to his being protected and would lead to a favorable disposition in his pending murder case.

The State must now establish that the jury would have reached the same verdicts and penalty even if Jelks had not testified. In other words, the impeachment evidence regarding Jelks was so potentially substantial that the jury may well have completely disregarded his testimony. In that event, the question then would be whether the jury would have found the testimony of Carl Connor and Marcellus James sufficiently persuasive that they would still have returned verdicts of guilty and a sentence of death. Appellant strongly asserts that this would not have occurred.

Carl Connor was dramatically impeached. The evidence is very strong that he intentionally committed perjury in the hope of receiving a financial reward for his efforts. (See Issues I and III in Appellant's Opening Brief, *supra*.) Marcellus James was willing to speak to the police only when he was in custody and needed their assistance. His testimony that Appellant simply confessed to him while they were standing on a street corner is the most easily concocted story an informant can create. The fact that he was impeached with numerous inconsistent statements regarding the source of his "knowledge" simply added to the doubt as to his credibility. (See Issue X in Appellant's Opening Brief, *infra*.) Furthermore, there was absolutely no physical evidence that connected Appellant to the crime; no fingerprints, no foot prints, no firearms identification evidence, no gun shot residue, nothing. In fact, the prosecution produced *no* evidence, other than the witnesses' own testimony, that the witness was at the murder scene (Connor), at Johnson's house (Jelks) or *ever* even had a conversation with Fat Rat (James). Further, Jelks' and Connor's testimony contradict each other in a manner that makes it clear one of them, if not both, lied. Appellant submits it is very

improbable that the State can persuasively argue that Appellant was the shooter based exclusively on the testimony of Connor and James.

D. Conclusion.

It is the essence of a fair trial that reasonable latitude by given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (*Alvarado v. Superior Court of Los Angeles County* (2000) 23 Cal.4th 1121. A trial court's limitation on cross-examination of a witness pertaining to the witness' credibility violates the confrontation clause if a reasonable jury might have received a significantly different impression of the witness' credibility had the excluded cross-examination been permitted. (People v. Ayala (2002) 23 Cal.4th 225.

The excluded evidence was relevant and admissible under *Davis v. Alaska* (1974) 415 U.S. 308, 317, because it was essential to bolster Appellant's defense that Jelks fabricated his testimony. More fundamentally, the court's ruling denied Appellant his constitutional right to present all favorable relevant evidence of significant probative value. (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Whether the error is measured by the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 21, or the *People v. Watson* (1956) 46 Cal.3d 818, 836, standard, a new trial is warranted because there is a reasonable probability that the exclusion of this highly relevant evidence affected the verdict to Appellant's detriment. The error was prejudicial because the jury could have disbelieved Jelks claim that he present at Johnson's house and observed what he claimed he observed.

Accordingly, Appellant respectfully requests this Court overturn his convictions and sentence of death.

V.

The prosecutor committed prosecutorial misconduct when she failed to disclose material evidence to the court upon the court's specific request. The prosecutor thereafter failed to correct the court's misunderstanding of the facts on five occasions. This misconduct was material, violated Appellant's Fourteenth Amendment Right to Due Process and a Fair Trial, and was prejudicial, thereby requiring Appellant's conviction and judgment of death be overturned.

A. Introduction..

Appellant respectfully inserts herein by reference as though fully set forth the more detailed statement of facts regarding the following summary, including citations, that is included in Argument IV.A, *supra*, of this Opening Brief.

Prior to the testimony of Freddie Jelks, the prosecution brought a motion *in limine* to limit the scope of cross-examination of Jelks. After reading a transcript of the interrogation of Jelks, the trial judge asked the prosecutor if there was any other evidence that linked Jelks to the Mosley murder besides Jelks' statements during the interrogation that he was the *driver* of the car in the Mosley drive-by murder. [RT, 16:3584] The prosecutor informed the court that another witness (i.e., Marcellus James) had identified both Jelks and Johnson as "being involved" in the Mosley murder; however, she failed to tell the court that James had told detectives that Jelks was *not* the driver. Rather, Jelks was in the right front seat of the car with a .38 caliber handgun, impliedly indicating that Jelks was one of the shooters. The significance of this information was that if James had told the truth, then Jelks was *still lying* to the detectives when he finally agreed with their accusations that he was *just* the driver of the car in the drive-by shooting.

Without this additional information which would have cast doubt on the credibility of Jelks' incriminating admission, the trial court assumed Jelks' statement to the detectives was trustworthy as to the Loggins/Beroit murders because he, in the same statement, had incriminated himself in his own murder case. Hence, the trial court reasoned that the necessity by the defense to confront

and cross-examine Jelks could be significantly limited because his statement to the detectives had indicia of reliability within it.[147]

On five (5) subsequent occasions during the court's discussion with counsel, the court made it clear it was deciding the prosecution's motion based on its understanding that Jelks was truthful when he admitted that he was the *driver* of the car in the Mosley drive-by murder. On each occasion, however, the prosecutor failed to advise the court of the additional information. Appellant asserts that if the trial court had been told that James contradicted Jelks and had told the same two detectives on two occasions that Jelks was *not* the driver but, impliedly one of the shooters, the trial judge would have viewed Jelks' credibility with considerable distrust. Hence, the trial court would have allowed the defense to fully confront and cross-examine Jelks to fully test his credibility.

Appellant asserts the prosecutor knowingly and intentionally failed to disclose to the court what James had told detectives because it would have led to the court's denial of her motion to limit the cross-examination of Jelks. Further, had the trial court denied the prosecution's motion to limit the scope of cross-examination of Jelks, Appellant and the co-defendant would have been able to impeach Jelks to such a degree that the jury may well have discounted, if not outright rejected, his testimony. Hence, Appellant maintains the withheld information was *material.*

Appellant argues the prosecutor's misconduct was such that the government cannot convince this Court that the error "was harmless beyond a reasonable doubt." Appellant's rights to due process under both the United States and California constitutions were violated, and the prosecutorial misconduct requires Appellant's convictions and judgment of death be overturned.

B. <u>The Applicable Law.</u>

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[147] The court's rationale was similar to that of Evid. Code, § 1230, an exception to hearsay for "declarations against penal interest."

1. Prosecutorial Misconduct and the Failure to Disclose Material Evidence that Is Favorable to the Defense.

Seventy years ago, the United States Supreme Court described the role of the prosecutor in our modern criminal justice system. That court stated that because the prosecutor "is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer ..., [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

A prosecutor "has no obligation to win at all costs and serves no higher purpose by so attempting." (*Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1195) The courts of this State are in complete accord with this view of the role of the prosecutor. "The DA's office is obligated not only to prosecute with vigor, but also to seek justice. (*People v. Connor* (1983) 34 Cal.3d 141, 148) It cannot resort to "the use of deceptive or reprehensible means to influence the jury." (*People v. Wiley (1976) 57 Cal.App.3d 149, 162) In People v. Ruthford* (1975) 14 Cal.3d 399, 405, this Court wrote:

> [T]he role of the district attorney is more than that of an advocate. "His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial....' [Citations] ... When such conduct hinders the ascertainment of truth, restraints must be imposed to prevent the denial of a fair trial as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States." (*People v. Ruthford* (1975) 14 Cal.3. 399, 405.

Under the due process clauses of the federal and California Constitutions, the prosecution has an obligation to disclose material evidence favorable to a criminal defendant. (U.S. Const., 5th & 14th Amends.; Cal Constitution, Art. I, § 15.) "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or to punishment." (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *United States v.*

Bagley (1985) 473 U.S. 667, 676; *United States v. Agurs* (1976) 427 U.S. 97, 107; *In re Brown* (1998) 17 Cal.4th 873.) In addition, the prosecution has a duty to disclose any favorable evidence that could be used "in obtaining further evidence." (*Giles v. Maryland* (1967) 386 U.S. 66, 74.)

This Court, in *In re Ferguson* (1971) 5 Cal.3d 525, 532-533, imposed a stricter duty upon prosecutors by requiring them to disclose substantial material evidence favorable to the defense *without request.* Subsequent United States Supreme Court cases expanded the federal duty to also disclose favorable material evidence even if the defense failed to request it. *United States v. Agurs* (1976) 427 U.S. 97, 110-111; *United States v. Bagley* (1985) 473 U.S. 667, 682.

Additionally, the prosecutor's duty to disclose all substantial material evidence favorable to an accused applies to evidence that "relates directly to the question of guilt, to matters relevant to punishment, or the credibility of a material witness." (*People v. Ruthford* (1975) 14 Cal.3d 399, 406. Emphasis added.)

In *East v. Johnson* (5th Cir. 1997) 123 F.3d 235, that if "the withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material." (*Id.* at p. 239, quoting *Wilson v. Whitley* (5th Cir. 1994) 28 F.3d 433, 439.)

Favorable evidence includes not only evidence that is exculpatory but also evidence that serves to impeach the credibility of government witnesses. (*Giglio v. United States* (1971) 405 U.S. 150, 154.) Furthermore, favorable evidence need not be competent evidence or evidence that would be admissible in court. (*United States v. Gladding* (S.D.N.Y. 1967) 265 F. Supp. 850, 886; *Sellers v. Estelle* (5th Cir. 1981) 651 F.2d 1074, 107, fn.6.) This Court has described "favorable" evidence as evidence that "either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." *In re Sassounian* (1995) 9 Cal.4th 535, 544.

Hence, a prosecutor's duty to disclose evidence favorable to the accused extends to evidence that is relevant to the credibility of witnesses. *People v.*

Ruthford (1975) 14 Cal.3d 399, 406, overturned on another ground in In re Sassounian (1995) 9 Cal.4th 535, 545-546. See also *Giglio v. United States* (1972) 405 U.S. 150, 154. This includes "any inducements made to prosecution witnesses for favorable testimony...." *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 43.

The United States Supreme Court used language that, Appellant asserts, is particularly pertinent to the prosecutor's misconduct in this case:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.... It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair. (*Napue v. Illinois* (1959) 360 U.S.264, 269-270. Internal quotations omitted.)

This Court is in full accord with these principles. "The duty to disclose evidence favorable to the accused extends to evidence which may reflect on the credibility of a material witness." (*In re Roberts* (2003) 29 Cal.4th 726, 742; *In re Jackson* (1992) 3 Cal.4th 578, 594.) And this Court held in *People v. Phillips* (1985) 41 Cal.3d 29, 46:

> Since a witness' credibility depends heavily on his motive for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements." (*Id.*, at pp. 29-30; see also *In re Jackson* (1992) 3 Cal.4th 578, 594. Emphasis added.)

The "materiality" standard for disclosure of favorable evidence is the same under the state Constitution as under the federal Constitution. The prosecution has a duty to disclose all evidence that is favorable to the defendant and material to guilt or to punishment. ((*In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

Evidence is deemed material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley,(1985),* 473 U.S. 667, 682.) See also *In re Roberts* (2003) 29 Cal.4th 726, 742*; In re Sassounian* (1995) 9 Cal.4th 535, 546.) More recently, the United States Supreme Court observed that a "reasonable probability" of a different result is shown when the non-disclosure "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict." (*Kyles v. Whitley* (1994) 514 U.S. 419, 506 (footnote omitted)].) "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." (*Id.* at p. 506.)

The good faith or the bad faith of the prosecutor or police investigator in failing to disclose exculpatory evidence is immaterial, for, as *People v. Ruthford* (1975) 14 Cal.3d 399, 406, stated, it does not matter whether such "a prosecutorial failure" is "intentional, negligent or inadvertent." See also *Brady v. Maryland* (1963) 373 U.S. 83, 87 [due process violation "irrespective of the good faith or bad faith of the prosecution."]

The courts emphasize that the criminal justice system's goal is to ascertain the truth, and that adversarial gamesmanship must be subordinated in order to achieve that goal:

> "The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the

> ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*United States v. Agurs* (1976) 427 U.S. 97, 110-111.

These prosecutorial duties of disclosure apply to the court itself just as they do to defense counsel.

Finally, the prosecutor's constitutional duty *to correct false testimony* is based on principles similar to those underlying the duty to disclose exculpatory evidence. In *Mooney v. Holohan* (1935) 294 U.S. 103, the United States Supreme Court first held that a prosecutor's use of false testimony could constitute a denial of due process.

> "[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (*Id.*, at p. 112.)

Mooney involved a knowing and intentional use of false testimony, which was related directly to the defendant's commission of the charged crime. Subsequently, the United States Supreme Court has expanded *Mooney* to cover perjury not suborned by the prosecutor (*Alcorta v. Texas* (19553) 355 U.S. 28), perjured statements not dealing with a substantive element of the prosecution's case (*Napue v. Illinois* (1959) 360 U.S. 264), and situations where the prosecutor did not know the testimony to be false, if the prosecutor should have had that knowledge. (*Giglio v. United States* (1972) 405 U.S. 150.)

> When a claim of prosecutorial misconduct in the suppression of material evidence is considered by an appellate court[148], the

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[148] Although the "question of the state's knowing use of perjured testimony to secure a conviction normally arises in habeas corpus proceedings rather than on appeal", this Court had held that when "the alleged perjury appears from the

> applicable standard of review differs depending on whether the misconduct pertains to issues related directly to the innocence or guilt of the accused, or whether the misconduct pertains to the credibility of an important prosecution witness. In *People v. Ruthford* (1975) 14 Cal.3d 399, 406-407, this Court explained that "the judgment of conviction must be reversed without weighing the degree of the prejudice" if the suppresses evidence "bears directly on the question of guilt...." (Id., at p. 406-407.)

However, this Court held in Ruthford that the "suppression of substantial material evidence bearing on the credibility of a key prosecution witness" will rise to "a denial of due process within the meaning of the Fourteenth Amendment" unless the Court "can declare a belief that the denial 'was harmless beyond a reasonable doubt.' *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ruthford* (1975) 14 Cal.3d 399, 408)

Further, the fact that the witness was impeached with other evidence does not change the materiality of the prosecutorial misconduct. (*In re Roberts* (2003) 29 Cal.4th 726, 742; *Napue v. Illinois* (1959) 360 U.S. 264, 269.

Hence, Appellant's Fourteenth Amendment Due Process Right was violated in the instant case if a) the prosecution failed to disclose to the trial court substantially material evidence favorable to the defense that was relevant to the credibility of a material witness, and b) the non-disclosure was not harmless beyond a reasonable doubt, applying the test enunciated in *Chapman*.

C. Discussion.

1. In ruling on the prosecution's motion to limit cross-examination of Jelks, the trial court specifically asked the prosecutor if there was *any other evidence* that linked Jelks to the Mosley murder.

Prior to the noon break, the trial judge indicated he had read about half of the rather lengthy transcript of Jelks' taped interrogation by detectives McCartin and Tapia. The court asked the prosecutor if there was any other evidence that

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record on appeal" it may be raised on appeal. (People v. Gordon (1973) 10 Cal.3d 460, 473, fn. 7.)

linked Jelks and co-defendant Johnson to the Mosley murder besides Jelks' admission to the detectives:

> CRT: All right. Let the record reflect that the jurors are now gone. In this case [i.e., the Mosley murder] where Mr. Johnson and Mr. Jelks are co-defendants, what, if any, other evidence exists to tie those gentlemen to the crime other than Mr. Jelks' statement? [RT, 16:3584 (Emphasis added)]

2. The prosecutor's response to the court's specific inquiry.

The prosecutor responded to the court's inquiry, but did not disclose the obvious contradiction between James' statements to the police and Jelks' "admission" to the detectives. The clear implication of the prosecutor's omission was that the trial court assumed Jelks' admission to the detectives was truthful, when it actually may well have been the next in a series of self serving lies.

> DDA: There is another witness [i.e., Marcellus James] that identifies the two of them as being among the perpetrators.[149]
> . . .
> DDA: I misspoke. There were two witnesses [i.e., James and Keith Williams) who testified about that particular case and made identifications. One of them [James]... saw the perpetrators together before the incident and then saw the[m] return.
> CRT: Who is the other person?
> DDA: The person [Williams] who admissions were made to [by co-defendant Johnson].
> CRT: So you do not have an eyewitness identification?
> DDA: No. The only person that would do that is Mr. Jelks.
> CRT: All right. [RT, 16:3584-3585. Names in brackets are added by Appellant to clarify who the prosecutor was referring to.]

The manner in which the prosecutor responded to the trial judge's inquiry led the court to believe that the particular witness' [i.e., Marcellus James'] statement and grand jury testimony was *consistent* with what Jelks finally told the

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[149] This witness who identified both Jelks and Johnson as "being among the perpetrators" was Marcellus James. James testified in the guilt phase of Appellant's trial. Subsequently, he was called by the prosecution to testify against co-defendant Johnson regarding the Mosley murder in the penalty phase of the trial.

detectives (after providing three previous lies as to his involvement in the Mosley murder). James had, in fact, identified Jelks and Johnson as being "the "perpetrators."[150] What the prosecutor *conspicuously omitted* in this exchange with the court was what James said was Jelks' role as one of the "perpetrators."

3. The prosecutor's argument further misled the trial judge.

After the noon break, and after the trial judge indicated he had read the transcript of Jelks' interrogation, the prosecutor again made comments that *misled* the court into believing there was *no evidence* that contradicted Jelks' admission and that would have indicated Jelks may still have been lying to the detectives.

> DDA: The police did tell them (sic) [Jelks] that they would let him go home if he told them the truth. They didn't tell him what to say, and they asked about a variety of different cases. He did talk about his own case from pages 84 to about –
> . . .
> And the police did tell him they had evidence against him already. So, he does give himself up and give up the other people that were involved in that particular case. [RT, 16:3587-3589]

The prosecutor continued to refer to the evidence regarding Jelks' involvement, but *not once* did she mention to the trial court that Marcellus James identified Jelks as one of the shooters, *not* the driver. As far as the court knew, James's statement to the detectives confirmed that Jelks' was the driver and not one of the shooters. Hence, in the court's mind, Jelks was truthful when he acknowledged he was *only* the driver. The prosecutor added:

> DDA: At the grand jury on the Mosley murder, Mr. Jelks did not testify, for obvious reasons, and the indictment was based on the testimony of 6 civilian witnesses and several law enforcement witnesses. And I brought the witness list down to court, and I would be willing to submit it if it would assist

[150] "Perpetrators" was the word selected by the prosecutor to use. James never used that word in describing the conduct of Jelks, Johnson and "Jelly Rock.".

> the court in its review.[151] I also brought the grand jury transcript with respect to 10896. [RT, 16:3591]

Again, what is significant in the prosecutor's comments is what she did not say. She did not tell the trial judge the content of James' testimony at the grand jury. She did not tell the trial judge that during two different interviews with the police, James identified Jelks as having the .38 caliber revolver and sitting in the right front passenger seat of the car used in the Mosley drive-by murder when the assailants drove off, as well as when they returned.

In other words, the prosecutor did *not* tell Judge Horan that Jelks may still have been *lying* to the detectives when he acknowledged that their statements to him that he was just the driver were true. .

Furthermore, although the prosecutor apparently had the grand jury transcript of the Mosley murder case with her, she had no copies for the court and defense counsel [RT, 16:3590-3591]. There also was no indication that the trial court ever read the grand jury transcript involving the Mosley murder to find out for itself what James and the other witnesses said regarding the Mosley murder. Without the prosecutor's having urged the court to read the grand jury transcript, there was really no reason for the court to question the representations of the prosecutor. In the court's mind, the grand jury transcript would simply have revealed what the prosecutor had already said; that the grand jury witnesses' testimony was consistent with Jelks admission to having been the driver.

4. On five (5) different occasions the prosecutor failed to correct Judge Horan's potentially false understanding of Jelks' involvement in the Mosley murder.

Thereafter, on five different occasions before and during the trial judge's discussion and ruling on the prosecutor's *in limine* motion to restrict cross-examination of Jelks, the court's comments to the attorneys revealed his

[151] The "list of witnesses" who testified at the grand jury hearing regarding the Mosley murder would not, of itself, have assisted the trial court in determining if there was additional evidence that tied Jelks to the Mosley murder.

understanding that Jelks' "confession" to the detectives was truly incriminating and not in any way self-serving. And on each of these occasions, the prosecutor failed to advise the court that its understanding of Jelks' veracity was in serious question. (See RT, 16:3600, 3808-3809, 3611, 3613-3614, 3592.)

Appellant asserts that if the trial court been made aware of James' statement, the trial court would immediately have asked the prosecutor if Jelks' "confession" during his interrogation was truthful or not.[152] In other words, the court would certainly have inquired of the prosecutor:

a) Did Jelks tell the truth when he confessed to the detectives, or was he still lying when he acquiesced to being the driver?;

b) If Jelks was still lying as to his involvement in his own pending murder case, how do we know he wasn't also lying when to told the detectives about the Loggins/Beroit murders?;

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[152] Although the overwhelming and unambiguous evidence illustrates the prosecutor and detectives knew James said Jelks was one of the shooters, there was some evidence, albeit rather ambiguous, that James on one occasion may have told the police that Jelks was the driver. During the penalty phase of the trial, James initially said that Jelks got into the driver's seat, then moments later indicated he wasn't sure who sat where. The confusion was exacerbated when the prosecutor insisted on asking leading and suggestive questions to the point it was not clear if the witness was simply agreeing with the prosecutor or was testifying from his own memory. [RT, 31:6198-6200]

On cross-examination of James during the penalty phase, James testified that Jelks was the driver of the car in the Mosley murder. James denied telling the police that "Jelly Rock" was the driver. Mr. Lasting properly refreshed James' memory by letting him read a police document, then had James admit he told the police that "Jelly Rock" was the driver, Jelks was seated in the right front passenger seat, and Johnson was seated in the rear seat. [RT, 31:6214-6216]

Thereafter, on redirect examination the prosecutor referred to "some notes of an interview with you", then asked James if the first time he spoke with the police, he said Jelks was the driver. No evidence was introduced to establish the "notes of an interview" referred to a particular interview with Jelks, when it occurred, etc. When the prosecutor asked another series of leading and/or suggestive questions of James. James then claimed he would have been mistaken in 1994 if he said Jelly Rock was the driver of the car. [RT, 31:6223-6224]

c) If Jelks was still lying as to his involvement in his own pending murder case, did the prosecution consider this "cooperation" on Jelks' part?

d) If Jelks believed that "cooperation" with the prosecution *did not necessarily mean telling the truth*, why should the trial court *limit* the defendants' right to confront and cross-examine one of their chief accusers in, of all cases, a capital case?

5. The court's rationale for limiting the scope of cross-examination was based on its belief that Jelks told the truth when he confessed and incriminated himself in the Mosley murder; hence, his entire statement to the police was sufficiently trustworthy to limit the scope of cross-examination.

Judge Horan's reasoning as to why it was appropriate to limit defense cross-examination of Jelks was similar to the analysis used to explain why "declarations against interest" have sufficient trustworthiness as to warrant qualifying as an exception to the hearsay rule. (See Evid. Code, § 1230) The out of court declaration is deemed trustworthy when the declarant's statement contains information that "subject[s] him to the risk of ... criminal liability such ... that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230) See also *Williamson v. United States* (1994) 512 U.S. 594[153]; *People v. Frierson* (1991) 53 Cal. 3d 730, 745-746) Hence, the need to confront and cross-examine the out-of-court declarant is diminished because the likelihood that cross-examination will reveal anything untoward is slight..

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[153] In *United States v. Williamson* (1994) 512 U.S. 594, Justice Kennedy wrote that an out of court statement should be admissible in its entirety if the statement in the aggregate was self-inculpatory. The indicia of trustworthiness, provided by the self-inculpatory portions of the statement, would be sufficient to allow the entire statement to be admitted, including non-self-inculpatory parts. The other eight members of the court rejected Justice Kennedy's argument, however. In fact, in a concurring opinion written by Justice Ginsberg, and joined in by three other justices, she wrote that the out-of-court declarant's "arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy."(*Id.*, at p.608.)

Judge Horan appears to have applied the same analysis to the necessity of the necessity of the defense being able to fully cross-examine Jelks. Because the court apparently believed that Jelks incriminated himself during his out of court interrogation with the detectives, the indicia of trustworthiness of his entire statement and subsequent testimony was high and the likelihood that cross-examination would reveal anything untoward was low; hence, the court reasoned that the need for the defense to confront and cross-examine this particular accuser was not as great as it might have been had Jelks not incriminated himself during the interrogation. Judge Horan's comments to counsel appear to reveal this analysis:

> CRT: Mr. Jelks, admits being involved in criminal activity himself on many occasions with your client. And those portions seem to be not what I would call self-serving at all. He admits a good deal of criminal liability on his own part, including driving the car in this one homicide that is trailing. Now he also tries to minimize it, it seems to the court, his own involvement, his own state of mind, and so forth. But the bottom line is he does admit to slowing a car down to 5, 6, 7 miles an hour with knowledge that there's guns in the car, driving to a rival gang territory to a party going on with some rival gang members, and lo and behold, somebody gets killed, there's a gun fight, he describes it, and so forth. To some degree he lays out your client on that, but he lays himself out as well. [RT, 16:3600 (Emphasis added).]

Appellant asserts the trial court would *never* have said the things it said if the prosecutor had responded to the court in a forthright and honest manner rather than intentionally withholding the very information that the court was concerned about. Jelks' "incriminating statement" that he was the "driver of the car" may well have been self serving! Jelks may still have been lying to the detectives. He had already told three different lies to the police (and insisted each version was the truth) before he finally "agreed" with the detectives statements that he was the shooter.

The trial judge also said,

CRT: All right. The ruling will be as follows:
It seems to me, Mr. Lasting, that you are in a fairly unique situation, wherein the pending case of the witness is a case wherein he in this transcript gives, oh, a confession, or the next best thing as to his being the driver of a car in a drive-by shooting wherein your client is allegedly the shooter. Your client and another individual, J Rock, I think, or somebody mentioned. [RT, 17:3808-3809 (Emphasis added)]

If James told the detectives the truth on both occasions when he said Jelks was, inferentially, one of the shooters, then Jelks' statement to the detectives was *not* "the next best thing to a confession." Jelks' acknowledgement that the detectives were correct when they said they knew he was just the shooter would have been self serving and an intentional attempt to minimize his involvement in that murder! The prosecutor was well aware of this possibility. The prosecutor also knew that the trial judge was *not* aware of this possibility. Yet the prosecutor did *nothing to advise* the court of that possibility.

6. The trial court would not have limited defense cross-examination of Jelks if the prosecutor had not withheld the information specifically requested of her.

If Jelks, during the interrogation, had said nothing that incriminated him, there would have been nothing about his statement to the police that would have suggested it was trustworthy. Hence, the need to cross-examine Jelks about that statement as it pertained to his testimony *in this case* would have been very important. But Jelks arguably did something much worse than simply not incriminate himself If Jelks lied to the police about his involvement in his own pending murder case, there would have been absolutely no justification for limiting defense cross-examination of Jelks. If the trial court had concluded that Jelks's "confession" to being the driver was simply the latest in a series of untruths that Jelks hoped would allow him to avoid being arrested, Appellant asserts the court would *never* have limited defense cross-examination of Jelks

Evidence that would have impeached the credibility of Jelks was highly relevant and probative in Appellant's trial If the jury did not believe Jelks, the likelihood of conviction would have been very remote, given the extent of the impeachment of Connor and James. It was therefore, very important that the defense be given adequate opportunity to challenge Jelks' credibility.

Moreover, why would the trial court have been concerned about "immunizing" Jelks from cross-examination regarding the facts of his pending case, if the court had concluded that Jelks was still lying about as a significant a matter as his involvement in a murder case? And why would the trial judge be concerned about the prosecution's ability to use Jelks as a witness in Appellant's case, yet also be able to prosecute Jelks in his own case, if the prosecution itself had "unclean hands." Appellant asserts the court would not have been concerned; hence, the court would have denied the prosecution's motion to limit cross-examination of Jelks (except as to Jelks' mentioning who his accomplices were in the Mosley murder.)

Moreover, had the defense been able to confront Jelks with his continuing lies in the case pending against him, it is reasonably probable that the jurors would have viewed Jelks' testimony against Appellant and co-defendant Johnson with significantly greater skepticism. His various lies during the interrogation would have contradicted much of his testimony given on direct examination. The lies regarding his involvement in the Mosley murder would have been character evidence of moral turpitude that would have undermined his credibility generally (See Issue IV in Appellant's Opening Brief), and his discussions with the detectives involving an agreement with them in exchange for his cooperation (See Issue VI in Appellant's Opening Brief) would have demonstrated Jelks' extremely strong bias motive to please the prosecution. Had the jury known these facts, they may well have rejected Jelks' testimony totally. Further, the credibility of McCartin, Tapia and Sanchez would also have been seriously undermined. After all, it was they who arguably applied the pressure that coerced Jelks into

confessing he was the driver, a fact they *knew* was inconsistent with, and contradicted by, James' statements.

Under the due process clauses of the federal and California Constitutions, the prosecution has an obligation to disclose material evidence favorable to a criminal defendant. (U.S. Const., 5th & 14th Amends.; Cal Constitution, Art. I, § 15.) The prosecutor's duty to disclose all substantial *material* evidence *favorable* to an accused applies to evidence that "relates directly to the question of guilt, to matters relevant to punishment, or the credibility of a material witness." (*People v. Ruthford* (1975) 14 Cal.3d 399, 406. Emphasis added.)

Favorable evidence includes not only evidence that is exculpatory but also evidence that serves to impeach the credibility of government witnesses. (*Giglio v. United States* (1971) 405 U.S. 150, 154. Emphasis added.) This Court has described "favorable" evidence as evidence that "either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) Certainly, James statements were favorable to the defense because they pertained directly to the credibility of Jelks, a key prosecution witness, and may well have influenced the trial court to rule otherwise.

Finally, in *People v. Ruthford* (1975) 14 Cal.3d 399, 408, this Court explained that...

> the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. ... An accused, accordingly, is entitled to relief in such circumstances unless we can declare a belief that the denial 'was harmless beyond a reasonable doubt.' Chapman v. California (1967) 386 U.S. 18, 24. (*People v. Ruthford* (1975) 14 Cal.3d 399, 408)

D. Other Constitutional Concerns.

Appellant also asserts that the fundamental rights contained in the Sixth Amendment and applicable to him through the Fourteenth Amendment were violated.

Not only could he not confront and cross-examine one of his chief accusers, but his constitutional right to effective assistance of counsel was meaningless if the court disallowed counsel from being able to adequately confront and question witnesses (cf. *Delaware v. Van Arsdall* (1986) 475 U.S. 673). Further, without the ability to adequately test Jelks' credibility, Appellant's fundamental right exemplified in the Eighth Amendment and made applicable to Appellant in state court proceedings through the Fourteenth Amendment, to reliable guilt and penalty determinations was violated. (*Herrera v. Collins* (1993) 506 U.S. 390, 398-399; *Beck v. Alabama* ( ) 447 U.S. 635; *Gardner v. Florida* ( ) 430 U.S. 349.) Indeed, "*Brady* does not require disclosure for the mere sake of disclosure. Rather, the requirement is a means to ensure that the defendant is afforded the opportunity to effectively present evidence in his or her defense." (*United States v. Boyd* (N.D. Ill. 1993) 833 F.Supp. 1277, 1354, affd. (7th Cir. 1995) 55 F.3d 239.) As discussed in Issue IV above, the prosecutor's failure to disclose undermined Appellant's right to a reliable guilt and penalty determination. The jury struggled to convict appellant. The credibility of Jelks was key to this determination.

Additionally, in the penalty phase of the trial, the jury heard the testimony from James that contradicted and undermined the credibility of Jelks' testimony in the guilt phase, impeachment evidence that may well have caused the "holdout" jurors to deepen their resolve to maintain their not guilty votes, and evidence that may have caused other jurors to switch their votes to not guilty. However, the decision regarding Appellant's guilt had already been made. In the penalty phase it was too late for the jury to reconsider Appellant's guilt with this new information regarding Jelks. Further, the trial court told the jurors to consider James testimony in the penalty phase only as to co-defendant Johnson. Even if the entire jury had wanted to re-visit the issue of Appellant's guilt because of this new information, the jury would have been unable to do so. This inability to do anything to correct a wrong would have undermined the jury's confidence in thei verdicts; it would also have undermined the parties' and the public's confidence in the validity of the verdicts of sentence of death.

4. <u>Conclusion</u>.

In summary, a) had the court and subsequently the jury learned that Jelks arguably continued to lie to the police and to minimize his involvement in the

Mosley murder, b) had the court and subsequently the jury learned that the police and prosecutor were aware that Jelks' "admission" may have been a self serving lie, and c) had the court and subsequently the jury been made aware that the police and prosecution told Jelks that they "knew he was telling the truth" and then encouraged him to continue "cooperating" in this fashion, it is reasonably probable that Appellant would have obtained a different result; that is, "our confidence in the verdict [would be] sufficiently undermined to warrant reversal." (See Giglio v. United States (1972) 405 U.S. 150, 154-155 [credibility of key government witness was important issue since government's case depended almost entirely on witness' testimony.]

Jelks was of paramount importance to the prosecution's case; the results of the trial depended to a large extent on his credibility. His testimony was essential to Appellant's conviction because he was one of only three witnesses who linked Appellant to the killings. In this regard, the language of the court in *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1377-1378, is fully appropriate to these facts:

> Serious charges of prosecutorial misconduct have been leveled in this proceeding. We examine these accusations carefully, aware that if established they undermine the fundamental core of our judicial system—a search for truth. We rely upon jurors to ascertain the truth and entrust them with the responsibility of determining whether an accused person is or is not guilty. At times, the decisions we ask jurors to make are particularly difficult and carry with them enormous consequences. Such was the nature of the task presented to this jury. If we expect jurors to do their job, they must be presented with the truth; not just part of the truth, but all of the truth. For if they are not, neither the trial participants nor the public will have confidence in the results. (*Id.*, at p. 1377-1378. Emphgasis added.)

Appellant submits the prosecutor's misconduct deprived Appellant of his right to due process and a fair trial under the California Constitution, Art. I, § 15. It also violated the Due Process Clause of the United States Constitution as interpreted by the U.S. Supreme Court in *Brady v. Maryland, supra,* and its progeny. It also deprived Appellant of the fundamental rights contained in the Sixth Amendment (the rights of confrontation, cross-examination and effective assistance of counsel) and the Eighth

Amendment (the right to reliable guilt and penalty determinations) that are applicable to state court proceedings pursuant to the due process clause of the Fourteenth Amendment.

Accordingly, and for the above reasons, Appellant respectfully urges this Court overturn his convictions and judgment of death.

VI.

Appellant's constitutional right to due process and to confront and cross-examine his accusers was violated when the tria court curtailed and limited Appellant's cross-examination of Freddie Jelks, Detective McCartin and Detective Tapia, thereby making it impossible for Appellant to establish Jelks' testimony was false, involuntary, and the product of continuing police coercion.

A. Introduction.

Appellant respectfully inserts herein by reference as though fully set forth the more detailed statement of facts regarding the following summary, including citations, that is included in Argument IV.A, *supra*, of this Opening Brief.

Detectives McCartin and Tapia were assigned to investigate the September 14, 1991 murder of victim Tyrone Mosley, a member of the 97 East Coast Crips gang. On July 11, 1994, and again on September 21, 1994, they interviewed Marcellus James, who told them that Freddie Jelks was involved in the drive-by murder of Mosley. James told the detectives that "Jelly Rock" was the driver, that Jelks was seated in the right front passenger seat armed with a .38 caliber handgun, and Cleamon Johnson was in the rear seat armed with a .45 caliber handgun when the car left to do the drive-by shooting, and the three individuals were in the same position when the car returned a few minutes later after the shooting. James told the detectives that both Johnson and Jelks admitted they had shot three people at the party.

On December 5, 1994 the same two detectives brought Jelks to the police department for the purpose of interrogating him about the Mosley murder, as well as about other crimes for which Jelks might have knowledge.

Appellant asserts in this argument that Jelks' subsequent trial testimony was false, involuntary, and the product of on-going police coercion. He had been pressured to such a degree during his interrogation on December 5, 1994 that he falsely confessed to, and/or minimized his role in, the Mosley murder.[154] Realizing the detectives might then arrest him for the Mosley murder, and knowing that his life was now in danger of gang retaliation (particularly if he was taken into custody), Jelks was coerced into answering additional questions asked by the detectives about other crimes; otherwise, he believed he would have been arrested and he would have received no protection from gang retaliation while in custody.

This same coercive pressure existed when Jelks testified against Appellant and co-defendant Johnson in the Loggins/Beroit murders. To avoid spending the rest of his life in prison for the Mosley murder, and to secure protection for his family and himself against the gang's certain efforts at retaliation, Jelks had been told by the detectives he had to convince the district attorney a) that Jelks would be a good witness, b) that Jelks should be used as a witness, and c), that Jelks' testimony was vital to the prosecution of Appellant and co-defendant Johnson in the Loggins/Beroit murders. Hence, when Jelks testified in the Loggins/Beroit murders, he had to testify in a manner that would please the prosecution; otherwise, Jelks believed he would spend the rest of his life in state prison for the Mosley murder with no protection against retaliation from members of the 89 Family gang.

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[154] Jelks consistently claimed he was *not involved* in the Mosley murder, and that the witnesses who allegedly incriminated him were lying. Assuming the witness (Marcellus James) was accurate when he identified Jelks as being involved in the Mosley murder, Jelks intentionally minimized his involvement in that murder when he "agreed" with the detectives that he was *only* the driver. In either situation, the police pressure was *coercive* and resulted in an *involuntary* statement.

Appellant asserts the trial court deprived Appellant of his constitutional due process right to a fair trial when it prevented him from being able to challenge the admissibility of Jelks' trial testimony on the basis that it was false, involuntary and the product of continuing police coercion. Further, even if this Court were to find Appellant's trial counsel waived this issue for appeal by not adequately raising and litigating this issue at trial, the trial court's evidentiary ruling that limited the scope of defense cross-examination of Jelks deprived Appellant of his federal and state due process rights to confront and cross-examine his accusers. Only by doing so, Appellant argues, could he have established the extreme bias harbored by Jelks that he *had to testify in a certain way* that would please the prosecutor, the truth notwithstanding.

B. <u>The Applicable Law</u>.

1. <u>Determining the involuntariness of a confession or admission</u>.

A criminal defendant's confession, if determined by the trial judge to be involuntary and the product of police coercion, is to be excluded regardless of its reliability, and any statements following it are also excluded unless any "taint" has been attenuated by the passage of time or by other factors. (*People v. Badgett* (1995) 10 C.4th 330, 347.) An involuntary confession is one that is induced by physical coercion, threats of violence, promises of benefits, or any other improper influences that overbear the will of the defendant. Although early cases dealt with physical violence, the courts later recognized that coercion might be psychological as well as physical. It has been said that most successful interrogation techniques are almost completely psychological in nature.[155] Thus, the Supreme Court has noted that "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated codes of 'persuasion.' " (*Blackburn v.*

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[155] Child, 10 Akron L Rev 261, 262; Lederer, The Law of Confessions--The Voluntariness Doctrine, 74 Mil L Rev 67, 80-82 (Fall 1976).

Alabama (1960) 361 U.S. 199.). A sister state court has noted that some types of psychological coercion may be no less devastating to the exercise of a person's free will than physical torture, and no less excusable. (*People v. Richter* ( ) 54 Mich.App. 598, 221 N.W.2d 429) In recognition of this, courts have held that the coercion prohibited by the constitution in securing a confession may include any kind of duress or inducement, physical or mental, that deprives a person of his power to make a voluntary confession. Over time, the cases have gradually come to stress psychological inducements more and physical violence less in considering the voluntariness issue. (*Blackburn v Alabama* (1960) 361 US 199; *People v Trout* (1960) 54 Cal 2d 576.)

2. <u>Challenging the admissibility of a third party witness' *testimony* that follows his *involuntary statement* to the police</u>.

A defendant seeking to exclude the trial testimony of a third party, however, must allege that the police not only coerced the third party into making an involuntary statement that incriminated the defendant, but the defendant must further establish that his own due process rights were violated when the third party testified at his (the defendant's) trial. "[D]efendants must allege a violation of their *own* rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced." (*People v. Badgett* (1995) 10 C.4th 330, 343.)

> Thus, only when the evidence produced *at trial* is subject to coercion are defendant's due process rights implicated and the exclusionary rule we analyzed in *Douglas* applied. When a defendant seeks to exclude evidence on this ground, the defendant must allege that the trial testimony is coerced and that its admission ...deprive[d] him of a fair trial. (*Id.* at p. 344, citing *People v. Douglas* (1990) 50 Cal.3d 468, 503).

This Court explained in *Badgett* that the basis for this rule "is to assure the reliability of the trial proceedings." (*People v. Badgett* (1995) 10 Cal.4th 330, 347.)

The *Badgett* holding has been extended to a witness' out-of-court statement that identified the defendant as the killer. (*People v. Lee* (2002) 95 Cal.App.4th 772, 787 [where defendant sought to exclude a witness' out-of-court statement identifying defendant as murderer on basis that witness' statement was coerced, defendant was required only to prove unlawful coercion and did not need to further show that evidence was unreliable, distinguishing *People v. Jenkins* (2000) 22 Cal. 4th 900.] The federal standard of review appears to be the same. (See, e.g., *Wilcox v. Ford* (11th Cir. 1987) 813 F.2d 1140, 1148, fn. 15.)

In resolving whether a defendant's confession or admission was coerced and involuntary such that its admission in California would violate the defendant's Fourteenth Amendment due process rights, the reviewing court should independently examine the entire record. The same rule would apply regardless of whether the declarant is the criminal defendant or whether the declarant becomes a third party witness. (*People v. Badgett* (1995) 10 Cal.4th 330, 351; *People v. Douglas* (1990) 50 Cal.3d 468, 503). Whether the defendant's/third-party-witness's initial statement to the police was voluntary or coerced is to be viewed "in light of the record in its entirety, including 'all the surrounding circumstances--both the characteristics of the accused [or third party witness] and the details of the interrogation'...." (*People v. Benson* (1990) 52 Cal.3d 754, 779, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) The relevant circumstances embrace "both the characteristics of the accused [or third party witness] and the details of the interrogation." (*Schneckloth v. Bustamonte, supra,* 412 U.S. at p. 226, [36 L.Ed.2d at p. 862]; *Lucero v. Kerby* (10th Cir.1998) 133 F.3d 1299, 1311.) Thus, relevant factors include the accused's/third-party-witness' age, intelligence, and education; the length of detention and questioning; whether the accused/third-party-witness gave any indication he was or was not willing to talk to the police; the use or threat of physical punishment, if any; whether *Miranda* warnings were given (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]); the accused's/third-party-witness' physical and mental characteristics; the location

of the interrogation; and conduct of the police officers. (See e.g., *Lucero v. Kerby, supra,* 133 F.3d at p. 1311.)

3. Determining if the Trial Court's Evidentiary Ruling Deprived Appellant of his Constitutional Due Process Right to Confront and Cross-Examine his Accusers.

Appellant respectfully incorporates herein by reference as though fully set forth his statement and discussion of the applicable law regarding the right of an accused to confront and cross-examine his accusers located at IV.B., subsections 1., 2., and 3 in this Opening Brief.

C. Discussion.

Appellant acknowledges that this Court had held that there is nothing improper in confronting a witness with the predicament he or she is in, with offering to refrain from prosecuting the witness if he or she will cooperate with the police investigation, or with offering to release the witness from custody in return for cooperation. (*People v. Badgett, supra,* 10 Cal.4th at p. 355,.) Appellant also acknowledges that the U.S. Supreme Court has never held that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced. (*Id.* at p. 354,; accord *People v. Ervin* (2000) 22 Cal.4th 48, 83)

The psychological ploys prohibited by this Court are those which, under all of the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*People v. Ray, supra,* 13 Cal.4th at p. 340.) Appellant asserts that the following citations to the Jelks interrogation transcript demonstrate a) Jelks' statements to the detectives on December 5, 1994 regarding the Loggins/Beroit murders were so coerced they were "both involuntary and unreliable"; and b) Jelks' subsequent testimony at Appellant's jury trial was involuntary, unreliable and *the product of this on-going police coercion.* Hence, Appellant was deprived of due process and his fundamental right to a fair trial.

1. The Offers of Proof by the Defense as to the Relevance of the Cross-Examination of Jelks Was Rejected by the Trial Court.

Evid. Code, § 354 reiterates the requirement that Appellant's conviction and sentence of death shall not be reversed because of the trial court's error in refusing to admit defense evidence unless the error "resulted in a miscarriage of justice and it appears that : (a) [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;...."

Prior to Jelks' testimony, the defense made offers of proof as to why they should be allowed to confront and cross-examine Jelks regarding the coercive and untrustworthy nature of his testimony. Mr. Lasting told the court that Jelks "was under arrest at the police station, and being advised [by the detectives] that he was going to be arrested for murder unless he cooperated, and if he wanted to go home, he better be cooperative, in essence." [RT, 16:3500] Mr. Lasting also stated:

> RL: He [Jelks] was told by the police that he was either going to leave the police station as a witness for the police, or he was going to be booked on the [Mosley] murder, in essence, and he was given a choice, and he made a choice to provide information. I think it goes to his bias. I think it goes to his motive. I think it goes to his credibility. [RT, 16:3503. Emphasis added.]

In response to the prosecutor's representation to the court that no promises had been made to Jelks relative to his pending murder case and that "it's wide open", Mr. Orr stated "That's not true." Mr. Orr then told the court that during the interrogation of Jelks and after he "confessed" to the Mosley murder, the detectives, in effect, "held the [Mosley] murder ... over him" and told him if he told them what he knew about the Loggins/Beroit murders, they would not arrest him on the Mosley murder and would let him go home to be with his young family for Christmas. Otherwise, Mr. Orr continued, the detectives told Jelks that he would be booked on the Mosley murder. [RT, 16:3500] Mr. Orr's rather obvious

point was the necessity of the defense being allowed to present to the jury evidence of Jelks' biased state of mind; that

> a) When the detectives let Jelks "walk out of the police station" *after* he had just confessed to his involvement in the Mosley murder, they had done so because he had provided specific incriminating information regarding Appellant's and co-defendant Johnson's involvement in the Loggins/Beroit murders; and
>
> b) Even though Jelks subsequently had been arrested and charged with murdering Mosley, only if he continued to incriminate Appellant and co-defendant Johnson in the Loggins/Beroit murders was there a possibility that he would receive consideration from the prosecution regarding his pending murder case, as well as protection for his family and himself from gang retaliation.

When Mr. Orr was then asked by the court whether there was a warrant for Jelks' arrest on December 6, 1994 for the Mosley murder, Mr. Orr responded,

> ORR: I'm not sure of that. But they [the detectives] said, "We have enough to book you [Jelks] on [the Mosley murder] now. You've been identified." And eventually they [the detectives] did book him and did arrest him on the [Mosley] murder case they used as bait to get his statement as to these two defendants [in the Loggins/Beroit killings]. [RT, 16:3501 (Words in brackets and punctuation are added by Appellant for clarification.)]

Again, the seemingly obvious point Mr. Orr made was that the detectives had used the threat of arresting him on the Mosley murder as leverage or "bait" to get Jelks to provide them with information regarding Johnson and Allen that the detectives wanted to hear, and that since the "bait" (the Mosley murder) was still pending, Jelks had a very strong need or incentive to continue to provide the same information that he now knew the prosecutor also wanted to hear. Otherwise, Jelks would believe he had no implied "promise" of leniency on his pending murder case; that is, he would receive no "pass for an alleged murder." [RT, 16:3500]

2. Detectives McCartin's and Tapia's knowledge of the September 14, 1991 murder of Tyrone Mosley.

Appellant respectfully inserts herein by reference as though fully set forth the more detailed statement of facts located at Argument IV.A, subdivision 1.a. through 1.d.,*supra*, of this Opening Brief for the detectives' knowledge of the Mosley murder as summarized below..

Detectives McCartin and Tapia were assigned to investigate the September 14, 1991 murder of victim Tyrone Mosley, a member of the 97 East Coast Crips gang. While at a party on 97th Street near Central Avenue in Los Angeles, Mosley was shot and killed in a drive-by shooting. Two other individuals were seriously wounded in the attack. Witnesses reported that during that evening, members and friends of the 97 East Coast Crips gang were partying in their neighborhood. A car drove slowly down the street in front of the party, then occupants of the car began firing into the crowd. There were three people in the car from which the shots were fired; the driver, as well as two people who were seated on the passenger side of the car that faced the party. Crime scene investigators located .45 caliber shall casings at the scene, as well as a .380 caliber shell casing. (Citations are from prosecution evidence offered against co-defendant Johnson in the penalty phase of the trial.)]

On July 11, 1994 and September 21, 1994, Marcellus James told Detectives McCartin and Tapia that he was present at co-defendant Cleamon Johnson's house on the evening of September 14, 1991. He observed three members of the 89 Family Bloods gang climb into a car and drive off. Minutes later, the same three individuals returned to the Johnson house. All three were in the same positions in the car as when they left. "Jelly Rock" was the driver of the car, Freddie Jelks (i.e., F.M.) was in the right front passenger seat armed with a .32 caliber handgun, and co-defendant Cleamon Johnson was in the rear seat armed with a .45 caliber handgun. [CT Supp IVA, 1:124-140; RT, 31:6203-6207.]]

3. The interrogation of Freddie Jelks on December 5, 1994 by Detectives McCartin and Tapia in which Jelks is coerced into making a false, involuntary and untrustworthy confession to the Mosley murder.

Appellant respectfully inserts herein by reference as though fully set forth the more detailed statement of facts located at Argument IV.A, subdivision 2.a. through 2.d, *supra* of this Opening Brief for the detectives interrogation of Freddie Jelks as summarized below.

Jelks insisted at the very beginning of the interview that he intended to be truthful with the detectives, and he assured them he would *not* try to "bullshit" them. [CT Supp.IV, 4:835] Throughout the entire interrogation, Jelks insisted he was being honest with the detectives, and he tried to assure them over and over again that he was not trying to "bullshit" them.[156] [CT Supp.IV, 4:840, 846, 847, 862

a. Detectives provided Jelks with a defective *Miranda* advisement when Jelks balks and the detectives downplay the importance of the advisement.

Because the detectives were intent on obtaining a confession from Jelks, they advised him of his *Miranda* rights at the very beginning of the interrogation. [CT Supp IV, 4:839] Jelks' response as to whether he was willing to talk to the detectives without an attorney being present was ambiguous, however. Jelks related he was "willing to talk to them" because he apparently assumed they were

[156] The mere fact that Jelks insisted over and over again that he was being truthful, yet also was caught lying over and over again should have been sufficient, Appellant asserts, to allow Appellant's attorney to confront and cross-examine Jelks regarding when he was telling the truth during the interrogation and when he was lying. Jelks numerous intentional attempts to mislead the detectives and to avoid saying anything that he thought might get him into trouble would have been a significant issue for the jury to know about, particularly when they deliberated whether Jelks was telling the truth or was simply telling another of his lies when he told the detectives of Appellant's involvement in the Loggins/Beroit murders.

not going to question him about any crime that he may have committed[157]. Hence, Jelks questioned the detectives as to why they had read him his *Miranda* rights. [CT Supp.IV, 4:839-840] When McCartin insisted on trying to obtain from Jelks an express waiver of his *Miranda* rights, Jelks hesitated, expressed he was very nervous, and asked McCartin, "...do you feel that I'm going to need an attorney, because I don't, I don't, I don't know what to do. I mean I – this is what I'm saying. Understand me. I'm willing to talk to you or to answer some of your questions if --." [CT Supp.IV, 4:840-842]

McCartin cut Jelks off at this point, however, and began trying to tell Jelks that he had no reason to need or want an attorney to be present for the upcoming interrogation. McCartin even downplayed the importance of why he was advising Jelks of his *Miranda* rights in an attempt to get Jelks to waive them.

> McC: Let me put it this way. You're not under arrest at this moment. And we're just going to talk to you about a lot of things that have – has been going on in the neighborhood. Okay? You do have some warrants; traffic warrants which you can be arrested on. But I mean that's not our concern right now.
>
> FJ: (Untranslatable) right. Right now you – you asking me a question. I hear you. And I understand where you're coming from. I'm – I'm –I'm nervous because you said –
>
> McC: That's just – we got to read that card [i.e., the *Miranda* advisement] to everybody when we talk to them. [CT Supp.IV, 4:841-842. Emphasis added.]

Jelks continued to reiterate how nervous he was talking to the detectives. [CT Supp.IV, 4:843, 848, 849, 884] However,Jelks thereafter tried to mislead the detectives into thinking that he had never been a member of the 89 Family Bloods

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[157] This was evident when Jelks told them he was nervous but still willing to talk to them about "a bunch of stuff that's been going on somewhere where I'm not at." [CT Supp IV, 4:843] Jelks moved from the 89 Family Bloods neighborhood in 1992. The interrogation occurred in December, 1994. Hence, Jelks was willing to talk about "a bunch of stuff that's been going on somewhere where I'm not at [89 Family neighborhood]."

gang. The detectives immediately confronted Jelks and accused him of not being forthright and honest with them ... even with something so simple and basic as whether he was at one time a member of the 89 Family Bloods gang. [CT Supp.IV, 4:845-847] Once Jelks and the detectives resolved that issue, McCartin warned Jelks to stop lying or it would "aggravate the situation." [CT Supp.IV, 4:848]

b. The detectives inferentially told Jelks they wanted him to tell them about crimes committed by Cleamon Johnson, Michael Allen and Johnson's brother "Sinister."

The detectives then told Jelks they had talked to numerous witnesses who had provided them information on crimes committed by four specific members of the 89 Family Bloods gang: Jelks, "Evil", "Sinister" and "Fat Rat." [CT Supp.IV, 4:854]

c. The detectives impliedly threatened Jelks that unless he began providing information to them, they would *not* allow him to go home and be with his four little children for Christmas.

After some discussion in which Jelks was seemingly evasive and non-committal, McCartin asked Jelks:

McC: How – how many kids did you say you got?
FJ: Four.
McC: Four kids. You like seeing your kids?
FJ: Yes.
McC: It's Christmas coming up, isn't it?
FJ: Yes, sir.
McC: We want to keep a nice flow of information coming here, okay?
FJ: Okay.
McC: And we're going to ask you a lot more on other cases. And you were just telling me before that you didn't know any Swans; is that what you're telling me? [CT Supp.IV, 4:866-867]

Suddenly Jelks was able to recall considerable information regarding Swan gang members.[158] [CT Supp.IV, 4:867-870]

d. <u>The detectives confronted Jelks regarding his involvement in the Mosley murder.</u>

At this point the detectives asked Jelks questions regarding the 1991 murder of Tyrone Mosley a member of the 97 East Coast Crips gang. Jelks *denied* knowing anything about that murder. The detectives responded by telling Jelks that witnesses had gone through various photos and "you were picked out." Also, "They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay?[CT Supp.IV, 4:871-872] Jelks continued to deny any involvement. [CT Supp.IV, 4:873]

e. <u>The detectives applied coercive pressure on Jelks that increased the potential that he would falsely confess to his involvement in the Mosley murder</u>.

Immediately after Jelks denied involvement in the Mosley murder, the detectives began asserting pressure on Jelks to admit he was involved in the Mosley murder.

FJ: I don't know nothing about that [the Mosley murder].
McC: Because what's going to happen is ultimately you're going to get booked for murder, okay? Because that case is still open. Nobody's been booked for that yet. And I know you said you want to go – you want to be home for Christmas, right?
FJ: Right (Untranslatable).
McC: You want to see your family.
FJ: Right.
McC: So we need to hear what happened out there. We got witnesses that have come out, looked through all the stuff,

[158] Although Jelks suddenly claimed to recall information regarding several Swans, there was no indication that what Jelks could then "recall" was truthful or simply at attempt by Jelks to tell the detectives what he thought they wanted to hear.

and identified you, as well as other people. [CT Supp.IV, 4:873]

From these comments by the detectives, it seems clear they were inferentially telling Jelks that if he admitted his involvement in the Mosley murder, he would "be home for Christmas" with his family. That is, if Jelks admitted he participated in the Mosley murder, the detectives would not arrest him that day for murder. The detectives would allow him to go home.[159] Appellant asserts this was an *implied promise* that the detectives communicated to Jelks in a wholly improper and unlawful attempt to get him to confess to his involvement in the Mosley murder.[160]

However, Appellant asserts that what the detectives said immediately thereafter dramatically exacerbated the danger that Jelks was being coerced into falsely confessing to his involvement in the Mosley murder.

McC: I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear.
TAP: I don't think you were the shooter, Freddie.
McC: Okay. Now, I don't think that. Otherwise we wouldn't be messing with you.
TAP: But Freddie, I know who the shooter was. At least I think I know who it was. But I wanted your version. [CT Supp.IV, 4:874]

The detectives had, in reality, been told by their *only* eye witness (Marcellus James) that Jelks was inferentially one of the two shooters in the Mosley murder; that "Jelly Rock" was the driver and that Jelks was in the right

[159] This is an example of what Mr. Orr was referring to when, in his offer of proof, he stated to the court: "During the interrogation [of Jelks] on Johnson and Allen, the police hold the [Mosley] murder case -- under which he's presently handcuffed -- over him and say, if you talk to us [i.e., about Jelks' involvement in the Mosley murder], we'll let you go." [RT, 16:3500]

[160] Once again, this is an example of what Mr. Orr was referring to when, in his offer of proof, he stated to the court: "I think that's a promise, and a pass for an alleged murder." [RT, 16:3500]

front passenger seat armed with a .32 caliber handgun. Yet the detectives had previously told Jelks the witnesses had told them that Jelks was the *driver* of the car in the drive-by shooting. [CT Supp.IV, 4:871-872] Appellant asserts it is quite obvious the detectives were urging Jelks to admit something that was inconsistent and contradictory to that which their *only* eye witness had told them. Yet, the detectives told Jelks at this point that if he admitted he was the *driver* of the car, he would be "cooperating" with the police, he would be telling them "the truth", and he would be "giving us information that we want to hear." It seems highly probable that the detectives were urging Jelks to lie at this point![161]

The detectives immediately added to the pressure on Jelks to admit he was the driver of the car in the Mosley murder. McCartin asked him "how many strikes you got on your – on your rap?" [CT Supp.IV, 4:874] Appellant submits the only reason McCartin referred to "strikes" was to cause Jelks to think his probable sentence to state prison for his involvement in the Mosley murder would be *even greater* than normal because of his prior convictions (strikes), and that Jelks' only chance to avoid this fate was to confess to being the *driver* of the car.

Jelks then exclaimed that he did *not* want to confess to a murder for which he was not involved. He didn't want to be sentenced to state prison for a crime he did *not* commit.

> FJ: I – I want to tell you the truth man. I don't – I don't – I don't want to sit up here and see my life just fall apart. I – I know too many people that's in jail for nothing, man. For nothing, man. I don't want to go down like that, man. [CT Supp.IV, 4:875]

The detectives continued to insist that Jelks tell them the truth. Jelks again claimed he knew nothing about the Mosley murder. Detective Tapia then told

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[161] Perhaps the detectives urged Jelks to admit he was merely the driver of the car because they thought it might be easier to get him to admit that than to get him to confess to being one of the shooters. After all, they were having a difficult time at that point in the interrogation getting Jelks to admit he was even aware of the 97 East Coast murder (the Mosley murder), much less that he was involved.

Detective McCartin they might as well just arrest Jelks for the Mosley murder and "send this in" for filing by the district attorney: "Well, why don't we – let's just send this in Brian [McCartin]. And we'll do our thing. And we'll just book you [Jelks], okay?" [CT Supp.IV, 4:876]

It appears from the transcript that Jelks began to panic. He pled with the detectives to, arguably, not force him to confess to a murder he did not commit.[162]

FJ: Wait a minute, man. Wait a minute.
McC: Is that what you want?
FJ: Wait a minute, man. I don't – I don't – don't – don't do my life like that, man!
McC We need the truth.
FJ: Don't do my life like that. [CT Supp.IV, 4:876]

McCartin responded to Jelks by impliedly threatening that they weren't messing around, that people had been killed, and that if Jelks ended up getting "steam-rolled", that would be "the breaks." [CT Supp.IV, 4:876] The detectives then accused Jelks again of lying when he denied involvement in the Mosley murder, that they knew he had been the *driver* in that murder. [CT Supp.IV, 4:877]

f. Jelks tried to exact a promise from the detectives: If Jelks helped them solve several gang cases in which Evil, Sinister and Fat Rat were involved (i.e., Jelks continued to deny involvement in the Mosley murder), the detectives would agree to *not arrest* Jelks on the Mosley murder..

Jelks appeared to be desperate to avoid being arrested for the Mosley murder. And if he admitted to being involved in the Mosley murder, he wanted the detectives to know that he would be killed because he talked to the police. This was particularly so if he talked to the police and they then arrested him. Jelks then attempted to work out a deal with the detectives: If he helped them clear up

[162] This was what Appellant sought to prove to the jury; that the detectives had coerced Jelks into confessing to a murder he did not commit, then used it to unduly pressure him to "snitch off" Appellant and co-defendant Johnson in the Loggins/Beroit murders because that was what Jelks thought the detectives "wanted to hear", regardless of whether it was true or not.

many of their open unsolved cases involving the 89 Family gang members that the detectives wanted information on[163] (i.e., "Evil", "Sinister", and "Fat Rat"[164]), would they promise him that they would *not* arrest him for the Mosley murder and let him go home?

> FJ: I don't want my life to end like that, man. ... God as my witness, I haven't never killed nobody, man. And I don't want to – I want to help you. I want you to help me. I want you to give me my freedom. But I don't want you to shut these doors on me, man. I don't want this, man. But what I'm saying to you is this. You have stacks of files of open cases. And ... [CT Supp.IV, 4:878-879] ... Listen to what I'm going to say. I grew up right there. I know everything that you can think to know. [CT Supp.IV, 4:881] ... <u>But you got to promise me, man – you got – you got to let me go home, man</u>. I can't – I can't lose my life. And all my family and my kids need me. My family need me. I mean I don't want to lose like this, man. [CT Supp.IV, 4:882-883. Emphasis added.]

From Jelks exhortations to the detectives, Appellant asserts it should have been *readily apparent to the trial court* that he was trying to exact *a promise* from the police. In exchange for his providing them information on the "stacks of cases" he knew about because he "grew up right here", the detectives would agree "to let [Jelks] go home"; to not arrest him for the Mosley murder. If the detectives took Jelks into custody for the murder of Mosley after he assisted them in solving various gang cases, Jelks retorted, he would surely be killed. "I can't lose my life. My family and my kids need me. I don't want to lose like this, man."

Detective McCartin responded by agreeing to the "deal" proposed by Jelks. McCartin promised Jelks that if he worked with the detectives, and he was afraid for his safety or for the safety of his family, "we can relocate you somewhere

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[163] Jelks was still, at this point in the interrogation, denying any involvement in the Mosley murder.

[164] See the comment by the detectives near the beginning of this interrogation of Jelks. [CT Supp IV, 4:854]

else." [CT Supp.IV, 4:883] Although McCartin may have been thinking about "relocating Jelks in a city jail rather than the county jail, it would seem clear that to Jelks, McCartin was *not* talking about arresting Jelks. Jelks response was immediate and firm: "You got to do that. You got to do that." [CT Supp.IV, 4:883] McCartin then re-affirmed they would be willing to relocate Jelks and his family to protect them from retaliation: "Right, we don't want anything to happen to you. We don't want anything to happen to anybody else." [CT Supp.IV, 4:883]

Jelks then reassured McCartin that he was willing to work with them, but he continued to seek a commitment from McCartin that he would not arrest Jelks but would let him go home. [CT Supp.IV, 4:884-885] At this point, Jelks told McCartin that he was not like the three gang members that McCartin wanted information about: "I'm not Evil, I'm not sinister, I'm not Fat Rat, I'm not none of them. And I'm Freddie Jelks, man." [CT Supp.IV, 4:886] From this comment, it seems very apparent that Jelks recalled the specific gang members for whom McCartin had expressed interest. From Jelks' point of view, information he provided to McCartin in exchange for not being arrested at that time would have to include information on these three individuals.

g. Detective McCartin promised Jelks that if Jelks told them *the truth* that day, they would not arrest him on the Mosley murder; they would let him go home.

However, Jelks apparently still did not trust the detectives. Again, he asked them "to be honest with me, man. If I talk to you, am I going home, man? Detective McCartin's response was a promise: Jelks would be going home "[i]f you give us the truth." [CT Supp.IV, 4:888] It is apparent that Jelks now felt he had a deal with the detectives. He responded to McCartin with "I can give you – I will give you so much truth." McCartin then advised Jelks:

> McC: You give me all the truth that you know on all this stuff; and I'll know if you're lying – you will go home today. I'm going to show all this to the district attorney. And I'm going to tell him how you cooperated. I can't promise you they

won't file on you later on. I can't promise that. I can promise you can go home today. I'll let you go, you give me truthful information today. And I'll work with the DA and whoever else and keep you out of jail. [CT Supp.IV, 4:889]

After making that promise to Jelks, the detectives then announced they wanted to begin talking to Jelks about various gang cases that Jelks was going to tell them the truth about. Based on the detectives' representations, Jelks now knew that *if the detectives believed he was telling them the truth, he would not be arrested on the Mosley case that day.*

h. <u>The detectives immediately began discussing the Mosley murder with Jelks in an attempt to obtain a confession from him.</u>

The discussion immediately returned to the 97 East Coast Crips murder in which Tyrone Mosley was killed. Jelks asserted he was "not bullshitting" the detectives when he again denied his involvement, then told the detectives, "Don't do me like that." [:890] That is, don't make me admit to the Mosley murder since it is not true.

After reassuring Jelks that he now had his life together, whereas before he didn't, they urged Jelks to "talk about" the Mosley murder. "Let's start with that one," McCartin indicated. [CT Supp.IV, 4:894-895] Once again, the detectives attempted to get Jelks to admit he was the driver of the car because that wasn't as serious as if he had been one of the shooters. They did this even though Marcellus James had clearly indicated that Jelks was not the driver; he was one of the two shooters:

Dets: The 9-7 one, let's start with that one. ... What's up with that? ... What happened on that? ... Who was in the car? ... I mean if you're just in the car or whatever, that's okay, all right? ... I don't think you're the shooter, Fred. ... I know. We don't think that. We know who was. ... Who was in the car? ... So what happened that night, Freddie? [CT Supp.IV, 4:895-896]

i. Jelks changed his story regarding the Mosley murder in an attempt to get the detectives to believe he was telling them the truth. Otherwise, Jelks knew he might be arrested that day for the Mosley murder.

Jelks' responses were ambiguous and evasive. Finally, Jelks told the detectives, "As far as the shit that happened that night, only thing I can just straight up be honest with you about is to tell you is the way the – the way the shit – damn, the way the shit supposedly went down. ... I'm telling you the truth, man." In response, the detectives told Jelks they did not believe he was telling them the truth. [CT Supp.IV, 4:897]

j. Jelks then gave a 3rd version regarding the Mosley murder in an attempt to get the detectives to believe he was telling them the truth. Otherwise, Jelks knew he might be arrested that day for the Mosley murder.

Jelks then shifted to Story #3 regarding the Mosley murder. He told the detectives he was going to see a girl named Amy that night who had told him she was going to a party. Jelks walked from his mother's house down the street to where "guys was standing around and shit." Jelks tried to avoid naming who was "standing around." [CT Supp.IV, 4:898] Upon being pressed by the detectives, Jelks indicated that two of the three people he knew the detectives wanted to hear about were among those present: "Evil" and "Fat Rat." "Little Evil" and "J-Rock" drove up in a small car and told the others that there was a party in the "East Coast hood." "Evil" climbed into the car and they all drove off. Jelks claimed he also drove off in his car to visit the girl. He heard some shots, and when he returned, "Evil and them was back." [CT Supp.IV, 4:902]

The detectives responded that they did not believe Jelks' Story #3 either. They then told Jelks what the witnesses were saying about Jelks' involvement. Jelks' response was, "Okay, I'm listening." [CT Supp.IV, 4:903] It was as though Jelks was trying to determine what the detectives believed happened, so that Jelks could align his next version in a fashion that would be consistent with the version

the police thought was the truth. This was what the defense meant in their offer of proof to the court:

> RL: He [Jelks] was told by the police that he was either going to leave the police station as a witness for the police, or he was going to be booked on the [Mosley] murder, in essence, and he was given a choice, and he made a choice to provide information. I think it goes to his bias. I think it goes to his motive. I think it goes to his credibility. [RT, 16:3503. Emphasis added.]

Appellant asserts Jelks sought to tell the detectives *anything he thought they would believe, regardless of its truth or falsity*, because his "choice to provide information" to the detectives was done for the purpose of avoiding his being arrested that day for the murder of Mosley.

k. The detectives unduly pressured and urged Jelks to admit to facts that were inconsistent with, and contradicted by, the *only* eye witness who identified those involved in the Mosley murder

Even though Marcellus James had told these same two detectives on two occasions just three to four months earlier that Jelks was not the driver, that he sat in the right front passenger seat armed with a .32 caliber handgun, the detectives told Jelks the witnesses (i.e. plural) had identified Jelks as the driver of the car, not one of the shooters.

> Dets: Let me tell what – want me to tell you what the witnesses are saying? ... Witnesses are saying that you were driving the car. ... That you drove the car down there to 9-7 hood. ... That is what – I'm just telling you what the witnesses are saying. ... We can prove that already. ... We can prove that. ... I can prove you're in the car already. ... And that someone else was in the car. Evil was in the car. And who else was in the car? ... I mean if you're just in the car driving the car, I mean tell us. [CT Supp.IV, 4:903-904]

Appellant contends that it appears rather obvious the detectives communicated to Jelks that they did not believe his Story #3, and if they didn't

believe his Story #3, Jelks would have feared they would probably arrest him that day for the Mosley murder. Accordingly, Appellant wanted to prove Jelks knew he had to come up with a version that the detectives would believe. And in Jelks' mind, according to their statements to him, they had already indicated to him what they believed.[165]

l. Jelks admitted, in his Story #4, to facts that were inconsistent with, and contradicted by, the *only* eye witness who identified those involved in the Mosley murder because Jelks hoped that by so doing, the detectives would believe he was telling the truth; hence, they would not arrest him that day for the Mosley murder.

It was at this point that Jelks finally "admitted" that he was the driver of the car that was involved in the Mosley murder. [CT Supp.IV, 4:906] Not only did he admit his involvement, however, but Jelks also "snitched off" "Evil" and "Jelly Rock", both members of the 89 Family Bloods gang, in the Mosley murder. [CT Supp.IV, 4:906-907]

Having "snitched off" two members of the 89 Family Bloods gang, Jelks then realized that his life was really in jeopardy now. He complained to the detectives that if he talked further with them, "they're going to kill me." [CT Supp.IV, 4:907-908] Jelks then pleaded with the detectives: "I mean help me, man!" [CT Supp.IV, 4:909]

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[165] Assuming Marcellus James was correct when he said Jelks was not the driver but was one of the shooters, the detectives here told Jelks they believed something that Jelks would have known was *not true*. Jelks would have known he was one of the shooters and not merely the driver. Yet, Jelks now would have realized that if he falsely admitted he was the driver, the detectives would believe he was being truthful, and therefore (per their previous agreement with Jelks), they would let him go home that day. Jelks knew that by lying, he would benefit greatly. This was an example of what Appellant could have shown, if cross-examination had not been restricted.

m. <u>The detectives informed Jelks that if he wanted police protection, he had to testify against Cleamon Johnson and "Jelly Rock" in the Mosley murder case.</u>

In direct response to Jelks' plea for help, the detectives told Jelks:

> Dets: Let me tell you how we're going to do it. We're going to have to use you for this whole thing [i.e., the Mosley murder prosecution].[166] You know you're going to have to testify, okay? ... And the way we do it, how we're going to do the initial phase, is we do a grand jury, which is secret. Nobody knows who the hell you are, where you live. They don't have any of that stuff, okay? ... But you have to be willing [to testify], Freddie. ... And you got to go through with it [i.e., testify before the grand jury on the Mosley murder case.[167]] [CT Supp.IV, 4:909]

Jelks then made it clear that if he had to testify, he was deeply fearful that he would be killed. Hence, when the detectives told him they "want to do whatever we can to keep you alive", Jelks responded, "But I'm saying don't – I can't – I can't go to jail right now, man." Further, , he wanted assurance that he and his family would be protected from retaliation by his "homies." [CT Supp.IV, 4:911-]

n. <u>The detectives told Jelks that if he wanted police protection from retaliation by the gang, *he had to please the district attorney.*</u>

Jelks asked McCartin if by protection, the detective meant "a witness protection program or something." McCartin responded, Yeah, we'd have to put you in a witness protection program." [CT Supp.IV, 4:913] McCartin then told Jelks:

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[166] These comments by the detectives had nothing to do with the Loggins/Beroit murders. Those murders had not yet been mentioned, much less discussed, at this point in the interrogation.

[167] At this point in the interrogation, the only case for which Jelks had provided information was the Mosley murder case. Hence, the reference to his testifying could have only referred to the Mosley murder case involving Jelks, Johnson and "Jelly Rock."

McC: What happens is – no, if the DA decides that you're a good witness and they want to use you, and that you're vital to our case, funding will comedown and you could be moved to another town, another city somewhere to protect you from anybody ever coming after you. [CT Supp.IV, 4:913-914. Emphasis added.]

Jelks was extremely fearful of being killed by the gang because he had told the detectives about the involvement of Cleamon Johnson and "Jelly Rock" in the murder of Tyrone Mosley. He desperately wanted his family and himself to be placed in a witness protection program so his "homies", who would forever consider him a "snitch", would be unable to find them. Appellant asserts that this was Jelks' state of mind during the remainder of the interrogation. The detectives had, however, just told Jelks that to have any chance of his family and himself being placed in a witness protection program, Jelks had to do three things:

1) Jelks had to somehow convince the DA that he would be a good witness;

2) Jelks had to somehow convince the DA that she/he would want to use Jelks as a witness; and

3) Jelks had to somehow convince the DA that his testimony would be vital to the DA's case. [CT Supp.IV, 4:913-914]

Jelks then expressed his concern regarding what would happen if he testified and the DA or the detectives then became upset with him; would the witness protection program still be available for his family and himself? In other words, Appellant asserts, Jelks asked what would happen to his family and himself if the DA became upset with him because he was not "a good witness"; or if the DA subsequently decided she did *not* "want to use Jelks as a witness" at the trial; or if the DA decided that his testimony was *not* "vital to the DA's case"?

FJ: And this is going to work?
McC: Yeah, why wouldn't it work?
FJ: I'm asking you. I mean –
McC: No, we've done it (untranslatable).

FJ: (Untranslatable) I don't – see, I don't want to get you all upset, and then you be like fuck it, I don't want to deal with this asshole, and – [CT Supp.IV, 4:914]

o. The detectives reassured Jelks that they *wanted* to work out a deal with Jelks; that was why they were talking to him. They *wanted* to keep a "good rapport" with him. Jelks simply needed to continue *cooperating* with them.

In response to Jelks' concern that the police or DA may decide they did not want "to deal with" him after he testified, McCartin told Jelks they wanted to "work something out" with Jelks:

> I want us to keep a good rapport basis with you. I don't want to – I don't want things to not work out. That's why we got you. ... And that's why we're talking to you. If we didn't want to work something out with you, we would have – we wouldn't even be in the room here sitting with you for so long. [CT Supp.IV, 4:915]

Jelks now understood, Appellant asserts, that as long as he "cooperated" with the detectives and the DA, "things would work out"; the police and prosecution "would work something out with" Jelks. [CT Supp.IV, 4:915]

Thereafter, Jelks told the detectives what he claimed happened regarding the Mosley murder. He "admitted" he was the driver, that Johnson was in the right front passenger seat[168], and "Jelly Rock" was in the rear seat.[169] [:922] He minimized his involvement, however, when he said he had *no knowledge* beforehand that Evil and Jelly Rock were going to shoot as they drove past the 97 East Coast Crips party. [CT Supp.IV, 4:923-924]

p. The detectives for the first time questioned Jelks regarding the Loggins/Beroit murders.

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[168] James statements to the two detectives contradicted Jelks in this detail James said Evil was in the rear seat.

[169] James statements to the two detectives contradicted Jelks in this detail also. James said Jelly Rock was the driver.

It was at this point in the interrogation that, for the first time, the detectives asked Jelks about the Loggins/Beroit murders.[170] [CT Supp.IV, 4:933-945]

q. After telling the detectives what he allegedly knew about the Loggins/Beroit murders,[171] Jelks asked the detectives if they were convinced he was "cooperating" with them.

Within a minute or two after Jelks told the detectives what he allegedly knew regarding the Loggins/Beroit murders, he asked the detectives if they were convinced he was "cooperating" with them. It was important for Appellant to show the jury that Jelks was very concerned about "pleasing" the detectives, that he was providing them information they *wanted* to hear, and that they felt he was "cooperating" with them; otherwise, Jelks may have believed the detectives would arrest him that day and subsequently prosecute him for the Mosley murder, thereby spending perhaps the rest of his life in prison.

> FJ: Am I -- can I ask you a question? Am I cooperating with you guys, man? Because I don't want you to sit here and think that this guy's just bullshitting. [CT Supp.IV, 4:947-948]

The detectives responded to Jelks by indicating they were "confident" he was "telling [them] the truth on most of it", and that they were "happy with it so far." [CT Supp.IV, 4:948] Appellant wanted to show the jury that Jelks now knew what he arguably *had to say* regarding the Loggins/Beroit murders if the police and prosecution were to believe he was "co-operating" with them, that he was telling them the truth, and that he was "telling them what they wanted to hear. The court's ruling prevented Appellant from doing so, however.

r. The defense sought to present additional evidence that Jelks "*neeed*" to please law enforcement was uppermost in his mind throughout the remainder of

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[170] They had a brief discussion with Jelks about the death of "Al Dog" just before the Loggins/Beroit discussions. [CT Supp.IV, 4:930-933]

[171] There was also a brief discussion regarding the death of an individual named "Baldy."

the interrogation and *continued during his trial testimony*.

Appellant wanted to present evidence to the jury that Jelks' motivation to please law enforcement was *real* and was *uppermost* in his mind as he spoke to the detectives. But for the court's ruling, Appellant could have presented the following statements by Jelks that circumstantially demonstrated his intense concern about pleasing the detectives and revealed that he *anticipated* consideration in exchange for his assistance as a part of *the plan*:

> FJ: So, are we working at me working with you, we working together, right? [:1008] Am I being helpful, sir? [CT Supp.IV, 4:1033] I just – man, I'll help you, man. Just – let me go home, man, to my family. [CT Supp.IV, 4:1037] Am I – am I helping you with numerous of cases (sic), right? ... Am I? So everything – everything is working according to plan, sir? ...So after we're through, am I going home, sir?[172] ... I am? ... And just stay in contact with you guys? [CT Supp.IV, 4:1048. Emphasis added.]

Appellant was also not allowed to introduce the following evidence that established Jelks' strong motivation to cooperate with law enforcement in order to avoid being arrested and prosecuted for the Mosley murder, not to mention his being killed in retaliation for talking to the police about members of the 89 Family gang:

> FJ: ...I want to help, you know, I want to help. But, then my safety and my life, I'm saying to myself what position am I putting my life into? And I have four daughters – that if – am I going to never see my children? Am I going to never be around my kids? All these questions going through my mind like now you know, I love my children. I try – I try to be a father to them, you know. ... My youngest will be two on the 13th of this month. I have another one five – four, who will be five in March. I have another one that's nine. And my oldest will be 12 in January. And I'm trying – I try my

[172] To this question, McCartin revealed to Jelks for the first time that they intended to let him go home that day; hence, Jelks' subsequent comments.

> damndest to raise them and take care of them, let them know I love them every day of my life. ... And that's the – that's my main focus, that I don't want – I don't want my life to end. ... I don't want to die. I don't want to be put away. I don't want – I don't want that in my life, you know, that's – that's main (sic) – that's my main focus is my children. I love my kids. ... And that's my main focus on dealing with you, you know, cooperating here. ... And that's my main focus is to make sure that I can take care of mine, you know, my main focus is to take care of my children. I got four daughters .... [CT Supp.IV, 4:1112-1114]

During the interrogation, Jelks realized he might have to testify in cases *other than* the Mosley murder case. [CT Supp.IV, 4:1004][173] Hence, Jelks knew he had to cooperate with law enforcement beyond that interrogation and beyond his potential testimony in the Mosley murder. Appellant wanted to present to the jury this evidence, and show the jury that Jelks' testimony in the Loggins/Beroit murder case was part of "the plan"; that in exchange for Jelks' willingness to cooperate by testifying against Appellant and co-defendant Johnson, he would receive consideration in his own pending murder case. Further, Appellant wanted to show the jury that if Jelks' testimony did not incriminate Appellant in the Loggins/Beroit murders, there was a real danger in Jelks' mind that the prosecution would conclude he was no longer "cooperating" and that he then would receive no benefit in his case nor would he and his family be relocated and protected from retaliatory attempts by members of the gang. The court's ruling prevented this, however.

During the interrogation, as well as at the conclusion of the interrogation when Jelks prepared to leave the police station, he once again revealed his willingness to arguably do or say anything that would help law enforcement: "Yeah, I answer my pager all the time. Anything – any help that I can give you,

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[173] Jelks: "So, wait a minute. Listen. All these different cases that you're asking me about, am I going to be a witness on all of these cases that you –" McCartin: "It's possible." [CT Supp.IV, 4:1004]

I'm going to give it to you, man. Because I know for a fact, man, somebody got to take the stand." [CT Supp.IV, 4:1170] Once again, Appellant was not allowed to introduce this evidence.

s. The court's ruling prevented Appellant from presenting additional evidence that detectives impliedly threatened Jelks during the interrogation in an effort to persuade him to continue "cooperating" with law enforcement.

After telling the detectives what he allegedly knew about Appellant's involvement in the Loggins/Beroit murders, the detectives reminded Jelks that he was "looking at some serious stuff", that "murder is the ultimate crime", and that he "was looking at some serious time." The detectives then impliedly threatened Jelks that if he did not continue to cooperate, he might be prosecuted for "murders"; not just the Mosley murder but "[m]any murders. [CT Supp.IV, 4:978-979]

Near the end of the interrogation, the detectives told Jelks that a condition of his not being arrested at that time was his willingness to continue "cooperating" with law enforcement; that "we're going to keep a mutual conversation going back and forth whenever we call"; and that if Jelks did not continue to co-operate, "the next time...you won't be going home." McCartin reminded Jelks that the detectives could, if they desired, take Jelks into custody at any time and thereby "keep an eye on you or keep you [in] protective custody, whatever it takes." [CT Supp.IV, 4:1139-1140]

Appellant wanted to reveal to the jury these *implied threats* and *promises* made to Jelks by the detectives to *persuade* Jelks to continue to co-operate[174], but the court's ruling prevented Appellant from doing so.

[174] Appellant contends in this Argument VI that the detectives' "persuasive" tactics were sufficiently extreme that they amounted to coercion. In effect, Jelks was coerced into cooperating with law enforcement.

4. The trial court's ruling prevented Appellant from presenting evidence to establish Jelks' statement to the detectives was false, involuntary and product of police coercison..

The case of *Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666 is, by analogy, instructive as to why the trial court's ruling prevented Appellant from raising the issue that the introduction of Jelks' testimony violated Appellant's right to a fair trial because his testimony was false, involuntary and the product of on-going police coercion. In *Gallaher* the prosecution presented[175] a key eye witness who, according to the prosecutor, would testify "only as to facts 'leading up to the shooting' and a statement immediately thereafter made by Gallaher, after which 'he is going to take the Fifth,...'." The prosecutor in *Gallaher* then explained, "I intend to ask no further questions of [the witness] other than that and I don't think that anything beyond that would be relevant." (*Id.*, at p.669.) The defense objected, claiming the denial of cross examination would violate "due process and fair play." Defense counsel claimed what went on afterwards was "probative, ... circumstantial, relevant and material...." and that the Fifth Amendment should not be exercised in such a fashion. (*Id.*, at p. 670.)

The witness in *Gallaher* testified on direct examination to the facts that led up to the shooting, as well as to a statement made by Gallaher immediately after shots were fired. On cross-examination, defense counsel asked a question regarding what the witness did *after* the shots were heard. The witness stated he intended to assert his Fifth Amendment right to decline to respond. The magistrate, without ruling on the Fifth Amendment assertion, stated the question exceeded the scope of direct examination, sustained an objection to the question and stated all questions that pertained to events that chronologically followed the shots would also be inadmissible for the same reason. [*Id.*, at p. 670.) At that point, the magistrate inquired of defense counsel: "[Are] you finished with cross-

[175] At Gallaher's preliminary hearing.

examination?" Defense counsel responded, "Yes, I am. I am finished, Judge, only because of the court's ruling." (Id., at p. 671.]

Similarly in the instant case, the prosecutor presented Jelks, a key eye witness, who according to the prosecutor would testify only as to facts he observed while at Johnson's house and to a statement made immediately thereafter by Appellant. Any questions regarding the circumstances of his making the statement to the police, or any questions that would demonstrate a potential bias (i.e., Jelks' pending case) might result in Jelks "taking the Fifth." As in *Gallaher*, the prosecutor in this case then stated any attempt by the defense to explore the circumstances of the interrogation or Jelks pending case would not be relevant and would be too prejudicial and time consuming. Subsequently, when the defense sought to question Jelks regarding the nature and circumstances of the interrogation that would have established the on-going coercive and false nature of Jelks' testimony, the court's ruling that limited the scope of cross-examination prevented Appellant from establishing the basis for this motion to exclude Jelks' testimony.

The *Gallaher* court in explained:

> It is well established that the scope of proper cross-examination may extend to the whole transaction of which the witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain the testimony given by a witness on his direct examination.
>
> ...
>
> One situated as was Gallaher is under no duty to point out to the magistrate, or even to know, what evidence his continued cross-examination would elicit. "Questions on cross-examination ... are largely exploratory, and it is unreasonable to require an offer of proof since counsel often cannot know what pertinent facts may be elicited." [Citations.] And, as here: "Where ... an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such

> evidence. [Citations]. (*Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, 671, 673. Emphasis added.)

However, in the instant case, both defense counsel made offers of proof. They may not have been so specific as to object to Jelks' testimony on the ground that "it was false, involuntary and the product of on-going police coercion", but *Galaher* indicates the defense normally does not even need to make an offer of proof prior to cross-examination "since counsel often cannot know what pertinent facts may be elicited." (*Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, 671, 673.) Further, "an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such evidence." (*Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, 671, 673.) This analysis should be particularly true where here the *trial judge actually read the interrogation transcript* and should have been readily aware of the evidence in the interrogation transcript the defense sought to present that would impeach Jelks in numerous ways, not the least of which was to show his testimony was false, involuntary and the product of on going police coercion.

It seems difficult to understand that the trial judge seemingly ignored the defense offers of proof. It should have been obvious to the court as it read the interrogation transcript that the detectives had placed considerable psychological pressure on Jelks to confess to the Mosley murder. Jelks was adamant that he had not committed that murder. The only witness who said Jelks was involved was Marcellus James, who on both February 27, 1992 and July, 1994 was in custody and would be considered an in custody police informant. Yet, the choice given to Jelks (after a clearly defective *Miranda* advisement) was to tell the detectives what they "wanted to hear" (i.e., that Jelks was the *driver* of the car as the *numerous* witnesses claimed!), or they would arrest him on the Mosley murder right then and he would spend the remainder of his life in prison. If he confessed to the Mosley murder, they would let him go home and be with his four young children for Christmas.

Jelks' fear of being arrested and killed in retaliation for assisting the police, as well as his concern about spending the rest of his life in prison, created powerful motivational tools the police capitalized on and used as leverage to pressure Jelks into talking about the Loggins/Beroit murders and subsequently testifying at that trial. Appellant asserts any trial judge who read the transcript of the Jelks interrogation should have seen the potentially meritorious issue of Jelks' testimony being the product of on-going police coercion. By ruling as it did, the trial court prevented the defense from exploring and raising this issue.

5. Analogizing Jelks' coerced statements during interrogation, his subsedquent testimony, and the "Successive Confession" law.

Analogizing to the "successive confession" cases in the Fifth Amendment context (e.g., *Clewis v. Texas* (1967) 386 U.S. 707; *Lyons v. Oklahoma* (1944) 322 U.S. 596; see also *People v. Hogan* (1982) 31 Cal.3d 815), Appellant argues the above quoted evidence also demonstrates that Jelks' prior coerced confession to the Mosley murder and his concurrent statement incriminating Appellant in the Loggins/Beroit murders established an unbroken chain of coercion that culminated in Jelks' testimony at the trial. Appellant contends that none of the events subsequent to the coerced interrogation on December 5, 1994 was sufficient to "purge the taint" of the earlier involuntary statements.

The federal constitutional standard concerning "successive confessions" was first articulated by the Supreme Court in *Lyons v. Oklahoma, (1944)*, 322 U.S. 596. Similar to the instant case, the *Lyons* court was faced with a situation in which arguably "improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime." (*Id.* at p. 602) *Lyons* observed

> The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of "mental freedom" to confess to or deny a suspected participation in a crime. ... If the relation between the

> earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process." (*Id.* at pp. 602- 603)

Appellant asserts that in the instant case, Jelks' initial confession and statement that incriminated Appellant in the Loggins/Beroit murders was involuntary and unreliable. During the interrogation, Jelks was not "in possession of mental freedom" to enable him to meaningful choose to confess or deny a suspected participation in [the Mosley murder]. In the same interrogation Jelks' statement that incriminated Appellant was also the product of the police coercive interrogation tactic. Appellant further argues that Jelks' testimony in the jury trial was "control[led by] the character of the" initial coerced interrogation, and therefore should have been excluded.

Even if this Court disagrees with this argument, however, Appellant still asserts the trial court erred when it did *not* allow the jury (as finder of fact) to resolve whether Jelks' jury trial testimony was "controlled by the character of the" initial interrogation. If the jury had found the initial interrogation was coercive in nature, and therefore, involuntary and unreliable, the jury may also have found Jelks' subsequent testimony (i.e., by analogy, Jelks' "successive" statements incriminating Appellant in the Loggins/Beroit murders) to be involuntary and unreliable.

Illustrative of this is argument is *Wilcox v. Ford* (1987) 813 F.2d 1140. Therein, the defendant was accused of murdering a victim whose body was not discovered until eight years after the crime was committed. The primary prosecution witness was Wrentz, an elderly, illiterate man, who had been in the company's employ for over 30 years. He testified, apparently under a grant of immunity, that he helped defendant and several other men load the victim's corpse into a box, after which they drove to a secluded spot where they buried the body..Defendant sought to exclude Wrentz's testimony on the ground that

Wrentz's earlier consistent statement to police had been impermissibly coerced from him. The Eleventh Circuit Court of Appeals rejected the claim, noting:

> "Even assuming that the police employed improper interrogation techniques to obtain ... Wrentz's out-of-court statements implicating Wilcox in the crime, [Wrentz's out-of-court statements were not] introduced at trial. ... There is no proof that Wrentz was incompetent to testify or that his trial testimony was coerced. ... Even assuming, however, that the reliability of Wrentz's direct testimony ... was somewhat suspect, the defendant had adequate tools in hand to challenge the reliability before the jury. The defense had full knowledge of the nature of Wrentz's ... interrogation, had access to the tapes and transcripts of the interrogation sessions prior to trial, and had a full opportunity to use those materials in examining [him]. Furthermore, in addition to a full opportunity to cross-examine [the witness], Wilcox had adequate opportunity to put on independent evidence to discredit the challenged testimony and did in fact put on such evidence. (*Wilcox v. Ford (1987)* 813 F.2d at p. 1149. Emphasis added.)

In comparison, "assuming [in Appellant's case] that the reliability of [Jelks'] direct testimony ... was somewhat suspect, the defendant [did *not* have] adequate tools in hand to challenge the reliability before the jury. ... Because of the trial court's ruling that limited the scope of cross-examination of [Jelks, Appellant did *not* have] a full opportunity to cross-examine [Jelks, nor did Appellant have] adequate opportunity to put on independent evidence to discredit the challenged testimony."

A similar situation existed in *People v. Douglas* (1990) 50 Cal.3d 468. Therein, the defendant moved to suppress prosecution witness Hernandez' trial testimony by arguing it was the product of an involuntary initial interrogation. In affirming the trial court's ruling that denied the defendant's motion, this Court commented that Hernandez' "trial testimony was subject to thorough cross-examination and impeachment. (*Id.*, at p. 503.) In the instant case, however, Jelks' "trial testimony was [*not*] subject to thorough cross-examination and

impeachment" because of the trial court's ruling that limited defense cross-examination.

6. The Trial Court's Ruling Prevented Appellant from Presenting the Above Evidence to the Jury Violated Appellant's Due Process Right to Present a Complete Defense. This Included Evidence that Pertained to the Witness' *Motivation to Testify.*

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22-23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Presenting the jury with substantial material evidence that impeaches the credibility of prosecution witnesses can be critical:

> We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347 [a defendant was entitled to present evidence of a witness's juvenile records despite a state policy of sealing such records]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679. Emphasis added.)

Further, "[t]he Sixth Amendment requires at a minimum, that criminal defendants have ... the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40.)

In *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1178, the Ninth Circuit reversed because the trial court excluded evidence that would have tended to undermine a main prosecution witness's credibility. The court reiterated that "where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." (*Id* at p. 1178*; DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.) The *Hubbard* court held that the limitation of Deputy Fancher's cross-examination also implicated Thomas's Confrontation

Clause rights under *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680. (*Thomas v. Hubbard, supra,* 273 F.3d at 1178-1179.) Similarly, in *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 873-879, the Court reversed the habeas petitioner's conviction because the trial court erred in excluding impeachment evidence of an important prosecution witness.

The trial court's exclusion of impeachment evidence pertaining to the credibility of Freddie Jelks also denied Appellant his constitutional right to present a defense and thus is reversible unless the state can show the error was harmless beyond a reasonable doubt. Due process requires that the accused have a reasonable opportunity to present his defense. (*People v. Wright* (1989) 209 Cal.App.3d 386, 392-393.) Every criminal defendant has a constitutional right to present all favorable relevant evidence of significant probative value. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) Few such rights are more fundamental than that of the accused to "present his version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Although the trial court is granted discretion under Evidence Code § 352 to reject evidence that creates a *substantial* danger of undue consumption of time or prejudicing, confusing, or misleading a jury, "§ 352 must bow to the due process right of the defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 594.) In *People v. Hall* (1986) 41 Cal.3d 826, 834, this Court cautioned that the balancing required under § 352 must be weighed carefully in order to avoid a hasty conclusion that deprives the jury of the chance to consider the relevant evidence.

The modern tendency has been to remove procedural barriers to the jury's consideration of evidence of both the prosecution and the defense. Article I, § 28, subdivision (d) of the California Constitution now provides in pertinent part that "relevant evidence shall not be excluded in any criminal proceeding ...." This

"truth-in-evidence" provision of an initiative enacted in 1982 was intended to "to expand the range of admissible evidence." (*People v. Armbruster* (1985) 163 Cal.App.3d 660, 665.)

If the jury concluded a) that Jelks felt compelled to testify in a manner that would please the prosecution, and b) that this compulsion was, in Jelks' mind, more important than telling the truth, the jury may well have disregarded Jelks' entire testimony. However, the trial court's ruling prohibited Appellant from presenting the aforementioned evidence that could have led the jury to reach this conclusion. Hence, Appellant asserts the trial court abused it discretion and erred when it prohibited the defense from inquiring into Jelks' motivation to testify in the manner that he did.

7. The Trial Court's Error Was Prejudicial.

Jelks was one of three prosecution witnesses at trial who identified Appellant as the shooter. As such, he was one of the legs of the prosecution's 3-legged stool upon which the prosecution's entire case rested. Freddie Jelks was, therefore, a key prosecution witness. The prosecution presented no physical evidence that linked Appellant to the murders of Loggins and Beroit. Because Jelks was such a critical prosecution witness, it was crucial that the defense be allowed to vigorously challenge Jelks' credibility.

However, Appellant was prevented from introducing evidence that may have caused the jury to totally disregard Jelks' testimony. The potentially coercive psychological pressure employed by detectives during their interrogation of Freddie Jelks was arguably so extraordinary that it not only may have resulted in a false confession to a murder by Jelks, but the further result was that Jelks' testimony at Appellant's trial was the product of continuing police coercion, in violation of Appellant's due process right to a fair trial.

a. The prosecutor, in her closing and rebuttal arguments to the jury, exacerbated the prejudicial effect of the trial court's ruling.

In both closing argument and rebuttal argument, the prosecutor zealously argued the credibility of Freddie Jelks. In doing so, however, the prosecutor urged the jury to consider portions of Jelks' testimony that referred to statements made during his interrogation, statements that were taken totally out of context by the prosecutor. Because of the trial court's ruling that prohibited Appellant from questioning Jelks regarding the circumstances of the interrogation that contained the relevant information, Appellant was unable to rebut the prosecutor's argument. The result was that the prosecutor, by taking out of context certain portions of Jelks' testimony that referred to his December 5, 1994 police interrogation, was able to *mislead* the jury as to Jelks' credibility.

Examples best illustrate the unfair advantage taken by the prosecutor in her closing and rebuttal arguments that exacerbated the prejudice that Appellant suffered because of the trial court's erroneous ruling.

Example #1. The prosecutor argued to the jury that Jelks received *no benefit* for talking to the police. In fact, the prosecutor argued, Jelks received a "negative reward" when the police subsequently filed charges against him based, in part, on what he told them. Further, she argued, because he feared for his life if he told the police anything about the murders of Loggins and Beroit, Jelks was understandably evasive at the beginning of the interrogation and initially gave conflicting accounts. At the beginning of the interview, she reasoned, Jelks did not want to get involved because he would be placing his life in jeopardy. She urged the jury to believe that as the interrogation continued, Jelks decided it was time for him to do something different, to tell the truth.

> DDA: Freddie Jelks, what benefit? Okay. The police go in in December, and I will grant you, they pressured him. But what does he do? He gives himself up for the crime that he's now in custody on. He cops out after some pressure, after some strong language. Look, this is not a walk in the park. These are homicide investigations, these are murder investigations, and it takes some time to elicit information, no question.

Had Jelks received a "benefit"? Yes; he was not arrested at the conclusion and was allowed to return and spend Christmas with his young children. Would he in the future receive a benefit on his pending murder case for his cooperation? Yes! But for the trial court's ruling, the defense could have established he was highly motivated to do anything necessary to convince the prosecution that he was "cooperating." Jelks had been told by the detectives that if he wanted any hope of protection and consideration in his pending case, he had to convince the DA that a) he was a good witness, b) that the DA would want to use him as a witness, and c) that his testimony would be vital to the DA's case. [CT Supp.IV, 4:913-914.]

Furthermore, but for the trial court's ruling, Appellant could have established the police "pressure" was of such a nature that Jelks may have "given himself up" to a murder he did *not* commit; or at the least, Jelks falsely confessed to a lesser role in a murder for which he was liable. And once Jelks "confessed" to being a principle in the Mosley murder, he had no choice but to "cooperate" with the police and prosecution in the Loggins/Beroit murders. In Jelks' mind, the alternative of his "not cooperating" was to spend the rest of his life in state prison. The jury was not allowed to know this, however, because of the trial court's ruling.

Example #2: The prosecutor argued Jelks was initially "evasive" during the three hour interrogation because of his fear of being killed "if he gave the information that he had." This "fear of being killed" explained any "inconsistencies" between his testimony and his statements to the police on December 5, 1994, the prosecutor contended. What "information" was the prosecutor referring to? The *only* inference the jury could draw was that Jelks' "information" pertained to the murders of Loggins and Beroit by members of the 89 Family Bloods gang, since the jury was *not allowed to know* that Jelks was actually referring to his knowledge of his and the 89 Family's involvement in the Mosley murder. [RT, 25:5212-5213]

Example #3: The prosecutor continued to argue that Jelks received no benefit for telling the police about Appellant's involvement in the Loggins/Beroit murders. Any incentive Jelks may have had of receiving some type of favorable treatment in exchange for his cooperation disappeared when the police arrested him 8 months later, according to the prosecutor. If Jelks was cooperating because he expected a benefit, as the defense argued, why would Jelks continue to cooperate with the police after they arrested him? If Jelks' cooperation was really "tit for tat, you'd expect him to come into court" and refuse to cooperate with law enforcement.

> DDA: So Mr. Jelks goes in there, he's under the gun, they are looking at him. They are telling him they have information, and he eventually gives information. What incentive does he have? That they are going to release him, and they say they'll talk to the D.A. Well, look at what happens, 8 months later he's arrested. What does that mean in terms of his cooperation level? If in August of 1995 after the cops say, Here, we'll talk to the D.A., after he testified to the grand jury, and they arrest him, what would you expect him to do? I mean, if all of this really is tit for tat, you'd expect him to come into court and say, "Hey, you guys blew me off. You didn't keep your word the last time. I'm not saying diddly-squat."
>
> What does he say instead? He says, "Hey, I'm telling the truth." And he says that the reason he's testifying is that originally he didn't want to have nothing to do with what the police were speaking of. He didn't want to say anything about it at the time. "But now it's time for something different to happen, you know. It's just the fact that in a situation like this you talk to the police, you know, it gets back and, you know, you are a dead man. You know, if you talk to them about something as major as this, the greater odds are against you to survive it."
>
> That's compelling information. What benefit did he get by testifying? None. He got jailed on his case, he's still in custody, and he had to testify against somebody who he was afraid of.

Appellant contends the above rebuttal argument by the prosecutor was *outrageously* unfair and substantially *increased* the prejudice suffered by Appellant because of the court's ruling.

The prosecutor argued to the jury that not only did Jelks receive *no benefit* in exchange for his decision to testify, but law enforcement treated him even worse because he decided it was time "for something different to happen." However, the prosecutor argued, instead of a response of "I'm not saying diddly-squat", Jelks' response was just the opposite. In fact, *despite* the actions of law enforcement, Jelks insisted on testifying even though by doing so he would be placing his very life in jeopardy! Accordingly, the jury should find Jelks to be very credible and believable, so the prosecutor's argument went.

However, according to the above quoted statements in Jelks' interrogation, Jelks received substantial benefits when he decided to "cooperate" during the interrogation. He was *not* arrested for a murder that he had just confessed to! He was allowed to go home and spend Christmas with his young family. The detectives would talk to the DA and do their best to keep him out of jail. Further, because he "snitched off" Cleamon Johnson and Jelly Rock in the Mosley murder, Jelks' desperate plea for police protection for his family and himself from anticipated gang retaliation was considered and relocation, if necessary, promised.

Further, the above quotes demonstrate Jelks *expected* a substantial benefit because of his testimony! It was part of the "plan" he and the detectives had worked out. They had agreed to "work together." However, for Jelks to receive witness relocation and protection, as well as consideration in his own pending murder case, he had to "be a good witness" that the "DA would want to use as a witness"; a witness whose testimony "would be vital to the DA's case." [CT Supp.IV, 4:913-914]

But for the trial court's ruling, Appellant could have presented the above evidence that reflected Jelks' motivation to provide favorable testimony for the

prosecution. Appellant could have readily rebutted the prosecutor's beguiling argument. Further, the jury would have realized the prosecutor's argument was misleading and, Appellant asserts, very disingenuous. In reality, the jury would have received evidence that not only did Jelks have an "incentive" to provide information on the Loggins/Beroit murders, but Jelks knew that he was at the *complete mercy* of the police and prosecution. They literally held his entire future in their hands. Jelks' had an incredibly powerful "incentive" to provide whatever testimony he thought the prosecutor wanted. This is what Appellant could have proven and argued to the jury, if the trial court's ruling had been different.

But for the trial court's ruling, Appellant could also have responded to the prosecutor's argument regarding Jelks' testimony, "But now it's time for something different to happen." The prosecutor was free to argue that Jelks was a changed man; he was willing to risk the danger of being killed or maimed in retaliation for telling the truth about the gang's senseless and violent crimes. Appellant would have responded, but *could not* respond, that Jelks' change of heart was much more selfish. Jelks' "change of heart" was motivated by his desire to avoid spending the rest of his life in prison for the murder to which he had just confessed.

Example #4: The prosecutor took even further unfair advantage of the trial court's ruling in her closing argument. She rhetorically asked again and again why Jelks would, in effect, "put his life on the line" by *falsely* incriminating his fellow gang members? Would Jelks "put his life on the line" in this manner simply because he was hoping that "something might happen with his case?" No, she argued to the jury. Why? Because when Jelks first spoke to the police on December 5, 1994, he had no pending case hanging over his head. Since his trial testimony was consistent with his initial statement to the police, his trial testimony was not motivated by a desire to receive something in exchange for his testimony. The defense-created-assault on Jelks' credibility was without merit, she argued.

DDA: You ask yourself why Mr. Jelks put his life on the line up there. Why would he do that? He told you again and again that his concerns were for his safety. [RT, 24:5125]

Example #5:

DDA: Mr. Jelks certainly hopes that something will happen with his case. But at the time that he talked to the detectives back in 1994, in December of 1994, he had no case. He was concerned about his safety. And he expressed that over and over. Significantly the facts as he related them to the officers then are the same facts that he related to you in August of 1997. [RT, 24:5128-5129]

And Example #6:

DDA: It is true that he [Jelks] hopes for some benefit as a result of his testimony. But remember that this all started long before he had a case. [RT, 24:5130]

But for the trial court's ruling, Appellant would have pointed out to the jury the fallacy of the prosecutor's argument. From the above quotes, it is apparent the *primary pressure* brought to bear on Jelks to talk to the detectives was their threat (in Jelks' mind) that he would be arrested on the day of the interrogation for the murder of Mosley. The fact that he was not indicted on that murder until several months later was, from the defense position, meaningless. However, the defense could not rebut this prosecutorial argument because the necessary evidence was kept out by the court.

There was a final area of the closing argument wherein the prosecutor knowingly took unfair advantage of the trial court's ruling: The prosecutor argued that if Jelks had not told the truth, the jury could be assured the *defense would have brought out the inconsistencies, the improper motives*, etc. Since the defense did *not* bring out any inconsistencies or improper motives on Jelks' part, it could be inferred that there were none. Therefore, the prosecutor argued, this was further proof that Jelks was a truthful witness.

Example #7.

DDA; Why should you believe what Mr. Jelks said? You should believe it because it makes sense, because it's corroborated, and because despite efforts by the defense to unearth some other motive, or some payment, nobody has been able to bring a shred of evidence into court that would indicate that Mr. Jelks got his information from any source other than his own memory. [RT, 24:5124 (Emphasis added.)]

Example #8.

DDA: In the course of a three hour interview, as described by Detective McCartin -- and if it had been any different I'm confident that the defense would have brought it to your attention – McCartin says that the evasiveness, and the questions, "You don't know what you are asking me to do, man; I want my freedom", all occurred in the first ten percent of the interview. If the interview is three hours long that means that they occurred in the first 20 minutes of the interview. Is that reasonable, given the weight of what that man had on his mind? Is that reasonable given the weight of what it was that he'd seen, and he knew, and he in fact was trying to get away from? (RT, 25:5212-5213. Emphasis added.)

Finally, but not least, Example #9 from her rebuttal argument:

DDA: The witnesses are consistent on events, on the actions and on the identities of the perpetrators. They told this to you in court. They were grilled on it in court. They've told it to other people before, namely the police. And I guarantee you that if there was a way for the defense to have shown in any way that there was any evidence that these witnesses were spoon fed, you would have heard it. Any way that these people would have been rehearsed, would you have heard it. It's not there. And because there is no evidence, you can't consider it. [RT, 25:5213. Emphasis added

"And because there is no evidence [of Jelks' untruthfulness], you can't consider it."

But for the trial court's ruling, the defense could have, and would have, introduced evidence that Jelks was *not* truthful in his testimony, evidence that the prosecutor claimed was non-existent. Appellant submits the prosecutor's argument was deceptive and disingenuous. That the prosecutor would capitalize on the trial court's ruling and argue in this manner was, Appellant maintains, grossly unfair and deprived Appellant of his rights to a fair trial under both the California and United States Constitutions.

D. Conclusion.

Accordingly, and for all the above reasons, Appellant asserts the trial court's ruling deprived Appellant of his constitutional due process rights to a fair trial, to present the defense case, and to confront and cross-examine his accusers under both the federal and state constitutions. Appellant respectfully requests this Court reverse his convictions and judgment of death on these grounds.

VII.

The trial court abused its discredtion when it refused to allow Appellant to confront, cross-examined and impeach Detective McCartin regarding details of his initial interrogation of Freddie Jelks, as well as details of Jelks' pending murder case. The trial court's error denied Appellant his Fifth, Sixth and Fourteenth Amendment Rights to confront and cross-examine his accusers, as well as to present a defense. The errors were prejudicial, and they require reversal of Appellant's convictions and sentence of death.

A.. Introduction.

After the prosecutor called Freddie Jelks and Marcellus James to testify, she called Detective McCartin, a Los Angeles Police Department homicide detective, to testify regarding his interviews with Freddie Jelks and Marcellus James.[176] As McCartin responded to questions from the prosecution on direct

[176] McCartin was also asked questions regarding an interview he conducted with co-defendant Johnson at Ironwood State Prison. Those questions were introduced only as to co-defendant Johnson.

examination, and later on re-direct examination, it was obvious she sought to enhance the credibility of Freddie Jelks by asking Detective McCartin numerous questions about his initial interrogation of Jelks, as well as Jelks' pending case.

Comparing McCartin's trial testimony with the transcript of his interrogation of Jelks quickly revealed significant discrepancies. Appellant asserts that Detective McCartin's direct examination was *remarkably misleading* and *disingenuous* when he testified about his interview with Jelks. Appellant further asserts that the prosecutor "opened the door" to the details of the interrogation, as well as to the details of Jelks' pending murder case, when her direct and re-direct examination questions went into the details of the interrogation, as well as details of Jelks' pending case.

However, the trial court's prior ruling that restricted what the defense could present to the jury regarding the details of the interrogation and the details of Jelks' pending case prevented Appellant from effectively cross-examining Detective McCartin regarding portions of his testimony that at times was directly contradicted by the discussions contained in the interrogation of Jelks. Further, some of the prohibited cross-examination would have undermined significantly the credibility of Freddie Jelks.

In effect, Detective McCartin was used by the prosecution to bolster the credibility of Freddie Jelks. At the same time, the defense was prohibited from confronting and cross-examining McCartin about facts to which he testified directly because to do so would have involved questioning McCartin about the prohibited details of Jelks' interrogation or Jelks' pending murder case.

B. <u>The Applicable Law</u>.

Appellant respectfully incorporates herein by reference as though fully set forth the relevant California and federal law as discussed in Argument IV.B, *supra*, regarding a criminal defendant's constitutional right to confront and cross-examine his accusers.

C. <u>Discussion</u>.

1. **Detective McCartin's direct/re-direct examination was remarkably misleading and disingenuous when he testified regarding Freddie Jelks. Further, the prosecutor's questions on direct and re-direct examination "opened the door" to Appellant's right to confront and cross-examine Detective McCartin, as well as Freddie Jelks, regarding the details of the interrogation of Jelks, and regarding the details of Jelks' pending murder case.**

On direct and on re-direct examination of Detective McCartin, the prosecutor herself presented numerous details of the interrogation of Jelks on December 5, 1994. As will be illustrated below, many of the details concerning McCartin's interrogation of Jelks were taken out of context and then used by the prosecution to present Jelks in a *totally false* light and to bolster his credibility. The defense pointed this out to the trial judge and urged the court to allow the defense to inquire into these areas the prosecution had delved into on direct and re-direct examination of McCartin. Specifically, Mr. Lasting told the court that McCartin testified that Jelks told the detectives "the truth about his own case, and that he [Jelks] implicated himself in his own case, and I think that that permits me, without bringing out the fact that Mr. Johnson is also involved in that case, to elicit from the witness [McCartin] that Mr. Jelks made conflicting statements about that case." [RT, 19:4241]

Mr. Lasting pointed out that Jelks a) initially denied any involvement in the Mosley murder; then Jelks told the detectives b) he heard about the Mosley murder but he wasn't around at the time; thereafter Jelks c) "tangentially implicates himself as being present at the time of the crime." [RT, 19:4242] Mr. Lasting argued that each of these three statements to the detectives conflicted with his eventual admission to the police that he was actually involved in the drive-by murder of Mosley:

> RL: And it seems to me that I should be entitled to bring that out so the jury is aware of the fact that he made conflicting statements about it [Jelks' involvement in his own pending criminal case.]. And it's bearing on his [Jelks'] credibility,

> because it seems that the district attorney's questions are designed to suggest to the jury that Jelks made – that they [the detectives] used this ruse [i.e., witnesses identified Jelks as the driver] and then he [Jelks] said, Okay, I was involved in this case. [RT, 19:4242]

Mr. Lasting's argument was clear: The prosecutor was arguing that Jelks was credible in his statement to the detectives about the Loggins/Beroit murders because in that same statement Jelks incriminated himself in his own pending case. The defense wanted the jury to know this was not necessarily the truth. Jelks initially *lied* to the police and denied any involvement in his own pending case. Then Jelks *lied again* to the police when he made up a second version regarding his pending case. Jelks thereafter *lied a third time* about his own-involvement in his pending case. Only after the detectives continued to confront Jelks with their "ruse" did Jelks finally admit he was involved in his pending case.[177] Mr Orr then added that Jelks' final "version" still may not have been the truth; that Jelks may *not* have been *merely* the driver because he had a gun with him and may, inferentially, have been one of the shooters. [RT, 19:4245] In other words, the defense argued that Jelks may have *still been lying* to the detectives when he finally "acknowledged" that he was the driver.

The trial court, however, seemed to be more interested in moving the case along and in avoiding any "unnecessary" delay. To Mr. Lasting's argument the court responded that the defense would be allowed to ask McCartin if early in the interrogation Jelks denied his involvement and that only subsequently, when the detectives told Jelks they had evidence of his involvement, that Jelks admitted being at the scene and participating. [RT, 19;4243] When Mr. Lasting pointed out there were additional conflicting statements by Jelks during the interrogation, the court responded, "Just in the interest of time, do it the way the court suggests or don't do it." [RT, 19:4244. Emphasis added.]

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[177] The jury still was *not* allowed to know that Jelks' pending case was a gang related drive-by murder case.

Then in what appears to be a rather sarcastic comment to counsel, the court told Mr. Lasting:

> CRT: Your point is what? You came up here to the bench and told me that you wanted to elicit from the witness the fact that this guy didn't – didn't just fess up? [RT, 19:4244]

The court thereafter reiterated that the defense would only be allowed to ask the two questions of McCartin that the court had previously authorized. The court then *re-emphasized* it had no intention of allowing the defense to go into any further facts of the interrogation or Jelks' pending case. [RT, 19:4244-4245]

It appears as though the trial court completely *missed* the thrust of the defense offer of proof: The prosecution had presented Jelks in a false light. The defense wanted to put Jelks' alleged self incriminating statements in perspective. Further, the defense suggested that Jelks may still have been lying when he finally "acknowledged" his involvement. If that were the situation, then Jelks' "declaration against his penal interest" (See Evid. Code, § 1230)[178] would *not* have been trustworthy. If Jelks were still lying about his alleged involvement in the Mosley murder, why should the jury believe he was telling the truth regarding the Loggins/Beroit murders? However, when Mr. Orr attempted to point this out, the trial court's response was even more curt:

> ORR: What about the fact that on the other case [the Mosley murder], he [Jelks] had a gun with him?

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[178] Jelks was a witness and was obviously available. None of his out-of-court statements were admitted pursuant to § 1230. Appellant uses by analogy the requirements that make that type of hearsay statement "trustworthy" to rebut the argument the court made when it limited the scope of cross-examination of Jelks; that because Jelks' initial out of court statement was, in effect, against his penal interest, and since his in-court testimony was consistent with that out-of-court statement, his testimony had indicia of trustworthiness; hence, there was less need for the defense to vigorously cross-examine Jelks. The defense sought to point out to the trial court that the circumstances surrounding Jelks' out-of-court statements to the detectives were anything but trustworthy. Hence, there was a significant need by the defense tobe allowed to place Jelks' testimony and his prior statements in their proper light. The trial court's ruling continued to disallow this.

CRT: That he what?
ORR: That he [Jelks] had a weapon with him.
CRT: No. You are already on such thin ice with your comment yesterday, Mr. Orr. No. No. [RT, 19:4245]

Because the trial court refused to allow the defense to inquire into the details of the interrogation of Jelks, as well as some details involving Jelks' pending case, the prosecutor was able to mislead the jury without fear the defense would be able to place McCartin's testimony in proper perspective. The following examples illustrate this point and demonstrate the prejudice suffered by Appellant because of the trial court's ruling that restricted cross-examination of McCartin.

a. Example #1: Detective McCartin mislead the jury into believing that the reason Jelks was reluctant to talk to the detectives and initially lied to them was because he was extremely afraid the gang would retaliate against him and his young children if he talked to the detectives about the Loggins/Beroit murders and "snitched off" Appellant and co-defendant Johnson.

McCartin began his testimony by stating he "inherited the investigation involving the death of Donald Loggins and Payton Beroit" in 1994. At that time, it was an "unsolved" or "open murder case." [RT, 18:4155] He reviewed all of the previously written reports. [RT, 18:4155-4156] He became aware of Marcellus James "[f]rom a previous report that was taken by the initial officers, investigating officers."[179] [RT, 18:4157] He said he interviewed James regarding the Loggins/Beroit murders. [RT, 18:4156-4165]

[179] This testimony by McCartin was quite misleading. McCartin was apparently also assigned the Mosley murder case in 1994. It was during his review of the Mosley murder case reports that he learned that Marcellus James spoke to the police about the Mosley murder in February, 1992. In July 1994 McCartin apparently learned that James was then in custody. He interviewed James regarding the Mosley murder case at that time. During the latter part of that in-custody interview, James told McCartin of the alleged admission by Appellant that he shot and killed Loggins and Beroit. [CT Supp. IVA, 1] Subsequently, in September 1994, McCartin re-interviewed the then out-of-custody James about the

McCartin testified he subsequently interviewed Jelks in December, 1994. [RT, 18:4165] Jelks was "very scared and reluctant" to go the police department and talk to the detectives on December 5, 1994. Jelks was not "forthcoming" at the beginning of the 3 to 3½ hour interview; his "reluctance to assist" the police was because he was "[s]cared. Scared that his family would be killed and himself." The detectives had to "pressure" Jelks to talk to them because "people are reluctant in *a gang case* to come forward and talk to us." [RT, 18:4165-4166] The detectives did not provide Jelks with any other kind of information "other than referring to specific – *to a specific case such as this*." Jelks further expressed to the detectives his concern that knowledge of his assisting the police "might get out on the street." As a homicide investigator, it was McCartin's opinion that Jelks' concerns about retaliation were "legitimate" concerns. [RT, 18: 4169-4171]

Testifying on re-direct examination, McCartin told the jury that "witnesses *in this case* did not talk and volunteer information." McCartin again testified that Jelks expressed "concern" for the physical safety of his family and himself, not because of the threat of being arrested by the police on his case, but because of his fear that members of Appellant's gang would retaliate against him and the members of his young family because he had cooperated with the police in the investigation of the Loggins/Beroit murders. [RT, 19:4233-4234]

The jury was *not* aware that almost all of the above testimony was based on statements made by Jelks in the context of the interrogation involving Jelks' knowledge and involvement *in his own case*, the Mosley murder. The jury was not aware that Jelks initial fear of retaliation was because he "snitched off his homeboys" in his *own pending murder case*. Nor was the jury aware that Jelks

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Mosley murder, then again spoke to James about Appellant's alleged admission to killing Loggins and Beroit. However, because of the trial court's ruling that prohibited the defense from asking questions about the Mosley murder (i.e., Jelks' pending case), none of these details were presented to the jury. [See Issue X in this Opening Brief for a detailed discussion of James' interviews with McCartin.]

talked about cases other than the Loggins/Beroit murders.[180] From McCartin's above cited testimony, the *only* reasonable inference the jury would have drawn from McCartin's above cited testimony was that Jelks' fear that he and his young family would become victims of retaliation was the reason he:

a) waited three years before talking to the police about the Loggins/Beroit murders,

b) was reluctant to talk to the police on December 5, 1994 about the Loggins/Beroit murders,

c) initially lied to the police before deciding to tell them the truth about the Loggins/Beroit murders,

d) made statements to the police that were inconsistent with his trial testimony regarding the Loggins/Beroit murders, and

e) was not initially forthcoming and explained why the detectives had to resort to using pressure and a ruse to get Jelks to finally tell them the truth about the Loggins/Beroit murders.

In other words, the prosecution mislead to jury into believing that Jelks initial reluctance to assist the police was not because of his fear of being arrested on his *own* case in which he "snitched off" members of the 89 Family gang, but rather because of his "legitimate fear" that members of Appellant's gang would retaliate against him and his family if the gang discovered that he had cooperated with the police and, in effect, "snitched off" Appellant and co-defendant Johnson in the Loggins/Beroit murders..

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[180] Although the jury was told that Jelks talked to the detectives about his involvement in the case that was pending against him at the time of the trial, McCartin testified that at that time Jelks did not express any concerns about his being arrested on the case for which Jelks admitted involvement. [RT, 18:4166]; that Jelks's fears were *not* because he thought the police might arrest him on his case. [RT, 19:4234] Hence, since the jury was not told that Jelks talked about any case other than his own case and the case involving Loggins and Beroit, the only reasonable inference was that Jelks' concerns were based on his assisting the police on the Loggins/Beroit murders.

The prohibited cross-examination.

Appellant was prevented from introducing evidence that the *first time* Jelks said anything to the detectives about the Loggins/Beroit homicides was well into the interrogation (at page 102 of the transcript of that interrogation). [CT Supp IV, 4:934][181] Up until that point in the interrogation, the detectives' questions and Jelks' responses had *nothing to do* with the Loggins/Beroit murders. The interrogation, for the most part, involved *Jelks' role* in the 97 East Coast Crips drive-by shooting in which Tyrone Mosley was murdered.[182] [See, for example, CT Supp IV, 4:839-844 (*Miranda* advisement and efforts at obtaining a waiver)]; [CT Supp IV, 4:853-855 (Jelks' past activities with the gang); [CT Supp IV, 4:871-930 (Mosley murder discussions).]

Appellant was prevented from introducing evidence that Jelks was "scared and reluctant" to go to the police department and talk to the detectives because he was worried they wanted to talk to him about *his involvement* in the Mosley murder. [CT Supp IV, 4:839-844; 853-857; 871-930.]

Appellant was prevented from introducing evidence that Jelks was not forthcoming at the beginning of the interview because the detectives were asking him about *his knowledge of, and his role in,* the Mosley drive-by murder! Jelks' reluctance to talk to the detectives during the first 102 pages of the interrogation had *nothing to do* with Jelks' fear of retaliation because he was "snitching off" Appellant and Johnson for their roles in the Loggins/Beroit murders, as the prosecutor urged the jury to believe. Jelks did not want to confess to his own involvement in the Mosley murder. Further, once Jelks told the detectives that co-defendant Johnson and "Jelly Rock", both 89 Family Bloods gang members, were

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[181] The first volume of the Jelks interrogation transcript consists of 186 pages [CT Supp IV. 4:833-1018] The second volume of the interrogation of Jelks consists of 152 pages [CT Supp IV, 4:1019-1170].

[182] The detectives previously had been told by Marcellus James that Jelks was one of the two shooters in the assailant's car. [See RT, 31:6205-6207]

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the shooters in the Mosley murder, Jelks feared retaliation because he "snitched off" Johnson and Jelly Rock in the unrelated Mosley murder. [CT Supp IV, 4:839-844; 853-857; 871-930.]

b. Example #2: The prosecution mislead the jury into believing that the detectives *never threatened* to arrest Jelks for the Mosley murder if he did not talk to them during the December 5, 1994 interrogation.

McCartin testified he never threatened Jelks with physical force, but he did admit he "played a mind game on" Jelks;: "We told him that if he does not cooperate, we will have to arrest him for his traffic warrants." Jelks "did not seem concerned about his traffic warrants, but he did express "concern about getting home" that day because it was December 5, just a couple weeks before Christmas. [RT, 18:4167-4168] McCartin related the detectives did not arrest Jelks on traffic warrants at the conclusion of the interview because "we felt there was no need to arrest him for just plain – or traffic warrants." [RT, 18:4169]

McCartin's testimony on cross-examination was undoubtedly extremely confusing to the jury because of the defense's inability to effectively and cohesively place McCartin's statements to Jelks in context. For example, Mr. Lasting confronted McCartin about his direct examination testimony regarding arresting Jelks on traffice warrants:

RL: Did you threaten Mr. Jelks with being arrested on a serious offense?[183] [i.e., not on traffic warrants!]
McC: No.
RL: Did Detective Tapia threaten to arrest him on a serious matter?
McC: I don't believe so. [RT, 18:4181]

[183] Mr. Lasting would have wanted to phrase this question, "Die you threaten to arrest Jelks for the murder of Mosley?" The trial court's ruling prohibited Mr. Lasting from asking this question; hence, the above question that, Appellant submits, had far less meaning to the jury as they considered whether Jelks' testimony was truthful or coerced and unreliable.

In response to this testimony, Mr. Lasting confronted McCartin with portions of the transcript of the interrogation, then had McCartin admit the detectives said the following to Jelks:

> McC: How many kids did you say you have? ... Do you like seeing your kids? ... Christmas is coming up. ... We want you to keep a nice flow of information coming. .[RT, 18:4181-4182]

When a "nice flow of information" was not forthcoming, McCartin admitted Detective Tapia told him in front of Jelks:

> TAP: Well, let's just send this in, Brian [McCartin]. We'll do our thing and we'll just book you. [RT, 18:4182-4183. Emphasis added.][184]

After further refreshing McCartin's memory of the interrogation details, McCartin them admitted he told Jelks:

> McC: You [Jelks] give me all the truth that you know on this stuff and I will know if you are lying. You will go home today. ... I can promise that you can go home today. I'll let you go if you give me truthful information and I will work with the D.A. and whoever else and keep you out of jail. [RT, 18:4184-4185]

However, McCartin *insisted* the detectives were referring to arresting Jelks on traffic warrants as to all of the above statements! When McCartin was confronted further with the interrogation transcript, he admitted he told Jelks that "he stood to be arrested on a very serious offense" and that offense "carried a potential life sentence." [RT, 18:4185] McCartin then reversed himself and admitted his "arrest" comments did refer to the "serious offense", and not the traffic warrants. [RT, 18:4185-4186] McCartin added that initially the detectives referred to arresting Jelks on traffic warrants, then later referred to arresting Jelks on the "serious offense." [RT, 18:4185]

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[184] Lasting initially quoted the interrogation statement as "We'll just book it." Moments after having McCartin refresh his memory by reading the interrogation transcript, Mr. Lasting quoted it as :We'll just book you."

However, when Mr. Orr cross-examined McCartin on the same statements that Tapia made to Jelks ("Let's just send this in, Brian" and "we'll just book you"), McCartin reverted to his original answer that they were referring to Jelks' traffic warrants, not his "serious crime." [RT, 18:4190] As an explanation, McCartin stated when Detective Tapia's statements were made, Jelks had not yet been identified on the life sentence case. [RT, 18:4190][185]

McCartin's testimony was confusing to the jury. It was not at all clear whether Jelks was threatened with being arrested on a "serious case" or on "traffic warrants", if he continued to avoid telling the detectives the truth.

The prohibited cross-examination.

However, there were several statements by the detectives in the interrogation transcript that would have made it very clear that Detective McCartin was being "less than candid", as well as disingenuous, with the jury; however, the court would not allow the defense to confront McCartin with these statements made during the interrogation. The following are examples:

> McC: Anyway, well, we have people that have picked you out. Picked you out on a – in a murder case. They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay? So, what we want to know is what happened?
>
> FJ: I don't know nothing about that.
>
> McC: Because what's going to happen is ultimately you're going to get booked fore murder, okay? Because that case is still open. Nobody's been booked for that yet.
>
> FJ: Uh huh.

[185] McCartin's testimony at this point was simply not true. James had identified Jelks to McCartin and Tapia as being one of the shooters in the Mosley murder on July 11, 1994, as well as on September 21, 1994. That was the reason McCartin and Tapia initiated this interrogation with Jelks; to try and obtain a confession from Jelks as to his role in the Mosley murder. [See Issue IV in Appellant's Opening Brief for a detailed discussion of this.] However, the defense was unable to show the jury that McCartin was not being truthful because to do so would have required delving into Jelks' pending murder case.

McC: And I know you said you want to go – you want to be home for Christmas, right?
FJ: Right (Untranslatable)
McC: So we need to hear what happened out there. [CT Supp IV, 4:872-873.]

There was no ambiguity in this interchange between McCartin and Jelks. McCartin told Jelks if he wanted to be home for Christmas (i.e., not be arrested and booked on the Mosley murder), Jelks had to tell them what he knew about the Mosley murder. However, the trial court's ruling prevented the defense from confronting McCartin with this interchange that demonstrated a) pressure on Jelks was increasingly heavy to tell the police "something" regarding the Mosley murder, and b) McCartin was not being candid and forthright with the jury. Appellant submits this evidence would have undermined the credibility of both Jelks and McCartin.

Later in the interrogation, as the detectives discussed other cases, as well as the necessity of Jelks' continued cooperation, Detective Mathew made the following very unambiguous comments to Jelks:

MAT: We wouldn't come and talk to you if we didn't have something on you, right? ...I'm not going to bullshit you, okay? You're looking at some serious stuff, okay? Murder is the ultimate crime. Never goes away. You have to look for your best interest, all right? ... I'm not going to sit here and stroke you and tell you, oh, this is this, and this is this (untranslatable) Freddie, you looking at some serious time and some shit goes down, okay? And if we – we want to work something out, you have to look out in your best interest. Because we have you implicated in murders. Not one murder. Many murders, okay? [CT Supp IV, 4:976-979]

In Jelks' mind, the threat of being arrested and of spending the rest of his natural life in prison would have escalated exponentially because the detectives communicated to Jelks at that point that they were referring to *additional murders* involving Jelks. However, the court's ruling prevented the defense from confronting McCartin with this additional evidence that would also have shown

the undue pressure on Jelks, as well as McCartin's less-than-honest testimony on direct examination.

c. Example #3: The prosecutor mislead the jury into believing that the detectives *never promised* Jelks that they would let him go home at the conclusion of the interrogation if he told them what they wanted to hear.

McCartin testified the detectives *never* "promised Jelks that they would let him go home that day if he told them the truth." [RT, 18:4171] McCartin was asked if he ever told Jelks that he would be allowed to go home at the conclusion of the interrogation if he provided "a certain version of the facts." McCartin's subsequent response was that they "just asked him to tell the truth. That is all we did." [RT, 18:4171]

The prohibited cross-examination.

The defense was prohibited from confronting and cross-examining McCartin about the following "promises" made to Jelks:

> McC: Anyway, well, we have people that have picked you out. Picked you out on a – in a murder case. They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay? So, what we want to know is what happened?
> FJ: I don't know nothing about that.
> McC: Because what's going to happen is ultimately you're going to get booked for murder, okay? Because that case is still open. Nobody's been booked for that yet.
> FJ: Uh huh.
> McC: And I know you said you want to go – you want to be home for Christmas, right?
> FJ: Right (Untranslatable)
> McC: So we need to hear what happened out there. [CT Supp IV, 4:872-873.]

The rather obvious inference communicated to Jelks during this interchange was that if Jelks told the detectives "what happened out there" in the "murder" case in which Jelks had been identified by witnesses, Jelks would be allowed to go

home and be with his family for Christmas. He would *not* be arrested for the Mosley murder that day if he admitted his involvement in the Mosley murder. Appellant asserts this was a rather clear "promise" made by McCartin to Jelks in an effort to get Jelks to talk to them about the Mosley murder.

Subsequently, while the detectives were still trying to persuade Jelks to tell them about the Mosley murder, Jelks appeared desperate to avoid being arrested for the Mosley murder. If he admitted to being involved in the Mosley murder, and in the process incriminated members of the gang, Jelks was very worried that he would be killed in retaliation for his talking to the police. This was particularly so if he talked to the police and they then arrested him. Hence, Jelks earnestly sought to work out a deal with the detectives: If he helped them clear up numerous open and unsolved cases involving 89 Family gang members, would the detectives *promise* him that they would *not* arrest him for the Mosley murder and let him go home?

> FJ: I don't want my life to end like that, man. ... God as my witness, I haven't never killed nobody, man. And I don't want to – I want to help you. I want you to help me. I want you to give me my freedom. But I don't want you to shut these doors on me, man. I don't want this, man. But what I'm saying to you is this. You have stacks of files of open cases. And ... [CT Supp.IV, 4:878-879] ... Listen to what I'm going to say. I grew up right there. I know everything that you can think to know. [CT Supp.IV, 4:881] ... <u>But you got to promise me, man – you got – you got to let me go home, man</u>. I can't – I can't lose my life. And all my family and my kids need me. My family need me. I mean I don't want to lose like this, man. [CT Supp.IV, 4:882-883. Emphasis added.]

Detective McCartin responded by agreeing to the "deal" proposed by Jelks. McCartin *promised* Jelks that if he worked with the detectives, and he was afraid for his safety or for the safety of his family, "we can relocate you somewhere else." [CT Supp.IV, 4:883] Jelks response was immediate and firm: "You got to do that. You got to do that." [CT Supp.IV, 4:883] McCartin then re-affirmed they

would be willing to relocate Jelks and his family to protect them from retaliation: "Right, we don't want anything to happen to you. We don't want anything to happen to anybody else." [CT Supp.IV, 4:883]

Jelks then reassured McCartin that he was willing to work with them, but he continued to seek a commitment from McCartin that he would not arrest Jelks but would let him go home. [CT Supp.IV, 4:884-885]

Later, Jelks again asked the detectives "to be honest with me, man. If I talk to you, am I going home, man?" Detective McCartin's response was a *promise*: Jelks would be allowed to go home "[i]f you give us the truth." [CT Supp.IV, 4:888] Jelks responded to McCartin's promise with "I can give you – I will give you so much truth." McCartin then *further promised* Jelks that not only would Jelks be allowed to go home that day, but McCartin would "work with the DA" to keep Jelks out of jail in the future.

> McC: You give me all the truth that you know on all this stuff; and I'll know if you're lying – you will go home today. I'm going to show all this to the district attorney. And I'm going to tell him how you cooperated. I can't promise you they won't file on you later on. I can't promise that. I can promise you can go home today. I'll let you go, you give me truthful information today. And I'll work with the DA and whoever else and keep you out of jail. [CT Supp.IV, 4:889]

These exchanges between the detectives and Jelks patently contradicted McCartin's testimony on direct examination that detectives *never* "promised Jelks that they would let him go home that day if he told them the truth." [RT, 18:4171] The defense was prohibited from confronting McCartin with this information, however, because of the trial court's ruling.

In *People v. Price* (1991) 1 Cal 4th 324, a prosecution witness *testified* that the prosecution promised they would protect his family if he testified against the defendant. On cross examination, defense counsel inquired as to who would be protected, whether they would be relocated, and whether money had been paid to move any family members. The prosecution objected to these questions for lack

of relevance, and the trial court sustained each objection. On appeal this Court held that "[t]he rulings were erroneous." (*Id.*, at p. 423.) This Court continued:

> In determining the credibility of a witness, the jury may consider, among other things, "[t]he existence or nonexistence of a bias, interest, or other motive" for giving the testimony. (Evid. Code, § 780, subd. (f).) In a criminal case, therefore, the defense is entitled to explore the nature of any promises the prosecution has made or inducements it has offered to its witnesses. (*People v. Duran, supra*, 16 Cal.3d 282, 294.) Although trial courts retain wide latitude to impose reasonable limits on defense inquiry into the potential bias of a prosecution witness (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 683, 106 S.Ct. 1431]), the trial court here erred in precluding all inquiry into the nature and extent of the promised protection. (*Id.*, at pp. 422-423.)

In *Price* the jury was at least allowed to know that the witness was promised protection for his family if he testified against the defendant. It was *error* to prohibit the defense from exploring some of the details of the promises. In the instant case, the trial court's ruling prohibited Appellant from even establishing that the police had promised Jelks anything in exchange for his cooperation and subsequent testimony, much less that the defense could explore the details of the promises.

In *Price*, however, this Court held the error was not prejudicial. Therein, however, the jury a) knew of the promise and the witness eventually testified that his mother had been relocated, and b) the defense presented evidence of other and stronger inducements that tended to impeach the witness. Appellant enjoyed neither of these benefits in this case. To the contrary, the jury was told Jelks received *no benefits* for his cooperation and testimony. That was also what the prosecutor argued on at least three separate occasions in her closing and rebuttal arguments. [See, for example, RT, 25:5212-5213]

A third reason given by this Court in *Price* to explain why that trial court's error was not prejudicial is of interest in Appellant's case. In *Price* this Court wrote that...

> ... the evidence had only slight value for impeachment because it is unlikely that a witness would testify falsely to obtain protection for family members when the protection is needed only because of the testimony. A promise is unlikely to be a significant inducement if its primary effect is to eliminate a negative consequence of the testimony rather than to provide a positive benefit. Here, it appears that the danger to the witness's family, against which the prosecution promised protection, was largely or even entirely a result of the witness's agreement to cooperate."

Although this statement may be true is most cases, Appellant respectfully submits it is not necessarily true in the instant case. As indicated in this Argument, as well as Argument VI, *supra*, Jelks was under great pressure to tell the detectives "what they wanted to hear." That was more important than telling the detectives the truth. If Jelks had not told the detectives "something" that the detectives would want to have heard regarding the Loggins/Beroit murders, Jelks would have been deemed to be no longer "cooperating." Any promises of protection for his young family and himself would have become null and void. Any consideration he hoped for in his own pending murder case would also have been forgotten. The law enforcement promises to Jelks were huge in his mind, and they were not necessarily based on his telling the truth.

d. Example #4: The prosecution mislead the jury into believing that the detectives *never* "told Jelks what to say."

McCartin testified he never "told Jelks what to say", he never gave Jelks "anybody else's statement", nor did he "provide Jelks with a script.". [RT, 18:4168-4169] At no time did they provide Jelks any information except to allow him to read the transcript of the interrogation before he testified at the grand jury hearing. McCartin explained that they "didn't want to taint his testimony." [RT, 18:4172] Prior to his testimony at the trial, Jelks was never told what to say or how to say anything. To McCartin's knowledge, Jelks had never been told anything to say other than to tell the truth. [RT, 18:4173]

The prosecutor carefully attempted to limit the detective's responses to information regarding the Loggins/Beroit murders. However, Appellant contends it was impossible to separate the information Jelks gave regarding Loggins/Beroit and information Jelks gave regarding the Mosley murder. The coercive pressure brought to bear on Jelks transcended everything Jelks talked about. Hence, by allowing the prosecutor to present the above testimony out of context, Jelks was presented in a false light.

The prohibited cross-examination.

Throughout the interrogation, the detectives impliedly, but clearly, told Jelks in the interrogation that they wanted Jelks to say certain things; that if Jelks did tell them certain things, they would know he was telling them "what they wanted to hear", that he was then "telling the truth", and they would know he was "cooperating" with them. Illustrations from the interrogation transcript demonstrate the detectives, in fact, did indicate rather clearly what they wanted Jelks to say.

It quickly became apparent during the interrogation that Jelks was being evasive. To pressure Jelks to talk to the detectives, McCartin played what he called a "mind game" or a "ruse" on Jelks. He told Jelks that the detectives already knew the truth regarding the Mosley murder based on what other witnesses had said. However, the detectives when much further than this. They told Jelks they *knew* he was the driver of the car used in the Mosley gang related drive-by shooting because witnesses had told them that. The detectives began a process of urging Jelks to admit to something that they had every reason to believe was *not* true. It began when McCartin and Tapia told Jelks:

> McC: I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear, okay?
>
> TAP: I don't think you were the shooter [in the Mosley murder], Freddie.
>
> McC: Okay. Now I don't think that. Otherwise we wouldn't be messing with you.

TAP: But Freddie, I know who the shooter was. At least I think I know who it was. But I wanted your version, Freddie.

McC: But even though you may not have been pulling the trigger, you could still get in trouble. And you know that. [CT Supp IV, 4:874.]

However, during the interrogation the detectives told Jelks over and over that they *knew* he was only the driver, and that being the driver was not as serious as being one of the shooters.

Dets: Freddie, there's a , there's a 97 slipping out there. They were having a party. You know what night I'm talking about, Freddie. Like I said, I don't think you were the shooter. You can shed some light on it. Freddie, I have other people telling me, okay?.[CT Supp IV, 4:877] ... I mean if you're just in the car or whatever, that's okay, all right? I don't think you're the shooter, Fred. ... We don't think that. We know who is. [CT Supp IV, 4:895] ... Let me tell what – want me to tell you what the witnesses are saying? Witnesses are saying that you were driving the car. ... That you drove the car down there to 97 hood. ... I'm just telling you what the witnesses are saying. We can prove that already. We can prove that. [CT Supp IV, 4:903-904]

The detectives' comments to Jelks were arguably not true. Their *only* witness (Marcellus James) who identified Jelks as being involved in the Mosley murder had told them on two separate occasions that Jelks was *not* the driver; he was in the right front passenger seat and armed with a .32 caliber handgun.[186] Hence, not only did they inform Jelks what Jelks had to tell them so they would know he was "cooperating" and telling them "what they wanted to hear", but they also informed Jelks that he was to admit to something that the detectives had no reason to believe was true!

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[186] See CT Supp IVA, 1: 130-131] for a transcript of the July 11, 1994 interview with James. See RT, 31:6205-6207 for a transcript of the September 21, 1994 interview. See the Argument in Issue IV of Appellant's Opening Brief for citations within those transcripts.

The detectives also told Jelks *who* it was that they wanted him to incriminate.

Early in the interrogation and before questioning Jelks regarding the Loggins/Beroit murders, the detectives told Jelks the *names* of the very people they wanted him to provide information on. The detectives told Jelks they wanted information specifically on Cleamon Johnson (Evil) and Michael Allen (Fat Rat).

> McC: I'm going to hit you with a bunch of questions on different things that happened. Because we've talked to a lot of people. A lot of witnesses. And they gave us information, okay? Namely about you and numerous other gang members from 89 Family gang. And namely, you know, Evil. You know Evil?
> FJ: Yeah.
> McC: Sinister.
> FJ: Yeah, I know.
> McC: Fat Rat.
> FJ: Yeah, I mean I – I know ... these people because we ... be in the community right there. [CT Supp IV, 4:855]

Jelks now knew who, specifically, the detectives wanted information on.

Later in the interrogation, after Jelks admitted his involvement in the Mosley murder but before he was asked about the Loggins/Beroit murders, Jelks "just happened" to tell the detectives that he was not like any of the three gang members that the detectives had previously told him they specifically were interested in. Jelks had not forgotten that he needed to tell the detectives "what they wanted to hear."

> FJ: So please, do not judge me because I lived on 88th Street. I am not Evil, I'm not Sinister, I'm not Fat Rat, I'm not none of them. And I'm Freddie Jelks, man. [CT Supp IV, 4:886]

Later in the interrogation, as Jelks expressed his fear of being killed when the gang discovered he "snitched" some of them off, McCartin told Jelks it was very important that Evil and the others never get out of prison.

McC: We want to keep these guys -- and keep them in prison forever. And we don't want Evil or any of these guys ever getting out again. [908]

After Jelks told the detectives that Evil was the shooter in the Mosley murder, and after Jelks told the detectives that Fat Rat and Evil were involved in the Loggins/Beroit murders, Jelks apparently realized that he might have to testify in more than just the Mosley murder case. The detectives' response simply reinforced in Jelks' mind the importance that his future testimony, regardless of the case, needed to be such that it would "bury" them deep.

FJ: So, wait a minute. Listen. All these different cases that you're asking me about, am I a witness? Am I going to be a witness on all of these cases that you –
McC: It's possible.
FJ: See, that's what I'm saying, so
...
McC: There's a few main players that are the – the badest (sic) idiots in the gang that we want, okay? And what we need is information. More and More information. The more we get, the – the deeper we bury them okay? [CT Supp IV, 4:1003-1004. Emphasis added.]

This evidence that would have discredited Jelks, as well as McCartin, was particularly important for the jury to consider since the prosecution presented *no physical evidence* that linked Appellant to the murders. The only other evidence that linked Appellant to the murders was the testimony of Carl Connor and Marcellus James, both of whom were impeached significantly by the defense.

Certainly, the above portions of Jelks' interrogation could have rebutted McCartin's testimony on direct examination that Jelks was not told what to say, that he was not given a script, etc. Arguably, *Jelks knew who it* was that he had to provide incriminating evidence against. Since Jelks was inferentially aware that the truth was not as important as what the detectives "wanted to hear", the presentation of the above evidence to the jury may well have caused the jury to discredit the testimony of Jelks, as well as of McCartin.

e. **Example #5: The prosecution mislead the jury into believing that because Jelks confessed to involvement in his own serious crime, this indicated he was also truthful when talking about the Loggins/Beroit case.**

McCartin told the jury that in order to get Jelks to talk to the detectives, they had to use a "ruse" to put pressure on him to talk. The ruse, however, was not the type of interrogation tactic that would give rise to a falsehood by the person being questioned. McCartin testified,

McC: In this case, we told [Jelks] that we had numerous other witnesses that were – that identified him from photographs, when they in fact had not, in order to get him to talk to us.
DDA: And in your experience does the pressure that that kind of ruse puts on a witness cause them to lie?
McC: No. [RT, 19:4232]

Continuing on re-direct examination, the prosecutor continued to "bolster" the credibility of Jelks through the testimony of Detective McCartin by having him testify that during the December 5, 1994 interrogation of Jelks, Jelks incriminated himself by telling them of his involvement in his pending case. The inference the prosecution sought to have the jury draw from this line of questions was that if Jelks was willing to *incriminate* himself in his own pending case, then he would also have been truthful when discussing a case that did not involve himself (i.e., the Loggins/Beroit murders).

DDA: During that interview did Mr. Jelks incriminate himself in the case for which he's now in custody?
McC: Yes, he did.
DDA: Did he provide you with information?
McC: Yes.
DDA: Did he provide you with information which was not favorable to himself?
McC: Yes, he did.
DDA: Did he tell you what his role was in the incident?
McC: Yes, he did.
DDA: Was that at the beginning of the interview, middle of the interview, or the end of the interview?
McC: Towards the middle.

DDA: When Mr. – when you were using this ruse, had Mr. Jelks told you about his involvement in the case yet?
McC: No.
DDA: Did Mr. Jelks subsequently tell you about his involvement in his own case?
McC: Yes he did. [RT, 19:4235-4236]

The prohibited cross-examination.

Appellant sought to prove to the jury, however, that the detectives' "ruse" during the interrogation actually caused Jelks to lie, and not once but several times. Finally, the detectives urged Jelks to agree with the detail contained within the ruse, a detail the detectives had no reason to believe was true. In fact, the jury could readily have found that the detectives *knew* the detail within the ruse was false. The inference would then have been that because Jelks was willing to tell the detectives whatever they wanted to hear, his testimony regarding the murders of Loggins and Beroit might be the same; that is, Jelks was simply testifying to that which he knew the detectives (and prosecutor) wanted to hear. Since what the detectives wanted to hear regarding the Mosley murder was not necessarily true, Jelks' testimony regarding Appellant's involvement in the Loggins/Beroit murders was also not necessarily true.

The "ruse" that "caused" Jelks to lie: When the detectives first asked Jelks about the Mosley murder [CT Supp IV, 4:871] Jelks' initial story was he knew nothing about the Mosley murder. [CT Supp IV, 4:871] The detectives then began perpetrating the "ruse" to try and get Jelks to tell them what they thought was the truth. The detectives told Jelks that witnesses they interviewed had identified Jelks' photograph. The detectives told Jelks: "They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay?" [CT Supp IV, 4:872; see also 4:873] Jelks stuck with Story #1, however, and continued to deny any knowledge of the Mosley murder. [CT Supp IV, 4:873]

As Jelks continued to deny knowledge of the Mosley murder, the details within the ruse became more specific: The witnesses had identified Jelks as the driver of the car; Detective McCartin told Jelks he believed Jelks was the driver; and Detective Tapia told Jelks he also believed Jelks was the driver. [CT Supp IV, 4:873-874] Even as the detectives turned up the pressure on Jelks, Jelks continued to deny he was the driver of the car. The ruse was not causing Jelks to tell the truth. [CT Supp IV, 4:873-894.]

Then, in order to get Jelks to admit the ruse' details were correct, the detectives intentionally told Jelks a falsehood; that it was less serious if he was *only* the driver in the drive-by shooting. They reassured him that neither of them thought he was the shooter; that if he was "just in the car or whatever, that's okay." [CT SuppIV, 4:895] With that, Jelks finally abandoned his Story #1. Yet, the detectives' ruse still did not get Jelks to tell the truth.

Jelks then admitted in his Story #2 to the detectives that he had *heard* about the Mosley murder, but it was all hearsay. When the detectives accused Jelks of not being truthful, Jelks insisted "I'm telling you the truth, man." [CT SuppIV, 4:896-897] Continuing with the ruse, the detectives applied more pressure on Jelks, telling him they knew he had been there.

Jelks then came up with Story #3, and tried to make it "fit" what the detectives had told him. Jelks knew the detectives thought he was present because that was what unknown witnesses had apparently told them. [CT SuppIV, 4:898-902] The ruse still had *not* caused Jelks to be truthful.

Jelks knew at that time it was in his best interests to admit to the detectives what they wanted to hear. Hence, he now presented Story #4. It did not matter whether it was the truth or not. The detectives had said they believed he was the driver, not one of the shooters. The detectives had said being the *driver* was *not* as serious as being one of the shooters. So Jelks "admitted" he was the driver of the car. [CT Supp IV, 4:906-907]

Yet, according to what Marcellus James had told these same two detectives on two occasions, Jelks was not the driver. Jelks was armed with a .32 caliber handgun and seated in the right front passenger seat. The detectives had no reason to believe Jelks was merely the driver. That apparently was just an interrogation ploy ... to get a recalcitrant witness to admit something less than the full truth. Nevertheless, the detectives arguably knew that their "ruse" or "mind game" had produced a self serving admission rather than what they had every reason to believe was the truth. [See Argument V in Appellant's Opening Brief for a detailed discussion of the above.]

Appellant sought to bring out this misleading, if not outright untrue, aspect of McCartin's testimony. If Jelks was not truthful when he spoke of his involvement in his own pending serious case, a reasonable inference could not be drawn that he was then truthful in a case in which he was *not* involved.

Appellant asserts this is simply another illustration in which both McCartin and Jelks could have been significantly impeached, if the trial court had allowed Appellant to inquire into the relevant details of the interrogation.

2. The trial court's limitation of defense cross-examination was prejudicial to Appellant's due process right to a fair trial, to present a defense, and to confront and cross-examine his accusers.

Prejudice enures from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (*Alvarado v. Superior Court of Los Angeles County* (2000) 23 Cal.4th 1121. A trial court's limitation on cross-examination of a witness pertaining to the witness' credibility violates the confrontation clause if a reasonable jury might have received a significantly different impression of the witness' credibility had the excluded cross-examination been permitted. (People v. Ayala (2000) 23 Cal.4th 225.

Further, the prosecutor's questions on direct and re-direct examination "opened the door" to Appellant's right to confront and cross-examine Detective McCartin, as well as Freddie Jelks, regarding the details of the interrogation of Jelks, and regarding the details of Jelks' pending murder case.

The excluded evidence was relevant and admissible under *Davis v. Alaska* (1974) 415 U.S. 308, 317, because it was essential to bolster his defense that Appellant be allowed to prove that Jelks fabricated his testimony. More fundamentally, the court's ruling denied Appellant his constitutional right to present all favorable relevant evidence of significant probative value. (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Whether the error is measured by the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 21, or the *People v. Watson* (1956) 46 Cal.3d 818, 836 standard, a new trial is warranted because there is a reasonable probability that the exclusion of this highly relevant evidence affected the verdict to Appellant's detriment.

D. Conclusion.

Appellant submits that the jury would have received a significantly different impression of the credibility of Detective McCartin, as well as that of Freddie Jelks, had the defense been allowed to properly cross-examine McCartin and bring to light all of the above. Accordingly, Appellant respectfully requests this Court overturn his convictions and sentence of death.

VIII.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Detective Sanchez regarding her conduct and state of mind as she escorted Freddie Jelks to and from court during the trial. The trial court's error denied Appellant his Constitutional Rights to Due Process and to a Fair Trial, the error was prejudicial, and it requires reversal of Appellant's conviction.

1. Introduction:

As stated previously, Freddie Jelks was one of three prosecution witnesses who provided evidence that Appellant was the shooter of victims Loggins and Beroit. His credibility was vigorously contested by Appellant.

After Jelks testified, the prosecution called Detective Rosemary Sanchez to testify. Many of the prosecutor's questions posed to Detective Sanchez pertained to her interaction with Jelks; that even though his pending case had a maximum life sentence, he posed no flight risk and was not at all dangerous.

Appellant asserts the trial court deprived Appellant of his constitutional due process right to a fair trial when it prevented him from confronting and cross-examining Detective Sanchez to establish she was less than candid and forthright as she testified on direct examination; that there were reasons why she was willing to treat Jelks in as cavalier a fashion as she did. Had the jury been made aware of these reasons, the jury may well have rejected Jelks' testimony completely, and the jury would have discounted, if not rejected, Detective Sanchez' testimony.

Because of the trial court's prior ruling that limited defense cross-examination into the details of Jelks' interrogation and pending case, Appellant was not able to effectively present these reasons to the jury. The court's ruling deprived Appellant of his federal and state due process rights to confront and cross-examine witnesses. The error was also prejudicial and denied Appellant a fair trial.

2. <u>The Applicable Law</u>:

A. <u>The Constitutional Right to Confront and Cross-Examine One's Accusers Is a Fundamental Right Applicable to State Courts Through the Fourteenth Amendment's Due Process Clause.</u>

Appellant respectfully inserts herein by reference his statement of the law regarding the right of an accused to confront and cross-examine his accusers, as discussed more thoroughly in this Opening Brief at Issue IV.B., *supra*.

3. <u>Discussion</u>:

During an evening recess after Jelks had partially testified, a member of the defense team happened to observe Jelks walking with Detective Sanchez to her car in the court parking lot. Although Jelks was an in-custody prisoner, he was walking without restraints alongside the detective. The following day, Jelks concluded his testimony.[187]

The prosecution then called Detective Sanchez to testify. The prosecutor anticipated the defense would seek to confront Detective Sanchez with this unusual conduct, so she "beat the defense to the punch" by asking the detective about this on direct examination. Sanchez acknowledged that she was assigned to transport Jelks to and from court each day, and that he was in custody. Responding to the prosecutor's questions, Sanchez said she kept Jelks handcuffed except when she let him smoke. She explained that she didn't want Jelks to smoke inside the police car. She justified this unusual procedure of letting him walk uncuffed along the street and smoking a cigarette in the following series of questions and answers:

> DDA: Did you allow Mr. Jelks to walk along the street without having handcuffs on in order to smoke?
> SAN: Yes.
> DDA: At the time that you did that, why did you do that?
> SAN: We were walking to my car and he – I wanted him to smoke before he got into my car, before I handcuffed him and took him back into custody.
> DDA: Were you concerned about his being a flight risk?
> SAN: No.
> DDA: Why not?
> SAN: He hasn't displayed any behavior where I had any concern about that. He has been in custody for a while and nothing had happened.
> DDA: Did you do it to show Mr. Jelks some sort of favoritism?
> SAN: I just wanted him to smoke, but not in my car. [RT 18:3988-3989 (Emphasis added)]

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[187] The defense briefly questioned Jelks about this incident prior to Detective Sanchez testifying. [RT, 17:3681-3684]

The nature of Appellant's intended cross-examination of Detective Sanchez was obvious; it required no offer of proof. (Evid. Code, § 354) Jelks had been indicted for a violent and senseless gang-related drive-by murder in which two other innocent people had been seriously wounded. His trial was pending, he could not post bail, and he was looking at spending the rest of his life in prison. His high bail was based on the fact that he posed a high risk of flight and he was considered a great danger to the public (See Penal Code, §1275). The trial court was fully aware of the above. Yet Jelks had been portrayed by Sanchez as someone who was *not* a flight risk; someone who "hasn't displayed any behavior where I had any concern about that. He has been in custody for a while and nothing had happened."

First, Appellant needed to establish to the jury *why* Jelks was no longer a danger to the public and *why* Jelks was no longer a flight risk. Appellant needed to prove to the jury that Jelks believed that he had absolutely no hope of a future out of prison and alive unless he did *exactly* what the prosecution wanted him to do. Appellant needed to prove the extent of Jelks' bias; that he had a motive to do anything he felt he needed to do that would please the prosecution.

Second, Appellant wanted to establish that because of her lenient and supportive treatment of in-custody prisoner Freddie Jelks, Detective Sanchez was nurturing and solidifying a strong bias in Jelks mind that if he continued to "co-operate" with the prosecution, this favorable treatment would extend to his pending case and its resolution. Appellant wanted to prove to the jury that Jelks' state of mind was such that he felt compelled to say anything and do anything, regardless of its truthfulness, if he thought it would convince the police and prosecution that he was "co-operating."

The most persuasive way for the defense to prove to the jury the intensity of Jelks' bias and motive to please would have been to demonstrate that Jelks was fully aware of what he needed to do to please the prosecution, as well as what the

consequences were to him if the prosecution concluded he was *not* cooperating fully:

Third, Appellant also sought to impeach the credibility of Detective Sanchez by confronting her with questions that would establish her own personal bias and prejudice for the prosecution and against Appellant. On direct examination, Detective Sanchez had downplayed and minimized the significance of her interactions with Jelks. Appellant sought to prove the detective was disingenuous in her answers, and that she was intentionally trying to conceal the truth behind her conduct. Detective Sanchez was not a "neutral" witness who was simply telling the truth as she saw it. She also harbored a strong bias against Appellant and co-defendant Johnson. By establishing the existence of her bias, Appellant sought to then discredit her testimony as it pertained to the credibility of both Freddie Jelks and Carl Connor.

However, because of the trial court's prior ruling that prohibited the defense from inquiring into the nature and circumstances of Jelks' pending murder case, Appellant was prevented from adequately and effectively impeaching Detective Sanchez , and through her testimony, the credibility of Freddie Jelks.

On cross-examination the defense was able to impeach the detective's credibility *slightly* by having Detective Sanchez admit that Jelks could have smoked a cigarette while handcuffed:

> RL[188]: Detective, would it be possible for Mr. Jelks to smoke a cigarette with his hands cuffed behind him?
> SAN: Sure. Outside, but not in my car.
> RL: You didn't need to uncuff his hands for him to smoke a cigarette, did you?
> SAN: Did I need to?
> RL: Yes.
> SAN: I didn't need to, but I did. [RT, 18:3989]

[188] "LAS" is Richard Lasting, trial counsel for co-defendant Johnson.

However, the trial court's previous ruling that prevented the defense from introducing evidence that pertained to Jelks pending murder case prevented Appellant from effectively confronting and cross-examining Detective Sanchez in this manner. Detective Sanchez' acknowledgement that it was not necessary to uncuff Jelks to allow him to smoke was *not* the type of impeachment that would have caused the jury to distrust her entire testimony. It suggested she was treating him favorably, but it did not demonstrate *why* she was treating him so favorably.

A. The probative value of confronting and cross-examining Detective Sanchez about her understanding of Jelks' involvement in the Mosley murder was considerable.

The prosecution had previously portrayed Jelks during his testimony as a rather meek and non-aggressive member of the 89 Family Bloods gang who was, at most, only active on the fringes of the gang. He was a follower, not a leader. He was passive, not violent. Now, through a second and respected prosecution witness, the prosecution again portrayed Jelks in a false light to the jury. It was important for the prosecution to continue painting a picture of Jelks that was different from the other 89 Family Bloods gang members; otherwise the jury might reject Jelks' testimony with the same improper emotional bias that caused them to hate everything about the 89 Family Bloods gang.

To rebut false inference #1: Jelks was not a threat to the public nor was he a "flight risk." The inference the prosecution sought to convey to the jury was that Detective Sanchez, an experienced and reputable gang investigator, was so confident that Jelks created no risk of violence or of fleeing that she was *willing* to remove his handcuffs while they walked to and from the courthouse! It was unnecessary for her to remove his handcuffs for him to smoke, but she was *willing* to do so because Jelks had done *nothing* that would suggest he was dangerous or that he was a flight risk. The detective testified she was not displaying favoritism: "No, I just didn't want him to smoke in my car."

It was extremely important that Appellant be allowed to confront Detective Sanchez about her lack of candor. The detective testified Jelks was not a flight risk, yet a Los Angeles County Superior Court judge had set Jelks' bail at $1,000,000. Had Appellant been allowed to confront Detective Sanchez with these facts[189], Detective Sanchez's credibility would have been sorely undermined in front of the jury. As an experienced police investigator, the detective was obviously aware of the dual purposes of bail in California; to insure the accused does not flee the jurisdiction, and to protect the public.[190] The detective was certainly aware that high bail was an indication that the accused posed a significant flight risk and/or the accused posed a great danger to the public! And the higher the bail amount, the greater potential danger the accused posed of fleeing or of harming a member of the public. Detective Sanchez would have found it extremely difficult to provide a credible explanation to the jury as to why Jelks' bail was so high, yet in her mind he was *not* "a flight risk" nor a danger to the public!

Appellant would then have been able to ask additional questions of Sanchez: What "leverage" did Detective Sanchez and the police/prosecution have over Jelks that gave them the confidence to treat him in such a cavalier fashion? Why was Detective Sanchez so confident that Jelks, with such high bail, would not try to escape when given the opportunity? Regardless of her answers, Appellant would then have been able to argue reasonable inferences to both questions: Both Jelks and Detective Sanchez knew his *only* hope of not spending the rest of his life in prison was for him to continue "cooperating" with the police

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[189] The trial judge, being a Superior Court judge, could have taken judicial notice of the Superior Court's own case files that indicated Jelks' bail amount. See Evid. Code, §§ 452(d) and 453. The court record in Jelks' pending case also qualified as a public records exception to the hearsay rule. See Evid. Code, § 1280. Jelks' pending case was, in fact, actually assigned to Judge Horan's courtroom, and was being continued every couple months in that courtroom.

[190] Penal Code , § 1275. "Public safety shall be the primary consideration."

and prosecution. Jelks would testify to anything he thought would make the police/prosecution happy because his entire future depended on it. This was what Appellant needed to establish through cross-examination of Detective Sanchez.

To rebut false inference #2: Jelks had not "displayed any behavior" that caused "concern" in the detective's mind. Detective Sanchez testified that Jelks had not displayed any behavior that caused her concern. However, Jelks had been identified as one of the two *shooters* in the violent and senseless gang-related drive-by murder of Tyrone Mosley, as well as the wounding of two other innocent bystanders. Jelks had also lied when he "confessed" to being the driver in those shootings. Had Appellant been allowed to confront Detective Sanchez on cross-examination with her understanding of Jelks' active involvement in such a violent crime as well as his continued lies about his involvement, her credibility would have been dramatically undermined. Regardless of what Detective Sanchez might have answered, a very reasonable and believable inference for the jury to draw would have been that Jelks' testimony was "bought and paid for." Although the prosecution and Jelks had not reached any definitive agreement as to his pending case, the police and prosecution were inferentially demonstrating to Jelks that it was in his best interests to *continue* to cooperate with law enforcement. Even though Jelks was charged with murder, he was not being treated as one. And Jelks would infer from this treatment the implied message that he would be treated in similar fashion when his pending case was resolved . . . as long as he continued to "cooperate."

This Court addressed this very issue in *In re Jackson* (1992) 3 Cal.4th 578:

> [A] number of recent decisions have observed that there may be an even greater danger that a witness may lie when the potential benefits that may flow from the witness' testimony are not specified ahead of time, than when the witness has been promised a specified benefit. (See, e.g., *People v. Morris*, 46 Cal.3d 1, 32; *People v. Phillips* (1985) 41 Cal.3d 29, 47-48.) Unless the witness is informed both of the terms of the agreement and that his receipt of the benefit cannot be denied so long as he testified fully and truthfully at the

> criminal trial, the witness cannot help but believe that his own treatment will depend on how "well" he does. ... [A] prosecutor's [or police officer's] insistence that the witness not be informed of the terms of the bargain has the inevitable tendency to lead the witness to color his testimony, so as to receive the most favorable treatment from the prosecutor. *People v. Morris* (1988) 46 Cal.3d 1, 32. See also *United States v. Bagley* (1985) 473 U.S. 667, 683. (*In re Jackson* (1992) 3 Cal.4th 578, 596-597.)

This was what Appellant needed to establish through cross-examination of Detective Sanchez. Jelks would testify to anything he thought would make the police/prosecution happy because his entire future depended on it.

To rebut false inference #3: Detective Sanchez was a disinterested and unbiased witness. Had Appellant been allowed to confront Detective Sanchez on cross-examination with her understanding of just some of the details of Jelks' pending case, it would have demonstrated to the jury that she had not been honest and forthright in her testimony on direct examination. Appellant would have presented evidence to the jury that the detective was a biased witness. As such, the jury would have considered her bias as they evaluated her testimony regarding both Jelks and Connor. Appellant would then have had a basis to argue that if she was willing to "shade the facts" regarding Jelks, she would have also been willing to "shade the facts" regarding a) the reward she claimed she never discussed with Connor, or b) the information from others that corroborated Connor's testimony.

Detective Sanchez' testimony went to the heart of the prosecution's case against Appellant. She was allowed to "bolster" the credibility of Jelks, of the three witnesses on whose testimony Appellant's conviction was based. The probative value of evidence that would have tended to impeach Detective Sanchez was considerable because any evidence that undermined the credibility of Jelks was very significant to the outcome of this case.

However, the court's previous ruling prevented Appellant from confronting and cross-examining Detective Sanchez in this manner. As it was, both Jelks and Detective Sanchez emerged unscathed.

B. The People Created any Undue Prejudice, and any Undue Prejudice to the People Was Minimal.

Any "undue prejudice" to the prosecution was minimal, if not outright non-existent. As argued previously, the trial court should have ruled that the defense could make reasonable inquiry into the facts of Jelks' pending case while avoiding any reference to the names of his accomplices. That would have allowed both defendants to adequately confront and cross-examine Jelks, while at the same time protect co-defendant Johnson's interests. It would also have avoided the prosecution's concern about trying Appellant and co-defendant Johnson separately.

However, and it bears repeating, Appellant did *not* create this section 352 problem. The prosecution created the potential 5th Amendment problem when it chose to have Jelks testify without first resolving Jelks' pending case. The prosecution had the ability to grant immunity to Jelks or, in the alternative, to strike a deal with Jelks in exchange for his testimony, thereby removing Jelks' ability to assert any 5th Amendment privilege. Further, the prosecution was aware that Johnson was a charged co-defendant in Jelks' pending case long before Appellant's trial began. In spite of this knowledge, the prosecution insisted on trying Appellant jointly with co-defendant Johnson, and opposed Appellant's motion to sever.[191] The prosecution then waited until mere moments before Jelks began testifying to bring its motion to limit cross-examination of Jelks.

C. Any Substantial Danger of Undue Prejudice to the People Did *Not* Substantially Outweigh the Probative Value of Confronting and Cross-Examining Detective Sanchez.

Applying the Evid. Code, § 352 balancing test, it is apparent the probative value of the evidence to Appellant's defense was considerable. The potential

[191] If Appellant had been tried separately from co-defendant Johnson, there would have been no concern about Jelks naming Johnson as an accomplice during cross-examination. The prosecution's motion to limit cross-examination of Jelks would have been denied.

danger of unfair prejudice to the government was practically non-existent. Certainly, the potential for *substantial danger* of undue prejudice did *not substantially outweigh* the probative value of the evidence that would have discredited both Detective Sanchez and Jelks. Appellant respectfully asserts it was not even a close call. The trial court abused its discretion, and thereby erred, when it previously ruled the defense was not allowed to inquire into the details of Jelks' pending murder case.

D. Appellant Did *Not* Waive this Issue for Appeal by Not Objecting.

The trial court previously ruled that the defense was not allowed to inquire into any of the facts of Jelks' pending murder case, except to establish it was a case that involved a potential life sentence if Jelks were to be convicted. [RT, 16:3609-3610] When Mr. Orr made further inquiry about whether the nature of Jelks' pending case could be explored, the trial court responded:

> CRT: No. We are not going to talk about the fact it's [Jelks' pending case] a murder case. Because if we do, if we discuss the facts – I told you what I'm going to let you have, which is that he's got a pending case wherein he is facing a potential life sentence. [RT, 16:3611]

When Marcellus James subsequently testified, Mr. Orr sought to cross-examine James about the conversation he had with the police on February 27, 1992 when James for the first time told the police what he knew about the Mosley murder, the murder case that was pending against Jelks. Mr. Orr did not want to explore the details of the Mosley murder; rather, he simply wanted to ask James if he spoke to the police about the Mosley murder on that date, and whether James also told the police on that date about the conversation he and Appellant had had in which Appellant allegedly confessed to the murders of Loggins and Beroit.

The prosecutor then confirmed that on February 27, 1992 James told the police what he knew about the gang-related drive-by murder of Tyrone Mosley, the pending murder case in which Jelks and co-defendant Johnson were charged

and whose trial was pending. [See RT, 16:3497, 3501] The reporter's transcript thereafter reads:

> DDA: The subject matter of that interview, though, was the Mosley murder, the drive-by, which is why we [the prosecutor and James] didn't go into it [on direct examination]. And I have admonished the witness [James] that he can't talk about it, but he was a witness on that case [the Mosley murder].
> CRT: I think we ought to stay away from that for that reason. We are liable to get right back into a situation –
> RL: That's why I wanted to bring it up.
> ORR: I wasn't going to go into that [i.e., the details of the Mosley murder]. [RT, 18:4051-4052 (Emphasis added)]

The trial court was apparently concerned that they were "liable to get right back into [the] situation" they had previously discussed during Freddie Jelks' testimony; that James might testify that co-defendant Johnson was charged with that crime, or perhaps that James' testimony might "open the door" to evidence of other crimes.

Mr. Orr reassured the trial court, however, that he did not intend to go into the details of the Mosley murder. Rather, Mr. Orr wanted to ask James if the gang investigators on February 27, 1992 tried to "squeeze" him into providing information concerning the Loggins/Beroit murders, not just the Mosley murder. The court responded, "We are not going to talk about the first – [i.e., the first interview James had with the police on February 27, 1992]. [RT, 18:4052-4053]

In other words, the court would not even allow the defense to bring out whether James had told the police about the Mosley murder, even though it would not be disclosed to the jury that the Mosley murder was the case Jelks had pending. If the court would not even allow this question to be asked, the court would *never* have allowed Mr. Orr to actually go into any of the details of the Mosley murder. That would have been absolutely clear to everyone.

Further, when Detective McCartin testified, Mr. Orr was apparently convinced that McCartin was being less than forthright in his testimony on direct

examination. On cross-examination of McCartin, Mr. Orr asked several questions regarding McCartin's efforts to get Jelks to talk about his "serious life offense." After one of McCartin's answers, the following occurred:

ORR: And when you meant "book him", you meant book him on the murder charge. Is that correct?
McC: No.
ORR: Or book him on the life sentence.
McC: We were thinking about the traffic warrants.[192] [RT, 18:4190]

A few minutes later, the jury was excused, and the following discussion occurred between the court and Mr. Orr:

CRT: All right. The jurors are absent. All right. Mr. Orr, did you happen to forget the court's ruling –
ORR: Regarding, sir?
CRT: -- regarding the case upon which Mr. Jelks is in custody?
ORR: I don't think – I don't know if I violated the rules. You will have to refresh my memory.
CRT: I think everybody else in the room knows you did.
ORR: I didn't intend to.
CRT: It was just – you misspoke?
ORR: If I did, I stated "life sentence."
CRT: Then you made it a murder case. Remember that?
ORR: I slipped. That is one point that I slipped.
CRT: That was an inadvertent situation?
ORR: Totally inadvertent.
CRT: Second slip.
ORR: Let me explain something before you keep going.
CRT: I will hear you.
ORR: Before you keep going, I will tell you the reason I did. I don't think that I was getting enough – I thought Detective McCartin was being – he was holding back.
CRT: So you decided to rectify that situation, did you?

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[192] McCartin's response was illustrative of why Mr. Orr and Mr. Lasting felt McCartin was being less than honest in his answers. It is rather obvious from reading the transcript of the interrogation of Jelks that the police were referring to Jelks' pending murder case when they spoke to Jelks about "booking him." Indeed, on cross-examination by Mr.Lasting, McCartin admitted they were, in fact, referring to Jelks' pending murder case when they referred to "booking" Jelks. [RT, 18:4185]

ORR: Probably did without intentionally trying to violate the court's rules. I don't like to do that.
CRT: Maybe you ought to stop for a second and think before you go any further.
ORR: I will not go into that area any more.
CRT: All right.
ORR: What was the second thing you wanted to bring up?
CRT: That was it. That was the only concern that I had. I guess there is a second and third and fourth and we could deal with those ones now. But tomorrow I will remind you not to argue with the witnesses. Tomorrow I will ask you to wait until they finish their answer before you start a question. And tomorrow I will remind you to not continue questioning once an objection has been made. I say that now because you will probably forget if I tell you now and you will do it again tomorrow. So I will remind you tomorrow morning.
ORR: Be my guest.
CRT: And, Mr. Orr, next time you make an inadvertent error of the same kind where we litigate matters outside of the jury's presence, and you are an attorney of about 30 years or thereabouts, due to frustration or overexcited, or whatever, and you decide that my ruling maybe is not appropriate enough, you make a murder case out of something that we decided can't be referred to as a murder case –
ORR: It is not a murder case.
CRT: Are you really that thick?
ORR: I know what you are talking about.
CRT: Let me put it bluntly to you. If you violate another court order, you will be in a very bad vicarious situation. Okay? You are shrugging as if that means nothing.
ORR: I say that is up to you.
CRT: Okay. Good. Thank you, Mr. Orr, for you cooperation and your kind response. Appreciate it. [RT, 18:4199-4203.]

From this colloquy between the court and Mr. Orr, as well as the discussions involving cross examination of Marcellus James by Mr. Orr, it was readily apparent to everyone that the court was simply not willing to allow anyone to delve into the facts of Jelks' pending case for any reason. It would have been useless to attempt to do so. Any offer of proof would also have been useless

because Mr. Orr attempted to make an offer of proof regarding cross examination of James, and the court rejected that offer without seriously considering it, *supra*.

E. The Error Was Prejudicial Beyond a Reasonable Doubt.

Obviously, the testimony of Freddie Jelks, was key to Appellant's conviction. Detective Sanchez was allowed to inferentially "bolster" the credibility of Jelks by treating him as though he, too, was a dependable, truthful individual. Had Appellant been allowed to adequately discredit Detective Sanchez, the jury would have given her testimony little or no weight as it pertained to the credibility of Jelks. Of course, if the jury had a reasonable doubt as to whether Jelks testified truthfully, the jury may *not* have convicted Appellant. Applying the *Chapman* "reasonable doubt" standard, Appellant asserts it cannot be said beyond a reasonable doubt that Appellant would still have been convicted absent the court's error.

For the above reasons, Appellant respectfully requests this Court reverse his conviction on this basis.

IX.

The trial court erred when it allowed the prosecution to introduce irrelevant evidence and inadmissible opinion evidence that improperly "bolstered" the credibility of wiltness Freddie Jelks. The errors were prejudicial, and require reversal of Appellant's conviction and judgment of death.

A. Introduction:

1. The importance of Freddie Jelks's testimony to the prosecution.

Freddie Jelks was one of three prosecution witnesses at trial who linked Appellant to the murders of Loggins and Beroit. Jelks' testimony [RT, 16:3540], along with the testimony of Carl Connor's [RT, 15:3349] and Marcellus James' [RT, 18:4042-4043], constituted the prosecution's evidence that linked Appellant

to the murders of Loggins and Beroit. As such, he was one of the legs of the prosecution's 3-legged stool upon which the prosecution's entire case rested.[193]

Both the prosecution and defense were very aware that Jelks' testimony was crucial if the jury were to convict Appellant of these murders. Hence, the battle over evidence that cast light on Jelks' believability was an extremely significant one, as both sides vigorously contested his credibility. However, the prosecution's improper use of the testimony of an experienced and respected police investigator[194] to "bolster" the credibility of Freddie Jelks was improper, and gave the prosecution an unfair and prejudicial advantage in the battle over Jelks' credibility.

2. <u>Jelks' incriminating testimony</u>:

Jelks testified that he was at co-defendant Johnson's house on the day of the shootings. The group of gang members were discussing a car thought to be owned by a Crip gang member that was located on the 89 Family side of Central Avenue [RT, 16:3520-3528] At that point Appellant walked up to the group as they spoke of the car at the car wash. [RT, 16:3529-3534]

Johnson said that the car in their neighborhood was a sign of disrespect to the gang because the owner was a Crip. [RT, 16:3540-3541] After further discussion, Johnson asked the group who wanted to go "serve" or shoot the individual(s) at the car wash. According to Jelks, Appellant volunteered to do it. [RT, 16:3542-3543] Johnson went into the rear yard and minutes later returned with an Uzi. [RT, 16:3543-5] He handed it to Appellant, who was then driven down an alley from which he could approach the car's occupants from behind. [RT, 16:3555-3564]

About two minutes later, 10 to 12 shots were heard coming from the direction of Central Avenue. Minutes later Appellant returned with the Uzi. [RT,

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[193] Appellant respectfully refers the Court to the Statement of Facts in this Opening Brief for details of Jelks' testimony.

[194] Detective Brian McCartin.

16:3566-3568] and gave it back to Johnson. [RT, 16:3570] Appellant stated "I got him" or he served them. Appellant then got into a car and was driven out of the neighborhood. [RT, 16:3572-3574] Probably the next day, Jelks related that he listened to Appellant as he described the shootings. [RT, 16:3622-3624]

3. The Defense's Assault on Jelks' Credibility:

On cross-examination, Jelks admitted he was in custody as he testified. [RT, 16:3642] and that he was facing a maximum term of life in state prison for that offense. [RT, 17:3682] Jelks admitted to several misdemeanor convictions, juvenile adjudications, and a felony possession of cocaine conviction. [RT, 17:3681-3682] Jelks admitted he had no discussions with the police between 1991 and 1994 even though he had been arrested during that time. [RT, 16:3646] He also said he was a member of the 89 Family Bloods gang in 1991. [RT, 16:3643] He was impeached with prior inconsistent statements [RT, 16:3651, 3653; 17:3695, 3700, 3705, 3709, 3724]

4. The prosecution rehabilitated Jelks' credibility with the inadmissible testimony of Detective McCartin.

Thereafter, the prosecution called Detective McCartin, an experienced and respected police detective, to testify in an effort a) to rehabilitate Freddie Jelks' credibility generally, b) to provide possible explanations for inconsistencies and contradictions in Jelks's trial testimony, his grand jury testimony, and his prior statement to the police, and c) to present a plausible reason for Jelks' 3 ½ year delay in talking to the police about the Loggins/Beroit murders. [RT,18:4165-4172, 4231-4238] Appellant asserts that the trial court erred when it allowed detective McCartin to testify to inadmissible matters that were prejudicial to Appellant under both state and federal standards of review. As such, Appellant's convictions and sentence of death should be overturned.

B. The Questions and Answers that Improperly Bolstered the Credibility of Connor:

Evidentiary Error #1:

The Prosecution Was Allowed to Improperly "Bolster" Jelks' Credibility by Having an Experienced and Respected Detective Testify that Jelks' Fears Were "Legitimate", thereby Rendering his Opinion that the Reason Why Jelks Waited 3 ½ Years Before Talking to the Police, and the Reason for Inconsistencies between his Testimony and his Prior Statements Were because of his Fear of Retaliation and Not Because His Testimony Was Untruthful.

During direct examination of Detective McCartin, he was asked if Jelks had expressed concern about what might happen to him if he was out on the streets after talking to the detectives. McCartin responded that Jelks had expressed concern for his safety. The following then occurred:

> DDA: In your view as a homicide investigator, were Mr. Jelks' concerns legitimate?
> McC: Yes. [RT, 18:4171]

When *Jelks* testified he was fearful of retaliation because of his cooperation with the police, that testimony was relevant to circumstantially provide an explanation as to why he waited 3 ½ years before talking to the police, and why there were inconsistencies between his testimony and his earlier statements to the police. Evidence that *Jelks* was *in fact* fearful of retaliation was relevant because it had a tendency to enhance his credibility as a witness. However, this testimony by *McCartin* amounted to no more than his personal belief that Jelks' claims of fear were "legitimate" or real; that is, in McCartin's opinion Jelks testified truthfully.

a. <u>This issue was preserved for appeal</u>.

Appellant did not interpose a timely and specific objection to this question quoted above. Normally, a failure to object constitutes a waiver of that issue on appeal. (Evid. Code, § 353; *People v. Pearson* (1969) 70 Cal.2d 218, 222.

Appellant asserts, however, that he was not required to object to this testimony by Detective McCartin because the trial court had previously rejected a timely and specific objection to the identical question posed by the prosecutor to Detective Barling that was also designed to improperly bolster the credibility of

Connor, Jelks, and James. (See Discussion at Issue XI, *infra*, in Appellant's Opening Brief.). Further,

> [t]he same is true where the sequence is reversed: e.g., the overruling of a proper objection to incompetent hearsay may be raised as error on appeal even though the appellant later acquiesced in the admission of other hearsay. *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 587. (Witkin, California Evidence, Fourth Edition, Chapter XII. "Objections to Inadmissible evidence"; [§ 374] Conduct Not Constituting Waiver or Estoppel.)

i. The trial court's previous ruling on this issue.

Before police gang expert Barling testified, the court requested an offer of proof from the prosecutor as to what she wanted him to testify to. Her offer of proof, in part, was the following:

> DDA: ...that in his [Barling's] view as a gang expert in the context of 89 Family and 89 Family alone, that the concerns about retribution voiced by the witnesses were in his view legitimately based. [RT, 19:4268]

The prosecutor's offer of proof, as discussed by Appellant in Issue XI, *infra*, in this Opening Brief, was ambiguous as to whether the word "legitimate" referred to a) bolstering the credibility of the witnesses by having Barling render his "expert" opinion that the witnesses were truthful when they testified that they feared retaliation, or b) proving the danger of retaliation was real because the 89 Family Bloods gang members were dangerous; that is, in his "expert" opinion the gang members had a propensity to be violent and to savagely retaliate against those they deemed were "snitches".

Mr Lasting objected to this aspect of Detective Barling's proposed expert opinion testimony as an inadmissible opinion or conclusion, as well as on § 352 grounds, regardless of which reason the testimony was being offered.. [RT, 19:4270] Mr. Orr joined and voiced the same objections. [RT, 19:4271]

The comments of both attorneys suggested they assumed Barling's "expert" opinion testimony was offered for both reasons; a) to bolster the credibility of the

witnesses by having Barling render his "expert" opinion that the witnesses were truthful when they testified that they feared retaliation, and b) to prove the danger of retaliation was real because the 89 Family Bloods gang members were dangerous; i.e., in his "expert" opinion, they had a propensity to be violent and to savagely retaliate against those they deemed were "snitches".

The trial court overruled the defense objections . [RT, 19:4276] and allowed Detective Barling to testify on seven (7) different occasions that the witness' fears of retaliation were "legitimate." (See Appellant's discussion of this in Issue XI, *infra*, of this Opening Brief.)

Once the court has resolved a certain line or character of evidence, defense counsel is not required to renew the objection each time the same type of evidence is presented. In *People v. Antick* (1975) 15 Cal.3d 79, defense counsel objected to the inadmissible evidence when it was initially presented through a police officer. Subsequently, the prosecution sought to introduce the same evidence through the victim's testimony, and again later by introducing the physical evidence itself. Defense counsel did not object to the introduction of the evidence on the latter two occasions. This Court held the original objection preserved this issue for appeal.

> Once having had this issue resolved against him, defense counsel was not required to repeat his objection when the burglary victim actually testified and when the items of property were admitted into evidence. (See Witkin, Cal. Evidence (2d ed. 1966) Introduction of Evidence at Trial, § 1294, pp. 1197-1198.) (8) It has long been the rule that "[w]here a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed." (*Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565.) (*Id.*, at pp. 95-96)

In *Moore v. Norwood* (1940) 41 Cal.App.2d 359, the court wrote:

> Where an objection to evidence is distinctly made and overruled, it need not be repeated to the same class of evidence subsequently received, although the evidence is given by or the question asked of another witness. Neither does the fact that appellant cross examined

> respondents' expert witnesses deprive the former of the benefit of his objections made at the trial, nor does such action militate against him on appeal. (*Id.*, at pp. 368-369. Internal quotation marks omitted. Emphasis added.)

See also *People v. Morris* (1991) 53 Cal.3d 152, 187-191 [When objection raised in a motion in limine and is overruled by the court, the defense in most circumstances need not object further when the evidence is introduced.] *People v. Fulks* (1980) 110 Cal.App.3d 609, 615 [No further objections on *Aranda* grounds were required to preserve the point for appeal.]

b. Detective McCartin's testimony was inadmissible opinion evidence used to improperly bolster Jelks' credibility.

Detective McCartin's testimony was inadmissible as "expert opinion" because i) He was not qualified as an expert witness in the subject area of "witness credibility" (Evid. Code, §720, subd. a.) ii) The "expert opinion" was offered for the purpose of enhancing the credibility of witness Freddie Jelks; and iii) The subject area of "witness credibility" is normally *not* "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. a.).[195]

Detective McCartin's testimony was also inadmissible lay opinion because i) he had no personal knowledge of the underlying facts in support of the opinion (Evid. Code, § 702, subd. a; §800, subd. a..), ii) his lay opinion was not "helpful to a clear understanding of [his] testimony" (Evid. Code, § 800, subd. b.); and iii) it was inadmissible lay opinion because it was offered for the purpose of enhancing the credibility of witness Freddie Jelks.[196]

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[195] A more detailed discussion of the inadmissibility of *expert opinion* testimony to bolster the credibility of a witness or hearsay declarant is included in the discussion in Issue XI, *infra*.

[196] A more detailed discussion of the inadmissibility of *lay opinion* testimony to bolster the credibility of a witness or hearsay declarant is included in the discussion in Issue XI, *infra*.

c. Detective McCartin's testimony was inadmissible character evidence in the form of an opinion to prove members of the 89 Family gang, including Appellant, had a propensity to commit violent and savage acts of retaliation against witnesses and their families.

If McCartin's opinion that Jelks' fears were "legitimate" was offered to prove the danger of retaliation was real, rather than being offered to prove Jelks' state of mind, McCartin's opinion testimony was inadmissible character evidence. (See Evid. Code, §§1101, subd. a; 1102.)[197]

Evidentiary Error #2:
The Prosecution Was Allowed to Improperly "Bolster" Jelks' Credibility by Having an Experienced and Respected Detective Testify that in Spite of the Evidence of Impeachment, It Was his *Opinion* that Jelks Was Truthful Because his Testimony Was Corroborated by Information Detective McCartin Had Received from Other Sources.

On direct examination, the prosecutor had Detective McCartin testify that Jelks made a prior identification of the shooter. She then asked McCartin the identical improper question that she previously asked Detective Sanchez regarding the credibility of Carl Connor.

DDA: Did Jelks make an identification?
McC: Yes, he did.
DDA: And did his information corroborate information that you had from other sources regarding the investigations that you were conducting?
McC: Yes. [RT, 18:4168-4169]

On re-direct examination, the prosecutor asked the same improper question regarding Jelks' credibility, only this time she phrased it in a negative fashion:

DDA: Detective McCartin, you were asked yesterday about the use of a ruse. Can you explain to the members of the jury what a ruse is?

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[197] A more detailed discussion of the inadmissibility of *opinion* testimony to prove a group's or individual's character trait for violent revenge is included in the discussion in Issue XI, *infra*.

McC: It's a technique that we use on a witness so that we will get them to tell us the truth. And generally you could consider it a lie so that they tell us the truth when they are very reluctant.
DDA: Can you give us an example of what a ruse is?
McC: Well, in this case we told the individual that we had numerous other witnesses that were – that identified him from photographs, when they in fact had not, in order to get him to talk to us.
DDA: And in your experience does the pressure that that kind of ruse puts on a witness cause them to lie?
McC: No.[198]
DDA: In the case of Mr. Jelks, did the use of that kind of ruse result in his giving you information that was completely different from other information that you had gotten?
McC: No. [RT, 19:4232-4233 (Emphasis added)]

These questions and answers were simply a disguised method of having Detective McCartin render his opinion as to the credibility of Freddie Jelks. In effect, Detective McCartin testified that *in his opinion,* Jelks' "information corroborate[d] information that [McCartin] had from other sources regarding the investigations that [McCartin] w[as] conducting. Phrased similarly but in a negative fashion, McCartin testified that *in his opinion* "the use of that kind of ruse" did not "result [in Jelks] giving [McCartin] information that was completely different from other information that [McCartin] had gotten."

The basis for McCartin's opinion was that he allegedly had been able to *independently corroborate* the content of Jelks' statements regarding the shootings with information provided to him and other police officers by various *unnamed* individuals and other *anonymous* sources.

a. <u>This issue was preserved for appeal</u>.

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[198] This question called for evidence that was not relevant to any issue in this case. It did not matter whether this particular type of interrogation ruse would cause other individuals to lie or tell the truth. The relevant issue in this case was the effect this interrogation ruse had on Jelks himself. Further, it asked for his opinion, inadmissible as either a lay or expert opinion.

Appellant did not interpose timely and specific objections to any of the questions quoted above. Normally, a failure to object constitutes a waiver of that issue on appeal. (Evid. Code, § 353; *People v. Pearson* (1969) 70 Cal.2d 218, 222.

Appellant asserts, however, that he was not required to object to this testimony by Detective McCartin because the trial court had previously rejected a timely and specific objection to the *identical type of question* posed by the prosecutor to Detective Sanchez that was also designed to improperly bolster Connor's credibility (See Issue III in Appellant's Opening Brief.):

> DDA: With respect to the information that was provided to you [Detective Sanchez] by Mr. Connor, was that information corroborated through other sources?
> RL[199]: Objection, your honor. Calls for hearsay.
> ORR[200]: Conclusion.
> CRT: Overruled.
> SAN: Yes. . [RT, 18:3991-2]

Once the court has resolved a certain line or character of evidence, defense counsel should not be required to renew the objection each time the same type of evidence is presented. (See Appellant's detailed discussion at Issue III, *supra*, in this Opening Brief.)

b. <u>Detective McCartin's testimony was inadmissible lay opinion because it was not based on his personal knowledge of the underlying facts</u>.

Unless some other evidentiary rule applies, witnesses must have personal knowledge of the matter about which they testify; otherwise their testimony is inadmissible. (Evid. Code, § 702) Further, when any witness renders a lay opinion, it must be "[r]ationally based on the perception of the witness" and it must be "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800) For several reasons, the objections of defense counsel should have been sustained,

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[199] "RL" refers to Attorney Richard Lasting, lead trial counsel for co-defendant Johnson.
[200] "ORR" refers to Attorney Joseph Orr, lead trial counsel for Appellant.

and Detective McCartin's lay opinion should not have been admitted into evidence:

The prosecution presented no evidence that Detective McCartin was present when the murders occurred, that he was involved in the initial crime scene investigation, or that he was present during the autopsies of Loggins and Beroit. His knowledge of the details of the crime was based solely on what others told him and what he read. Since he had no personal knowledge of any of these details, his testimony regarding them would have been inadmissible. (Evid. Code, § 702)

If Detective McCartin could *not* provide admissible testimony regarding the specific facts that in his opinion "corroborated" Jelks' statement to him, his lay opinion that was based on those *same* specific facts would also not be admissible for the same reason; his opinion was *not* "rationally based on [his] perception" of the underlying facts. (Evid. Code, § 800)

Appellant asserts, therefore, that the trial court erred on this basis when it allowed Detective McCartin to render his lay opinion regarding Connor's credibility.

c. <u>Detective McCartin's testimony was inadmissible lay opinion because it was not "helpful to a clear understanding of [his] testimony." (Evid. Code, § 800(b))</u>

This Court explained in *People v. Melton* (1988) 44 Cal.3d 713 the reason why lay opinion is admissible *only* when it is [h]elpful to a clear understanding of [the witness'] testimony.":

> A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. (Citation) "Whenever feasible, 'concluding' should be left to the jury; however, when the details observed, even though recalled, are 'too complex or too subtle' for concrete description by the witness, he may state his general impression. [Citation.]" *People v. Hurlic* (1971) 14 Cal.App.3d 122, 127. ... (Evid. Code, § 800, subd. (b).)

There is *no* indication that Detective McCartin could *not* have expressed the details of his "other sources" that he claimed corroborated Jelks's statement to him because they were "too complex or too subtle" to lend themselves to "concrete description." Hence, the prosecution's request that he render his opinion *in lieu* of testifying about his personal observations was improper.

Appellant asserts, therefore, that the trial court erred on this basis when it allowed Detective McCartin to render his lay opinion regarding Jelks's credibility.

d) Detective McCartin's testimony was inadmissible lay opinion because it was offered for the purpose of enhancing the credibility of witness Freddie Jelks.

In *People v. Melton* (1988) 44 Cal.3d 713, this Court observed:

> Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained [*People v. Sergill* (1982) 138 Cal. App. 3d 34, 39-40], the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (id., § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. (Citations) Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (id., § 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (Citations) (*People v. Melton*, supra, 44 Cal.3d at 744-5)

Therefore, the trial court erred when it allowed this evidence to be introduced.

e) Detective McCartin's testimony was also inadmissible as "expert opinion."

Detective McCartin's testimony was also inadmissible as "expert opinion" testimony because i) He was not qualified as an expert witness in the subject area of "witness credibility"; ii) The "expert opinion" was offered for the purpose of enhancing the credibility of witness Freddie Jelks; and iii) The subject area of "witness credibility" is normally *not* "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. a.).

If Respondent were to contend that Detective McCartin qualified as an expert witness on "witness credibility", this Court has also made it clear that, except in rare circumstances, expert opinion testimony is *not* admissible for the purpose of bolstering the credibility of another witness. Quoting again from *People v. Melton*, *supra*, (and substituting the names of the witnesses in the instant case in place of those in *Melton*), this Court's reasoning is apparent:

> The instant record does not establish that [Detective McCartin] is an expert on judging credibility, or on the truthfulness of persons who provide [him] with information in the course of investigations. [Detective McCartin] knew nothing of [Jelks'] reputation for veracity. [Detective McCartin] was able to describe [his] interviews with [Jelks and his "other sources"] in detail, leaving the factfinder free to decide [Jelks'] credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to [Detective McCartin] had the essential "ring of truth." The trial court thus erred insofar as it admitted [Detective McCartin's] testimony to indicate [his] assessment of [Jelks'] credibility. (*People v. Melton*, *supra*, 44 Cal.3d at 744-745)

See also, *People v. Smith* (2003) 30 Cal.4th 581, 628; *People v. Anderson* (2001) 25 Cal.4th 543, 576; *People v. Smith* (1989) 214 Cal.App.3d 904, 914-915; *People v. Miron* (1989) 210 Cal.App.3d 580, 583; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39.

Moreover, a police officer's opinion regarding the truthfulness of a suspect's confession is generally deemed inadmissible. (*People v. Anderson* (1990) 52

Cal.3d 453, 478; *People v. Cole* (1956) 47 Cal.2d 99, 103; *People v. Arguello* (1966) 244 Cal.App.2d 413, 421.) In *Anderson, supra*, an investigating officer testified for the prosecution regarding the results of his investigation of several murders.

> He recounted defendant's confession to those crimes as well as defendant's vague statements concerning other murders he purportedly committed in Las Vegas. On cross-examination, Thompson admitted that he doubted the veracity of defendant's confession to the Las Vegas killings, and he observed that no law enforcement officers contacted by him credited it. On redirect, Thompson stated his further belief that defendant's confession to the Glashien and Blundell killings, being supported by sufficient details, was true. (Id., at p. 478. Emphasis added.)

This Court held the trial court erred when it allowed into evidence the officer's opinion that the defendant's confession was true. (*Id.*, at p.478.)

f) Detective McCartin's testimony consisted of inadmissible hearsay evidence.

If Detective McCartin had been asked to relate the particular information that his "other sources" had provided him, his response would have included inadmissible hearsay evidence.

Detective McCartin had *no* personal knowledge of the facts of the Loggins/Beroit murders. What information he did have consisted of out-of-court oral and written statements by others. If the prosecutor had asked Detective McCartin what each "other source" had said, the prosecution would have been offering these various out-of-court statements to "prove the truth of the matter stated."[201] His testimony as to the content of each out-of-court statement would have constituted inadmissible hearsay. (Evid. Code, § 1200, subd. b and c.)

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[201] Evid Code, §1200(a). Detective McCartin's "other source" out-of-court statements would, of necessity, have been offered by the prosecution "to prove the truth of the matter stated" or they would have had no relevance. That is, if Detective McCartin's "other source" information was not the truth, the fact that

Likewise, if the prosecutor's question to Detective McCartin, by its terms, asked him to relate in summary form the contents of the various out-of-court statements provided to him by his "other sources", his response would still have constituted inadmissible hearsay.

In the instant case, the prosecutor sought to prove the contents of Jelks's statement to Detective McCartin were consistent with the contents of the several out-of-court statements by the detective's "other sources." Since the various statements, including Jelks', were offered "to prove the truth of the matter stated" (i.e., that Jelks told Detective McCartin the truth), the prosecutor's question called for inadmissible hearsay.

Appellant asserts, therefore, that the trial court erred on this basis when it allowed Detective McCartin to testify to inadmissible hearsay.

Evidentiary Error #3:
The Prosecution Was Allowed to Improperly "Bolster" Jelks' Credibility by Having an Experienced and Respected Detective Render a *Legal* Opinion that Inferentially Suggested the Courts Allowed This Type of Interrogation Tactic Because There Was Little Danger that It Leads to Untruthful Testimony.

In the previous discussion (Evidentiary Error #2, *supra*), the prosecutor had Detective McCartin render his opinion, based on his experience, as to whether the psychological pressure created by "that kind of ruse" caused the individual to lie or to make false statements. Now, however, Detective McCartin was asked if it was "legal" to use a ruse such as the one used during the interrogation of Jelks. That is, *do the courts* agree with the detective's previously stated factual conclusion that use of that type of ruse does not make the individual's resulting statement so unreliable that it is illegal or inadmissible.

DDA: And in your experience is it permissible as an investigator, *legally*, to use those kinds of ruses?
McC: Yes.

Jelks's statement was consistent with the "other source" statements would have been meaningless.

ORR: Wait a minute, calls for a conclusion.
CRT: Would you read the question, Debbie?
(The requested testimony was read by the reporter.)
CRT: You can answer the question.
McC: Yes, it is. [RT, 19:4232-4233. Emphasis added.]

This question called for a legal conclusion or opinion. Evid. Code§310 expressly states that "questions of law ... are to be decided by the court." That section also states that "[t]he determination of issues of fact preliminary to the admission of evidence [i.e., whether a statement is involuntary, coercive, illegal, etc.] are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4. Whether a particular ruse in a particular situation leads to a voluntary confession or to an "involuntary" (and therefore inadmissible or "illegal) confession is a question of law made by the court pursuant to Evid. Code, § 405.[202]

In *Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, that court cited the California Supreme Court and stated:

> It is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide. (*Morgan v. Myers,* 159 Cal. 187; 10 Cal.Jur. 953 and cases there cited.) (*Id.*, at p. 528.)

More recently, the courts have reiterated this principle.

> However, questions of law are not to be decided by the trier of fact; rather it is for the judge, not the lawyers or the witnesses, to inform the jury of the law applicable in the case and to decide any purely

[202] Why the objection to this question and answer should have been sustained is illustrated by what happened in this case. This "ruse" that was used on Jelks "caused" Jelks to lie to the police! He continued to deny his involvement in the Mosley drive-by murder, then he admitted he had heard about it, then he admitted he was present and saw the assailants leave to do the shooting, then he finally admitted he was the driver of the car used in the drive-by killing. However, according to Marcellus James, even this was still a lie. James told the police in two separate interviews that Jelks was not the driver; he was one of the actual shooters. See Appellant's discussion of this issue at Issues IV and VI in this Opening Brief, *supra.*

> legal issue. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182. See also *Nieves-Villanueva v. Soto-Rivera, (????),* 133 F.3d ??. 100.); *People v. Torres* (1995) 33 Cal.App.4th 37, 43 -48 [A witness may not express an opinion as to the definition of a crime, the guilt or innocence of the defendant, or whether a crime has been committed.]

The comment to Evid. Code, §405 explains that the issue of whether a confession is voluntary or involuntary (i.e., legal or illegal) is a question of law to be decided by the court. (See West's Ann.Cal.Evid.Code, § 405) And the courts of this State have held that the resolution of whether a confession or admission is "legal" or "illegal" based on coercive tactics, promises of leniency, or "ruses" is a question of law for the court to resolve.

> A confession motivated by a promise of leniency is involuntary and therefore inadmissible as a matter of law. (*People v. Rowe* (1972) 22 Cal.App.3d 1023, 1031, *People v. Mack* (1977) 66 Cal.App.3d 839, 857.

Furthermore, even if expert opinion testimony was admissible regarding whether a particular ruse used in interrogations was "legal", there was no showing that Detective McCartin qualified as an expert in that subject matter.

The trial court erred in overruling Appellant's objection and allowing Detective Barling to render this opinion testimony.

4. <u>The Erroneous Admission of the Above Cited Portions of Detective McCartin's Testimony Was Prejudicial Under Either Standard of Review</u>.

<u>State Standard of Review</u>: In determining whether the erroneous admission of portions of Detective McCartin's testimony was prejudicial to Appellant, the Court must examine the entire record and determine whether it is reasonably probable that a result more favorable to Appellant would have been reached had this evidence not been admitted. [*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Gurule* (2002) 28 Cal.4th 557, 625 [". . . we conclude it is not reasonably probable that the admission of the [evidence] affected the jury's verdict."]; *People*

v. Malone (1988) 47 Cal.3d 1, 22 [same]; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [same]. Evid. Code § 353(b).

The Standard of Review When Due Process Rights Are Implicated: Further, this Court has held that if the erroneous admission of evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States constitution. In *People v. Garceau* (1993) 6 Cal.4th 140, the accused was tried for the murders of Maureen and Telesforo Bautista. The jury was erroneously instructed that it could consider the facts of Garceau's prior murder for any purpose, not just "other acts evidence" to prove intent, identity, motive, etc. (See Evid. Code, § 1101, subd. b.). This Court expressed concern that the jury may have improperly considered the evidence "for the purpose of establishing defendant's propensity to commit murder"; that Garceau had a propensity to kill, so he probably killed the Bautista's. (See Evid. Coed, § 1101, subd. a.) This Court further explained:

> If the jury drew that inference, the prosecution's burden of proof as to the central issue in the case, the identity of the Bautistas' slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired. (*People v. Garceau* (1993) 6 Cal.4th 140, 186-187.)[203]

Under these circumstances, the defendant's conviction must be reversed unless the state can establish that the erroneous admission of evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246]; *People v. Garceau* (1993) 6 Cal.4th 140

For Appellant, the *only* material issue in dispute at his trial was the *identity* of the shooter. There was no dispute as to whether someone murdered Loggins and Beroit that afternoon. There was no dispute as to whether the killer

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[203] This Court in Garceau did not resolve the issue of whether that particular instructional error "lightened" the prosecution's burden of proof because it concluded under either the *Chapman* or *Watson* standard, the error was harmless.

premeditated and deliberated the killings prior to pulling the trigger of the Uzi. All of the major disputed evidentiary battles in this trial pertained to the credibility of the witnesses who linked Appellant (and co-defendant Johnson) to the killings.

Although the defense presented some circumstantial evidence from which it could be inferred that a rival Crip gang member was the shooter,[204] in reality Appellant's defense rested on his ability to undermine the credibility of witnesses Connor, Jelks, and James. *Properly* admitted evidence that had any tendency to support or impeach the credibility of Jelks, therefore, was highly probative. At the same time, *erroneously* admitted evidence that improperly bolstered Jelks' credibility was highly prejudicial to Appellant.

Because Jelks's credibility was significantly undermined, Appellant asserts his testimony by itself would *not* have been sufficiently persuasive to convince all twelve jurors that Appellant was guilty beyond a reasonable doubt. In fact, the jury may have completely discounted Jelks and his testimony because of the nature and scope of the impeachment evidence. Certainly it can be inferred from the record on appeal that the jury discussed Jelks' credibility extensively.[205]

However, when the trial court erred and allowed the inadmissible portions of Detective McCartin's testimony to be presented to the jury, the jury was given three additional and very persuasive reasons to conclude that Jelks had testified truthfully. If the jury had then concluded that Jelks testified truthfully , the jury would have convicted Appellant based on Jelks's testimony alone. Hence, "it [would have been] reasonably probable that a result more favorable to Appellant would have been reached had this evidence (Detective McCartin's improper

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[204] Prosecution witness Eulas Wright testified the shooter wore a black Raiders or Oakland Raiders jacket. Defense expert witness Gallipeau testified that during 1991, Crip gang members wore black Raiders or Oakland Raiders jackets, but Blood gang members did not. Galipeau also testified the neighboring Kitchen Crips gang was a hostile rival Crip gang at the time. The inference was that a Kitchen Crip, or some other rival Crip gang member, shot and killed Loggins and Beroit.

[205] See, for example, RT, 26, 5247-5252.

testimony) not been admitted." *People v. Watson* (1956) 46 Cal.2d 818, 836. And under the *Chapman* standard, Respondent would not have been able to establish "beyond a reasonable doubt" that the result of Appellant's trial would have been the same if the trial court had not admitted the erroneous portions of Detective McCartin's testimony. *Chapman v. California* (1967) 386 U.S. 18, 24.

a. First reason why the jury believed Jelks testifimony was truthful based upon Detective McCartin's improper testimony: McCartin told the jury he personally believed Jelks really did fear retaliation from the gang.

The prosecution presented evidence that Jelks waited 3 ½ years before talking to the police because he feared retaliation from gang members if he cooperated with the police. The prosecution argued that any inconsistencies in Jelks' testimony and his previous statements to the police and grand jury were because of his fear of retaliation; hence, he was not initially forthcoming, the police had to use "ruses" to get him to talk, etc.

Freddie Jelks was impeached with evidence from which an inference could reasonably have been drawn that he was "making things up" in an effort initially to avoid being arrested and later to obtain a benefit in his case in exchange for his cooperation. He had a pending case in which he was facing a life sentence, he had been convicted of various and sundry offenses suggesting a bad character trait, his testimony contained added details that were not present in previous statements, etc.

Jelks' credibility as a witness was vigorously disputed. Appellant submits the jury would not have been sufficiently convinced that Jelks's testimony was truthful because of the evidence of impeachment. That is why McCartin's inadmissible opinion testimony was prejudicial.

McCartin, in effect, told the jury he personally believed Jelks testified truthfully; that the defense's arguments that Jelks was "making things up" for his own personal reasons were not true. Why? Because Jelks really was fearful of

retaliation if he cooperated with the police. It was this actual fear of retaliation, according to McCartin, and not selfish personal motives that explained Jelks' delay in speaking to the police and provided a reasonable explanation for the inconsistencies between his testimony and his prior statements.

This testimony, coming from an experienced and respected homicide investigator, would have been particularly persuasive to the jury when McCartin's credibility was compared with other witneses.

b. Second reason why the jury believed Jelks testimony was truthful based upon Detective McCartin's improper testimony: In spite of the extensive nature and scope of the impeachment of Jelks, Detective McCartin told the jury that he was still convinced Jelks had testified truthfully.

Detective McCartin's testimony regarding Jelks' credibility was very significant. The prosecution presented little, if any, evidence that independently corroborated Jelks' testimony. The details of the shootings were common knowledge, various rumors on the street named the possible shooter, etc. Even though the defense clearly contended that Jelks' testimony was not truthful, the prosecution was apparently unable to present any evidence, other than Jelks himself, that Jelks was even present at the Johnson residence that day!

The probability that the jury attached considerable weight to Detective McCartin's testimony becomes even more apparent when his testimony is considered alongside other witnesses whose credibility was extremely suspect; witnesses who were in custody and were seeking favorable treatment from law enforcement in exchange for their "co-operation", witnesses who may have been expecting hefty financial rewards in exchange for their belated "co-operation", etc. Jelks was, in effect, an "in-custody informant"[206] when he testified and was, for all

[206] California Penal Code § 1127(b) and CALJIC 3.20 explain what should be obvious to every juror concerning an "in-custody informant", or any other witness similarly situated, when they talk to the police, then testify:

intents and purposes, an "in-custody informant" during his initial interrogation by the detectives. James would also be considered an "in-custody informant" when he initially spoke to the police about Appellant's admission. Connor had a financial motive to say what the prosecution wanted to hear, and he was rather dramatically impeached. (See Appellant's discussion in Issue III in this Opening Brief.)

On the other hand, Detective McCartin was a respected and experienced police investigator whose entire career was dedicated to serving others. He had no "apparent" motive to fabricate. Hence, as far as the jury would have been concerned, he was one of the few prosecution witnesses whose testimony the jury could reliably believe.

But perhaps the most egregious and prejudicial aspect of his testimony regarding his "corroborating" Jelks with information he received from "other sources" was the implication or inference that his opinion was based on additional information; information that had not been presented to the jury but that he knew about.

The jury was never told what information Detective McCartin possessed that "corroborated" what Jelks told him. This question and its answer created the very prejudicial scenario in which the jury would assume that Detective McCartin possessed *additional* information that corroborated the credibility of Jelks; evidence of which the jury was not aware. This *improper* inference drawing process is the very basis, analogy-wise, for the evidentiary rule that prohibits a

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> "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case."

prosecutor from rendering her opinion as to whether a particular witness told the truth or not!

> A prosecutor may not express a personal opinion or belief in a defendant's guilt "where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." (Citation) *People v. Adcox* (1988) 47 Cal.3d 207, 236. See also *People v. Fauber* (1992) 2 Cal.4th 792, 822.

The conclusion testified to by Detective McCartin also improperly implied that the faith and integrity of the Los Angeles Police Department, as well as that of the Los Angeles County District Attorney's office, were pledged in support of the veracity of Connor's testimony. See *People v. Adams* (1960) 182 Cal.App.2d 27, 34-35.

c. <u>Third reason why the jury believed Jelks testimony was truthful based upon Detective McCartin's improper testimony: Because the courts are *not* worried that the ruses used in the interrogation of Jelks lead to untruthful statements, neither should the jury be concerned.</u>

On cross-examination, McCartin admitted he intentionally lied to Jelks in an attempt to get him to talk to the investigators. McCartin said this was a "ruse" that was used routinely by the police to pressure individuals into speaking with the police.

The defense introduced this evidence in support of their position that Jelks was pressured into telling the police what they wanted to hear, regardless of whether it was true or not. Therefore, the jury should be skeptical of Jelks' claims that he was testifying truthfully. After all, Jelks was facing a life sentence in prison and had a very strong need to please the prosecution. He didn't want to spend the rest of his life in prison, and the only way he could avoid that was to provide testimony that assisted the prosecution in convicting Appellant and co-defendant Johnson.

When the trial court allowed McCartin to render his own inadmissible opinion that the type of ruse he used on Jelks during the interrogation was "legal", the prosecution created the wholly improper inference that the courts of this State were not worried about the use of that type of ruse in interrogations. As long as the ruse was "legal", the courts, in effect, had given that type of ruse their stamp of approval. If the courts were not worried about the ruse causing an individual to make a false statement, then neither should the jury be concerned.

5. Conclusion:

Appellant respectfully asserts the errors were prejudicial under either standard of review and urges this Court reverse his conviction on this basis.

X.

The trial court abused its discretion when it refused to allow Appellant to confront, cross-examine and impeach Marcellus James regarding his initial in-custody interview with the police on February 22, 1992. The trial court's error was an abuse of discretion and the error denied Appellant his due process right to confront and cross-examine his accusers under both the United States and California constitutions. It was prejudicial to Appellant's right to a fair trial and it requires his convictions and his judgement of death be reversed.

A. Introduction.

1. Marcellus James Was One of Only Three Prosecution Witnesses Who Provided Testimony that Appellant Was the Shooter.

Marcellus James was the 3rd and last prosecution witness called to testify who connected Appellant to the murders of Loggins and Beroit in August, 1991. James testified that at some point after the shootings, he and Appellant met on the street. He asked Appellant about the shootings, and Appellant allegedly told him that he (Appellant) had been the shooter.

Five weeks later, in September of 1991, James witnessed details involving another 89 Family Bloods murder (i.e., the Mosley murder). In February 1992,

James was arrested and in custody. He asked to speak to detectives because he had information to give them on a criminal case. He spoke to them about the Mosley murder. Appellant sought to cross-examine James about this initial interview, whether the detectives asked him about the Loggins/Beroit murder, or whether James volunteered to them that he knew something about the Loggins/Beroit.

The trial court simply sustained the prosecution's objection and refused to allow any cross-examination into the details of that interview. Counsel argued and explained why it was important to delve into that interview briefly but the court refused to alter its initial ruling.

Because of the trial court's prior ruling that limited defense cross-examination into the details of the initial in-custody interview of *Jelks*, Appellant was not able to prove whether James said anything about Appellant's alleged admission at that time. If not, a reasonable inference could have been drawn that the conversation with Appellant never occurred or James would have mentioned it at that time. Further, regardless of whether the Loggins/Beroit murders was mentioned, Appellant was not allowed to establish whether James received a benefit at that time in exchange for his cooperation in the Mosley murder case. If James received *any* type of benefit in that case, James would have been *hoping* for another benefit when he *again* found himself in custody and was *again* willing to speak to the police ... this time about Appellant's alleged admission in the Loggins/Beroit murders. The court's ruling deprived Appellant of this opportunity, however.

Appellant argues that this ruling, made even before any offer of proof was made, illustrated the court did not exercise any discretion before ruling, the error was prejudicial, and it denied Appellant his federal and state due process rights to confront and cross-examine witnesses and a fair trial.

B. <u>The Applicable Law</u>:

Appellant respectfully inserts herein by reference his statement of the law regarding the right of an accused to confront and cross-examine his accusers, as discussed more thoroughly in this Opening Brief at Issue IV.B., *supra*.

C. Discussion.

1. James' incriminating testimony.

On direct examination, Marcellus James testified that in 1991 he lived near 88th and Central Avenue, he was aware of the 89 Family Bloods gang in that neighborhood, but he was not a member of the gang. [RT, 18:4040-4041] He recalled the shootings of two men in front of the car wash on Central Avenue in 1991. [RT, 18:4041] At some point in time after the shootings, James said he asked Appellant who shot them. Appellant allegedly responded that he (Appellant) did, that he walked up to them and shot them. [RT, 18:4042-4043] James further explained that Appellant also provided a motive for his killing the two individuals: "They was from the wrong 'hood." [RT, 18:4043-4034] James testified that he never "volunteered" this information to the police until 1994 when he was in-custody and was interviewed by the police. [RT, 18:4044]

During further direct examination, James told the jury that he had not felt good talking to the police at that time (1994), that he was scared at that time (1994), and that he was still scared at the time he was testifying (1997). [RT, 18:4044-4045] James stated he was fearful of retaliation by 89 Family Bloods gang members because of his testimony. [RT, 18:4045] He explained he was also afraid of retaliation because he had two children, as well as a baby soon to be born. Further, the mother of the two children had recently been killed [RT, 18:4045] in an unrelated incident [RT, 18:4089-4090].

When the prosecutor asked James again if he was still fearful of retaliation, James said he was, but that he no longer lived in the neighborhood. [RT, 18:4046] He said he had not been threatened by anyone since he spoke to the police in 1994 "because they didn't know I was coming to testify." [RT, 18:4046] He concluded his testimony by stating he felt like he shouldn't be testifying because "it's really

not none of my business." He felt he was making himself a "snitch" by testifying, but he was telling the truth. [RT, 18:4047]

During cross-examination, James indicated he had this discussion with Appellant in 1991 while he was still living in that neighborhood. [RT, 18:4072-4073] He moved from the neighborhood in 1992. {RT, 18:4074][207] James indicated that he and "Silent" (co-defendant Johnson's brother, Earl Ray Johnson) [RT, 18:4073-4074] were on 88th Place and simply "met up" with Appellant. [RT, 18:4076-4078] James initiated the conversation with Appellant and asked if he (Appellant) was the shooter. James said he wasn't concerned about who the shooter was; he just wanted to know. [RT, 18:4078] James could not recall if they spoke of anything else during that conversation. [RT, 18:4078-4079] James claimed he said nothing about this conversation with Appellant until he spoke with the police on September 21, 1994, while he was in-custody. [RT, 18:4048-4049, 4054] He admitted he had contacts with the police during that interim time period, he could have told the police about Appellant's admission, but he chose not to tell the police about Appellant's admission in any of those "most casual or most close" contacts. [RT, 18:4055]

2. The prosecutor's objection, Appellant's offers of proof, and the trial court's ruling.

On further cross-examination, James testified that he was in jail in 1994 when he first spoke to the police about his conversation with Appellant. The prosecutor objected or relevance grounds when Mr. Orr asked James why he was in custody in 1994. [RT, 18:4049]

Outside the hearing of the jury, Mr. Orr made an offer of proof as to the relevance of that question and subsequent questions he sought to ask James. (See Evid. Code § 354.) The prosecutor continued to object, now on § 352 grounds.

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[207] It is somewhat ambiguous whether James told the detectives in 1994 that the conversation with Appellant occurred in 1991, 1992, or as late as 1993. See RT, 18:4075-4076]

The trial court sustained the prosecutor's objection. [RT, 18:4049-4053] The trial court's ruling is the basis for this issue on appeal.

Mr. Orr made an offer of proof as to why he sought to explore the details of James' conversation with the police:

> Orr: I want to get it out of him because I think that's how they squeezed statements out of people.
>
> . . .
>
> There was [a conviction for assault with a deadly weapon]. What I'm getting to, this is a common way that the conversation starts. I think I'm entitled to know the background and what led to his talking. [RT, 18:4049-4050 (Emphasis added.]

What Mr. Orr, in effect, said was that gang investigators are aware of the following: An individual who lives in a gang neighborhood is not willing to provide information to the police about gang crimes. He is afraid of retaliation from members of the gang and doesn't want to be known as a "snitch." Hence, as long as the individual is out-of-custody, he is not willing to provide information to the police about gang crimes.

Gang investigators know, however, that once an individual is in-custody, the likelihood that he will provide information to the police concerning gang crimes is much greater. The individual knows he is in trouble, and by providing information to the police, he hopes to receive police consideration in exchange for the information he can provide to them. Hence, gang investigators approach individuals when they are in-custody and attempt to "squeeze" them for information. The likelihood that gang investigators will make "promises" to the in-custody individual regarding his case in exchange for his gang information, or the likelihood that the in-custody individual will draw inferences from the statements of the gang investigators as he provides them with gang information is great, and creates a strong potential motive in the individual to tell the police what he thinks the police want to hear, but not necessarily what the truth is.

This is what Mr. Orr wanted to explore during cross-examination of James. This is what he meant when he said, "[T]hat's how they squeeze statements out of people", and "this is a common way that the conversation starts." Mr. Orr wanted to discover the "background" that "led to his [James'] talking." This was his offer of proof.

The trial court agreed with Mr. Orr "to some degree, yeah." [RT, 18:4050] Mr. Orr then provided the trial court with a copy of James' 1994 pre-plea report. He (and co-counsel) referred to a February 27, 1992 in-custody interview that James had with the police. Mr. Orr stated he wanted to also question James about that conversation with the police. Defense counsel were not aware of the contents of that February 27, 1992 in-custody interview with James.[208]

The prosecutor then told the trial judge that on February 27, 1992 James told the police what he knew about the gang-related drive-by murder of Tyrone Mosley, the pending murder case in which Jelks and co-defendant Johnson were charged and whose trial was pending. [See RT, 16:3497, 3501] The reporter's transcript of that discussion follows:

> CRT: I've got it [i.e., James' 1994 pre-plea report].
> RL: It shows an arrest of 2-27-92.
> CRT: Yes.
> RL: That's the first day he [James] talked to the police.
> ORR: Right.
> RL: Because there's a transcript of an interview at a later date that makes reference to a previous police interview on this date.
> CRT: On what date?
> RL: On 2-27-92. I can show you if you want to see the page.
> DDA: The subject matter of that interview, though, was the Mosley murder, the drive-by, which is why we [the prosecutor and James] didn't go into it [on direct examination]. And I have admonished the witness [James] that he can't talk about it, but he was a witness on that case [the Mosley murder].
> CRT: I think we ought to stay away from that for that reason. We are liable to get right back into a situation –

[208] Their lack of knowledge regarding the content of that interview can be inferred from their statements to the court. [RT, 18: 4051-4052]

RL: That's why I wanted to bring it up.
ORR: I wasn't going to go into that [i.e., the details of the Mosley murder]. [RT, 18:4051-4052 (Emphasis added)]

The trial court was apparently concerned that they were "liable to get right back into [the] situation" they had previously discussed during Freddie Jelks' testimony; that James might testify that co-defendant Johnson was charged with that crime, or perhaps that James' testimony might "open the door" to evidence of other crimes.

Mr. Orr reassured the trial court, however, that he did not intend to go into the details of the Mosley murder. Rather, Mr. Orr wanted to ask James if the gang investigators on February 27, 1992 tried to "squeeze" him into providing information concerning the Loggins/Beroit murders, not just the Mosley murder. The response by the court is reflected in the reporter's transcript:

CRT: I'll let you [Mr. Orr] do this: You can ask him [James] if it's not a fact that he was in custody at that time on an allegation of – I don't think spousal abuse is the right word; I don't think they were married – but domestic abuse.
ORR: Are you talking about 2-27[-1992]?
CRT: No, no.
. . .
DDA: No, he's talking about the date in 1994.
CRT: We are not going to talk about the first – [i.e., the first interview with James on 2-27-1992]
ORR: They [the police] wanted information on this case [Loggins/Beroit] then [on 2-27-1992].
CRT: If you want to get into a situation wherein we're talking about another drive-by shooting, that's what we're getting at.
ORR: I'm going to say "this case here you gave information." That's what I'm going to say.
CRT: What I'm going to let you do is elicit from him [James] that in 1994 the interview wherein he tells the police that your client confessed to this homicide, that at that point in time he, the witness [James] was in custody on an allegation that he had abused the female that he lives with, or who is the mother of the kids. Yes, you may do so. [RT, 4052-4053 (Emphasis added)]

3. Discussion: The Trial Court Abused Its Discretion when It Limited the Scope of Appellant's Cross-Examination of James Regarding his Initial Interview with the Police on February 27, 1992.

a. The Probative Value of Appellant's Proposed Cross-Examination of James was Substantial.

Relevance Reason #1: If Mr. Orr had been allowed to prove (a) that the gang investigators asked James about the Loggins/Beroit murders during the February 27, 1992 discussion, and (b) that James said nothing about Appellant's admission in that discussion, the obvious and reasonable inference the jury could have drawn was that James and Appellant never had that conversation; otherwise, James would have told the gang investigators about Appellant's admission during that discussion. This was part of Mr. Orr's offer of proof when he told the court, "They [the police] wanted information on this case [Loggins/Beroit] then [on 2-27-1992]." [RT, 18:4052-4053]

Relevance Reason #2: Additionally, if Mr. Orr had been allowed to prove (a) that the gang investigators asked James about the Loggins/Beroit murders during the February 27, 1992 discussion, (b) that James provided them information regarding the Loggins/Beroit murders and (c) that James received a benefit on his then pending case, the obvious and reasonable inference the jury could have drawn was that when James told the police of Appellant's alleged admission in 1994, he was hoping to receive a similar benefit from the police in exchange for "information", just as he had received in February, 1992.[209] This was part of Mr. Orr's offer of proof when he told the court, "They [the police] wanted information on this case [Loggins/Beroit] then [on 2-27-1992]" [RT, 18:4052-4053]; "[T]hat's how they squeeze statements out of people" [RT,

[209] There is no indication the defense was provided discovery of James' 1992 case. He was charged with a felony and it had been reduced to a misdemeanor when he pled guilty; hence, there was reason to suspect James did receive a benefit in exchange for the information he provided the police.

18:4049-4050]; "[T]his is a common way that the conversation starts." [RT, 18:4049-4050]; and the jury is "entitled to know the background and what led to his [James'] talking." [RT, 4049-4050] This information would have been just as relevant in February 1992 as it was in September 1994.

Relevance Reason #3: Even if James was not asked, nor did he say anything, about the Loggins/Beroit murders during the February 27, 1992 police interview, inquiry on cross-examination was relevant for an additional reason. This reason became *increasingly* relevant because of the prosecutor's tactical decision to have James testify that he feared retaliation from members of the 89 Family Bloods gang because of his cooperation with the police and because of his testimony.

The prosecution presented James to the jury as a good citizen who, until September, 1994, was too frightened to tell the police of Appellant's admission. On direct-examination James testified he was still afraid that members of the 89 Family Bloods gang would retaliate against him and his young children. [RT, 18:4044-4045]

To rebut this evidence and to *dramatically* impeach James, Appellant sought to prove that on February 27, 1992 (when James was also in-custody), James provided information to the police regarding a murder that had been committed by 89 Family Bloods gang members just five weeks after the Loggins/Beroit murders. He did this in February 1992 in spite of the fear of retaliation that he then would *also* have been experiencing.

The reasonable and relevant inferences the jury could have drawn from this cross-examination were obvious. Only when James was in-custody and facing criminal charges was he willing to talk to the police about crimes committed by 89 Family Bloods gang members. His motive to receive a benefit in exchange for his information was greater than his fear of retaliation from members of the gang. And, if James had no information regarding the crime he was asked about, he would have been willing to "make it up" because of his desire to receive law

enforcement assistance. Finally, the *easiest* evidence he could "make up" would be that the accused privately confessed to him.[210]

In each of the three above reasons that justified the proposed cross-examination of James, Mr. Orr had no need to delve into any additional facts about the Mosley murder. He had no need to ask who the assailants were in the Mosley murder. This is why Mr. Orr told the court, "I wasn't going to go into that [i.e., the details of the Mosley murder]." [RT, 18:4051-4052]

Based on the trial court's ruling, however, Appellant was not allowed to confront and cross-examine James to establish any of the above, each of which would have impeached James' credibility significantly.

The probative value of any evidence that would have assisted the jury in determining James' credibility had even greater significance in the instant case than most cases because the prosecution presented no *independent* evidence that this conversation between Appellant and James ever took place. In fact, the prosecution presented *no* evidence that *independently* corroborated whether James even knew Appellant well enough to speak with him about *anything*, much less that he and Appellant actually spoke about something as serious as Appellant admitting to having committed two murders. Appellant was presented by the prosecution as a hard-core 89 Family Bloods gang member, whereas James claimed he was not even a member of the gang. [RT, 18:4041] This is hardly the type of conversation that would "just happen" to occur between a hard core gang member and a mere acquaintance while each was walking by the other on a public street!

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[210] James testified that from the day Loggins and Beroit were killed, he had heard rumors on the street that "Fat Rat" was the shooter. He testified that several people told him that. [RT, 18:4069-4072] It would have been relatively simple for James to fabricate the story that that Appellant quietly confessed to him that he shot Loggins and Beroit.

A "confession to a crime" is also the easiest type of testimony for an in-custody police-informant to fabricate because it cannot be verified independently. Prosecutors, therefore, normally present this type of informant-testimony only if the prosecutor can show through other independent evidence that it is trustworthy. This is usually done by examining the contents of the in-custody police informant's testimony and comparing it with the actual crime details. If consistent, the details of the crime corroborate the testimony of the police informant. This is persuasive, however, only if the details of the crime are not readily available to the general public. If no one but the killer was aware of the details, the police informant's ability to accurately relate any specific details of the crime creates the inference that the police informant actually did speak with the killer.

That is *not* the factual situation in the instant case, however. Everything James claimed Appellant said to him was "public knowledge." Literally anyone could have concocted this testimony. The probative value of any impeachment evidence pertaining to James, therefore, was extremely significant.

Evidence that would impeach the credibility of James was probative and material. Each of the three reasons for admissibility discussed above was *highly* probative on the issue of the credibility of James.

c. <u>The Danger of Undue Prejudice, Confusion of Issues, or Undue Consumption of Time that Might Have Occurred if the Court Allowed Appellant's Proposed Cross-Examination of James Was Minimal, if Non-Existent</u>.

<u>There Was No § 352 Potential Undue Prejudice to the People</u>. Based upon what Appellant sought to accomplish on cross-examination of James as discussed above, Appellant asserts there was *no* "undue prejudice" from which the People would have suffered if Mr. Orr had been allowed to conduct the brief and *limited* proposed cross-examination. Certainly there was no "*substantial* danger of undue

prejudice" by allowing the limited cross-examination of James, as section 352 requires.

With the proposed cross-examination limited, as Mr. Orr proposed, there was also no "*substantial* danger . . . of confusing the issues of misleading the jury." Finally, the limited scope of the proposed cross-examination would have taken perhaps five minutes at most, an amount of time that, in the context of this case, would not be deemed an "undue consumption of time."

The trial court created a "fictionalized version of the facts" that caused confusion and unfairly benefited the prosecution greatly.

The trial court's ruling that limited cross-examination of James undoubtedly created a considerable amount of *confusion* in the minds of the jurors that would have *benefited* the People *greatly*. In an effort to "lessen" the prejudice to Appellant when the court limited cross-examination, the court created a "fictionalized version of the facts."[211] James was told to conform his testimony to this "fictionalized version of the facts." Hence, James testified that during his interview with the police on September 21, 1994 he was "in custody." [RT, 18:4049, 4054]

Detective McCartin was not aware of this court created "fictionalized version of the facts", and he was not told to conform his testimony to it. Hence, McCartin testified later in the trial that he drove to James house on September 21, 1994, picked him up and drove him to the police department for that interview.

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[211] In fairness to the trial judge, he may not have realized that James was interviewed on at least three different occasions.[See RT, 18:4158] However, the prosecutor was aware of all interviews, but said nothing to clarify it. The version may have been an "unwitting fiction" on the trial court's part, but it was nevertheless a "fiction" to have James testify he was "in custody" in September 21, 1994. In reality, James was in-custody when he initially asked to speak to the police on February 27, 1992, he was in-custody again on July 11, 1994 when he spoke to McCartin and Tapia about the Mosley murder, then for the first time the alleged admission by Appellant in the Loggins/Beroit murders, then on September 21, 1994 when he spoke to the police again, he was not out-of-custody when he to McCartin and Tapia spoke about both murder cases.

McCartin testified he did *not* arrest James that day *nor* was James in custody that day! [RT, 18:4157-4158][212] Based on McCartin's testimony, James told Detective McCartin about Appellant's admission when he was *not* in-custody; hence, James would have had no reason to ask for McCartin's help in consideration for the information he provided. Any juror who considered this would have concluded that James was probably "truthful" because he had "no reason" to tell the police about Appellant's admission, except that of being a good citizen.

d. Applying the § 352 test to the facts of this case.

Appellant asserts that § 352's "presumption of admissibility" of relevant evidence is significant in the instant case because the competing interests the trial court considered in its ruling were those same competing interests expressly listed in § 352.

Any undue prejudice, confusion, or consumption of time considerations were minimal in the instant case. The probative value of the limited proposed cross-examination was certainly not "*substantially* outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create *substantial* danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Shoemaker* (___) 135 Cal.App.3d 442, 448. Emphasis added.)

Appellant asserts the trial court simply wanted to avoid any mention of Jelks' pending murder case or any detail associated with it, *regardless of any*

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[212] Detective McCartin's initial interview with James was on July 11, 1994 when James was in custody on a probation violation hold. James told McCartin about Appellant's alleged admission at that time. On September 21, 1994 McCartin wanted to re-interview James and show him some photographs to see if James could identify Fat Rat. However, James probation revocation had been resolved by that date, and James was no longer in-custody. The trial court created a "fictional version of the facts" in an attempt to "lessen" the prejudice of his ruling wherein he restricted Appellant's cross-examination of James, but Detective McCartin was not "privy" to this "fictional version of the facts"; hence, he testified truthfully and in the process generated confusion in the jurors' minds.

reason Appellant may have had. The trial court's comment to counsel during the discussion of the issue illustrates this:

> DDA: The subject matter of that interview [on February 27, 1992], though, was the Mosley murder, the drive-by, which is why we [the DDA and James] didn't go into it [on direct-examination]. And I have admonished the witness [James] that he can't talk about it, but he was a witness on that case [the Mosley murder].
> CRT: I think we ought to stay away from that for that reason. We are liable to get right back into a situation –
> LAS: That's why I wanted to bring it up.
> ORR: I wasn't going to go into that [i.e., the details of the Mosley murder]. [RT, 18:4051-4052 (Emphasis added)]

As soon as the trial court heard the prosecutor say the interview dealt with Jelks' and Johnson's pending murder case, it *immediately* stated it wanted to "stay away from that for that reason." The court was simply not interested in *any* reason Appellant may have had for inquiring about that February 27, 1992 interview, even if the only defense questions pertained to whether the interview occurred, or whether James was in-custody at the time, or whether the police during that interview had asked James about something that was unrelated to the Mosley murder case.

Appellant asserts that when the trial court sustained the prosecutor's objection *without any idea* as to why Appellant sought to question James about the February 27, 1992 interview, the trial court demonstrated that its ruling was not based on any rational or legal basis. Rather, the ruling was simply "arbitrary, capricious, or patently absurd", and because James' answers could reasonably have resulted in the jury disregarding his testimony because it was untrustworthy, the ruling caused a "manifest miscarriage of justice." *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.

e. The Trial Court's Error Was Prejudicial Beyond a Reasonable Doubt.

In applying *Chapman*'s "harmless beyond a reasonable doubt" standard for determining on appeal if the trial court's error was prejudicial to the accused, this Court cited the language in *Neder v. United States* (1999) 527 U.S. 1, 7-10:

> [A]n appellate court may find an error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 7-10.)" *People v. Bolden* (2002) 29 Cal.4th 515, 560.

In the instant case, an appellate court could avoid resolving this issue by conceding for purposes of argument that (a) the trial court's ruling was an abuse of discretion, (b) the error denied Appellant his due process right to confront and cross-examine James, then (c) conclude the error was "harmless beyond a reasonable doubt" because "after conducting a thorough review of the recortd", the testimony of Connor and Jelks was such that "the jury verdict would have been the same absent the error".

Appellant asserts, however, that Connor's testimony was so fraught with material inconsistencies and significant contradictions that Appellant's jury would *never* have been convinced beyond a reasonable doubt that Appellant was the shooter based solely on Connor's testimony. His testimony, including his identification of Appellant as the shooter, should not be considered in determining whether the error involving James was harmless or prejudicial. Appellant respectfully refers this Court to his detailed discussion of the testimony of Connor located in Arguments I and III of Appellant's Opening Brief.

Appellant also asserts he was denied his constitutional right to confront and cross-examine Freddie Jelks and demonstrate his testimony was involuntary, false, and the product of on-going police coercion. Had Appellant been allowed to establish this, the jury would have discounted his testimony, if not outright rejected it, because of its lack of trustworthiness. His testimony, including his identification of Appellant as the shooter, should not be considered in determining whether the error involving James was harmless or prejudicial. Appellant

respectfully refers this Court to his detailed discussion regarding the testimony of Jelks located in Arguments IV, VI, VII, VIII and IX of Appellant's Opening Brief.

f. Factors to Consider in Evaluating Whether The Trial Court's Error was Prejudicial Beyond a Reasonable Doubt.

As indicated previously, the Supreme Court in *Delaware v. Van Arsdall* (1986) 475 U.S. 673 provided guidelines for evaluating when a trial court's error in limiting a defendant's cross-examination of a prosecution witness was "harmless beyond a reasonable doubt." Initially, the reviewing court is to assume "that the damaging potential of the cross-examination [was] fully realized." *Id.*, at p. 684.

Thereafter, the "correct inquiry" focuses on various factors that are unique to each particular case. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross- examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*, at p. 684. See also *People v. Rodriguez* (1986) 42 Cal.3d 730, 750-751; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 349-350.

"The importance of [James'] testimony in the prosecution's case":

Marcellus James testified that Appellant confessed to shooting and killing victims Loggins and Beroit. He was one of only three witnesses who linked Appellant to the killings, and the credibility of the other two witnesses was undermined to the point where the jury may have completely ignored their testimony. If the jury believed James' testimony, however, it would have been legally and factually sufficient to convict Appellant. His testimony was *very*

important to the prosecution's case, particularly since the credibility of both Connor and Jelks was undermined so extensively.[213]

"Whether [James'] testimony was cumulative of other evidence that identified Appellant as the shooter":

James' testimony that Appellant admitted being the shooter of Loggins and Beroit was cumulative *only* if this Court were to find that the testimony of Connor and/or Jelks that identified Appellant as the shooter was admissible and believable beyond a reasonable doubt. Otherwise, James' testimony should not be deemed cumulative of other evidence that identified Appellant as the shooter.

"The presence or absence of evidence corroborating or contradicting the testimony of [James] on material points":

The *only* "material" aspect of James' testimony was Appellant allegedly admitting to him that he (Appellant) was the shooter. The *only* corroboration of this material point was the testimony of Connor and Jelks that Appellant was the shooter. Their credibility was undermined so substantially that Appellant contends their testimony should be given little weight by this Court as it evaluates whether James' testimony was "corroborated" by other sources. Additionally, there was no independent corroboration that James and Appellant ever spoke to one another about anything, much less about this case.

Furthermore, James contradicted himself on this material point. He admitted on cross-examination several times that he had "heard from others" that Fat Rat was the shooter; that he had not heard it from Fat Rat himself. [RT, 18:4069-4072]

"The extent of cross-examination [of James] otherwise permitted":

On cross-examination, the defense was able to impeach James with several of his prior inconsistent statements to the police in which he said he had been told

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[213] The Court is referred to Appellant's Arguments I and III for a discussion of Connor's credibility. The Court is referred to Appellant's Argument VI, VI, VII ,VIII and IX for a discussion of Jelks' credibility.

by others that Fat Rat was the shooter, rather than Fat Rat himself telling James he was the shooter. [RT, 18:4069-4072]

However, on re-direct examination, the prosecutor rehabilitated James by asking a series of leading questions that allowed him to testify that he "held back" initially when he spoke with the police because he was fearful of getting involved. [RT, 18:4080-4081]

Furthermore, in her closing argument the prosecutor reminded the jury of James' explanation for making the prior inconsistent statements:

> He [James] also told you that he held back initially because, like some of these other people, he figured if he held back and didn't get involved, he wouldn't have to testify, which would eliminate any problems that he might have. Similar to the people that said going back into the neighborhood saying, "Hey, I don't know anything. Leave me alone. I'm not a snitch." So Mr. James says in essence, Yeah, I held back because I figured they would back off and I wouldn't get involved. If I held back on the information, well then I wouldn't get involved. But they [detectives] pressured him. There is no question about that. But again, pressure doesn't mean that people necessarily lie. [RT, 24:5136-5137 (Emphasis added)]

The prosecutor provided the jury with a reasonable explanation as to why James made those prior inconsistent statements to the police in 1994. Hence, Appellant's proposed additional impeachment evidence, which the trial court disallowed, should *not* be deemed cumulative to the impeachment evidence that was admitted. In effect, James' credibility at trial emerged practically unscathed.

Further, additional cross-examination of James regarding the circumstances of his interview with the police in 1994 was necessarily limited, benign, "watered-down" and hardly effective. (See, e.g., RT, 18:4054-4055) James and practically every non-law-enforcement-witness called by the prosecution testified they were too afraid to talk to the police about crimes committed by the 89 Family Bloods gang, at least when they were out-of-custody. Hence, since the trial court's ruling prohibited Appellant from establishing that James had previously chosen, while in-custody, to "snitch" on members of the 89 Family gang in spite of his fear of retaliation, James (and the prosecution) had a

"ready-made" reason for why he never spoke to the police about Appellant's admission until 1994.

"The overall strength of the prosecution's case":

The prosecution presented no physical evidence that connected Appellant to the murders of Loggins and Beroit, such as fingerprints or DNA analysis testimony. The prosecution presented no other physical evidence that indirectly connected Appellant to the crime scene, such as clothing or weapons found in his possession that matched the witnesses' descriptions of the clothing worn or weapon used by the killer. The prosecution presented no witnesses who did not know Fat Rat previously, yet who independently identified his photograph as being the shooter. The prosecution presented no tape recorded admission or confession by Appellant that linked him to the murders.

What the prosecution did present that linked Appellant to the murders was:

1. The "eye witness" testimony of an individual (Connor) ...
   a) who waited three years before contacting the police (and coincidentally contacted the police at the same time that rewards were being offered by the police for information),
   b) whose own employee time card established in contemporaneous fashion that he was *not* present when the murders were committed,
   c) who clearly provided false information to the police about the murders, and
   d) whose own statement and subsequent testimony contained numerous internal inconsistencies and contradictions.

2. The testimony of a fellow gang member (Jelks) ...
   a) who, when he finally did talk about Appellant and the Loggins/Beroit murders, was being unambiguously threatened with a murder conviction and subsequent life sentence in prison if he did not tell the police what they wanted to hear,
   b) who knowingly and willingly admitted to false information about his own murder case because he knew that was what the police wanted to hear, and
   c) who needed to convince the prosecutor that he was a necessary witness and that his testimony was important or he would be prosecuted for murder and not be provided with protection against those gang members he had "snitched off."

3. The testimony of an in-custody informant (James) who claimed Appellant privately confessed to him under circumstances that made it impossible to independently corroborate, verify or validate, and who was impeached with numerous prior inconsistent statements regarding the source of his information.

Appellant contends "the overall strength of the prosecution's case" was weak, at best.

g. <u>The prosecutor's closing argument exacerbated the prejudicial nature of the trial court's error.</u>

The prosecutor took full advantage of the trial court's ruling during closing argument to present James in a favorable light to the jury. She quoted a portion of James' testimony to explain why the jury should find his testimony credible; that in spite of his fear of retaliation, James believed "it was one of those things he just had to do."

> DDA: You saw his demeanor. He had fear all over his face. He was very hesitant but said it was one of those things he just had to do. [RT, 24:5136]

Appellant could not rebut the prosecutor's argument because the trial court had prohibited the defense from establishing in rather clear fashion[214] that James had a selfish reason to talk to the police and subsequently testify, and it was *not* "one of those things he just had to do."

The prosecutor took further advantage of the trial court's ruling during closing argument when she argued James's three year delay in reporting Appellant's admission was "understandable." The reason why he waited to

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[214] The "clear fashion" in which James' selfish reason would have been demonstrated, absent the trial court's ruling, was for Appellant to prove that only when James found himself in-custody and needed police assistance would he provide information to the police even though he "feared" retaliation from the gang.

contact the police with this information was because James feared for his safety and for the safety of his family if he came forward with this type of information:

> DDA: There was a passage of time of about two years – excuse me, about three years between the shooting and that statement. Is that understandable given the circumstances? Absolutely. What did Mr. James get out of this? What kind of benefit did he get out of it? Absolutely nothing. Absolutely nothing.[215] You can believe what Marcellus James said because it is corroborated by the circumstances and by the facts. And you can look at Mr. James' behavior after this incident to see what he did. He moved out of the neighborhood. And once his mother was out fo the neighborhood, he hasn't gone back. What does that tell you about who he is afraid of Is he afraid of LAPD or afraid of the neighborhood.[216] [RT, 24:5137-5138 (Emphasis added)]

The jury did *not* get to see James in his true light; that in spite of his professed fear of retaliation, he was willing to "snitch" on those he professed to fear, that in 1992 he did not wait three years to talk to the police about the Mosley murder committed by 89 Family Bloods gang members because he was afraid, that he did hope to "receive a benefit" in exchange for talking to the police, that James' actions spoke louder than his testimony. The defense could do nothing to refute the prosecutor's argument, however, because the evidence that would have refuted it was disallowed by the court's ruling.

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[215] There was *no* evidence that James received *nothing* in exchange for the information he provided to the police on February 27, 1992 concerning the Mosley murder. Appellant was not provided discovery for that prosecution, and the court prohibited Appellant from questioning of James to determine if he received anything from law enforcement in consideration for the information he provided that day.

[216] Appellant's argument in response to this prosecutorial argument would have been devastating but for the trial court's ruling prohibiting introduction of the evidence: James' "behavior" less than six months "after this incident" was to become a "snitch" and provide information to the police about another 89 Family Gang murder, in spite of his fear of retaliation. Then he waited 2 ½ more years until he found himself in jail again and decided to provide additional information.

Finally, during the prosecutor's rebuttal argument, she again took advantage of the court's ruling that disallowed Appellant from establishing a strong argument that James had a powerful motive to lie:

> DDA: Marcellus James, he moved away. He was pressured by – in some ways there's evidence that he was pressured in some ways by contacts with his mother. He moved out of the neighborhood. He too expressed concerns, not because of the police, but because he didn't really want to have anything to do with this. And he admitted that he hedged. Does that make sense? You think Marcellus James having grown up in that environment is going to come through and just say, Hey, let me tell you, here we go, blah, blah, blah, blah, blah, blah, blah? Didn't happen. Didn't happen until there was some hard talking and some hard choices. And he told the truth, and he came in here and he still told the truth, and you saw his reluctance written all over his face. What benefit did he get? Absolutely none. [RT, 25:5223-4. Emphasis added.]

James was apparently not so concerned about gang retaliation to keep him from talking to the police in February 1992 about the 89 Family Bloods gang members' involvement in the Mosley murder. At that time, he apparently was willing "to have anything to do with this [informing on gang members]." The "hard choices" James had to make before he spoke to the police were not altruistic as the prosecutor led the jury to believe. It was not clear "what benefit did he get "when he spoke with the police in 1994. If he received a benefit in 1992, he would have been expected a similar benefit in 1994. However, because of the trial court's ruling, Appellant in his closing argument could not counter any of these arguments made by the prosecutor.

4. Conclusion.

Marcellus James was an important witness for the prosecution. He was, in effect, one of the legs of the "three-legged stool" that supported the prosecution's case. Because the defense vigorously disputed his credibility as a witness, evidence that undermined his credibility was material. The above proposed evidence would have been highly probative of his lack of credibility. The

prohibited cross-examination would have produced "a significantly different impression of [James'] credibility." *Van Arsdall*, *supra*, 475 U.S. at p. 680. The prosecution presented James as a fearful, yet altruistic, witness who finally after three years made the "hard choice" of risking gang retaliation because he wanted to tell the truth about a gang crime. The prohibited defense evidence would have shown James to be an opportunistic witness who, when he needed police assistance in his own criminal cases, was willing to provide information concerning gang crime in spite of his fear of retaliation. In other words, his motive to ingratiate himself with the police in exchange for their assistance was greater than any fear of gang retaliation. Further, if James denied any knowledge of the Loggins/Beroit murders when asked about it by the detectives in February 1992, this would have created additional doubt as to whether this conversation with Appellant ever occurred. The prohibited cross-examination testimony would certainly have produced "a significantly different impression of [James'] credibility" in the minds of the jurors.

Appellant asserts that James responses to this limited, but prohibited, cross-examination would have impeached Marcellus James sufficiently that this Court would *not* be able to say it is convinced "beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 7-10.)" *People v. Bolden* (2002) 29 Cal.4th 515, 560.

Accordingly, Appellant respectfully requests this Court reverse his convictions and sentence of death on this basis.

XI.

The trial court erred and abused its discretion when it allowed the prosecution to introduce extensive, inflammatory and highly prejudicial gang evidence for the ostensible purpose of circumstantially proving the state of mind of certain witnesses. The errors were prejudicial and require Appellant's convictions and judgment of death be reversed.

A. Introduction:

During the discussions the trial court had with counsel regarding the admissibility of gang evidence, the trial court ruled that gang evidence would be admissible as circumstantial evidence of a witness' fear of gang retaliation; that is, certain gang evidence would be relevant and admissible because, inferentially, it would provide a possible explanation as to a witness did not contact the police earlier or to explain why statements the witness made to the police were inconsistent with his trial testimony. [RT, 15:3335]

B. The Applicable Law.

A. Admissibility of Gang Evidence to Prove the State of Mind of Witnesses.

Appellant acknowledges that gang evidence has been deemed relevant and admissible, subject to Evid. Code, § 352, when offered to support or attack the credibility of witnesses. (*People v. Ayala* (2000) 23 Cal.4th 225; *People v. Malone* (1988) 47 Cal.3d 1, 30 [It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.]; *People v. Warren* (1988) 45 Cal.3d 471, 481 [Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible.]; *People v. Avalos* (1984) 37 Cal.3d 216 [Witness' fear, regardless of cause, is relevant to assess her credibility.]) *People v. Green* (1980) 27 Cal.3d 1, 19-20 [testimony witness was afraid to go to jail because defendant had friends there relevant to witness's credibility.]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588; Evid. Code, § 780, generally.)

This Court, however, has also consistently expressed its concern that gang evidence a) may have a "highly inflammatory impact" on a jury, and b) may create the risk the jury will infer guilt and criminal disposition merely from an accused's gang membership. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Cox* (1991) 53 Cal.3d 618, 660.) California courts have repeatedly held that gang

evidence uniquely tends to evoke an emotional bias against the defendant as an individual, may often have very little relevance to the issue of guilt of the underlying charge, and can deprive the accused of a fair trial. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.)

The admission of gang evidence, particularly when the defendant claims membership in the gang, 1) creates a risk that jurors will improperly infer guilt from the defendant's criminal disposition or propensity [Evid. Code, § 1101(a).], and 2) may have a highly inflammatory and prejudicial impact on the defendant. Hence, before gang evidence is admitted, the trial court must carefully evaluate its probative value versus its potential undue prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Trial courts often give limiting instructions to the jury in an attempt to mitigate the potential of undue prejudice when gang evidence is introduced. The court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S. 756, 764, 97 L.Ed.2d 618; 107 S.Ct. 3102.) This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208, 95 L.Ed.2d 176, 107 S.Ct. 1702.)

As noted in *Old Chief v. United States* (1997) 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574, " a]lthough ... propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance. (Internal quotation marks omitted.)" Hence, in gang cases, there exists considerable doubt as to the actual effectiveness of limiting instructions.

On appeal, the reviewing court applies the "abuse of discretion" standard to determine if the trial court erred when it admitted gang evidence over § 352 objections. *People v. Williams* (1997) 16 Cal.4th 153, 196). If the reviewing court determines the trial court abused its discretion and erred when it admitted the gang evidence, the trial court's erroneous admission of gang evidence does not require reversal unless it is reasonably probable the defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

However, this Court has also stated that if the trial court's error "lightens" the prosecution's burden of proof to a level less than the beyond-a-reasonable-doubt standard, the *Chapman* "harmless error" analysis applies. (*People v. Garceau* (1993) 6 Cal.4th 140, 186.[217]

C. <u>Discussion:</u>

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[217] Cases that have held that the erroneous admission of evidence "lightened" the prosecution's burden of proof and thereby violated the defendant's due process rights include *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246] [admission of an involuntary confession]; *Satterwhite v. Texas* (1988) 486 U.S. 249, [108 S.Ct. 1792, 100 L.Ed.2d 284] [admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause]; *Crane v. Kentucky* (1986) 476 U.S. 683, 691, 106 S.Ct. 2142, 2147, 90 L.Ed.2d 636 [erroneous exclusion of defendant's testimony regarding the circumstances of his confession]; *Delaware v. Van Arsdall,* (1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 [restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause]; *Moore v. Illinois* (1977) 434 U.S. 220, 232, 98 S.Ct. 458, 466, 54 L.Ed.2d 424 [admission of identification evidence in violation of the Sixth Amendment Counsel Clause]; *Brown v. United States* (1973) 411 U.S. 223, 231-232, 93 S.Ct. 1565, 1570-1571, 36 L.Ed.2d 208 (1973) (admission of the out-of-court statement of a non-testifying codefendant in violation of the Sixth Amendment Counsel Clause]; *Milton v. Wainwright* (1972) 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 [confession obtained in violation of *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 ; *Chambers v. Maroney* (1970) 399 U.S. 42, 52-53, 90 S.Ct. 1975, 1981-1982, 26 L.Ed.2d 419 [admission of evidence obtained in violation of the Fourth Amendment].

1. The inadmissibility of character evidence to prove that individuals, including criminal defendants, have a *propensity* to retaliate against witnesses.

California law is clear and unambiguous. The prosecution is not allowed to introduce evidence to prove the criminal defendant has a specific character trait for the purpose of establishing the defendant acted in conformity with the character trail at the time the crime was committed. That is, the prosecution cannot introduce evidence of a criminal defendant's character to prove he has a propensity to act in a manner consistent with that character trait. (Evid. Code, § 1101(a)) Even in those cases in which the criminal defendant has initially introduced evidence of his good character trait for the purpose of establishing he acted in conformity with that character trait, the prosecution in response is *limited* to using reputation or opinion evidence to prove the defendant possesses the opposite character trait. The prosecution is *not* allowed to introduce specific instances of conduct to establish the criminal defendant's character trait. (See Evid. Code, § 1102.[218])

This general rule regarding character evidence applies to organizations as well. *Absent an adequate foundation* (See Evid. Code, §§ 402, 405), evidence of reputation, opinion or specific instances of conduct is *not* admissible to prove an organization (i.e., the 89 Family Bloods gang) acted in conformity with its habit or custom. (Evid. Code, § 1105)

Specifically, reputation, opinion or specific acts evidence that 89 Family Bloods gang members had previously committed acts of violence in retaliation against an individual who cooperated with the police or who testified was *not* admissible in Appellant's trial to prove that members of that gang would in the future commit acts of violence in retaliation against those who cooperated with law enforcement or who testified against fellow gang members. Because of this

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[218] There are certain exceptions to this rule; however, none are applicable in this case. See, for examples, Evid. Code, §§ 1103(a)(2), 1103(b), 1103(c)(2) and (3).

general rule that prohibits using character evidence to prove conduct, California courts have held that although gang evidence was relevant if offered to circumstantially prove a witness may have been fearful of retaliation by gang members, this evidence was subject to restrictions placed on the admission of relevant evidence by the provisions of § 352. [*People v. Ayala* (2000) 23 Cal.4th 225; *People v. Malone* (1988) 47 Cal.3d 1, 30; *People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Green* (1980) 27 Cal.3d 1, 19-20; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588].

2. The Impact of Careless Questioning by the Prosecution and the Trial Court's Refusal to Sustain Proper Defense Objections.

Furthermore, when the prosecution introduced evidence that a witness was fearful of gang retaliation, it was imperative that:

a) The prosecutor's questions were clearly phrased in such a manner that the jury understood the gang evidence was being introduced to prove the subjective state of mind of the witness; and

b) The trial court instructed the jury that the gang evidence was to be considered for the sole purpose of determining the witness' state of mind, regardless of whether the evidence consisted of reputation, opinion or specific acts.

Further, if the prosecution's question is improperly phrased such that it refers to something other than the witness' state of mind, any specific and timely defense objection should have been sustained. In this manner, the prosecution would be required to phrase the question in a manner that made it clear that it referred to the witness' state of mind.

Without all of the above requisites, the danger of confusing the issues, misleading the jury, or unduly prejudicing Appellant is, Appellant asserts, too great. (Evid. Code, § 352)

3. Examples of Offending Testimony.

The following examples illustrate a) the unnecessary amount of gang evidence introduced to prove witnesses were fearful, b) the indignant and emotionally provocative nature of the gang evidence introduced for that purpose, and c) the confusing, cavalier and careless manner in which the prosecution introduced the gang evidence. Just from these listed examples, the prosecutor asked about "the-gang's-propensity-for-violence-and-retaliation/the witness' fear-of-retaliation" on at least nine (9) separate occasions with witness Connor; in relation to James the subject was broached by the prosecutor on at least ten (10) separate occasions[219]; and in relation to Jelks this subject was raised an astounding seventeen (17) separate times!

a. <u>Witness Carl Connor</u>:

Carl Connor did not talk to the police about the murders he claimed to have witnessed until almost three years had passed. He did contact the police at about the same time $25,000 rewards were being offered by the city to individuals who had information that would assist in the successful prosecution of various murders that had been committed in that city. The inference the defense wanted the jury to draw was obvious: Connor made everything up in an attempt to obtain a $25,000 reward. He perjured himself in the process.

The prosecution sought to enhance Connor's credibility even before he testified to a single fact pertaining to the murders. Only moments after he was sworn as a witness, the prosecutor asked questions in an attempt to establish Connor's state of mind of fear regarding the consequences of his testifying; that he was afraid of testifying because of his fear of retaliation by members of the 89 Family Bloods gang.

> DDA: How do you feel about being here today? ... Did the police tell you that you had to come to court? ... Did they tell you you had to testify? ... Why is it that you don't want to be here? ...

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[219] This occurred even though James' entire direct and re-direct examination consists of only eighteen (18) Reporter's Transcript pages [RT, 18:4040-4047, 4079-4088]

> Has anybody told you other than the police whether or not you should come to court? ... Have any of your relatives told you not to come to court? ... How come you don't want to be here? ... Did anybody threaten you to get you to come here today? [RT, 15:3334-6 (Emphasis added)]

Unable to get Connor to admit he feared violent retaliation by 89 Family Blood gang members because of his testimony, the prosecutor shifted to a different series of questions. Later, the prosecutor again attempted to get Connor to admit he was afraid of retaliation by 89 Family Bloods gang members because of his testimony, and again the prosecutor encountered similar responses by Connor. [RT, 15:3361-3]

Example #1:

Connor was then asked questions about "snitches", but this time the questions posed by the prosecutor did *not* refer to Connor's *state of mind*. Rather, the questions pertained to the dangerous nature of the 89 Family Bloods gang members, and what they do to "snitches."

> DDA: Are you familiar with the word "snitch"?
> CC: Yes.
> DDA: By coming into court today, are you making yourself a snitch?
> CC: Not really. I am telling the truth. Yeah. You can say that.
> DDA: How are snitches viewed by people in your neighborhood?
> CC: Outcast.
> DDA: Why?
> CC: Because they tell on someone.
> . . .
> DDA: What happens to snitches in your neighborhood?
> CC: You can get killed. Snitches get killed. [RT, 15:3361-2 (Emphasis added)]

The prosecutor's questions did *not* refer to Connor's state of mind, particularly when he was asked, "What happens to snitches in your neighborhood?" Connor's answer to that specific question also did *not* refer to his

state of mind. Rather, he testified that the 89 Family Bloods gang members kill snitches.[220]

Example #2:

Just moments later, the prosecutor asked Connor if he knew any members of this 89 Family Bloods gang that "kill snitches." When Connor said he did, the prosecutor intentionally singled out Appellant by name and asked Connor if Appellant was a member of 89 Family Bloods gang. Connor's affirmative answer unambiguously and indelibly linked Appellant to this terrifying gang whose members "kill snitches."

DDA: Are you familiar with a gang called 89 Family?
CON: Yeah.
DDA: Do you know any of its members?
CON: Do I know any of the members? Yeah. I knew of some of the members.
DDA: Was Mr. Allen a member of 89?
CON: I seen him – Yeah. He was a member. [RT, 15:3363]

Stated plainly, Connor testified that Appellant was one of the 89 Family Bloods gang members who "kill snitches" that inform on any 89 Family Bloods gang members. Since Connor was testifying against two 89 Family Bloods gang members, the natural inference to be drawn by the jury was that Appellant would murder Connor, if given the opportunity. This evidence was now before the jury.

Direct examination continued, and for a third time, the prosecutor attempted, but was unable, to get Connor to admit he was fearful of testifying because of the threat of retaliation against him. [RT, 15:3381-2]

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[220] Respondent may argue this testimony was relevant to inferentially establish Connor's fearful state of mind. However, the questions themselves do *not* refer to his state of mind, nor was a limiting instruction given to that effect. The jury was free to consider this evidence for any purpose they deemed relevant, and the natural and reasonable inference was that members of the 89 Family Bloods gang have a propensity to kill "snitches." The prosecutor could have remedied this issue by simply posing a question that asked for relevant and admissible evidence: "*What is your understanding or belief* as to what happens to snitches in your neighborhood?"

Example #3:

The prosecutor then asked a series of questions that made it very clear in the jurors' minds that the 89 Family Bloods gang and its gang members really were extremely dangerous! She brought out, over defense objection, that *another "snitch" had in fact been murdered by 89 Family Bloods gang members in retaliation for testifying against one of their "homeboys."*

DDA: Do you know anybody who has been called a snitch before?
ORR: Excuse me. That is irrelevant.
CRT: It is relevant. Overruled. Go ahead.
CC: No. No. I don't know.
DDA: Do you know one [i.e., a "snitch"] by the name of Nece Jones?
ORR: That is irrelevant.
CRT: Overruled.
CC: Yes.
DDA: What happened to Nece?
CC: She got killed.
DDA: Why did she get killed?
ORR: That is irrelevant.
CRT: Overruled. Go ahead.
CC: She testified against someone.
DDA: Did she testify against somebody who was part of the 89 Family?
ORR: That is irrelevant.
CRT: Overruled. Ladies and gentlemen, the reason the court is allowing this in over the objection of relevance is it is not so the jury will have any particular knowledge of what happened to Nece, or anybody else, but how it may bear upon this witness' testimony and why he has made certain statements, his demeanor or reluctance. Does everybody understand the limited purpose that you are allowed to consider this evidence? [RT, 15:3382-4 (Emphasis added)]

According to the court's limiting instruction to the jury, the relevance of each of these questions was to establish Carl Connor's subjective state of mind[221]; that is, he was fearful of testifying because a person he personally knew, Nece Jones, was recently murdered because she testified against a member of the 89 Family Bloods gang. In Connor's mind, she became a "snitch" when she testified against one of Appellant's "homeboys" and because of her testimony, she was killed.

However, regardless of the court's limiting instruction to the jury, these same jurors heard that a woman named Nece Jones *had testified* against someone from the 89 Family Bloods gang and that *because* of this, she had been *murdered.* Appellant asserts this is the type of information that a normal, reasonable human being cannot simply disregard and forget having heard it. To add to the brewing confusion in the juror's minds, the prosecutor's questions themselves did *not* refer to Connor's state of mind, *nor* did the wording of Connor's answers. Jurors had heard the phrasing of the questions and answers, yet the trial judge had thereafter

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[221] The court decided why the prosecution was asking these questions without inquiring of the prosecutor why she was asking these questions. Further, the trial court made this decision even though the prosecutor's questions themselves did *not* indicate they were directed to Connor's state of mind. Each of Mr. Orr's objections was timely, specific and correct. The trial court erred when it did not sustain each objection, then allow the prosecution to ask a *properly phrased question ... if* that was why the prosecutor was asking the question! Appellant respectfully asserts that if the law requires, as a general rule, that the defendant make a timely and specific objection to inadmissible testimony or the issue is deemed waived on appeal (Evid. Code § 353), it goes without saying that the prosecution should *also* be required to *properly phrase* his/her questions so that they do not ask for objectionable and inadmissible evidence. By overruling the objections, and providing a limiting instruction that was inconsistent with the express wording of the questions and subsequent answers, the trial court increased the potential confusion for the jury as to how to evaluate the testimony. In gang cases, where the danger of undue prejudice is inherently high, the need to minimize confusion and ensure the jury properly understands the scope of the witness' answers is even greater than normal.

instructed them to *not* consider the testimony for the very purpose that had actually been expressed in those questions and answers!

As stated previously, Appellant acknowledges the rule that jurors are assumed to follow the law. (*Greer v. Miller* (1987) 483 U.S. 756, 764.) However, the Supreme Court has explained that limiting instructions are in actuality based on judicial "necessity", and not that the jurors will, in fact, follow the court's limiting instruction. (*Richardson v. Marsh* (1987) 481 U.S. 200, 208; *Old Chief v. United States* (1997) 519 U.S. 172, 181.) The law assumes the jurors in this case did their conscious best to follow the court's limiting instruction. However, in reality, each juror had been given another subconscious "reason to hate." To each juror, Appellant and his "homeboys" would now try to kill Connor, just as they had killed Nece Jones. This "hatred" for the 89 Family Bloods gang members was undoubtedly simmering below the surface, but this evidence inevitably turned up the heat.

Appellant respectfully asserts that the trial court's error in not sustaining these defense objections should *not* be considered "ticky tack" or insignificant, and therefore harmless. As explained in many of this Court's decisions, gang evidence is *inherently prejudicial*, and care must be taken to ensure this inherent and very real prejudice is not presented to the jury in a manner that allows the jury to consider it for an inappropriate reason. It is difficult enough for a jury to limit its consideration of gang evidence to a particular reason when the question and answer clearly refer to that particular reason. It becomes impossibly confusing to the jury when they are told to consider evidence for a particular reason, yet the very language of the question and answer refer to a *different* reason. Because of this "inherent" danger of prejudice and confusion, Appellant respectfully asserts these errors by the trial court, when considered in conjunction with other erroneous gang-related evidentiary rulings by the trial court, were substantially prejudicial to Appellant.

But the problems of unfair prejudice and hopeless confusion in the minds of the jurors were just beginning!

Example #4:

Literally just moments later, the prosecutor presented to the jury evidence that Connor had also testified in the Nece Jones murder case!

DDA: Now, Mr. Connor, have you testified in other cases?
CC: One case.
DDA: What case was that?
CC: Nece's case.
ORR: That is irrelevant, your honor.
CRT: That is relevant. [RT, 15:3385-6; 3389]

Just minutes before, the jury had been instructed by the court to *not* consider the previous evidence as proof that Nece Jones had in fact been murdered, much less that her assailant had in fact been prosecuted! Further, the jury had just been instructed they were *not* to conclude she had in fact been murdered because she had actually testified against a member of the 89 Family Bloods gang. They had been specifically instructed by the trial court to consider the reference to Nece Jones *only* as to why Connor may have been *afraid* to cooperate with the police; that is, to explain why he waited three years before talking to the police and to explain why there were inconsistencies between his testimony and his previous statements to the police.

The prosecutor was, over defense objection, allowed to establish that Connor not only knew about Nece Jones' murder, but that he had also testified against the 89 Family Bloods gang member who killed her. And the trial court gave no further limiting instruction to the jury. The jury was free to consider this evidence for any purpose they deemed relevant.

Appellant contends the obvious and practically overwhelming inference that any normal juror would have drawn from these two questions in combination with the previous questions was that Connor's life was also in danger! Nece Jones had been murdered for testifying against one of Appellant's homeboys. Connor

had also testified against one of Appellant's homeboys. Worse yet, Connor was again testifying against two "leaders" of the 89 Family Bloods gang. The natural, reasonable and inescapable inference each juror would have drawn was that Connor was in even greater danger of being murdered by Appellant's fellow gang members because he was testifying against Appellant.

Further, the jury was now free to infer that Appellant's desire, as an 89 Family Bloods gang member, to kill "snitches" like Connor existed before this trial and had only intensified as Appellant listened to Connor testify against him. The likelihood that this jury would convict Appellant because of his gang involvement, rather than his having committed the charged crime, was great The prosecutor had succeeded in providing the jury with another "reason to hate."

Again, part of the problem with the confusion surrounding the admission of gang evidence was the court's erroneous rulings on defense objections. In the most recent, and brief, quotation cited above, it would appear the trial court *assumed*, as it had done previously *without* asking the prosecutor, that the prosecutor was still asking questions that were directed to establishing Connor's state of mind of fear [i.e., that Connor testified in the Nece Jones case]. Therefore, the court overruled counsel's relevance objection.[222]

Mr. Orr requested he be heard out of the presence of the jury, however. Pursuant to that discussion at the bench, the prosecutor represented to the court that she was asking these questions of Connor for a *different* reason; to establish Connor had received a reward for testifying in the Nece Jones case, but that he was not expecting to receive a reward for his testimony in this case. [RT, 15:3386-8] This theory of relevance advanced by the prosecutor went to the state of mind

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[222] The defense objection should have been sustained if the court ruled under the assumption that the prosecutor was still seeking to introduce evidence in support of Connor's state of mind. The questions by themselves did not explicitly refer to Connor's state of mind. Had the court inquired of the prosecutor before ruling on the objection, the prosecutor would have expressed why she was offering this testimony and the court could then have ruled appropriately.

of Connor for credibility purposes, but it had *nothing* to do with Connor's fear of retaliation because of his testimony.[223] Based on this offer of proof, however, the trial court's ruling was still erroneous.

At that point in Appellant's trial, the fact that Connor had testified in some other unrelated case was *not* relevant to any issue in Appellant's case. Nor was it relevant in Appellant's case that Connor had received a reward for testifying in some other unrelated case. And even if it were somehow relevant to Connor's credibility in the instant case, the identification of the victim in that other case was not relevant. The prosecutor could have made the *exact* point she claimed she was trying to make by simply asking Connor a) had he testified in a different case previously, b) had he received a reward for his testimony in that case, and c) was he expecting a reward because he was testifying in Appellant's case.

Therefore, once again, Appellant's specific and timely objection should have been sustained by the court.[224]

The court's erroneous rulings on these evidentiary issues were not harmless. It was becoming increasingly difficult and confusing for the jury to understand what reasons they could consider certain gang evidence, and what reason(s) they could not consider other gang evidence. One thing was certain in the minds of the jurors, however. Sitting in front of the jury were two of the leaders of that extremely violent gang . . . and they were both charged with the brutal and cold-blooded execution-style murders of two young men whose only "act in

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[223] This is an example, Appellant submits, of why it is not appropriate for the trial court to "assume" why the prosecutor was asking particular questions. The trial court should have sustained the defense objection on relevance grounds, then allow the prosecutor to make an offer of proof as to why the question sought relevant information. Here, the objection would still have been sustained, but the prosecutor could then have re-phrased the question to elicit appropriate "state of mind" evidence.

[224] It would appear that the prosecutor's *real* reason for asking these questions was to "inoculate the jury" to this potential line of impeachment before the defense had the opportunity to ask Connor questions about it.

provocation" for this senseless and savage killing was sitting quietly in a car properly parked on a street open to the public while the passenger's car was being washed!

The prosecution's questions, accompanied by the court's erroneous rulings, had intensified the jury's "reason to hate." The simmering of this hatred was rapidly coming to a full boil.

Example #5:

The gang evidence that circumstantially established Connor's state of mind was now becoming cumulative and the potential for undue prejudice substantial. However, the prosecutor asked additional questions relating to Connor's state of mind, and these questions were of such an incendiary nature that the potential undue prejudice, Appellant submits, was inescapable.

DDA: Back when you testified before the grand jury, did you testify that you were afraid?
CC: Did I testify – No. I wasn't afraid. My thing was that I didn't want anybody talking in the neighborhood. I am afraid for my family. I am not afraid about me.
DDA: Is your family still living in the general area?
CRT: I will sustain my own objection to the question. Next question.
DDA: What is it that you are afraid will happen to your family if you testify?
CC: I am testifying now. Anything could happen.
DDA: What do you think – What are you afraid of happening?
ORR: That is irrelevant.[225]
CRT: No, it is not, Mr. Orr.
DDA: What are you afraid of happening to your family?
CC: As of this, there could be a shoot out. Somebody may get shot and killed.
DDA: Who may get shot and killed?
CC: Somebody from my family.

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[225] This relevance objection by Mr. Orr was *not* well taken because the question expressly indicated it was directed to Connor's state of mind; that he was "afraid" something might happen to his family. The appropriate objection would have been based on the danger of unfair prejudice presented by the evidence based on Evidence Code section 352, as revealed moments later.

DDA: Why?
ORR: Irrelevant, your Honor. I object again.[226]
CRT: I think the point is made, People. Next question. [RT, 15:3384-5 (Emphasis added)]

The initial questions in this series were relevant, subject to the balancing of § 352. However, even here, after asking three questions that contained the word "afraid", the prosecutor asked a question that on its face referred to the propensity of the gang to be violent ... because she omitted from her question any reference to Connor's state of mind.[227]

The trial court was now aware that the prosecution had just "upped the ante" as far as the danger of unfair prejudice. Not only was Connor in danger of life-threatening retaliation, but innocent members of his family might also be

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[226] This objection by Mr. Orr was well taken. The question by the prosecutor was not limited_ to Connor's state of mind. This question was, in effect, "Why would somebody from your family get shot and killed? Connor's answer would have been "Because I testified against members of the 89 Family Bloods gang." . The inference from this testimony would have been that 89 Family Bloods gang members will violently retaliate against not just "snitches', but their innocent family members as well. By the court simply stating "I think the point is made, People. Next question.", the message sent to Mr. Orr was that his objection would have been overruled if the court didn't think the People had already made their point. Therefore, Mr. Orr was put in a difficult position regarding making this type of objection again: Should he object and be embarrassed by the court as it overrules his legally correct objection again, or does he try to maintain credibility with the jury by not objecting and not appearing to be an obstructionist?

[227] "Who may get shot and killed?" versus "Who are you afraid may get shot and killed?" Respondent may again argue this is a minor or "ticky tack" point. Not so. When the prosecutor seeks to use inherently prejudicial gang evidence, she must articulate clearly within the question what she is asking about. It is much too easy for a jury to misuse gang evidence for an inadmissible and prejudicial purpose. And even though the court may issue a limiting instruction, when the plain language of the prosecutor's questions are inconsistent with the court's instruction, it will lead inevitably to jury confusion. And in serious cases like this, the accused stands to lose.

targeted for a vicious and senseless murder by Appellant and other members of the 89 Family Bloods gang.[228]

The jury now had before it inflammatory gang evidence that, over defense objection, was relevant to prove the gang's propensity for committing horrible and savage acts of violence in retaliation of anyone who opposed them, as well as the witness' loved ones.

At the conclusion of Connor's testimony, the jury was aware of the following evidence, some of which the jury had been instructed to consider only for Connor's state of mind. The rest of the evidence could be considered by the jury for the totally *improper* purpose of Appellant's (and the gang's) propensity to retaliate[229].

1) Appellant was a member of the 89 Family Bloods gang.

2) Members of the 89 Family Bloods gang considered individuals who testify against fellow gang members "snitches".

3) Members of the 89 Family Bloods gang *kill* "snitches."

4) Nece Jones was known as a "snitch" by members of the 89 Family Bloods gang because she testified against a member of the 89 Family Bloods gang.

5) A member of the 89 Family Bloods gang *murdered* Nece Jones in retaliation for her testifying against a fellow gang member.

6) Connor testified against the killer in the Nece Jones murder case, thereby becoming a "snitch" himself in the eyes of members of the 89 Family Bloods gang.

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[228] Since no evidence was introduced to describe Connor's family, the jury could have speculated that the lives of innocent little children were in danger because of the lethal retaliatory nature of members of the 89 Family Bloods gang! Appellant did not cause this problem. "Careless" phrasing of questions by the prosecutor, and the trial court's unwillingness to sustain the defense's proper objections caused this problem. Appellant should not suffer because of these errors.

[229] Character evidence to prove "Propensity", or to prove an individual acted on a given occasion in conformity with that character trait, is inadmissible in the instant situation. See Evidence Code sections 1101(a) and 1102.

7) Connor was now testifying against two of the leaders of the 89Family Bloods gang.

8) The *actual danger* that Connor would be murdered by 89 Family Bloods gang members in retaliation for his testimony was now even greater because of his testimony in this case.

9) The intensity of the 89 Family Bloods gang members to retaliate against "snitches" was so great that they would also murder innocent family members of "snitches" in retaliation of their testimony. In other words, Connor's own family members, who were totally blameless, were also in very real jeopardy of being brutally murdered.

Of the above 9 factors that were known to the jury, *some* had been accompanied by a limiting instruction, but *others* had *not*. Appellant asserts the jury would at this point have been hopelessly confused as to the purpose[s] for which they could consider the above testimony of Connor. In any event, Appellant's propensity to kill "snitches" would have been uppermost in their minds.[230]

b. Witness Freddie Jelks:

[230] The confusion became even worse when the jury heard the tape recordings of co-defendant Johnson, while in state prison, trying to get Bill Connor to "school" his brother Carl Connor about the risks of testifying, and that Bill should give Carl Connor "a crash course" in the risks of testifying against him. The court told the jury that this evidence was admitted only against co-defendant Johnson, but the jury heard it. They heard the voice of Appellant's homeboy (co-defendant Johnson) as he sought to have someone "school" Connor. (See People's Exhibits 38 and 38A, 39 and 39A, 40 and 40A, and 41 and 41A. These exhibits are located at CT IV Supp, 2:388-396; 397-399; 400-404; and RT, 21:4785—6; respectively.) Appellant argues it was impossible for the jury to keep in mind what evidence they could and could not consider against Appellant, much less the purpose for which they could consider the evidence! Evidence demonstrating the propensity for violence and retaliation by 89 Family Bloods gang members, including Appellant, permeated every aspect of the trial. The evidence was not admissible for that purpose, but it nonetheless was everywhere.

Witness Freddie Jelks did not voluntarily make contact with the police, as Connor had done. Rather, almost 3½ years after the murders, detectives went to Jelks' sister's house and took him to the police department for interrogation purposes. During the interrogation, they coerced and cajoled Jelks into admitting that he had participated in a gang-related drive-by shooting with co-defendant Johnson and "K-Rock". The detectives advised Jelks that they were pleased he was finally "cooperating" with them, and that if he continued to cooperate with them, they agreed they would not arrest him that day and would let him return home. With that promise, Jelks needed to tell the police what he believed they wanted to hear about the Loggins/Beroit murders.

Furthermore, since the prosecution eventually filed murder charges against Jelks and Johnson for the Tyrone Mosley drive-by shooting, Jelks realized even more that he had to please the prosecution; otherwise, he would be sent to prison for the rest of his life without State protection. Hence, Jelks not only told the detectives what they wanted to hear about the Loggins/Beroit murders, but he had to continue and testify as to what they wanted to hear since his murder case was still pending .

The inference the defense wanted the jury to draw was obvious. Jelks fabricated his story to the extent that he convinced the police he was telling the truth. His testimony was necessarily consistent with his coerced statement. In effect, he perjured himself in the process.

Appellant acknowledges that gang evidence that would inferentially establish Jelks was fearful of retaliation if he came forward to talk to the police and subsequently testify was relevant to explain, from the prosecution's point of view, why he waited more than three years before telling the police what he claimed to have observed.

Similar to the situation with Carl Connor, however, as the prosecutor sought to introduce gang evidence pertaining to Jelks' state of mind, an *astoundingly* large volume of evidence was also introduced that was relevant only

to prove that members of the 89 Family Gang had a *propensity* to violently threaten and intimidate potential witnesses, as well as viciously retaliate against anyone who dared talk to the police or testify against their criminal acts.

Example #6:

Near the conclusion of direct examination, the prosecutor asked Jelks questions regarding his state of mind; that he feared retaliation from the 89 Family Bloods gang members. The prosecutor's question made it clear that Jelks answer was in reference to his state of mind. He explained that after he spoke to the police, word of his discussion got out on the street.

> DDA: When you said you were scared, what were you scared of?
>
> . . .
>
> FJ[231]: Just the fact, you know, in a situation like this you talk to the police, you know, it gets back and, you know, you are a dead man. You know, if you talk to them about something as major as this, the greater odds are against you to survive through it. [RT, 16:3631 (Emphasis added)]

Even though the prosecutor's question referred expressly to Jelks' state of mind, Jelks' response did not expressly refer to his state of mind. (See the underlined portion of Jelks' answer above.) That is understandable, since Jelks was not a lawyer or a professional witness. However, the potential danger that the jury would consider his answer as evidence that the 89 Family Bloods gang would, in fact, retaliate with lethal force against him was obvious.

Examples 7, 8 and 9:

Jelks explained that after his discussion with the police, three (3) different people had approached him and asked him if he had become a "snitch." The three were "Face", "Bat Mike" and "Belinda." [RT, 16:3631]

At this point, the trial court walked a legal tightrope between allowing testimony of gang evidence that was relevant to Jelks' credibility but, at the same

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[231] "FJ" refers to Freddie Jelks.

time, carried the strongest possible potential danger that the jury would consider it for a different, inflammatory, and highly prejudicial, purpose:

DDA: And when "Face" talked to you, what did he tell you?
RL[232]; Objection, hearsay.
DDA: Offered for state of mind.
CRT: Overruled. Go ahead.
FJ: He said that Evil sent him to find out if I was talking or not.
CRT: All right. Ladies and gentlemen, that statement will not be received for its truth, but only as it may bear upon this witness' credibility in testifying. Is everybody clear on that? You can't use it for any other purpose.
DDA: What did you tell "Face"?
FJ: I told him, "No, I didn't say nothing."
. . .
DDA: Did "Face" tell you anything else?
FJ: That there was a hit for me.
DDA: When you say a hit, what's a hit?[233]
FJ: I was supposed to get killed.
ORR: Same objection [hearsay and not relevant].
CRT: Ladies and gentlemen, it goes to this witness' state of mind, his demeanor, and nothing else. Everybody clear on that? Finish your answer. Go ahead.
DDA: When you say a hit, what is your understanding of a hit?
FJ: It's a killing.
DDA: Did "Face" tell you there was a kill-on-sight order on you?
FJ: Pretty much, yes. [RT, 16:3632-3]

The prosecutor continued to introduce gang related evidence that carried with it an extreme risk that the jury would no longer consider it solely for the admissible purpose.

DDA: Did anyone else tell you something similar?
FJ: Yes.
DDA: Who was that?
FJ: "B-Mike" and a young lady named Belinda.
DDA: What did "Bat-Mike" tell you?

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[232] "RL" refers to Richard Lasting, co-defendant Johnson's defense attorney.

[233] Once again, the prosecutor was "sloppy" in phrasing this question. To her credit, however, she corrected it when she asked the question again moments later.

FJ: The same thing, that Mr. Johnson had wanted them to shoot me.
DDA: And was this after you talked to the police?
FJ: Yes.
DDA: Were you on the street at that point?
FJ: Yes.
DDA: And Belinda, did she tell you the same thing?
FJ: Yes.
DDA: Did you feel that anything that they were telling you was credible?
FJ: Yes.
RL: Excuse me, your honor, could we approach the bench for a moment?
CRT: People, I'm going to sustain the objection at this point. Was there a forthcoming objection?[234]
RL: There was, your honor.
ORR: Yes.
CRT: I'll sustain it under 352, this is consumption of time and so forth. People, next question. [RT, 16:3633-3634]

At this point of the direct examination of Jelks, the trial court concluded pursuant to § 352 that the introduction of additional gang retaliation evidence for the purpose of explaining Jelks' state of mind would not be permitted. The danger of unfair prejudice now substantially outweighed the probative value of the gang retaliation evidence as it pertained to Jelks' state of mind of fear.

Example #10:

Immediately thereafter, however, the prosecutor sought to introduce additional, and qualitatively much more inflammatory, gang retaliation evidence! Both defense counsel objected, citing § 352 and lack of discovery. The trial court's response was to *overrule* its own prior § 352 ruling, then allow the gang retaliation evidence to be introduced ... but in a manner that went directly to

[234] It appears very clear the court was becoming increasingly concerned about the amount of inflammatory evidence being introduced under the theory of "witness' state of mind." However, the court apparently wanted to sustain the opposing attorney's objection, not the court's own objection.

proving the gang's *propensity to retaliate* against "snitches", and further, to *retaliate against their family members* as well!

DDA: To the best of your knowledge, have any of your family members been threatened?
FJ: Yes.
DDA: Who?
FJ: My niece and my sister.
DDA: And with respect to your niece, when did that happen?
RL: Your honor, excuse me, could we approach?
ORR: 352, your honor. Same objection. [RT, 16:3634-3635 Emphasis added.]

At a discussion outside the presence of the jury, the court heard argument, then overruled the defense objections and told the prosecutor: "I will simply allow you [i.e., the prosecutor] to ask the following leading question. Whether family members received threats, those that you described earlier. Take the answer without detail and move on to something else." [RT, 16:3636]

Back in front of the jury, the following question and answer was heard by the jury:

DDA: Mr. Jelks, is it true that relatives of yours have been threatened?
FJ: Yes. [RT, 16:3638]

The sole question the trial judge stated the prosecutor could ask did *not* pertain to Jelks' state of mind! The prosecutor's subsequent question did *not* refer to JELKS' fear that his relatives had been threatened, and how that may have influenced his testimony. The court gave no limiting instruction in that regard. The jury was free to consider the question, the answer, and any reasonable inference from it for any purpose the jury deemed relevant.

From Jelks' testimony, the jury was now *fully aware* that:

1) Appellant was a member of the 89 Family Bloods gang.

2) In response to his having spoken to the police about the 89 Family Bloods gang, three different people told Jelks that Johnson, a member of the 89 Family Bloods gang, had put out a

"hit" on him. (The trial court instructed the jury that this evidence could only be considered for the impact it may have had on Jelks' state of mind.)

3) 89 Family Bloods gang members had also threatened Jelks' "family members" or "relatives." (The court gave no instruction to the jury that limited their consideration of this evidence.)

The jury was basically free to speculate as to the nature of the threat to Jelks' family members. The jury was also free to speculate as to which relatives or family members had been threatened. It may have been Jelks' niece and sister, or it could have been any of his four (4) young children. [CT Supp IV, 4] Conceivably, the jurors could have concluded that the 89 Family Bloods gang members had even gone so far as to *threaten to kill* Jelks' innocent young children, his niece *and* his sister in response to his having spoken to the police. And now, since Jelks was testifying at the trial of two of its leaders, the need for members of the 89 Family Bloods gang to retaliate would have intensified dramatically.

Appellant submits that to any reasonable juror, this evidence would have been more than just frightening. It would have been absolutely horrifying! At some point in time, jurors themselves would have begun wondering if *their* lives were in jeopardy. In fact, that is exactly what happened during the penalty phase of Appellant's trial! A juror became so alarmed about her safety, she contacted the court because thought Mr. Orr and Appellant kept looking at her! [See Arguments XXI and XXII.]

The prejudice that Appellant suffered because of the court's rulings on these evidentiary issues appears obvious. However, the prosecutor continued to add to the problem:

Re-direct examination by the prosecutor:

Example #11:

After defense counsel concluded their cross-examination of Jelks, the prosecutor immediately asked questions of Jelks that would remind the jury of

their "reason to hate." Her second question on re-direct examination re-opened the issue, and the following questions and answers were not limited in any way:

> DDA: By talking to the police would you be considered a snitch?
> FJ: Very much so.
> DDA: Did the fact that you weren't still a major part of 89 Family make any difference with respect to whether or not you wanted to be a snitch?
> FJ: No. I know what comes along with it.
> DDA: What happens to snitches?
> FJ: They get killed. [RT, 17:3729-30 (Emphasis added)]

From this testimony, the jury was told that when a resident of the neighborhood claimed by the 89 Family Bloods gang spoke to the police about the gang, even if the resident was a victim of one of their violent and senseless crimes, members of the 89 Family Bloods gang considered them "snitches." And members of the 89 Family Bloods gang *killed* "snitches." That was the message the prosecution once again gave the jury. That was the message the prosecution continually brought before the jury. Now on re-direct examination, the prosecution reminded the jury of their "reasons to hate" Appellant and his fellow gang members.

Example #12:

Minutes later, the prosecutor returned again to the *same* subject: What does the 89 Family Bloods gang do to "snitches"?

> DDA: What did you think would happen to you if you told them [i.e., the detectives] what you knew about the — the first incident, your incident [the case for which Jelks was in custody] that they were talking about?
> . . .
> FJ: I knew that if I spoke to the police about the matter and was on the streets, I'll [sic.] get killed. [RT, 16:3732 (Emphasis added)][235]

[235] This question posed by the prosecutor raised a difficult issue that was created by the court's ruling that prohibited the defense from questioning Jelks about the facts of his pending case, an issue that Appellant undoubtedly would have liked to

According to this testimony, Jelks could not even confess to the police about *his* involvement in a crime that arguably did not involve the 89 Family Bloods gang unless he was *also* willing to become the target of a retaliatory murder by the gang. That was how vindictive the gang was, according to Jelks. It did not matter what a person said to the police or why the person said it. By simply talking to the police, the individual was deemed a "snitch" and was then the gang's next murder target! What an absolutely frightening neighborhood in which to live! This evidence simply gave the jury "one more reason to hate."

Example #13:

The prosecution's emphasis on hating the gang and its members continued. Responding to the prosecutor's questions on re-direct examination, Jelks admitted that he was more afraid of being known as a "snitch" than he was afraid of being arrested and booked for a crime that carried a life sentence! Why? Jelks made it very clear to the jury: A life sentence in prison did not include being executed. Being known as a "snitch" in that gang neighborhood, however, was tantamount to being executed.

DDA: Were you more concerned about yourself being booked or yourself being labeled a snitch?
FJ: The repercussions behind being labeled a snitch.
DDA: What were those – what did you think were the repercussions back then?
FJ: I would get killed. It was –
DDA: What was that based on?
FJ: Just – just the lifestyle that was in that area, things that I knew that would happen.
DDA: Did you know that those things would happen because of things that you had seen before you had this interview?

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question Jelks about. Since the jury was completely unaware of the details of Jelks pending case, and since Jelks had stated over and over that he was not an active participant in the gang's criminal behavior, his pending case must not have involved violent conduct with the 89 Family Bloods gang. Why, then, was Jelks so worried that the 89 Family Bloods gang members would want to kill him if he spoke to the police about his pending case?

FJ: Yes, just previous things that had occurred in the neighborhood. [RT, 17:3733 (Emphasis added)]

The message conveyed by this testimony was obvious. The 89 Family Bloods gang had literally destroyed any semblance of law and order in that neighborhood. Based upon what Jelks had seen the gang do previous to his talking to the police, Jelks "knew that [his murder] would happen." The jury was left to speculate about the untold scenes of violence, carnage and death that had been perpetrated by the gang on its own law abiding neighborhood residents. The prosecution continued to provide the jury with "reasons to hate" Appellant and his fellow gang members.

Example #14:

The prosecutor, however, added still more fuel to this all-consuming fire of hatred that the jury was feeling. She then had Jelks relate to the jury the crimes of intimidation and retaliation that he had *seen* the 89 Family Bloods gang do in that neighborhood; retaliatory crimes that caused Jelks to fear being known as a snitch more than spending the rest of his life in prison!

DDA: Did you go on, on page 49 [i.e., of the transcript of Jelks' interrogation by the detectives], line...14 to say: "Detective Tapia: And we know how danger [sic] it is. Answer [i.e., by Jelks]: But you've been working there, but you go home and you do another thing. I live there, man.
FJ: Yes.
DDA: What were you describing?
FJ: The killings, the beatings that I've seen, I've known – I knew that happened. [RT, 17:3737-8 (Emphasis added)]

Example #15:

A few questions later, the prosecutor once again had Jelks remind the jury what the 89 Family Bloods gang members did to "snitches":

DDA: Back in 1994 did you tell the police that you didn't want the homies to know where you lived?
FJ: Yes.
DDA: Why was that?

FJ: I didn't want to end up dead. [RT, 17:3739 (Emphasis added.)]

Example #16:

For the gang's members to commit these heinous crimes with seeming impunity, their ability to intimidate victims and witnesses would have been necessary. Hence, the prosecutor asked Jelks to tell the jury about deadly weapons he had seen the gang members possess in the past. However, to maximize the impact of this evidence, the prosecutor asked leading questions to ensure Jelks talked about automatic weapons, or as she described them in her closing argument, "killing machines."

DDA: Had you ever known anybody in 89 Family to have a tech 9?
FJ: Yes.
DDA: Did you know anybody in 89 Family during your association to have an uzi?
FJ: Yes. [RT, 17:3740]

Example #17:

As the prosecutor came to the end of re-direct examination, she finally switched and specifically asked Jelks about his present state of mind while testifying. Appellant asserts, however, that by then the damage had long since been done, and the prosecution had done it very effectively. A defense request for a limiting instruction would have been meaningless at this point.

DDA: When you came into court yesterday for the first time, how did you feel?
FJ: Nervous.
DDA: Why?
ORR: Its' been asked and answered, your honor.
CRT: Overruled.[236] Go ahead.
FJ: Repercussions behind what I'm doing today.

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[236] The question had been asked previously, and Jelks had answered it previously. Defense counsel's objection was well taken. The court's ruling was consistent with previous evidentiary rulings made by the court in response to defense objections. Hence, the defense ceased to object....

DDA: As you sit here today, are there in your mind repercussions that may happen because you offered testimony?
FJ: Yes.
DDA: What are those repercussions that you fear?
FJ: Death.
ORR: Assumes a fact not in evidence. I object.
CRT: Go ahead.
FJ: I'll be killed. [RT, 17:3747 (Emphasis added)]

Re-direct examination concluded. The defense asked a few questions on re-cross examination. Finally, Jelks' testimony concluded . . . almost.

Example #18:

In spite of all of the above, the prosecutor took one last opportunity to remind the jury that they had "a reason to hate." On "re-re-direct examination", the prosecutor asked Jelks what 89 Family Bloods gang members do to snitches:

CRT: All right. Anything further, Mr. Orr?
ORR: Nothing, your honor.
CRT: People, anything further?

FURTHER REDIRECT EXAMINATION
DDA: Why were you more scared after you left the police station than you were before?
FJ: Because of I told the police what happened on the things that they asked me about.
DDA: So, why would that put you in fear when you got to go home?
FJ: I knew that it would get back to the street somehow that – you know, what I said, that I knew it.
DDA: Were you concerned that it would get back to the streets that you cooperated with the police?
FJ: Yes.
DDA: Would that have made you a snitch?
FJ: Yes.
DDA: Would that have put you in greater danger?
FJ: Yes.
DDA: Nothing further. [RT, 17:3755 (Emphasis added)]

c. **Witness Marcellus James**:

James began his testimony by identifying Appellant as "Fat Rat", a member of the 89 Family Bloods gang. [RT, 18:4040-4043]

Example #19:

After testifying about the discussion James said he had with Appellant, the prosecutor asked James whether he was afraid of retaliation when he spoke with the police.

DDA: Back in 1994 when you talked to the police how did you feel about talking to the police?
MJ[237]: I didn't feel good about it.
DDA: Why?
MJ: Because I'm scared, I mean – [RT, 18:4044]

Example #20:

The prosecutor followed up by asking James if he was "still scared" because he was testifying. She continued to press the issue of James' fear. When James responded he feared that 89 Family Bloods gang members would retaliate against him, the prosecutor *immediately re-asked* James if Appellant was one of these 89 Family Bloods gang members that he was so fearful of ... even though James had testified Appellant was a member of the 89 Family Bloods gang not more than a minute or two before.

DDA: Are you still scared?
MJ: Sure.
DDA: Why?
MJ: Because I have a baby on the way, and I have two more kids to take care because their mother got killed just recently,[238] so –
DDA: What were you afraid of?
MJ: Retaliation.
DDA: What did you think might happen if you testify?
MJ: Retaliation.
DDA: By whom?
MJ: I don't know – I don't know. I mean – just retaliation.
DDA: Related to your testimony?
MJ: Sure.
DDA: From 89 Family or from somebody else?

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[237] "MJ" is Marcellus James.

[238] All parties stipulated at the conclusion of James' testimony that the death of the mother of his children was in no way related to this case. [RT, 18:4090]

MJ: 89 Family. That's – those are the ones I'm testifying against.
DDA: This person you call Fat Rat, Mr. Allen, is he a member of 89 Family?
MJ: Yes, he is.
DDA: Was he a member of 89 Family back in 1991?
MJ: Yes, he was.
DDA: Do you see anybody else in court today who was a member of 89 Family back in 1991?
MJ: Yes.
DDA: Who's that?
MJ: Evil. [RT, 18:4044-5]

The intention of the prosecutor could not be more transparent. She had just moments before established through James' testimony that Appellant was a member of the 89 Family Bloods gang. Now, after James indicated he feared retaliation from members of the 89 Family Bloods gang in part because of his two young children (with a third child yet to be born), the prosecutor immediately re-asked if Appellant was a member of that gang. The rather obvious inference was the prosecutor sought to cement in the minds of the jurors that Appellant was one of those gang members James feared because of their harrowing *propensity to retaliate violently* against anyone who spoke out against him or his gang. Simply put, the prosecutor gave the jury another "reason to hate" Appellant, and thereby make his conviction easier.

Example #21:

Moments later, the prosecutor asked James if he still feared retaliation from the gang, even though he had moved out of the neighborhood:

DDA: Now, your testimony today, do you still feel the same kind of fears that you had before?
JAM: Yes.
DDA: Have you moved out of that neighborhood?
JAM: Yes. [RT, 18:4046 (Emphasis added.)]

Example #22:

At the conclusion of her direct examination of James, the prosecutor established one last time that James did not want to testify because he would be making himself a "snitch".

DDA: Why didn't you want to testify?
JAM: Because it's really not none of my business.
DDA: Are you familiar with the word "snitch"?
JAM: That's the name.
DDA: Are you making yourself a snitch by testifying in court today?
JAM: I feel so. [RT, 18:4047 (Emphasis added)]

At this point in the trial, the jury was well aware what Appellant and his fellow 89 Family Bloods gang members did to "snitches." If provided the opportunity, they would murder any "snitch." That was the message the prosecution sent to the jury in very clear and unambiguous terms as she concluded her direct examination of James.

Example #23:

However, consistent with her tactics used with witnesses Connor and Jelks, the prosecutor on re-direct examination once again asked James about his fear of retaliation by 89 Family Bloods gang members:

DDA: When you talked to the police the first time, did you feel comfortable talking to the police?
MJ: No.
DDA: Did you want to talk to the police?
MJ: No.
DDA: Did you – As soon as you talked to the police, did you immediately tell them everything that you knew?
MJ: No.
DDA: Did you hold back a little bit?
MJ: Yeah.
DDA: Why?
MJ: I was – because I was scared. [RT, 18:4080]

Connor, Jelks and James had each testified several times in response to the prosecutor's questions that they feared retaliation from Appellant's "homeboys." The probative value of any further questions regarding their state of mind would

have been minimal. Further, the danger of undue prejudice would increase with each further question and answer. Nevertheless, the prosecutor proceeded to ask additional questions of the detectives regarding their fear of retaliation. The jury's "reasons to hate" Appellant for being a member of this group of "domestic street terrorists" simply intensified as the prosecution continued to pursue these fears.

d. Detective Sanchez's Testimony.

Example #24:

DDA: While you spoke to Mr. Connor, did Mr. Connor at any time on the 15th of August, 1994, express concerns to you about his safety?
SAN: Yes.
DDA: What did he say?
SAN: He was scared for his family in the neighborhood.
DDA: Did you tell Mr. Connor that he might have to testify?
SAN: Yes.
DDA: How did he respond?
SAN: He didn't want to.
DDA: Did Mr. Connor ask you for any kind of protection?
SAN: No. He just said that he didn't want to testify.
DDA: Did Mr. Connor at any point ask you if his name could be changed?
SAN: Yes, he did. [RT, 18:3974]

The clear message sent to the jury was Connor did not want to testify because he feared the gang would retaliate against his family members who still lived in the community. Connor might be able to avoid being killed, but his family members would be extremely vulnerable to the gang's savage efforts at retribution. And the jury was free to speculate as to who the family members were; innocent young children, elderly parents, teenagers not involved in gangs, etc. The potential for undue prejudice, Appellant submits, no longer had boundaries.

Example #25:

During subsequent direct examination of Detective Sanchez, the prosecutor once again asked the witness concerning Connor's attitude about testifying, the

obvious inference being that he was afraid of retaliation if he testified against any member of the 89 Family Bloods gang. Mr. Orr objected because the question had been asked previously and an answer received; however, the court overruled the objection.

DDA: How would you describe Mr. Connor's attitude about testifying in this case?
ORR: Asked and answered.
CRT: Overruled. Go ahead.
SAN: He didn't want to. [RT, 18:3987]

Example #26:

While still on direct examination, the prosecutor inquired of Detective Sanchez for the *third time* concerning Connor's attitude about testifying. The defense did not object this time. Mr. Orr had apparently learned it was useless for the defense to interpose any objections to questions by the prosecutor regarding any evidence that could conceivably be connected to the state of mind of a witness. The detective was asked to relate a statement Connor had made earlier that circumstantially reflected his fear of testifying, then concluded her comments regarding Connor's state of mind by having her testify that Connor's "concern about his safety" had never "gone away."

DDA: Before coming into court, did Mr. Connor make any statement to you about his willingness or unwillingness to testify?
SAN: Yes.
DDA: What did he tell you?
SAN: He said I will testify against Fat Rat but not Evil because Evil has too many followers.
DDA: With respect to this particular case, has Mr. Connor's concern about his safety ever gone away to the best of your knowledge?
SAN: No. [RT, 18:3987-3988 (Emphasis added)]

The undue prejudice of this last portion of Detective Sanchez's testimony was even greater than normal because the trial court earlier had overruled Mr.

Orr's objection[239], then failed to instruct the jury that the statement by Connor was to be limited to their consideration of Connor's state of mind. Combined with other gang related testimony, the jury was free to infer there were, *in fact*, "too many" 89 Family Bloods gang members who would violently retaliate against any witness or the innocent and vulnerable family members of any witness.

e. Detective McCartin's Testimony:

Example #27:

Detective McCartin testified that he went to James' house to pick him up and take him to the police department to be interviewed. The prosecutor then asked McCartin to tell the jury about James' state of mind at that time:

DDA: How did Mr. James appear to respond to your presence at his house?
McC: He was very reluctant and scared. [RT, 18:4157]

Example #28:

Moments later, the prosecutor asked McCartin about James' state of mind at the beginning of the interview at the police department:

DDA: What was Mr. James' demeanor when you started that interview?
McC: Very scared and reluctant. [RT, 18:4159]

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[239] This series of questions was the *third* time during direct examination that the prosecutor inquired about Connor's attitude toward testifying. Mr. Orr's timely, specific and legally proper objection following the *second* time the prosecutor asked about the subject should have been sustained. Because of the trial court's erroneous ruling, the prosecutor was encouraged to continue "hammering" on Connor's fear of retaliation. At the same time, the defense was discouraged from making timely, specific and legally proper objections regarding questions involving Connor's state of mind because any objections were useless. Further, the defense would want to avoid creating the appearance that they were trying to hide something. That is a natural assumption jurors would make when the trial court consistently overrules defense objections. After all, the jury assumes the court's rulings are correct, meaning that the defense objections are not well taken and are being asked to keep certain damaging evidence from being presented to the jury..

Example #29:

As the interview with James progressed, McCartin testified that James initially "hedged" when asked about his knowledge of the Loggins/Beroit shootings. The prosecutor then asked McCartin what James' demeanor was like while he was "hedging":

> DDA: Did he [James] immediately identify Mr. Allen when you started talking to him?
> McC: No, he didn't.
> DDA: Did he hedge?
> McC: Yes.
> DDA: What was his demeanor like when he was hedging?
> McC: Same as I said before. He did not want to get involved. He was scared for his family and his life. If he were to say anything, he thought there would be retribution. [RT, 18:4160 (Emphasis added)]

Example #30:

The prosecution then shifted the focus of her questions and began asking Detective McCartin about his interrogation of Freddie Jelks.

> DDA: In December of 1994, did you speak to an individual by the name of Jelks?
> McC: Yes.
> ...
> DDA: At the time that you spoke to Mr. Jelks, how would you describe his attitude toward accompanying you to south bureau homicide?
> McC: Very scared and reluctant. [RT, 18:4165-4166]

Example #31:

The detective explained that the interrogation lasted between 3 and 3 ½ hours. In response to questions, he stated that Jelks was not immediately forthcoming. The prosecutor then asked if Jelks said why he was not initially "forthcoming":

> DDA: At the beginning of that period of time, was Mr. Jelks forthcoming?
> McC: Not in the beginning, no.

DDA: Did he express to you any reasons for his reluctance to assist you?
McC: Scared. Scared that his family would be killed and himself. [RT, 18:4166. Emphasis added.]

Example #32:

While still on direct examination of Jelks, the prosecutor asked the detective if Jelks expressed additional fears about retaliation. The prosecutor followed this up by asking McCartin if, in his experience as a homicide investigator, Jelks' expressions of fear were legitimate.

DDA: Did Mr. Jelks ever express to you any concerns that what he said to you might get out on the street?
McC: Yes, he did.
...
DDA: In your view as a homicide investigator, were Mr. Jelks' concerns legitimate?
McC: Yes. [RT, 18:4169-4171]

Example #33:

Even though the prosecutor had asked McCartin about both James' and Jelks' fears of talking and later testifying on direct examination, on re-direct examination the prosecutor returned to this same topic, and in effect, re-asked the same questions. However, this time she emphasized their fears about their family members still living in the neighborhood. Of course, the prosecutor had *already* established their fears for the safety of their family members through the testimony of both Jelks and James, as well as McCartin's testimony on direct examination:

DDA: Did they [Jelks and James] express concerns about their physical safety?
McC: Yes, they did.
DDA: Were they afraid of the police or somebody else?
McC: Somebody else.
DDA: Were they concerned about themselves or somebody else?
McC: Themselves and other people in their family. [RT, 19:4233-4234]

Example #34.

Detective McCartin further testified regarding his interrogation of Freddie Jelks. After a series of improper leading questions asked by the prosecutor regarding whether the detective had coerced Jelks, threatened Jelks, made promises to Jelks, told Jelks what to say, or provided Jelks information from which he would know what to say [RT, 18:4167-4169], Barling opined that Jelks' worries regarding retaliation were "legitimate."

DDA: In your view as a homicide investigator, were Mr. Jelks' concerns legitimate?
McC: Yes. [RT, 18:4171]

f. Gang Expert Witness Barling's Testimony:

Near the conclusion of the prosecution's case, Detective Barling, the prosecution's gang expert, testified. After testifying extensively as an expert, the prosecutor asked Barling the identical questions she had asked Connor, Jelks, James, Detective Sanchez and Detective McCartin; did Connor, Jelks and James ever tell him they feared retaliation from the members of 89 Family Bloods gang if they spoke to the police and if they testified about one or more of the gang members.

Example #35:

As to Connor, Barling testified:

DDA: Did you, during the course of your role as an investigator with south bureau homicide, speak to Carl Connor?
BAR: Yes. I have spoken to Carl Connor.
DDA: Did Mr. Connor express fears regarding 89 Family?
BAR: Yes. To myself and other detectives.
DDA: In your view, how would you categorize those fears?
BAR: They are legit fears and concerns of Mr. Connor by his statement and other factors. [RT, 19:4324]

Example #36:

Barling also testified as to Jelks' state of mind. Jelks' fear that the gang would retaliate against his four very young children was cumulative and highly prejudicial to Appellant. When Barling testified these fears regarding Jelks' little

children and other innocent family members were based on fact (i.e., Jelks' fears were "legitimate".), the prejudice was magnified exponentially:

DDA: Have you spoken to Mr. Jelks regarding this particular case?
BAR: Yes.
DDA: And has Mr. Jelks ever expressed to you any concerns about his safety?
BAR: Yes, he has.
DDA: Were those safety concerns related to 89 Family?
BAR: Yes.
DDA: Was he concerned about retribution?
BAR: To himself as well as his children and other members of his family.
DDA: How would you categorize those fears?
BAR: Legitimate fears and concerns.
DDA: Was that as a consequence of his being a witness?
BAR: Yes. [RT, 19:4324-4325]

Example #37:

Finally, Detective Barling testified regarding the state of mind of Marcellus James. The most egregious and improper nature of his testimony regarding James was his rendering of his "expert opinion" that James' fears were based *solely* on his fear of gang retaliation and *not* because he was fearful of being prosecuted for criminal offenses he had committed. In effect, Barling was allowed to "read James' mind."

DDA: And Marcellus James, NaNa; did you talk to him about this case?
BAR: Yes, I have.
DDA: And did Mr. James express any concerns about his safety?
BAR: He has.
DDA: How would you characterize those fears?
BAR: Legitimate fears.
DDA: Are they legitimate fears of the police, the system or the gang?
BAR: All the fears are of the gangs and not the police. [RT, 19:4325 (Emphasis added)]

4. The Trial Court's Errors Significantly Exceeded the *Watson* "Reasonable Probability" Standard for Determining "Harmless Error."

Each time the prosecution introduced irrelevant "propensity" evidence, either intentionally or through carelessly worded questions, that 89 Family Bloods gang members committed needless acts of violence, threatened or intimidated witnesses, and/or perpetrated savage acts of retaliation on witnesses or innocent family members, it became increasingly difficult for Appellant to receive a fair trial.

Each time highly inflammatory evidence about the 89 Family Bloods gang, as well as Bloods and Crips gangs generally, was introduced to circumstantially establish a witness' state of mind, it became increasingly difficult for Appellant to receive a fair trial.

Taken together, the extensive amount and incendiary nature of the gang evidence introduced by the prosecution made it impossible for Appellant to receive a fair trial. (See *People v. Maestas* (1993) 20 Cal.App.4th 1482; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

The direct examination of Connor, Jelks and James regarding the 89 Family Bloods gang encompassed much more than simply establishing inferentially their subjective state of mind of fear. They also were allowed to testify, over defense objection, that 89 Family Bloods gang members possessed a *propensity* for violence. When the prosecution introduced gang evidence to prove Appellant and his fellow gang members had a propensity to commit acts of savagery and to retaliate violently, California law is clear and unambiguous: The gang evidence was not admissible for that purpose. (Evid. Code §§ 1101(a), 1102)

Appellant further asserts the trial court abused its discretion pursuant to Evid. Code, § 352 when it allowed the prosecution to introduce an overwhelming, and prejudicial, amount of gang evidence for violence, witness intimidation and retaliation to circumstantially establish the state of mind of witnesses Connor,

Jelks and James. The additional testimony of detectives Sanchez, McCartin and Barling simply exacerbated an already significant problem.

The jury was provided such a voluminous and malevolent amount of gang evidence, Appellant contends no reasonable juror could have put aside his/her emotional feelings of abhorrence and revulsion of the members of the 89 Family Bloods gang. Since the prosecution emphasized again and again that Appellant was an active member of that vile gang, thereby taking on the characteristics and propensities of that gang, to suggest the jury was not unduly influenced by that evidence would be nonsense. This is particularly true when limiting instructions given by the trial court, already of questionable validity, pertain to emotional, inflammatory, and frightening evidence.

If the trial court had required the prosecution to properly phrase her questions relating to state of mind evidence, *if* the trial court had promptly instructed the jury to limit its consideration of the gang evidence to the witness' state of mind, and *if* the trial court had limited the amount and provocative nature of the gang evidence presented, Appellant vigorously maintains it is "reasonably probable" that he "would have obtained a more favorable outcome." (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) When considered together with other inadmissible gang evidence (See Issues XII, XIII, XIV, XV and XXII in Appellant's Opening Brief.), as well as other errors raised in this appeal, Appellant asserts the impact on the jury of the combined errors clearly exceed that which this Court would deem "harmless."

Appellant respectfully urges this Court overturn his convictions and resultant sentence of death on these grounds.

5. The Trial Court's Errors in Admitting this Evidence Also Involved Violations of Appellant's Federal Constitutional Rights that Are Applicable to California's State Courts by the Due Process Clause of the Fourteenth Amendment.

a. The gang evidence "lightened" the prosecution's burden of proof.

This Court has recognized, however, that when the erroneous admission of irrelevant and prejudicial evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. *People v. Garceau* (1993) 6 Cal.4th 140, 186. In this situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24.

Appellant respectfully asserts the admission of gang evidence, as illustrated above, violated his Fourteenth Amendment right to due process. Due process requires that a criminal defendant receive a fundamentally fair trial. (*Lisenba v. California* (1941) 314 U.S. 219, 236 [86 L.Ed.2d 166, 62 S.Ct. 208]; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237 [84 L.Ed.2d 716, 60 S.Ct. 472].) Fundamental fairness is not provided when a California State court conviction is based upon improperly admitted evidence or unfairness on the part of the State in the use of the evidence. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [4 L.Ed.2d 242, 80 S.Ct. 274]; *Spencer v. Texas* (1967) 385 U.S. 554, 564 [17 L.Ed. 2d 606, 87 S.Ct. 648].) When a State court's evidentiary rulings are "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [115 L.Ed.2d 720, 111 S.Ct. 2597].)

When gang evidence is erroneously introduced to prove members of a particular gang possess a violent *propensity* to threaten and intimidate potential witnesses and to viciously retaliate against anyone who speaks to the police or who testifies to their criminal acts, it has the natural and inescapable effect of causing any individual juror to despise and hate the gang and its members.

When gang evidence that circumstantially proves a witness' state of mind becomes so cumulative and so inflammatory that the probative value is

substantially outweighed by the danger of undue prejudice and limiting instructions become superfluous, it has the natural and inescapable effect of causing any individual juror to despise and hate the gang and its members.

In both situations, the jurors hate the gang because of the violent propensities of its members. The jurors then hate anyone who is a member of this gang. Once the jury transfers these "reasons to hate" to the accused, the prosecution's burden of proof is "lightened" and conviction becomes much easier. The jury *wants* to convict the accused, not necessarily because of any criminal act he may have committed, but because he is a member of this gang that the jury has been given so many " reasons to hate."

The prosecution's burden of proof is "lightened" and convictions become easier because the jury, in its desire to punish the accused for being a member of that gang, is then willing:

a) To believe a questionable prosecution witness without thoroughly evaluating his credibility;

b) To overlook or simply reject any legitimate defense evidence simply because it is just that ... defense evidence; and

c) To look past the evidence and determine the outcome of the trial based on their hatred of the accused, his gang, and what that gang and its members represent.

The prosecution presented this jury with numerous reasons to hate the 89 Family Bloods gang, as well as its members, because of the gang's willingness to use compulsion, terror and brutality to obtain their desires, all at the expense of the decent, peaceful, law abiding residents of the same community. These feelings of injustice and unfairness would have resonated deeply within each juror. Throughout the trial, these feelings undoubtedly simmered just beneath each juror's conscious surface where, probably unbeknownst to each juror, it affected the juror's *subconscious* thought patterns. This subconscious emotional revulsion would have resulted in the juror's desire to punish Appellant because of his gang

associations, and not just because of what he may have done. Each juror, trying his/her best to follow the court's instructions and to be just and fair, would not have been consciously aware of the intensity of the impact this hatred would have had on the juror as he/she deliberated, in good faith, the fate of the accused.

Further, this same difficulty would have arisen when the trial court gave the jury an instruction that they were to limit their consideration of voluminous and highly inflammatory gang evidence to some "emotionally benign" reason such as its impact on the state of mind of a witness. The jurors would consciously do their best to follow the limiting instruction. But, if the gang evidence was too inflammatory, either in its quantity or by its nature, the already-simmering cauldron of hate inherent within each juror would have begun bubbling, then finally boiling over, as this subconscious hatred of the gang manifested itself in an unfair verdict of guilt. The trial court's limiting instructions in situations like this would have had little or no impact on the jurors.

Finally, the continuous and repetitive introduction of gang evidence, particularly the specific illustrations of murder, drive-by shootings, and savage gang retaliation (including the brutal retaliatory murder of Nece Jones) committed by members of the 89 Family Bloods gang reinforced, deepened and intensified each individual jurors' "reasons to hate." throughout the entire trial.

When these "reasons to hate" the gang and its members were transferred to Appellant (he was, after all, a member of the gang), it would have undeniably "lightened" the prosecution's burden of proof. and deprived Appellant of his Fourteenth Amendment right to due process in a California State court. (*People v. Garceau* (1993) 6 Cal.4th 140, 186. See also, *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246]; *Delaware v. Van Arsdall,* (1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674) Whatever evidentiary weaknesses existed in the prosecution's case that linked Appellant to the killings would have been more-than-made-up-for by the jury's emotional insistence on punishing Appellant because he was an active member of this murderous, brutal gang.

b. The Trial Court Failed to Ensure that the Evidence Possessed Even Greater Reliability than Normal Because This Was a Capital Case.

In addition, both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama (1980)* 447 U.S. 635, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens (1983)* 462 U.S. 862, 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256]).

If Appellant's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of the Fifth, Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

The admission of unduly inflammatory evidence is "an irrelevant consideration" and often leads to "an unguided emotional response" by the jury. It undermines the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and it deprives Appellant of the reliable individualized capital sentencing determination guaranteed by the Eight Amendment. *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.

In this regard, Appellant asserts that the trial court's admission of the above described irrelevant and inadmissible gang evidence, combined with the above described gang evidence that was cumulative of the witnesses' state of mind and highly inflammatory in violation of § 352, amounted to "an irrelevant consideration" by the jury that undoubtedly led to "an unguided emotional

response" by the jury. This undermined the reliability of Appellant's conviction for this capital offense and deprived Appellant of the individualized capital sentencing determinations guaranteed by the Eight Amendment, as applied to California by the Fourteenth Amendment.

6. <u>A Vivid Illustration of the Impact the Gang Evidence Had on Jurors</u>.

During presentation of additional evidence of extreme gang violence, intimidation of witnesses by gang members, and gang retaliation during the subsequent penalty phase of the trial, the court clerk was handed a note from one of the jurors. It stated:

> Juror: Your Honor, I feel very uncomfortable being pointed at by Defendant Allan [sic.] and his lawyer. Could you please address this issue. Thank you, Alternate #2." [CT, 5:975, 977; RT, 32:6553]

The juror who handed the note to the court clerk was eventually determined to be "Alternate #2", a then sitting juror who is identified in the Reporter's Transcript by her original position on the jury after jury selection. {RT, 32:6554-6555, 6571-6572] When Mr. Orr told the court that he and Appellant had been "trying to do some guessing things" related to jurors, the trial court expressed the emotional atmosphere that must have existed in that courtroom because of the amount of frightening gang evidence that had been presented:

> CRT: Who were you pointing at? Were you pointing at somebody?
> ORR: Not really. We are trying to do some guessing things.
> CRT: Don't point at them. <u>They'll think you are going to put them on a hit list, given the evidence they've heard. Gee whiz, you are dealing with laypersons</u>. [RT, 32:6554 (Emphasis added)]

Subsequently, Mr. Orr indicated that "about an hour and a half" earlier, he and/or Appellant made a gesture in the direction of the jury from their location at counsels' table, but neither of them directed any gesture toward that particular

juror. [RT, 32:6573] Mr. Orr had "no idea" as to "why [the juror] even thought our gestures went that far to the south. " [RT, 32:6573]

With the entire jury present, the trial judge determined which juror wrote the note and gave the note to the clerk. The juror also told the trial judge that she told all of the jurors of the contents of the note and that she was giving it to the trial judge. [RT, 32:6571-6572]

At this point, Mr. Lasting moved for a severance of the penalty trial, then moved for a mistrial. In support of his motions, Mr. Lasting's argument illustrated the problem that gang evidence was permeating every aspect of the trial:

> RL: It seems to me that the juror sent that note to the court because the juror is frightened about what she perceives to be some pointing at her, which apparently is interpreted as a threat.
> Given the nature of the evidence that's been introduced in the penalty trial, given the opening statement of Mr. Allen's lawyers, where they suggest to the jury that Mr. Allen does things that Mr. Johnson tells him to do, and then the juror shares the note with the other jurors, it seems to me that it's extremely prejudicial to Mr. Johnson to have a juror feeling that she's been threatened by Mr. Allen, or Mr. Allen's attorney, and then tell that to the other jurors. I think it enhances the likelihood that the jury will come back with a death verdict.
> ...
> I think the facts of what has transpired here, with the note being sent to the court, and the apparent belief that the juror's been threatened, then she tells that to the other jurors, has no place in the penalty trial.
> ...
> I think the reasonable interpretation of that is she feels threatened, that's why she's uncomfortable. [RT, 32:6573-6575 (Emphasis added.)]

The trial court re-assured the juror that Mr. Orr and Appellant were not pointing at her or any other particular juror, and in any event, their conduct should not be viewed as a threat to any juror. The court inquired of each juror individually as to whether any of them felt they couldn't go forward and do their

duty in the penalty phase of the trial. Each juror responded they felt they could.[RT, 32:6575-6576]

The trial court's comments *might* have removed any fear the jurors had *regarding that specific conduct* by Mr. Orr and/or Appellant. However, the incident still *vividly demonstrates* that at least one juror had personally become fearful of gang retaliation, and that the intensity of her fear of gang retaliation was so great it bordered on paranoia; she was even fearful that Mr. Orr might be involved! If one juror felt that way, the very reasonable inference was that all jurors were experiencing some concern for their safety because of the voluminous amount inflammatory gang evidence that had been introduced.[240]

D. Conclusion.

If just one juror was experiencing this degree of personal fear, her attitude toward members of that gang, including Appellant, would have been one of disgust and revulsion. She would have "hated" that gang and its members. Even if that single juror's personal fear of retaliation no longer existed, she would still have felt the same disgust and revulsion for the gang because of its impact on the residents of the neighborhood and the witnesses in this case. She would have "hated" the gang and its members because of their horrifying impact on other decent people. Since Appellant was a willing member of that sordid and debased gang, her hatred for the gang would naturally have been transferred to Appellant. Since the verdicts and findings had to be unanimous, Appellant submits the government cannot prove beyond a reasonable doubt that the above erroneously admitted evidence did not contribute to the jury's unanimous verdicts. (*Chapman*

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[240] In response to Mr. Lasting's argument that the juror's note indicated she felt she had been threatened, Judge Horan attempted to rebut Mr. Lasting's argument by suggesting the juror never said that. The court's response seems somewhat unusual in light of the court's original comments to Mr. Orr (Don't point at them. They'll think you are going to put them on a hit list, given the evidence they've heard. Gee whiz, you are dealing with laypersons.), as well as the fact the court avoided asking the juror if she felt she had been threatened or was fearful of retaliation. [RT, 32:6571-6578]

v. California (1967) 386 U.S. 18, 26.) For the same reason, Appellant submits there is "a reasonable probability" the result would have been more favorable to Appellant had the improperly introduced gang evidence not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836) Further, if one juror had these feelings, the inference that other jurors shared those feelings is strong. Under either standard, Appellant asserts the trial court's errors in admitting the quantity and nature of gang evidence in this case was prejudicial.

Appellant maintains that the trial court's erroneous admission of the above gang testimony, by itself, is more than sufficient for this Court to conclude the errors were prejudicial and Appellant's conviction must be reversed. Considered in combination with the other inadmissible gang evidence (See Issues XII, XIII, XIV, XV, and XXII in Appellant's Opening Brief), Appellant contends he was clearly deprived of his Fifth and Eighth Amendment rights that are guaranteed to him in California state courts by the Fourteenth Amendment's due process clause.

For all of the above reasons, Appellant respectfully urges this Court overturn his convictions and the resultant sentence of death.

XII.

The trial court abused its discretion and erred when it allowed the prosecution's gang expert to present to the jury his own *personal* beliefs and opinions regarding Appellant, co-defendant Johnson, and the 89 Family Bloods gang. This testimony improperly corroborated the testimony and enhanced the credibility of Freddie Jelks that the shootings were gang motivated and that Appellant was the shooter. These errors were prejudicial and require Appellant's convictions and judgment of death be overturned.

A. Introduction.

1. Making "a silk purse out of a sow's ear."

In spite of the large amount of gang related evidence presented by the prosecution in this case, *credible* evidence that the *motive* for these murders was gang related, not considering Detective Barling's testimony, was practically *non-*

existent. It consisted almost entirely of witness Freddie Jelks' claims that Johnson and other gang members talked about being "disrespected" by individuals who allegedly were Crips, then Johnson sending Appellant to "serve" (i.e., shoot) the offending enemy gang members. Since Jelks's credibility was vigorously disputed by the defense; it was necessary for the prosecution to present the testimony of Detective Barling because it would *corroborate* Jelks' claims. However, much of Barling's testimony, erroneously admitted under the guise of expert testimony, was actually nothing more than the detective's personal beliefs and opinions regarding the facts of the case and the inferences that should be drawn from those facts.

When the trial court overruled the defense objections and erroneously allowed Detective Barling to testify regarding his own personal beliefs and opinions, the prosecution was able to corroborate the testimony of Jelks with the testimony of an experienced, respected and credible police gang expert. Not only was it much more likely that the jury would believe Jelks' testimony that the killings were gang motivated, but *more importantly*, Barling's corroborating testimony enhanced Jelks' credibility generally. That is, the jury was much more likely to believe Jelks' testimony that Appellant was the killer. In effect, Detective Barling's inadmissible testimony, offered under the guise of gang expert testimony, created "a silk purse out of a sow's ear."[241]

Appellant claims the trial court's rulings were an abuse of its discretion, these errors were prejudicial, and they deprived Appellant of his due process right to a fair trial.

B. <u>The applicable law.</u>

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[241] Lest the symbolism be confusing, Jelks' testimony that Appellant was the shooter was "a sow's ear" because his credibility was suspect. However, when his testimony in many particulars was improperly corroborated by the testimony of an experienced and respected police gang expert, Jelks' credibility overall was enhanced (i.e., the sow's ear became a silk purse.).

1. A police gang investigator must be qualified as an expert on gangs to render expert testimony.

"[W]e have without question permitted police to provide expert testimony regarding gangs." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) However, a police gang investigator must be qualified as an expert on the subject of gangs *generally* in order to testify as an expert. The police witness must have "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject [i.e., of African-American street gangs] to which his testimony relates." (Evid. Code, § 720, subd. a.) In *People v. Kelly* (1976) 17 Cal.3d 24, this Court cautioned that the expert's "field of expertise must be carefully distinguished and limited."

> However, whether a person qualifies as an expert in a particular case depends upon the facts of that case and the witness' qualifications. [Citation] "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." [Citation] *(People v. Kelly* (1976) 17 Cal.3d 24, 39.)

When the opposing party disputes the witness' qualifications to testify as an expert on a particular subject, it is for the court, not the jury, to determine the existence of non-existence of this preliminary fact. (*People v. Alcala* (1992, modified, 1993) 4 Cal.4th 742, 787.) Whether a witness qualifies to testify as an expert on a specific subject is a preliminary fact to be determined pursuant to Evid. Code, §§ 402 and 405. The *proponent* must persuade the judge that his expert is qualified (See the "Assembly Committee on Judiciary Comment to Evid. Code, § 405."), and pursuant to these sections, the trial court *must* be convinced by *a preponderance of credible evidence* that the witness is qualified on the particular

subject *before* allowing the witness to testify as an expert. (Evid. Code, § 115, 402, 405, 720.)[242]

Although a police gang investigator may qualify as an expert on the subject of gangs *generally*, the gang investigator will rarely qualify as an expert on the subject of a *particular* gang's customs, habits, behavioral characteristics and psychology. Moreover, a police investigator's expertise in gangs generally does *not* qualify the witness as an expert on the subject of an individual gang member's habits, behavioral characteristics, mental states or thought processes. Further, a police witness' expertise in gangs generally does *not* transform the police investigator into an expert on the subject of credibility of witnesses or hearsay declarants.

Hence, any testimony the police investigator renders regarding a particular gang or specific gang member will normally be limited to that of a lay witness. His testimony must then also be *limited* to those items about which he has *personal knowledge*. (Evid. Code, § 702) If the gang investigator has *no personal knowledge* of the facts about which he testifies, then his testimony regarding a particular gang or a specific gang member is simply his *personal belief* as to what he thinks about the case facts and the inferences to be drawn from those facts. In that case, his personal beliefs are normally *irrelevant* and *inadmissible*.

The case of *People v. Killebrew* (2002) 103 Cal.App.4th 644 illustrates this. In *Killebrew* the prosecution's gang expert (Detective Darbee) initially provided expert factual testimony regarding gangs *generally*. Detective Darbee then testified about the mental state that specific gang members would have had in the scenario of that case.

> Through the use of hypothetical questions, Darbee testified that each of the individuals in the three cars (1) knew there was a

[242] Unlike Evid. Code, § 403 which expressly allows the trial court to conditionally admit the proffered evidence subject to the preliminary fact being subsequently proven up (see § 403, subd. b.), § 405does not provide that option to the trial judge.

gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. In other words, Darbee testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.

Darbee's testimony was the only evidence offered by the People to establish the elements of the crime. As such, it is the type of opinion that did nothing more than inform the jury how Darbee believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded. (*Summers v. A.L. Gilbert Co., supra*, 69 Cal.App.4th at pp. 1182-1183.)

Darbee simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. Darbee's beliefs were irrelevant. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658. Emphasis added.)

2. The witness' expert *factual testimony* must be relevant and not precluded by other evidentiary considerations.

Assuming the gang investigator is qualified to testify as an expert witness on the subject of gangs generally, his expert *factual testimony* must also be *relevant*. (Evid. Code, § 210, 350. See *People v. McDonald* (1984) 37 Cal.3d 351, 369-371 [The witness' expert *factual testimony* regarding "potential errors in eye-witness identifications" must be relevant.) The basis on which the expert testimony rests must also be one upon which other experts *in that field* reasonably rely. (Evid. Code, § 801, subd. b) Irrelevant or speculative matters are not a proper and reliable basis for an expert's opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 589; *Idaho v. Wright* (1990) 497 U.S. 805, 816-827; EC sections 802, 803.) Although an expert may base his opinion on any matter known to him, including hearsay that is otherwise inadmissible, the "matter known to him" must contain factors that are reasonably relied upon by other experts in that field. (Evid. Code, § 801, subd. b; *People v. Catlin* (2001) 26 Cal.4th 81, 137.)

Additionally , the probative value of his expert *factual testimony* must not be "substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Further, it must also not be precluded by some other rule of law, such as a privilege (Evid. Code, §§900, *et. sec.*), a public policy (Evid. Code, §§ 1115-1128, 1151-1160), *inadmissible character evidence*, (Evid. Code, § 1101, subd. a.), etc.

3. The witness' expert *opinion testimony* must be such that it would assist the trier of fact before it is admissible.

Additionally, if the qualified gang expert witness is asked to render expert *opinion testimony*, the subject matter to which the opinion relates must involve specialized knowledge that is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" in understanding the evidence or in determining a fact in issue. (Evid. Code, § 801, subd. a; *People v. McDonald* (1984) 37 Cal.3d 351, 369-371.)

California courts have also held that an expert witness is not allowed to simply express *any* opinion or belief that he or she may have under the guise of an expert opinion. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972 ["[T]he admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes."]) The court in *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, wrote:

> Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided. ... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision." (*Id.*, at p. 1182-1183.)

4. The Standard of Review on Appeal Is for an Abuse of Discretion.

Finally, when reviewing the trial court's ruling to admit expert testimony on gangs, "[t]he decision of a trial court to admit expert testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Roberts* (1992) 2 Cal.4th 271, 298.)

C. Discussion.

1. The prosecution presented minimal credible evidence that the slayings of Loggins and Beroit were motivated by gang considerations.

In this case, the prosecution presented very little *credible* evidence that the motive for the murders of Loggins and Beroit was actually gang related. In fact, much of the prosecution's evidence strongly suggested the shootings were *not* committed for gang purposes.

The prosecution presented *no* evidence that either Loggins or Beroit were, in fact, members of the East Coast Crips gang, or any other gang for that matter.[243]

The prosecution presented *no* evidence that these killings were in retaliation for some prior violent incident perpetrated by East Coast Crips against the 89 Family Bloods gang. The prosecution presented *no* evidence, other than the traditional "Bloods hate Crips" testimony, that there existed any specific animosity between the East Coast Crips and the 89 Family Bloods gang, such that random

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[243] In fact, victim Loggins did not even live in the East Coast Crips neighborhood! All parties stipulated that Loggins lived at 1151 East 88th Street in Los Angeles. [RT, 17:3817] However, the prosecution's own gang expert, Detective Barling, testified that 1151 East 88th Street was east of Central Avenue, but it was *not* within the East Coast Crips neighborhood. [RT, 21:4796] This evidence suggested that Loggins was *not* a member of the East Coast Crips gang.

Further, Carl Connor testified that he "grew up" with Loggins and Beroit, both of whom lived on the east side of Central Avenue. He had known them for 15 years; however, Connor was not a member of the East Coast Crips gang. Although Connor was not living near them in 1991, he would occasionally visit that neighborhood east of Central. [RT, 15:3336-3337, 3363] Simply put, the prosecution presented *no* evidence whatsoever that Loggins or Beroit were, in fact, gang members.

shootings might occur simply because the victims were East Coast Crips. The prosecution presented *no* evidence that Loggins and Beroit were selling drugs on the Bloods' side of Central Avenue, an act that might reasonably have precipitated a violent gang motivated retaliatory response.

There was *nothing* about the conduct of Loggins and Beroit that suggested they were gang members or that they were acting in a manner that would cause on-lookers to think they were gang members. The prosecution presented *no* evidence that they were scribbling gang graffiti on walls or that they were "crossing out" 89 Family Bloods gang graffiti. The prosecution presented *no* evidence that Loggins and Beroit were "claiming" gang affiliation, *no* evidence that they were challenging the gang membership of others, *no* evidence that they were clad in blue, the Crips color of choice. There was absolutely *nothing* about the conduct of Loggins and Beroit that suggested they were gang members, much less rival gang members.

Rather, the *only* facts the prosecution presented that suggested the murders were gang motivated (ignoring Detective Barling's testimony) were:

a) Testimony that Central Avenue, a busy thoroughfare with businesses on both sides, was considered the dividing line between East Coast Crip territory to the east and the neighborhood claimed by the 89 Family Bloods gang to the west.

b) On direct examination, the prosecutor asked Connor a leading question, "Did you tell them [the police] that Fat Rat shot at the guys because he (Fat Rat) thought they were Crips?" Connor answered, "yes".[244] (RT, 15:3379]

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[244] This was not *credible* evidence for three reasons. First, it was inadmissible hearsay. Connor never testified on direct examination why Fat Rat shot Loggins and Beroit; hence, his prior statement to the police was not inconsistent with his testimony. Second, Connor's statement to the police about why Fat Rat shot Loggins and Beroit was pure speculation, since he could not read Fat Rat's mind. He was not competent to testify to that "fact" since he had no personal knowledge.

c) The prosecution played a portion of the tape recording of Connor's initial statement to the police in August 1994 as a prior inconsistent statement. Therein, Connor said Fat Rat intended to shoot BaaBaa, *who was not a Crip*. [CT, 2:373] Subsequently, Detective Matthew told Connor, "He [Fat Rat] knew he [BaaBaa] was a Crip." Connor said "Yeah." [CT, 2:380] [245] [People's Exhibits #22 and #22A; CT, 2:371-388.]

d) Jelks' testimony regarding the discussion involving co-defendant Johnson and other 89 Family Bloods gang members *prior* to the shootings. Jelks said that for 15 minutes the discussion involved *stealing* the black Chevrolet, a low rider with hydraulics and flashy rims that was being washed at the car wash. [RT, 16:3525-3529] Jelks did not know what car the group was talking about until after the shootings. [RT, __:3534] Jelks testified that eventually the discussion shifted to whose car it was; that it supposedly belonged to a guy named Brian or BaaBaa. [RT,

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(Evid. Code, §§ 702, 800.) Third, a review of the transcript of that interview that was subsequently played to the jury reveals that Connor said Fat Rat intended to shoot BaaBaa, who was *not* a Crip. [CT, 2:373] Subsequently, Detective Matthew *told* Connor, "He [Fat Rat] knew he [BaaBaa] was a Crip." Connor said "Yeah." [CT, 2:380] This also was pure speculation, not to mention the fact that *it was the detective who put those words in Connor's mouth*, and the prosecutor took full advantage of this fact. Unfortunately, Appellant's trial counsel did not object to this testimony. Nevertheless, it was still not *credible* evidence.

[245] This also was pure speculation on Connor's part, not to mention the fact that *it was the detective who put those words in Connor's mouth*. The prosecutor took full advantage of this fact, however, when she asked Connor the leading question.. Unfortunately, Appellant's trial counsel did not object to this testimony, nor did the defense confront Connor or Detective Matthew or Detective Sanchez to demonstrate Connor never said BaaBaa, Loggins or Beroit were Crips. Nevertheless, it was still not *credible* evidence. As discussed briefly at Issues I and III in Appellant's Opening Brief, this portion of Connor's prior statement to the police was obviously speculative on Connor's part and should never have been included in the tape recording that was played to the jury. See People's Exhibit #22 and 22A. And this assumes Connor was truthful when he told the police he was present at the murder scene on August 5, 1991.

16:3537] Jelks said he knew an individual named Brian or BaaBaa, and that Jelks "believed" this individual was an East Coast Crip [RT, 16:3538]

In response to a leading and suggestive question by the prosecutor, Jelks said the discussion involved BaaBaa's showing "disrespect" to the 89 Family Bloods gang by having his car in their neighborhood [RT, 16:3540], and that Johnson said the car was BaaBaa's. [RT, 16:3540] Jelks then explained that someone else mentioned that it was not BaaBaa's car; that "it was supposed to have been a guy name Payton's car." [RT, 16:3540-3541] Jelks admitted he did *not know* someone named Payton, nor did he know whether someone named Payton owned a car like the black Chevrolet. However, Jelks said he had "heard of the name Payton" [RT, 16:3541] Jelks then stated that although he had heard of the name Payton but did not know someone named Payton, Jelks claimed to *know* that this Payton individual associated with the East Coast Crips gang! [RT, 16:3541] Jelks testified there was also a "reference" by someone in the group that this "Payton" might be a member of a rival gang [RT,16:3541-3542]

In response to *another leading and suggestive question* by the prosecutor, Jelks indicated that he, Johnson and the rest of the group "seemed upset" that "a Crip might bring his car over on to Central"[246] [RT, 16:3542]; that Johnson then "kind of like spoke to the group, as far as who would like to go serve, which is another indication of serving someone"; that is, shooting someone. [RT, 16:3542]; that after Appellant left to do the shootings, Johnson told Jelks and the others that "he is going to go serve him." [RT, 16:3564]; and that in response to *another leading and*

[246] These are the prosecutor's words. It was as though the prosecutor was simply telling her theory of the case to Jelks through her questions, and Jelks was simply responding "yes" to each question.

suggestive question, Jelks said this shooting "constituted a mission."[247] [RT, 16:3624]

2. Much of Detective Barling's "expert" testimony was simply a reiteration of Freddie Jelks' testimony.

Near the conclusion of the State's case-in-chief, the prosecutor sought to present the testimony of Los Angeles Police Detective Christopher Barling as a police gang expert. The defense objected to this testimony. [RT, 19:4265, 4269-4271.] At this point, the prosecutor made a rather startling comment to the trial court; Detective Barling was "not a gang expert in a generic sense."

> CRT: Let's start talking about this gang issue. Tell me specifically what it is – specifically what it is you want to elicit from a gang expert.
>
> DDA: Mr. Barling – Detective Barling is not a gang expert in a generic sense. He is an individual that worked for LAPD from at least 1989 until the present and focused on 89 Family and the neighboring swan gangs.
>
> CRT: Was he a C.R.A.S.H.[248] officer?
>
> DDA: He was a C.R.A.S.H. officer, then he was on loan from C.R.A.S.H. to homicide. Now he's a homicide investigator. He had daily contacts with the people involved in the street. He was intimately familiar with who lived where and what the relationship between the people in this particular set of gangs were. He, in fact, was one of the on scene officers in the Albert Sutton cases, both the attempted murder and the subsequent murder. He is somebody who had contact with virtually everybody whose names have come up in the context of this particular case.
>
> CRT: So, he's an expert on this little subset. What do you expect him to testify to? [RT, 19:4265-4266 (Emphasis added)]

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[247] Once again, these words were the prosecutor's. The prosecutor had no difficulty getting Jelks to say anything she wanted him to say. She would phrase the question with the suggestion included, and Jelks would simply respond affirmatively.

[248] C.R.A.S.H. was the Los Angeles Police Department's gang unit. The initials stood for "Community Resources Against Street Hooliganism." [RT, 19:4289]

Based on this minimal "offer of proof" as to Barling's expertise, and without considering defense evidence or argument, the trial court announced it was persuaded that, although Barling was apparently *not* "a gang expert in a generic sense", he was qualified as "an expert on this little subset." (Evid. Code, §§115, 402, 405, 720 [the trial court *must* be convinced by a preponderance of evidence that the witness is qualified on the particular subject *before* allowing the witness to testify as an expert.].)

The prosecutor's further offer of proof made it very clear that she wanted Detective Barling to render testimony on the subject of "this little subset" called the "89 Family Bloods Gang", as well as the status, involvement, and mental thought processes of Appellant and Cleamon Johnson as members of "this little subset" called the 89 Family Bloods gang. The offer of proof was basically a reiteration of the testimony of Freddie Jelks, and Jelks' testimony was the basis for the prosecution's theory of the case that the shootings were gang motivated. Appellant asserts that the prosecutor simply wanted the more credible Detective Barling to relate that same theory to the jury, thereby more firmly establishing that theory *and* enhancing the credibility of Jelks.

> DDA: I want to elicit from him the manner in which 89 Family operates; which is the fact that Mr. Johnson is a person who occupies a position of great respect; that he is a person who is able to get his business done; that he uses other gang members and other gang members do things for Mr. Johnson to gain respect in the neighborhood; that Mr. Johnson is somebody who is feared by members of the gang because of his position of respect;... [RT, 19:4266-4267]

> DDA: ...that Mr. Allen had returned to the neighborhood after a short period – after being out of the neighborhood; and that part of the way that a gang member reenters the neighborhood and regains respect is to go on missions; that this [shooting of Loggins and Beroit] was in fact a mission; that it had all of the markings of a mission,... [RT, 19:4266-4267]

DDA: ...and that – I expect Detective Barling could testify as to the gang implications of a killing in the middle of the day on a major thoroughfare, which was a boundary line between the East Coast Crips and the 89 Family Bloods. [RT, 19:4266-4267]

DDA: ...that there was a particular location in the 89 neighborhood where guns were known to be kept; that that location was the pigeon coop in the back of the Johnson's yard;...[RT, 19:4266-4267]

Subsequently, the prosecutor made a further offer of proof, albeit ambiguous, that Barling would provide testimony regarding the testimony of previous witnesses Connor, Jelks and James:

DDA: ...that in his [Barling's] view as a gang expert in the context of 89 Family and 89 Family alone, that the concerns about retribution voiced by the witnesses were in his view legitimately based. [RT, 19:4268]

Both defense counsel continued to object to Barling's proposed expert testimony. [RT, 19:4265, 4269-4271.] For the most part, the trial court overruled the bulk of the defense objections. [RT, 19:4271-4276, 4279-4284.]

3. First Claim of Error:

The trial court abused its discretion and erred when it ruled that Detective Barling was qualified to testify as an expert on the subject of the customs, habits, behavioral characteristics, psychology and mental thought processes of Appellant, Cleamon Johnson, and other members of the 89 Family Bloods gang, separately or as a group.

In determining whether a police gang investigator qualifies as an expert witness on a subject *other than gangs generally*, the trial court must cautiously determine the extent of his expertise, then "carefully distinguish and limit" the expert's testimony to that particular field of expertise. (Evid. Code, §§ 720, 801; *People v. Kelly* (1976) 17 Cal.3d 24, 39.)

Because of the inherent undue prejudice that accompanies the introduction of any gang evidence, Appellant asserts it is absolutely incumbent on the trial

judge to *insist* that the prosecution meet its burden of proof as to whether the police gang investigator actually does qualify as an expert *on the particular subject matter* about which the witness seeks to testify. Hence, for Detective Barling to qualify as an expert witness on a subject *other than gangs generally*, the prosecution had the burden of presenting sufficient, reliable and credible proof in the §405 hearing to convince the trial judge by a preponderance of evidence that Detective Barling was *qualified* to testify as an expert on the customs, habits, behavioral characteristics, psychology and mental thought processes of Appellant, Cleamon Johnson, and other members of the 89 Family Bloods gang, separately and as a group, *before* allowing the witness to testify as an expert. (Evid. Code, §§115, 402, 405, 720.)

Other than objecting and thereby placing in dispute Barling's qualifications to testify as an expert in that particular field, the defense had no affirmative responsibility to disprove his qualifications. (Evid. Code, §§402, 405.)

According to the prosecutor in this case, however, Detective Barling "*was not a gang expert in the generic sense.*" [RT, 19:4265-4266][249] She apparently believed that Barling did *not* have the qualifications to testify as an expert on African-American gangs generally in the Los Angeles area! Yet, the 89 Family Bloods gang was an African-American gang in the Los Angeles area! If Barling did not qualify as an expert on African-American gangs generally, how would he qualify as an expert on this particular African-American gang? Appellant submits that the only way Barling could have qualified as an expert on the "subset" of the 89 Family Bloods gang, but not on African-American gangs *generally*, would

[249] Appellant asserts this in simply another example wherein the trial court failed to ensure Appellant and co-defendant Johnson would receive a fair trial. The prosecutor's offer of proof regarding Barling's qualifications was at best ambiguous, and at worst, simply "double talk" designed to mislead and confuse the court and counsel. Her admission that Barling was "not a gang expert in a generic sense" made no sense and *should have caused great concern for the trial court.*

have been if there was something unique and different about the 89 Family Bloods gang that set it apart and made it substantially different from other African-American gangs. The prosecutor, however, presented absolutely no evidence to the court during the §405 hearing in this regard.[250] Rather, much of Barling's subsequent testimony was identical with that of a "generic" gang expert on African-American gangs in the Los Angeles area! In fact, when Barling was recalled to testify later in the trial, he admitted on cross-examination that during the years he investigated crimes in his assigned area (and developed his gang expertise), he was involved with 40 to 50 different gangs! [RT, 21:4799] From this, it would appear that Barling was just what the prosecutor said he *wasn't*; an expert on African-American gangs *generally* and "in the generic sense."

This comment by the prosecutor at the beginning of her offer of proof should have been very troubling to the trial court. It should have alerted the trial court to the issue of whether Barling was going to provide testimony beyond that of gangs *generally*, and it should have focused the court's attention on the additional or different qualifications Barling needed to possess in order to be qualified as an expert on a subject that was *not* gangs in general.

Furthermore, by emphasizing Barling's personal knowledge of the *small number of gangs* with which he was supposedly familiar, and by further emphasizing that Barling personally knew the gang members he would be testifying about, the prosecutor was basically indicating to the court that Barling

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[250] Appellant does *not* suggest the trial court must conduct a formal §405 hearing and call it such. But in the instant case, the trial court's discussions with counsel and the brief testimony presented by Barling constituted what Appellant asserts was a woefully inadequate §405 preliminary fact hearing that was prejudicial to Appellant.

would be rendering his own lay, or personal, opinions about the defendants, their gang, and the facts of this case.[251]

A similar situation occurred in *People v. Killebrew* (2002) 103 Cal.App.4th 644. Therein, the court addressed the propriety of a gang expert rendering alleged *expert testimony* about specific individuals, rather than gangs *generally*. (*Id.*, at pp. 649-659.) That court cited numerous cases that dealt with the admission of gang evidence through testimony of police gang experts, then stated:

> While not an exhaustive list of all cases that consider expert testimony on gangs, nor an exclusive list of all gang topics for which expert testimony may be admissible, these cases provide guidance to resolve the issue presented by this case. None of these cases permitted testimony that a specific individual had specific knowledge or possessed a specific intent. *Olguin* came close to addressing this issue when the appellate court held the officer's testimony was admissible since it was framed in terms of gangs in general, not a specific defendant's subjective expectation. *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658.)

The *Killebrew* court found that the gang expert could provide expert testimony about gang behavior *in general*, but the gang expert should *not* have been allowed to testify about a specific defendant's subjective knowledge or intent. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658.) According to the *Killebrew* court, such testimony reflected no more than the expert's personal belief about the defendant's guilt. (*Killebrew,* at p. 658.) It did not assist the trier of fact in understanding a matter beyond their personal experience (i.e., it was inadmissible expert *opinion* testimony), but drew conclusions on issues reserved for the jury. (*Killebrew*, at p. 658.)

This concern is particularly troublesome in cases in which the expert witness has a potential personal bias or stake in the outcome of the case. Many

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[251] Unless a witness is testifying as an expert pursuant to Evid. Code § 801, the witness must have personal knowledge about that which he testifies. (Evid. Code, §§ 702, subd. a; 800, subd. a.)

gang experts are the actual detectives assigned to handle the investigation of criminal cases involving gang members. Others work very closely with the assigned detectives and prosecutors as they attempt to solve difficult gang related cases. It is often a very subtle, yet inadmissible, shift when the gang expert renders expert *factual testimony* that "gang members *generally* will seek to retaliate against witnesses", to "members of the 89 Family Bloods gang will seek to retaliate against witnesses", and finally, to "Michael Allen and Cleamon Johnson will seek to retaliate against witnesses."[252] A prosecutor or a police gang expert who wanted Michael Allen and Cleamon Johnson to be convicted of a particularly heinous gang related murder can artfully phrase questions and articulate answers in such a way that the distinction between admissible expert testimony and inadmissible personal beliefs and opinions testimony becomes blurred and confusing.

The key to avoiding this problem, Appellant asserts, is for the trial court to *insist* that the prosecution provide sufficient evidence that the police gang expert has *additional* expertise on a specific subject to allow him to testify to something other than *gangs generally*. For example, it is highly unlikely that Detective Barling, or any other police officer, would have "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject" of the specific behavioral characteristics or psychological makeup of Michael Allen and Cleamon Johnson, such that the officer would qualify as an expert witness on their specific behavior and psychology. (Evid. Code, § 720, subd. a.) And, even if Barling did have this expertise, it *must* be incumbent on the

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[252] The latter two subjects would be the gang expert's *personal* belief that Appellant, Johnson , and other 89 Family gang members have a propensity to retaliate against witnesses because his field of expertise is *not* the behavioral characteristics of these particular human beings. It would also be inadmissible character evidence. (Evid. Code, § 1101, subd. a) The initial factual testimony regarding gangs generally is the typical admissible expert testimony that is based on his training and special experience.

prosecution to *convince* the trial court of that particular expertise. If the trial court fails to insist that the prosecution meet their burden of proof as to this preliminary fact of additional expertise, Appellant asserts the trial court *abuses its discretion* if it then allows the gang expert to provide expert testimony on any subject other than gangs generally.

Consistent with this concept, in this case the trial court was required to carefully evaluate whether the prosecution established Barling was qualified, based on "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert" (Evid. Code, § 720, subd. a.) to render expert testimony on the subject of the customs, habits, behavioral characteristics, psychology and mental thought processes of Michael Allen, Cleamon Johnson, and other members of the 89 Family Bloods gang, separately and as a group. The burden of proof was *not* on the defense to disprove his qualifications. Since the prosecution presented no evidence that Barling had this additional expertise, Barling was not qualified to render expert testimony on that subject. The trial court, therefore, abused its discretion and erred when it allowed Barling to render expert testimony that pertained specifically to Appellant, co-defendant Johnson, and/or other members of the 89 Family Bloods gang.

a. Barling's testimony:

Detective Barling testified regarding the concept of "respect" among gang members generally. "It is the most important thing to a gang member. The respect that he gets from other people by his actions or his reputation is what he or she is going to rely on as how much power, pull and influence they have over other people and how they can travel from different parts of the city within the gang culture." It is important, he testified, for gang members to earn respect. Respect could be earned in different ways. "If you are known for a violent reputation, you will have more respect because the guys will be afraid of you and intimidated by you and will want you along with them if they have to travel in rival gang territories of if they need to do a mission against another gang." [RT,

19:4296-4297] In other words, the amount of "respect" a gang member had was synonymous with his *reputation for violence*, according to Barling's expert testimony.

He further explained, "A mission is someone tells you to do something. You will do a mission. I need you to do a mission. I need you to take care of some of my business and put work in for me." [RT, 19:4298]

Barling testified that some gang members would "do a mission" at the request of another highly "respected" gang member because they both wanted the mission "to be done to show that our gang is still way up here above everybody else." [RT, 19:4298-4299] Responding to the prosecutor's leading questions, he told the jury that serving the mission would be, in part, a show of loyalty on the part of the gang member who committed the mission, and it would also be "a show of respect" to the more highly respected gang member.[RT, 19:4298-4299]

These portions of Barling's testimony were expert factual testimony about gangs *generally*, a subject on which Barling was arguably qualified to render testimony.

Pursuant to the trial court's rulings, however, Detective Barling was also allowed to render inadmissible expert testimony that:

> a) Cleamon Johnson's level of "gang respect" (ie., his reputation for violence) was as high as *any* gang member, Crip or Blood, with whom Barling was aware; in fact, Johnson's gang reputation was "unique";
>
> b) Johnson was his gang's "shotcaller", and it was Johnson who directed the activities of the gang;
>
> c) Other gang members would do what Johnson told them to do because of their "respect" for, or fear of, Johnson;
>
> d) Appellant had recently returned to the 89 Family neighborhood after being gone, and he was accordingly *expected* to perform missions and commit acts of violence for the gang;

e) To display his respect for Johnson in order to increase his level of gang respect that was slightly less than Johnson's, Appellant had to do what Johnson requested;

e) To re-establish and demonstrate his loyalty to the gang in order to increase his level of gang respect, Appellant was *expected* to go on missions and commit acts of violence to enhance his gang's level of "respect" or reputation among other gangs; and

f) Therefore, by "serving" (i.e., killing) victims Loggins and Beroit, Appellant performed a "mission" at the behest of Johnson and to support his gang, so that Appellant could increase his gang "respect" level.

To illustrate, Detective Barling was also allowed to render "expert" testimony as to the specific gang "respect level" (or reputation for violence) of co-defendant Johnson *and* Appellant. Barling related that Appellant had a little bit less "respect" than Johnson because Appellant "had just recently rejoined the gang."[253] Barling immediately added, in an obvious reference to Appellant, that one way to regain "respect" after being gone from the gang was to go on a "mission." This was simply a very obvious and unambiguous comment by Barling that Appellant served a mission at the behest of Johnson when he shot and killed Loggins and Beroit.

DDA: Now you indicated the reputation was very important. Is that correct?
BAR: Yes.
DDA: What were the respect – What were the respective positions, if that is appropriate, of Mr. Allen and Mr. Johnson in the gang as of August of 1991?
BAR: You don't have positions like president, vice-president or captain or lieutenant. You have positions by the respect and how you command yourself. Mr. Johnson had a lot more respect than other members of that gang that I dealt

[253] This comment by Barlng did violate the trial court's ruling. Barlng could only testify to this if he had personal knowledge. As will be discussed infra, the prosecution made an inadequate showing that Barling had personal knowledge of this event. Hence, Barling was not competent to testify regarding this. (Evid. Code, §§ 700, 702.)

with. Mr. Allen had a little bit less respect. He had just recently rejoined the gang.

...

DDA: What is the consequence of having been out of the neighborhood for a while?

BAR: It usually means that you have to come back and do something to reshow that you are still part of the neighborhood and still down for the 'hood and you are willing to do stuff for that gang.

DDA: Would that include doing missions to show your loyalty?

BAR:Yes. [RT, 19:4302-4303.][254]

The prosecutor then had Detective Barling testify that co-defendant Johnson's respect level (i.e., his reputation for violence) among gang members was so strong that few, if any, gang members on the street had as great a respect level (i.e., reputation for violence) as co-defendant Johnson:

DDA: And back in August of 1991, what was Mr. Johnson's level of respect in 89 Family?

BAR: My dealings with him is that he had a lot of respect, a lot more respect than most – than a majority of the 89 Family.

DDA: In respect to Mr. Johnson's status in the gang in August of 1991, can you think of anybody else who was on the street at the time who had an equal or greater amount of respect?

BAR: There were a couple of other people that had maybe just as much respect as he did. [RT, 19:4303-4304]

During subsequent direct examination, the prosecutor continued to ask Barling questions regarding the reputation of co-defendant Johnson. Barling testified that co-defendant Johnson had the reputation for meting out discipline

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[254] The trial court had ruled previously that Barling could render his opinion that "sometimes when folks are absent and then return, they are expected to, or choose to, do things for the gang to sort of get back in their good standing, without reference to his opinion that that's what Mr. Allen did here." [RT, 19:4274 (Emphasis added.).] Appellant submits the prosecution's adroit phrasing of her questions may have obfuscated her intent, but it did not eliminate the fact that she directly violated the trial court's previous ruling.

when members of the 89 Family Bloods gang displayed disrespect to the gang or acted in a disloyal fashion. [RT, 19:4305-4306] The prosecutor and Barling then engaged one more time in testimony regarding who it was that was fearful of co-defendant Johnson. Barling took full advantage to talk about how wide-spread Johnson's reputation or respect level was; that members of his gang knew him and his propensity for violence, as did the citizens in the community. "Most of his rivals" knew of his reputation for violence; in particular, the rival Main Street Crips did. Further, the extent of co-defendant Johnson's "respect level" or his reputation for violence was "unique", according to this experienced C.R.A.S.H[255] gang investigator.

> DDA: When you say that Mr. Johnson was respected in the gang, was Mr. Johnson feared?
> BAR: Yes.
> DDA: By whom?
> BAR: By his fellow gang members as well as other citizens.
> DDA: Was Mr. Johnson -- How was Mr. Johnson's reputation with respect to rivals, if you know?
> BAR: Most of the rivals knew of his reputation or knew of his name which, also, as a police officer working C.R.A.S.H., spoke to his respect within the gang. They had heard his name. When I went to the Main Street Crips, one of the gangs that I spoke to which is a rival gang, they would know of his name and reputation, which is unique that a rival gang would know of a person' nickname and reputation within that gang. [RT, 19:4306-4307]

The prosecutor then had Barling render his expert *opinions* that Appellant and co-defendant Johnson were members of the 89 Family Bloods gang. [RT, 19:4299-4301][256] Sandwiched between Barling's expert *opinion testimony*

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[255] CRASH is the acronym for the Los Angeles Police Department's gang unit. It stands for Community Resources Against Street Hooliganism. [RT, 19:4289]

[256] Appellant acknowledges this expert opinion testimony was appropriate because the ways in which someone can determine if an individual is a gang member is "related to a subject that is sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. a.)

regarding the two defendants, however, the prosecutor asked a series of leading questions regarding a "mission", as well as the "loyalty" and "respect" that was so important to gang members.

The trial court had previously ruled that Barling could render his opinion as to what the term "mission" meant, but he could *not* testify that Johnson's sending Appellant out to commit these killings was a "mission." [RT, 19:4274][257] By conveniently inserting the references to a "mission" and the resulting display of "loyalty" and the sign of "respect" given to the ranking gang member, the prosecutor successfully presented to the jury a "not too subtle" reference to Appellant's having served a mission at the behest of Johnson when he shot and killed Loggins and Beroit. The prosecutor had Barling do everything *but* violate the express wording of the court's ruling. [RT, 19:4300-4301.]

However, Appellant submits the prosecutor subsequently violated the court's ruling again when she had Barling render "expert" testimony that Johnson was the gang leader "who another member would respond to with respect in completing a mission." Near the conclusion of Barling's direct examination, he was asked to once again re-affirm that Johnson was the gang's "shot caller", that he was feared and "looked up to" by members of the gang, and that he had sufficient gang respect to "direct a mission", and that when a gang member responded to him by serving a mission, that gang member showed his respect to Johnson. Barling's testimony was an *obvious* reference to Appellant's having served a "mission" for Johnson when he shot Loggins and Beroit:

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[257] Appellant does not challenge this portion of the trial court's ruling. It refers to expert factual testimony regarding gangs generally and what the word "mission" meant to gang members generally. Further, once Barling testified as an expert as to the definition of a "mission" in general gang terms, the jury was just as capable as Barling to conclude that Johnson's sending Appellant to kill Loggins and Beroit was a "mission." That is, Barling's expert opinion would not "assist the trier of fact" (Evid. Code, § 801, subd. a.) and was therefore inadmissible.

DDA: You have earlier described Mr. Johnson's role as being one of respect. How would you compare Mr. Johnson's position in the gang with anybody else in the gang?
BAR: I believe that he at the time was one of the people that called shots of 89 Family Bloods.
DDA: When you say "called shots", was he somebody who could direct a mission?
BAR: Yes.
DDA: Was he somebody that was feared?
BAR: Yes.
DDA: Would he be somebody who other members of the gang looked up to for leadership?
BAR: Yes.
DDA; Was he somebody who directed the progress of the gang?
BAR: In my opinion, yes.
DDA: And was he somebody who another member would respond to with respect in completing a mission directed by Mr. Johnson?
BAR: Yes. [RT, 19:4325-4326]

As stated, *supra*, Barling was *not* an expert witness on the subject of the customs, habits, behaviorial characteristics and psychology of Cleamon Johnson, Michael Allen, or other members of the 89 Family Bloods gang, separately or together. Hence, any expert testimony he rendered on this subject, including expert opinion testimony, was inadmissible.

The above cited *expert testimony* of Detective Barling was also *inadmissible* for several additional legal reasons.

Second reason: Detective Barling's testimony was *inadmissible* lay opinion testimony because there was no showing he had personal knowledge of the matters about which he testified.

If Detective Barling's testimony was inadmissible expert testimony because he was not qualified to render expert testimony on that subject, then any testimony he gave had to be based on his personal knowledge. (Evid. Code, §702.) A witness' lay *opinion* testimony is admissible only if it is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony." Evid. Code, § 800. For an opinion such as Barling's to be "rationally

based on the perception of the witness", Detective Barling needed to have *personal knowledge* of the facts that formed the basis for his lay opinion. (Evid. Code, § 702.)

Since the defense objected to Barling's rendering opinions on these topics, the preliminary fact of personal knowledge was disputed. Evid. Code, § 402 explains the duty the trial court has when a preliminary fact is disputed:

> When the existence of a preliminary fact is disputed, its existence or non-existence shall be determined as provided in this article [§§ 400-406.] (Evid. Code, § 402, subd. a. Emphasis added.)

When the preliminary fact is whether the witness has personal knowledge of the facts upon which his proposed lay opinion testimony is based, Evid. Code, §403 explains the proffered lay opinion testimony "is inadmissible unless the court finds by evidence sufficient to sustain a finding that the witness has personal knowledge of the facts underlying the opinion.

The trial court never required the prosecution produce evidence sufficient to sustain a finding that Barling had personal knowledge of the underlying facts that formed the basis of his lay opinion. Nor did the prosecution ever present evidence sufficient to sustain a finding that Barling's "lay opinion" was "rationally based on the perception of the witness." (Evid. Code, §800, subd. a.)

For example, Detective Barling testified that in his opinion Johnson "had a lot more respect than other members of" the 89 Family Bloods gang. [RT, 19:4302-4303] No evidence was introduced by the prosecution that demonstrated Barling had personal knowledge of the facts upon which this opinion was based. Therefore, it was inadmissible lay opinion.

Barling also opined that Appellant "had a little bit less respect" than Johnson during the summer of 1991. [RT, 19:4302-4303] Yet Barling testified that Appellant had allegedly been gone for about a year prior to his returning to the gang during the summer of 1991. If Appellant was gone, what facts known to Barling *personally* formed the basis for this opinion by Barling? The defense

objected to this opinion testimony. The prosecution had "the burden of producing evidence as to the existence of the preliminary fact [personal knowledge], and the proffered evidence [lay testimony/lay opinion testimony] was inadmissible unless the court found that there was evidence sufficient to sustain a finding of the existence of the preliminary fact [personal knowledge] ...." (Evid. Code, § 403.)

Barling opined that in August of 1991 he could think of only a couple of other people that had maybe just as much respect as Johnson did. [RT, 19:4303-4304] The prosecution presented no evidence to prove Barling had personal knowledge of any fact that supported this conclusion. It was therefore inadmissible lay opinion testimony.

The remainder of Barling's above quoted lay testimony regarding Johnson and Appellant was equally inadmissible for the same reason. The trial court erred when it did not require the prosecution to present evidence that Barling had personal knowledge of the facts that formed the basis for his lay testimony, as well as his lay opinion testimony. Barling's lay testimony regarding Johnson, Appellant and other gang members was erroneously admitted.

Third reason: If Barling's opinion testimony was inadmissible expert opinion testimony, and if it was also inadmissible lay opinion testimony, then his testimony was simply an expression of his personal beliefs as to how he viewed the evidence and what inferences he thought should be drawn. As such, his testimony was not relevant and was inadmissible.

One example from Barling's above quoted testimony illustrates this issue rather clearly. Near the conclusion of Barling's testimony, he testified that he believed Johnson was the *shotcaller* for the 89 Family Bloods gang in August of 1991. [RT, 19:4325-4326]

The prosecutor in *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 used the same tactic that was employed by the prosecution in this case. Therein, the police gang expert was allowed to render expert opinion testimony regarding East Side Crips gang members and the mental state of specific gang members on the night in question. The expert witness, Detective Darbee, testified that

Killebrew was the "shot caller" for the East Side Crips gang. In finding the trial court abused its discretion in admitting much of Darbee's testimony and reversing the conviction, the reviewing explained that Darbee's personal belief that Killebrew was the gang's "shot caller" was "rank speculation" that "should never have been submitted by the prosecution and undoubtedly increased the prejudice of" the remaining gang testimony:

> Darbee also testified that Killebrew was the "shot caller" for the East Side Crips that day, i.e., he ordered the drive-by shooting at Casa Loma Park. This rank speculation should never have been submitted by the prosecution and undoubtedly increased the prejudice of the Casa Loma Park testimony. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 651, fn. 6.)

The *Killebrew* court found that the gang expert could offer testimony about gang behavior in general, but he should not have been allowed to testify about a the subjective thought processes of a specific individual. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658.) According to the *Killebrew* court, such testimony reflected no more than the expert's *personal* belief about the defendant's guilt. (*Killebrew,* at p. 658.) It did not assist the trier of fact in understanding a matter beyond their personal experience, but drew conclusions on issues reserved for the jury. (*Killebrew*, at p. 658.)

Appellant asserts the trial court abused its discretion and erred when it overruled the defense objections and allowed Detective Barling to present his own "rank speculation" to the jury under the guise of an expert witness, as discussed above.

Fourth reason: Testifying about a specific gang member's "respect level" was simply using different phraseology to testify about that gang member's "reputation for violence." It was accordingly, inadmissible character evidence.

According to Barling, Johnson was the gang member with the highest "respect level" of anyone in the gang. Because of this reputation for violence, he was the gang's "shot caller." Because Johnson had such a *propensity* for engaging

in gang violence, he would be expected to respond violently to East Coast Crips who were allegedly encroaching on the territory claimed by 89 Family. He would be expected to respond personally, or he would be expected to direct other gang members to commit acts of gang violence against the offenders. This would include sending gang members on "missions" to "serve" the invading rival gang members.

Appellant, whose respect level or his reputation for violence was just a little bit less than Johnson's, would also be expected to act in conformity with his own character trait for violence. Appellant would be expected to "serve" others and to go on "missions" to demonstrate his loyalty to the gang's "shotcaller." He would be expected to commit these acts of violence to enhance the gang's respect level among other gangs, and in the process, increase his own personal gang "respect level."

However, this character evidence, presented in the form of their reputation for violence i.e., their gang "respect level"), was simply *not admissible* for this purpose. (Evid. Code, § 1101, subd. a.)

Fifth reason: Even if there was some relevant and admissible reason for admitting this *expert testimony*, any probative value the evidence may have had was "substantially outweighed by the probability that its admission" created a "substantial danger of undue prejudice." (Evid. Code, § 352.)

For Evid. Code, § 352 purposes, prejudice refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) In a jury trial involving the execution-style murders of two victims for which the motive was gang related, evidence that the defendants were gang members who had a propensity to kill was the very type of evidence "that uniquely tends to evoke an emotional bias against the defendant[s] without regard to its relevance on material issues."

b. Additional "expert" testimony by Barling regarding members of the 89 Family Bloods gang that was *not included* in the prosecutor's offer of proof to the court.

Detective Barling was allowed to testify as a gang expert to many more facts regarding Appellant, co-defendant Johnson and the members of the 89 Family Bloods gang. He rendered additional expert opinions regarding the same individuals. Appellant has hereafter simply listed many of these facts and opinions that the court improperly allowed Barling to testify to as an expert witness. Appellant asserts that each of the following facts and opinions was inadmissible because they were Barling's own personal beliefs regarding the case, and therefore, not relevant nor admissible, as argued above. Each was also inadmissible evidence of the character trait for violence for members of the gang that, of course, included Appellant:

Members of the 89 Family Bloods gang were not afraid of the police and would often manipulate the police to obtain useful information for the gang. [RT, 19:4291-4292]

Members of the 89 Family Bloods gang had a p*ropensity* to be extremely violent, to commit murders, drive-by shootings and walk-up shootings. [RT, 19:4296-4298] According to Barling, "the 89 Family were known for committing homicides, for doing shootings." [RT, 19:4297]

Members of 89 Family Bloods gang were expected to demonstrate their loyalty and support for the gang by committing acts of violence. [RT, 19:4298-4301]

Johnson and his supporters in the 89 Family gang would respond violently to their *own* members who displayed "disrepect" or were "disloyal" to their gang; that "disciplining in a gang" meant "taking care of a problem whether it is physically beating them, physically beating that member, or maybe even shooting that member or pushing that member aside as a black sheep of that gang." [RT, 19:4305-4306][258]

[258] The even more sinister nature of the undue prejudice contained in this portion of Barling's testimony, however, was manifested by the prosecutor's question, "Would a failure to ... show your loyalty result in discipline?" Barling's affirmative response provided an additional reason as to why Appellant would

Members of 89 Family Bloods gang intimidated and retaliated against those who cooperated with the police and/or testified. They killed "snitches" [RT, 19:4311-4317]

Members of the 89 Family Bloods gang threatened the innocent family members of those who cooperated with the police and/or testified to discourage "snitches" [RT, 19:4311-4313]

People in the neighborhood were fearful of speaking to the police because of their fear of retaliation by members of the 89 Family Bloods gang.

Members of the 89 Family Bloods gang would commit violent acts to increase their reputation or "respect" *within* the gang.

Detective Barling testified regarding gang tattoos, gang hand signs and gang graffiti, none of which was relevant to *any* issue in this case. It was totally unnecessary, and its only purpose was to inflame the jury. It, too, should have been excluded. [RT, 19:4319]

c. The Court's Errors Were Prejudicial.

Appellant contends that for two reasons, the court's erroneous rulings that allowed Detective Barling to render the above expert testimony was prejudicial to Appellant's right to a fair trial.

First, the prejudicial impact of this highly inflammatory evidence of gang violence appears rather obvious. The above "expert" testimony was, in reality nothing more than inadmissible character evidence; that members of the 89 Family Bloods gang possessed an extreme propensity for violence for violence. (Evid. Code, § 1101, subd. a.) And since the prosecution continuously reminded the jury that Appellant was a member of this gang, this inadmissible and prejudicial character evidence would have been considered by the jury as to Appellant. Appellant respectfully asserts that this reason, in and of itself, is sufficient to cause this Court to overturn his convictions and judgment of death.

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commit such a heinous act; to avoid being "disciplined" by Johnson and his enforcers.

Second, Barling's inadmissible expert testimony was also prejudicial to Appellant because it corroborated portions of Jelks testimony and, therefore, enhanced the credibility of Jelks overall. Hence, the jury was more likely to believe Jelks' testimony that Appellant was the shooter.

Jelks had previously testified to the above cited facts, and rendered the same opinions, as Barling did. Jelks' lay opinions were arguably not inadmissible because Jelks had personal knowledge of the facts that formed the basis for his opinions. For example, Jelks had previously testified about the status of co-defendant Johnson within the 89 Family Bloods gang. Johnson was the gang member whom "everyone would go to if they had problems. So he was pretty heavily respected." [RT, 16:3559] The prosecutor then began establishing her theory of the case by asking a series of leading and suggestive questions of Jelks:

DDA: They [other 89 Family Bloods gang members] would report problems with rivals to him [Johnson]?
FJ: Yes.
DDA: Did they report other gang members who were not doing work for the neighborhood?
FJ: Yes. [RT, 16:3560]

Thereafter, Jelks was asked to render his opinion as to the amount of respect that Johnson had in the 89 Family Bloods neighborhood. The relevance of the question was to establish Johnson's reputation in the gang, his "respect level" within the gang. Jelks responded that on a scale of 1 to 10, he placed Johnson at "about an 8, 9." [RT, 16:3560] The testimony continued:

DDA: Anybody higher than him [Johnson] that you knew of?
FJ: Not on the streets.
DDA: Anybody of that caliber on the streets that day when you were over at the Johnson house?
FJ: No. [RT, 16:3560-3561]

Jelks opined that it was Johnson who made the choices and created a game plan for the shootings. [RT, 16:3624] The prosecutor then had Jelks testify that Johnson was the leader or "shot caller" of the gang, that Johnson used the

"intimidation factor" and his gang "status" to "make people do what he said."[259] Jelks responded again to the prosecutor's leading question by affirming the shootings of Loggins and Beroit "constituted a mission." He explained that a mission was "when you go out and commit murder." [RT, 16:3624]

Further, it was Johnson who would "discipline" a member of the 89 Family Bloods gang if that individual did not do what Johnson told him to do, and Johnson would personally "beat up" or "jump on" the individual or he would have one of his "followers" do the disciplining of the offending member of the gang. [RT, 16:3625-3626]

Jelks' responses to the prosecutor's consistently leading and suggestive questions established the prosecutor's theory for the case. Co-defendant Johnson achieved that status of "shotcaller" within the gang through "intimidation" and because of his reputation for committing violent acts (i.e., his "respect level" in the gang). There was no one "on the streets" who had a greater "respect level" than Johnson, who was an 8 or 9 of a possible 10. Gang members would report to him when rival gang members encroached onto their territory. They would also report to him which of the members of the gang "was not doing work for the neighborhood." Johnson would tell that gang member (i.e., Appellant) to murder someone ("go on a mission"). Appellant would commit the murder because of his fear of being "disciplined" by Johnson or his followers.

This gang theory that included the identification of Appellant as the shooter, coming from a witness (Jelks) whose credibility had been vigorously challenged by the defense, and who had a strong motive to testify in a manner that would please the prosecutor, needed corroboration if the jury was to believe him. Hence, it was extremely important for the prosecutor to have an experienced, respected and credible *expert* witness corroborate the testimony previously

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[259] This last phrase was the prosecutor's language used in her question. It misstated what Jelks had previously said.

rendered by Jelks. Without this corroboration, the jury may not have believed Jelks testimony.

However, Detective Barling lacked the personal knowledge to testify to these facts and render his lay opinions as Jelks had done. To get around this legal foundational impediment, the prosecution cleverly argued that Barling's testimony was expert opinion testimony. Further, the prosecution disguised the "reputation for violence" character evidence by referring to it as Johnson's and Appellant's level of "respect" among gang members.

Barling's inadmissible *expert* testimony regarding the above quoted evidence enhanced Jelks' credibility overall, and made it more likely that the jury believed his testimony that Appellant was the shooter. As such, Barling's erroneously admitted testimony was prejudicial to Appellant's right to due process and a fair trial.

For both of the above stated reasons, Appellant asserts the trial court's ruling that allowed Detective Barling to present the above testimony was prejudical error.

4. Second Claim of Error:
The Trial Court Erred when It Allowed Detective Barling to Render *Expert* Testimony that the Killing of Loggins and Beroit Sent a Clear Message to Its Rival Crips Gang That the 89 Family Bloods Gang Was to be "Respected."

Appellant submits that the trial court abused its discretion and erred when it overruled defense objections and ruled that Detective Barling could render his expert opinion regarding "the significance of the fact and the boldness of a killing in the middle of the day on a thoroughfare that apparently is the dividing line between various gangs." [RT, 19:4275-4276]

a. Barling's Testimony.

DDA: Drawing your attention specifically to Central Avenue. You have indicated that that is a dividing line. Is that correct?
BAR: Yes.

DDA: What would be the significance of committing a murder or double murder at 3:00, 4:00 in the afternoon on Central by one gang against rival members?

BAR: Let the other gang know: Do not come into our territory. This is ours. This is our turf. How dare you either cross it or how dare you even come close to us.

DDA: What would that do to somebody's level of respect?

BAR: It would enhance the respect of whatever gang did the killing or shooting to let that other gang back off -- excuse my French – we are bad asses and you do not want to come over here.

DDA: Would that scenario send a message to non-gang members of the community?

BAR: Sure.

DDA: What would that be?

BAR: Look, we are bold enough to do a killing during the daylight and none of you have the guts to tell us about it or the police about it because you will be next. [RT, 19:4315-4317]

As argued above, the trial court abused its discretion and erred when it found that Detective Barling was qualified, based on his "special knowledge, skill, experience, training, or education" (Evid. Code, § 720, subd. a.) to render expert testimony regarding the customs, habits, behavioral characteristics, psychology and mental thought processes of members of the 89 Family Bloods gang, separately or as a group. If Barling was not qualified to testify as an expert on this subject, any expert opinion he rendered regarding the subjective thought processes of this gang was inadmissible. Hence, his testimony regarding what specific message certain members of the 89 Family Gang intended to communicate to members of another particular gang (or to non-gang members in the community!) when one of the gang members allegedly killed Loggins and Beroit, was inadmissible.

The above cited *expert testimony* of Detective Barling was *inadmissible* for several additional legal reasons.

Second reason: Detective Barling's testimony was *inadmissible* lay opinion testimony.

If Detective Barling's opinion testimony was inadmissible expert opinion testimony because he was not qualified to render expert testimony on that subject, then any opinion testimony he gave, to be admissible, had to qualify as lay opinion testimony. As also argued above, Barling's lay opinion testimony was admissible only if it was "rationally based on the perception of the witness" and was "helpful to a clear understanding of his testimony. Evid. Code, § 800. For an opinion such as Barling's to be "rationally based on the perception of the witness", the prosecution had to establish that Detective Barling had *personal knowledge* of the facts that formed the basis for his lay opinion. (Evid. Code, § 702.) Barling obviously had no personal knowledge of any facts that would form the basis for this opinion. His testimony was therefore inadmissible lay opinion testimony.

Third reason: If Barling's opinion testimony was inadmissible expert opinion testimony, and if it was also inadmissible lay opinion testimony, then his testimony was simply an expression of his personal beliefs as to how he viewed the evidence and what inferences he thought should be drawn. As such, his testimony was not relevant and was inadmissible.

The subsequent cross examination and re-direct examination of Detective Barling's "expert" testimony demonstrated in rather graphic detail *why* this testimony was *not* the opinion of an expert, but rather his own personal beliefs as to how he viewed the facts of the case. Worse yet, subsequent questioning demonstrated Barling was also a biased witness who seemed to be willing to testify to anything the prosecutor wanted him to say!

On cross-examination, the defense questioned Barling as to whether these murders on Central Avenue in broad daylight were, in fact, gang related, or was he just speculating. His responses demonstrated he was simply speculating!

Barling was asked if a Crip, being fully aware of the deadly rivalry between Bloods and Crips, *entered into Bloods territory*, would the Crip take precautions to protect himself while he was there? Barling's response was equivocal: "May or may not. It depends on the individual and it will depend upon the reason that they

were going and what their purpose was in doing it." [RT, 19:4340-4341] Barling was asked if the Crip would be likely to arm himself when he *entered into Blood territory*? Barling's response was again very equivocal. [RT, 19:4341]

Barling was asked if the Crip would "maintain some awareness of his surroundings being the fact that he was in a danger zone?" Barling hedged his answer, then stated:

> BAR: They [Crips] may dress down so they are not as flashy about their gang membership.
> ...
> RL: When you say "dress down and not be flashy", that is because they would not want to attract undue attention to themselves?
> BAR: Sure.
> RL: They would not want to make themselves an obvious target?
> BAR: Depending upon the person, yes. [RT, 19:4341-4342]

In effect, Barling's "expert" testimony on cross-examination was that when a Crip knowingly entered Bloods territory, he would take steps to *not* draw attention to himself because he would *not* want to make himself a target for the rival Bloods in the area.

Having set Barling up, Mr. Lasting then asked the loaded series of questions: *If* the west side of Central Avenue was actually claimed by the 89 Family Bloods gang such that they attacked any rival gang intruders who encroached on their side of the street, *then* a Crip gang member, knowing he was in this danger zone, would be expected to "dress down" and take steps to protect himself to avoid becoming a target. *If* this was true, *then* why would Payton Beroit, an alleged East Coast Crip gang member, knowingly and intentionally take his *flashy* black Chevrolet with Daytona rims into this dangerous Bloods territory to be washed, and *then* sit *with another Crip* in the latter's car in *broad daylight* for 2 to 3 hours?

The answer was obvious: The businesses on the west side of Central Avenue were *not* a gang danger zone for Crips. The 89 Family Bloods gang

members were *not* motivated to attack any rival gang intruders who encroached on their side of the street because they were being "disrespected":

> RL: Would that include taking a flashy automobile into a rival gang area?
> BAR: That is something -- That is something that you cannot control as much because that may be your only mode of transportation. But that can be a factor, yes.
> RL: How about take it [the flashy automobile] and park it there? Would that be something that one – if they were a Crip and were aware of the rivalry between the Crips and Bloods they would be unlikely to do in your opinion?
> BAR: Depends why they are parking it there.
> RL: Would they be likely or unlikely to take a flash -- Would a Crip be likely or unlikely to take a flashy car into an automobile shop and leave it there for a substantial period of time, say 2 or 3 hours? [RT, 19:4342-4343]

Once again, Barling's response was equivocal. "It depends...."

If the gangs in that area did not consider businesses on the west side of Central Avenue during the day as a gang danger zone, then why would Barling, under the guise of being an expert on those very gangs in that very locale, describe in such emphatic detail that a *specific* message was being sent from the 89 Family Bloods gang to the East Coast Crips gang when those shootings occurred? He stated on direct examination what the message was: "Do not come into our territory. This is ours. This is our turf. How dare you either cross it or how dare you even come close to us." And, "we are bad asses and you do not want to come over here." [RT, 19:4315-4316] If gang members themselves did not act as though the businesses on Central Avenue were part of the 89 Family territory, then why would Barling render that type of *specific expert* testimony?

On re-direct examination, the prosecution sought to control the damage to Barling's credibility. She immediately asked Detective Barling about gang territories. Barling's expert opinion changed dramatically, and even in the sterile reporter's transcript of the trial, it is obvious he was very flustered!

DDA: Earlier you were talking about the significance of territory. In your experience are major thoroughfares generally part of a territory that are defended by one gang or another?

BAR: No. When we're dealing with major thoroughfares such as Central, or Manchester, or Slauson, or Crenshaw, those are kind of neutral territories. But in a major thoroughfare sometimes just east or just west would be the gang, and it's kind of – it's like going to the mall. Anybody could go to the mall. You don't have to be – live – the Crenshaw Mall is a Blood neighborhood. You don't have to be a Blood to go to the Crenshaw Mall. Crips go to the Crenshaw Mall all the time. There's neutral territories. [RT, 19:4362-4363]

On further re-direct examination, Barling continued to retrench as he simply agreed with the prosecutor's leading and suggestive questions. Barling now testified that in the minds of gang members, including the 89 Family Bloods, Central Avenue was a major thoroughfare, and rival gang members would often have "legitimate business" there Now Barling said that gangs, including the 89 Family Bloods gang, "recognized" that "there are businesses in their neighborhood that somebody from a rival neighborhood might patronize."[260] Barling's testimony now was that businesses on the west side of Central did not cater only to Bloods, nor did they cater only to Crips, and if a rival gang member was on the west side of Central Avenue at 3:00 or 4:00 in the afternoon, Barling now testified that it would not necessarily be an invasion of gang territory. [RT, -194363-4364] The prosecutor continued to suggest answers to Barling as she tried to help Barling retrench.

As Barling's retrenching continued, it became increasingly obvious that he was *not* qualified to render expert testimony on the specific thought processes of a *specific* gang or an *individual* gang member on a *particular* occasion. He was, Appellant asserts, just what the prosecutor said he wasn't. He was "a gang expert in the generic sense."

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[260] These words were, of course, the prosecutor's. Barling simply gave the one or two word answers that were suggested by the question.

Appellant submits this is a "textbook" illustration of a gang expert witness rendering his own *personal beliefs* as to how he wants the jury to view the facts of the case. Worse, Barling was obviously a biased expert witness.

All of this simply illuminates the fact that the trial court erred and abused its discretion when it ruled that Barling qualified as an expert on the subject of the customs, habits, behavioral characteristics, psychology and mental thought processes of a specific gang or its individual members, and especially at a particular time and place.

Fourth reason: Barling's above quoted testimony was not relevant, and the trial court abused its discretion when it allowed it to be introduced.

Appellant has previously acknowledged that gang evidence which had "any tendency" to establish a motive for the murders of Loggins and Beroit would arguably be relevant (Evid. code, § 210, 350) because it would be circumstantial evidence from which the identity of the shooter could be inferred. That is, a killer usually has a reason (i.e., a motive) for killing someone.

However, according to the prosecutor's offer of proof, she was offering Barling's expert testimony to prove "the gang implications of a killing in the middle of the day on a major thoroughfare, which was a boundary line between the East Coast Crips and the 89 Family Bloods." This offer of proof was *meaningless*. What "gang implications" was the prosecutor referring to? For example, the prosecutor asked Barling: "Would that scenario send a message to *non-gang members* of the community?" [RT, 19:4316] And if so, what was the message these killings were meant to send to residents of the neighborhoods who were *not* gang members? Barling's answers had *no* "tendency in reason to prove or disprove" motive or identity of the shooter (Evid. Code, § 210.)

Appellant asserts this was simply another example wherein the trial court failed to ensure Appellant and co-defendant Johnson would receive a fair trial. Earlier, the prosecutor's offer of proof regarding Barling's qualifications ("He is not a gang expert in the 'generic' sense.") was at best ambiguous, and at worst,

simply "double talk" designed to mislead and confuse the court and counsel. [RT, 19:4266] Similarly, this offer of proof should have, at a minimum, caused the trial court to inquire for further clarification. Unfortunately, the trial judge made no further inquiry. The court's evidentiary ruling simply paraphrased what the prosecutor said.

Appellant submits the trial court is vested with considerable discretion in making decisions such as these; hence, the standard on review on appeal is for an abuse of discretion. However, when the trial court makes decisions on the admissibility of evidence without exercising any discretion, as here, Appellant respectfully submits the reviewing court should have little difficulty finding the trial court abused its discretion ... because it never exercised discretion when it considered its evidentiary ruling.

Therefore, this testimony was not relevant and not admissible (Evid. Code, § 350) and the trial court erred when it authorized its admission.

Fifth reason: The substantial danger of undue prejudice substantially outweighed the probative value of the evidence.

Even if the above cited testimony was relevant (i.e, Appellant's motive to murder Loggins and Beroit was to enhance the "respect" level of his gang by sending a message to rival gang members that 89 Family Bloods were "bad asses", etc.) any probative value the evidence may have had was "substantially outweighed by the probability that its admission" created a "substantial danger of undue prejudice." (Evid. Code, § 352.)

For Evid. Code, § 352 purposes, prejudice refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) In a jury trial involving the execution-style murders of two victims for which the motive was gang related, evidence that the defendants were gang members who were killing suspected rival gang members to send a message to rival gangs *and* residents of the area that they are "bad asses" is the type of evidence "that

uniquely tends to evoke an emotional bias against the defendant[s] without regard to its relevance on material issues."

Even if this expert testimony had any relevant and admissible reason for its introduction, Appellant asserts the trial court abused its discretion when it overruled the defense objections and authorized its admission.

b. The court's error was prejudicial.

Barling's expert testimony corroborated Jelks' testimony regarding the shootings of Loggins and Beroit. In response to the prosecutor's leading and suggestive question, Jelks had earlier in the trial affirmed that the shootings would have sent a message to rival gang members.

DDA: By shooting [Payton Beroit] would a message be sent?
FJ: Yeah. Pretty much.
DDA: Who was the message directed to?
FJ: The East Coast Crips.[261]
DDA: What time of day was this?
FJ: Mid-day.
DDA: Is there any significance to the fact that this was going to occur mid-day?
FJ: No. [RT, 16:3552-3553]

As has been stated previously, however, Jelks was a less than credible witness by himself. When a respected and experienced detective who was qualified as an expert on gangs testifies to the same facts, it enhances the believability of Jelks' testimony that this was in fact part of the motive for the shootings. *More importantly*, it would have enhanced Jelks' credibility as a witness in the minds of the jury, and would have caused the jury to more readily believe Jelks' testimony that Appellant was the shooter. Because Jelks was one of only three witnesses who linked Appellant to the murders, any evidence that improperly enhanced Jelks credibility was prejudicial to Appellant's right to due process and a fair trial.

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[261] This portion of Jelks' testimony was speculative and should not have been permitted. However, no objection was made.

5. Third Claim of Error. The Trial Court Abused Its Discretion When It Allowed Detective Barling to Render Expert Opinion Testimony that the 89 Family Bloods Gang Kept Their Weapons Arsenal in a Pigeon Coop in the Backyard of the Johnson House.

The defense objected to Detective Barling's proposed testimony that the chicken coop was the 89 Family Bloods gang's repository for their cache of deadly weapons, indicating it was not a proper subject for a gang expert witness' opinion testimony. Barling's testimony on this topic, the defense contended, would be his inadmissible personal opinion based on hearsay "offered to prove that specific fact." If Barling had ever seen guns in the chicken coop, the defense argued, he could testify to that as could any witness with personal knowledge. It was not, however, the subject of an expert's opinion. [RT, 19:4265, 4269-4270].

The trial court overruled the defense objections and held that Barling could render expert testimony that the pigeon coop was the *actual* repository for the 89 Family Bloods gang's weapons.

a. Detective Barling's Testimony.

Barling testified that gangs kept their guns at a particular location "so they could access them readily, easily, if a rival gang is coming by; if they need to do a mission or do something. So they would have them ready." [RT, 19:4314][262] Pursuant to the trial court's ruling, however, Barling then testified that the weapons repository for the 89 Family Bloods gang was the chicken coop in co-defendant Johnson's rear yard. [RT, 19:4315]

As argued previously, the trial court abused its discretion and erred when it held that Detective Barling was qualified to render expert testimony on the customs, habits, behavioral characteristics and psychology of the various members of the 89 Family Bloods gang. Hence, any expert factual and opinion testimony

[262] Appellant does not challenge this portion of Barling's expert testimony. He was providing expert factual testimony about gangs generally.

he rendered on the subject of the 89 Family Gang and its individual members was not admissible expert testimony. (Evid. Code, §§ 720, 801.)

However, assuming Barling was a qualified expert on this particular subject, his testimony was inadmissible expert *opinion testimony* because it did not relate to a subject that was "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, §801, subd. a.)

Appellant acknowledges that a qualified expert witness on gangs generally could provide expert *factual testimony*, if otherwise relevant, that gangs normally have a repository where they keep the gang's weapons; that the weapons must be kept at a location that is secure but readily accessible to leaders of the gang, etc. (See Evid. Code, § 720) Barling's initial testimony, quoted above, was just that; expert factual testimony on the subject of gangs generally.

However, when Barling was asked to render expert *opinion testimony*, his expert opinion had to relate "to a subject that is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact." (Evid. Code, § 801, subd. a) In *People v. Hernandez* (1977) 70 Cal.App.3d 271, the court explained:

> The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. [Citations] (*Id.*, at p. 280.)

Once Barling provided expert factual testimony to the jury that gangs normally have a designated location set aside to keep the gang's weapons, the jury was just as capable as Barling to conclude, based on Jelks' testimony, that the pigeon coop in Johnson's rear yard was the repository for the 89 Family Bloods' weapons. That conclusion or opinion was reserved for the jury, and the trial court erred when it allowed Barling to tell the jury his opinion. *People v. McDonald*

(1984) 37 Cal.3d 351, 366; *People v. Wright* (1988) 45 Cal.3d 1126, 1141; *People v. Sandoval* (1994) 30 Cal.App.4th 1288; 1298; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1053:

Further, even if expert *opinion* testimony on this subject was appropriate, Appellant asserts that Barling's opinion was *still inadmissible* expert *opinion testimony* because it was not "[b]ased on matter ... that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, ..." (Evid. Code, § 801, subd. b.)

Appellant submits that a review of the facts available to the trial court should have made it clear that the basis for Barling's *expert opinion* was wholly inadequate.

Initially, and after listening to the prosecutor's offer of proof, the trial court stated she would need to provide evidence to show Barling had a sufficiently reliable basis for his expert opinion that the pigeon coop was the weapons repository for the 89 Family gang. The court provided examples of what the prosecutor would have to show to lay an adequate foundation for Barling's expert opinion testimony:

> CRT: In terms of the coop, the pigeon coop, at this point I don't see -- Your offer did not contain within it sufficient foundation for me to rule that admissible. If he is aware of seizures; if people have been arrested for various crimes and during their debriefings, for example, have indicated, time after time we get the guns, or we keep them over at the pigeon coop, you might well be able to lay a foundation. But absent that, I just – you've got to lay some foundation before he just gets up there and is able to testify that he knows they keep guns in the pigeon coop. [RT, 19:4274-4275]

Thereafter, the prosecutor called Barling to testify at the Evid. Code, § 405 hearing to determine if there was sufficient foundation for him to render his expert opinion regarding the location of the weapons repository for the 89 Family Bloods

gang. The only evidence the prosecution could present to establish the foundation for Barling's expert opinion was:

> 1. There was a pigeon coop in the rear yard of the Johnson house. [RT, 19:4280]
>
> 2. Between 1989 and 1991, Barling had spoken with "probably about six" different people who told him that guns were kept in the pigeon coop from time to time. Some were gang members, while others were "citizens in the area." Of the gang members, some had been arrested while some had only been detained.[263] Barling provided no information about who the individuals were, whether they had personal knowledge, why their information was reliable, when he spoke to them, etc. [RT, 19:4280-4281]
>
> 3. Barling had observed "pigeon debris" in the pigeon coop "as if pigeons were kept in it", but he had never seen pigeons therein. [RT, 19:4337]
>
> 4. Although Barling had been there "on many occasions", including when serving search warrants, he had *never* found any firearms in the pigeon coop.[264] He had looked in the pigeon coop "probably 5 or 6 times" for weapons, but he never found any weapons in the pigeon coop. [RT, 19:4329, 434359-4360, 4366]
>
> 5. To Barling's knowledge, law enforcement officials had *never* found guns or anything else that even suggested that guns were stored in the pigeon coop. [RT, 19:4281]

When the trial court explained why it concluded a sufficient foundation had been established to allow Barling to render his expert opinion, the trial court for some reason *added* information that had *not* been presented, facts that made the foundation sound much better than it was. For example, the trial judge said it was "the neighbors" who told Barling about guns being stored in the pigeon coop,

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[263] Since Barling referred to at least two non-gang members who provided information, the maximum number of gang members who provided this information would have been four, two in custody and two only detained.

[264] Barling did state that on one occasion he found a rifle in the rear yard. It was not in the pigeon coop, however. It was in an abandoned vehicle parked in the rear year next to the pigeon coop. [RT, 19:4280]

implying that these individuals had personal knowledge and had no reason to be untruthful. Barling *never* testified that any of the "about six" individuals were neighbors, nor did he provide any information that would support a conclusion that any of the "about six" individuals had personal knowledge of guns being stored in the pigeon coop.

Appellant asserts this is not even close to the type of foundation on which legitimate police gang expert witnesses form their expert opinions. Six anonymous informants over a period of three years told Barling that the pigeon coop was used by the gang to store their weapons. *No corroboration* for any of these hearsay statements was provided, except other hearsay statements from other unnamed and unknown informants. This was not "matter ... that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, ..." (Evid. Code, § 801, subd. b.) When the defense objected and thereby disputed the existence of the preliminary fact that formed the basis for Barling's opinion, they invoked the provisions of Evid. Code, §§ 400-406. The mandatory provisions of §§ 402 and 405 required the prosecution convince the court by a preponderance of evidence (Evid. Code, § 115) that there was a sufficiently reliable basis for Barling to render an expert opinion. Appellant respectfully asserts the prosecution's efforts to meet this burden fell considerably short.

b. <u>The court's error was prejudicial</u>.

Since Barling's opinion was not admissible expert opinion testimony, and since it was also not admissible lay opinion (i.e., there was no evidence he had personal knowledge that the gang stored their guns in the chicken coop), the opinion he rendered was simply his own personal belief as to how he viewed the facts of the case. His personal views were not relevant nor admissible.

Since Barling had no personal knowledge as to where the killer obtained, or disposed of, the Uzi, the only relevant purpose in having Barling render his expert

opinion was to *corroborate* the testimony of Freddie Jelks, a witness whose credibility was very suspect.

Jelks had previously testified that co-defendant Johnson went to the back yard of his house where a pigeon cage was located and moments later returned with an Uzi in hand. Johnson gave the Uzi to Appellant to use in the shootings. Jelks also testified that the 89 Family Bloods gang's weapons were stored in the pigeon cage. If a member of the gang needed a gun, he "would get it from the pigeon coop." [RT, 16:3544-3545]

Barling's inadmissible opinion testimony, coming from a respected and experienced police gang expert, would have corroborated Jelks testimony in the minds of the jurors. *More importantly*, it would have enhanced Jelks' credibility as a witness in the minds of the jury, and would have caused the jury to more readily believe Jelks' testimony that Appellant was the shooter. Because Jelks was one of only three witnesses who linked Appellant to the murders, any evidence that improperly enhanced Jelks credibility was prejudicial to Appellant's right to due process and a fair trial.

6. Fourth Claim of Error.
The Trial Court Abused Its Discretion and Erred when It Allowed Detective Barling, the Prosecution's Gang Expert, to Render Expert Opinion Testimony that the Fears Expressed by Witnesses Carl Connor, Freddie Jelks, and Marcellus James Were "Legitimate."

a. Introduction.

As indicated in Issue XI of Appellant's Opening Brief, Carl Connor, Freddie Jelks and Marcellus James all testified on numerous occasions about their fears of retaliation, as well as the various bases for their fears. Detectives Sanchez, McCartin and Barling also testified that these three civilian witnesses expressed their fears of retaliation to them either directly or indirectly.

Near the conclusion of the prosecution's case-in-chief, the prosecutor proffered the testimony of Detective Barling, a gang expert witness, to render an

expert opinion as to whether the testimony of Connor, Jelks and James that they feared retaliation was "legitimate":

> CRT: Anything else you [DDA] would seek to elicit from the witness [Detective Barling]?
>
> DDA: No – well, yes, your Honor, that the -- that in his view as a gang expert in the context of 89 Family and 89 Family alone, that the concerns about retribution voiced by the witnesses were in his view legitimately based. [RT, 19:4268 (Emphasis added)]

It was not clear from her offer of proof what the word "legitimate" referred to. Was there an actual, real or legitimate danger that the gang members would, in fact, retaliate against the witnesses? Or was the testimony of witnesses Connor, Jelks, and James truthful or legitimate when they each said they feared retaliation because of their cooperation with the police and their testifying.

The prosecutor's further offer of proof did not provide clarification [RT, 19:4272-4273], although most of the prosecutor's additional comments about Barling's proposed expert testimony referred to the *actual* danger to the witnesses and their family members from violent gang retaliation. That is, the members of the 89 Family Bloods gang were, in fact, violent. In Barling's expert opinion, those gang members had a propensity to commit acts in retaliation; hence, they would act in conformity with that character trait after a witness testified against members of their gang, if given the opportunity.

The defense objected to Detective Barling's proposed expert testimony as an inadmissible opinion or conclusion, as well as on § 352 grounds, as to *both* reasons for which the testimony could have been considered by the jury. [RT, 19:4270-4271] The comments of both defense attorneys suggest they assumed Barling's "expert" opinion testimony was to be considered by the jury for both reasons; a) to bolster the credibility of the witnesses by having Barling render his "expert" opinion that the witnesses were truthful when they testified that they feared retaliation, and b) to prove the danger of retaliation was real because the 89

Family Bloods gang members were dangerous; that in his "expert" opinion, they had a propensity to be violent and to savagely retaliate against those they deemed to be "snitches".

The trial court's basis for overruling the defense objections was also ambiguous as to whether a) the testimony would be admitted to prove the witnesses were, in fact, fearful or b) the testimony would be admitted to prove the actual danger of retaliation was, in fact, real. [RT, 19:4276] However, Appellant contends that under either basis, the trial court abused its discretion and erred when it ruled Detective Barling could testify that the witnesses' fears of retaliation were "legitimate."

b. Detective Barling's "expert opinion" testimony.

Detective Barling rendered his *expert* opinion that "retaliation" was "a legitimate concern for potential witnesses" who lived in that neighborhood or who had family members who lived in that neighborhood that was controlled by the 89 Family Bloods gang. [RT, 19:4312] Further, he gave his *expert* opinion that even if the gang member against whom the witness was testifying was in-custody (i.e., Appellant and co-defendant Johnson!), the witnesses' "fear of retaliation" would not be eliminated because the in-custody gang member "could get on the phone" and instruct fellow gang members to "do whatever you have to do" to keep the witnesses from testifying in court against the in-custody gang-member. [RT, 19:4312-4313]

The prosecutor then simply substituted the word "retribution" for "retaliation" and asked Detective Barling the *identical* question: "With respect to 89 Family, if you were told that a witness was concerned about retribution, would it be your opinion that is a legitimate fear?" Detective Barling's *expert* opinion response (i.e., "Yes.") was "based on [his] years of experience with 89 Family." [RT, 19:4314]

Thereafter, Detective Barling was allowed to testify that, in his *expert* opinion, Carl Connor's expressions of fear of retaliation were "legitimate." [RT, 19:4324]

Similar testimony was elicited from Detective Barling as it pertained to witness Freddie Jelks . Barling testified that Jelks had also expressed fears and concerns about retaliation against not only himself, but also against "his children and other members of his family." Jelks' fears, according to Barling, were also "legitimate." [RT, 19:4324-4325][265]

Similar testimony was also elicited from Detective Barling as it pertained to witness Marcellus James; that James expressions of concern for his safety were "legitimate fears." .[RT, 19:4325]

c. Detective Barling's "Expert" Opinion Was *Not* Admissible to Prove the Danger of Gang Retaliation Was Real or "Legitimate."

First Reason. Barling was not an expert witness on the subject of the customs, habits, behaviorial characteristics and psychology of the members of the 89 Family Bloods gang. Hence, any expert opinion he rendered was also inadmissible.

As argued previously, the trial court abused its discretion and erred when it found that Detective Barling was qualified, based on his "special knowledge, skill, experience, training, or education" (Evid. Code, § 720, subd. a.) to render expert testimony regarding the customs, habits, behavioral characteristics and psychology of the members of the 89 Family Bloods gang, separately and as a group. If Barling was not qualified to testify as an expert on this subject, any expert opinion he rendered on this subject was inadmissible.

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[265] The prosecutor also asked Detective McCartin the same question regarding the "legitimacy" of Jelks' expressions of fear. [RT, 18:4169-4171]

Second reason: Even if Barling Was a Qualified Expert on the customs, habits, behavioral characteristics and psychology of the members of the 89 Family Bloods gang, his expert opinion testimony was still inadmissible because the subject the opinion related to was not "sufficiently beyond common experience" that it would "assist the trier of fact."

Expert opinion testimony is limited to those subjects that are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" in properly understanding the subject matter. (Evid. Code, § 801) Appellant respectfully asserts it is rather hard to believe that an experienced trial judge in Los Angeles County would actually believe that the concept of "gangs retaliating against snitches" was a subject "sufficiently beyond the common experience" of jurors who lived in Los Angeles County "that the opinion of an expert would assist them" in evaluating if the danger was real or legitimate! (See Evid. Code, § 801, subd. (a).] Appellant submits that of all the counties in the United States, Los Angeles County would be one of the *last* counties where an understanding of "gang retaliation against snitches" in a gang-related prosecution would be "beyond [the] common experience" of the jurors! Over 20 years ago, California appellate courts wrote of this ugly phenomenon in Los Angeles County. In *People v. Maestas* (1993) 20 Cal.App.4th 1482, that court stated:

> As the *Perez*[266] court noted: "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word gang ... connotes opprobrious implications .... [T]he word 'gang' takes on a sinister meaning when it is associated with activities."

Third reason: Barling's opinion testimony was inadmissible as lay opinion testimony because it was not based on facts of which he had personal knowledge.

The prosecution did not offer Barling's opinion testimony as his *lay* opinion. (Evid. code, § 800) Had it done so, the foundation of "personal knowledge" of the underlying facts on which the lay opinion was based would

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[266] *People v. Perez* (1981) 114 Cal.App.3d 470, 479.

have been required. (Evid. Code, §§ 702, 800.) Since there was no evidence presented that Barling had *personal knowledge* of any attempt at retaliation by members of the gang, his lay opinion would also have been inadmissible to establish the gang members would retaliate in the future.

Fourth reason: Barling's testimony was his inadmissible personal belief regarding the propensity of the 89 Family Bloods gang to retaliate against witnesses. Hence, it was irrelevant and inadmissible.

For these reasons, any opinion rendered by Detective Barling, expert or lay, was inadmissible on this subject. Any opinion that he rendered, therefore, would have simply been his own personal belief or opinion regarding the propensity of the members of the 89 Family Bloods gang to retaliate against witnesses.

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656 -658, the prosecution's gang expert (Detective Darbee) testified regarding various aspects of gangs, similar to the initial testimony of Detective Barling. Then, through the use of hypothetical questions, the gang expert in *Killebrew* was allowed by that trial court to render his opinion regarding specific mental states various gang members had on the night of the crime. In explaining why the expert testimony was erroneously received, the court explained that the expert's testimony was "the type of opinion that did nothing more than inform the jury how [the gang expert] believed the case should be decided", and that the gang expert's personal "beliefs were irrelevant." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656 -658.)

Detective Barling's opinion was the same type of opinion as that of the gang expert in *Killebrew,* except that in the instant case, the prosecution did not even use hypothetical questions to present Barling's opinion testimony. Detective Barling "testified to the subjective ... *intent* of each" 89 Family Bloods gang member as to what they would do against the witnesses (and their family members) in the future. "Such testimony is much different from the *expectations* of gang members *in general* when confronted with a specific action. (Emphasis added.)" Further, Detective Barling's testimony was "the type of opinion that did

nothing more than inform the jury how [Barling] believed the case should be decided." And, "[Barling] simply informed the jury of his belief of the" 89 Family Bloods gang members' intent to retaliate, "issues properly reserved to the trier of fact. [Barling's] beliefs were irrelevant." (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658.)

Detective Barling's testimony was irrelevant and inadmissible, therefore, because it was simply a statement of his own beliefs regarding the gang and its propensity to retaliate against witnesses.

Fifth reason: Even if Barling's opinion testimony was proper expert or lay opinion testimony, his opinion testimony was *still* inadmissible character evidence in the form of an opinion to prove the gang's propensity to violently retaliate against informants and witnesses.

If Detective Barling's testimony was offered to prove that 89 Family Bloods gang members were in fact violent and would retaliate against witnesses (i.e., the danger of gang retaliation was "legitimate" or real.), it was inadmissible character evidence. In effect, it was his opinion, expert or lay, that members of the 89 Family Bloods gang (i.e., including Appellant and co-defendant Johnson) were *in fact* dangerous and that they had a propensity to retaliate violently against witnesses and others who cooperated with the police! This opinion testimony was obviously inadmissible character evidence when offered for this purpose (See Evid. Code, § 1101, subd. (a).) and was extremely prejudicial to Appellant.

d. Detective Barling's Expert Opinion Testimony Was Not Admissible to Prove the Witnesses Testified Truthfully When They Said They Feared Retaliation; that is, their Testimony Regarding their Fears of Retaliation Was "Legitimate" or Truthful.

As stated previously in Issue XI, testimony involving gang evidence that circumstantially proves a witness might have been fearful of retaliation by gang members may, in appropriate cases, be relevant and admissible. [*People v. Ayala* (2000) 23 Cal.4th 225; *People v. Malone* (1988) 47 Cal.3d 1, 30; *People v. Warren*

(1988) 45 Cal.3d 471, 481; *People v. Green* (1980) 27 Cal.3d 1, 19-20; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588]. In the instant case, Appellant listed numerous examples of this type of testimony in Issue XI of Appellant's Opening Brief.

A Witness' Fear of Retaliation Involves his Subjective State of Mind; Hence, whether the Basis for the Fear Is Real or "Legitimate" Is Not Relevant.

A witness' fear of gang retaliation may be based on actual danger of which the witness is personally aware, or his fear may be based on a perceived, but non-existent, danger. It is the witness' *subjective state of mind* that is relevant. It makes no difference if the *basis* for his fear actually exists or that the *basis* for his fear is "legitimate" and "real." The witness' fear of retaliation may in truth be based solely on the witness' erroneous perception that he is in danger of retaliation.

Therefore, evidence that these witnesses were fearful of gang retaliation would be relevant even if no actual danger existed. On the other hand, evidence that a gang member actually attempted to intimidate or retaliate against any of these witnesses would *not* be admissible to prove the witness feared gang retaliation *unless* the witness was actually aware of the attempt.

The facts in the case of *People v. Gutierrez* (1994) 23 Cal.App.4th 1576 were quite similar to those of the instant case. Shortly after the murder several of the witnesses who had been part of the crowd in and around the apartment that morning gave statements to the police and several identified appellant as the shooter from a photo lineup. At the time of trial many of these witnesses were extremely reluctant to testify. On the stand they either denied any knowledge of the incident, claimed they could no longer remember the events or claimed they really could not see well enough the morning of the incident to identify the shooter. Over defense objections, the trial court ruled evidence the witnesses had been threatened was relevant to their state of mind and demeanor while testifying.

The prosecution then called a police investigator to testify. On cross-examination, the defense sought to ask the investigator whether, in his opinion, the threats made against certain witnesses were "credible." (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576. FN8.) The trial court sustained the People's objection to this series of questions based on relevance. In upholding the conviction, the reviewing court explained:

> We agree evidence concerning what the investigator believed concerning the credibility of the threats had no tendency in reason to prove or disprove any contested issue at trial. (Evid. Code, § 210) The investigator's opinion of the threats could shed no light on whether the witnesses believed the threats credible and whether the witnesses' testimony was affected because of that belief. (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576. FN8.)

Similarly, in the instant case, "...what [Detective Barling] believed concerning the credibility [i.e., the "legitimacy"] of the [threats of retaliation] had no tendency in reason to prove or disprove any contested issue at trial [i.e., the state of mind of the witnesses.]. [Detective Barling's] opinion of the [threats of retaliation] could shed no light on whether the witnesses believed the threats credible and whether the witnesses' testimony was affected because of that belief." (Paraphrasing *People v. Gutierrez* (1994) 23 Cal.App.4th 1576. FN8, but inserting in brackets the names and issues in the instant case.).

Detective Barling's opinion testimony regarding whether the bases for the witnesses' fears were "legitimate" or real was not relevant to prove the subjective state of mind of those witnesses, and the defense objections should have been sustained on this basis.

Furthermore, opinion testimony by any witness, expert or lay, that another witness testified truthfully at the trial is normally *not* admissible. That is, the law did not permit Detective Barling to render his opinion, expert or lay, that Connor, Jelks and James testified truthfully when they claimed they feared retaliation. There are several reasons for this rule of inadmissibility.

Second Reason. Barling was *not* an expert witness on the subject of the credibility of witnesses when they speak to the police or when they testify. Hence, any expert opinion testimony he rendered was also inadmissible.

As argued earlier in this Issue XII, the trial court abused its discretion and erred when it found that Detective Barling was qualified, based on his "special knowledge, skill, experience, training, or education" (Evid. Code, § 720, subd. a.) to render expert testimony on the subject of whether individuals are truthful when they speak to the police or when they testify at trial. If Barling was not qualified to testify as an expert on this subject, any expert opinion he rendered on this subject was inadmissible.

In *People v. Melton* (1988) 44 Cal.3d 713, this Court discussed whether a police investigator qualifies as an expert merely because he investigates criminal activities:

> The instant record does not establish that Carpenter is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations. He knew nothing of Boyd's reputation for veracity. He was able to describe his interviews with Boyd in detail, leaving the factfinder free to decide Boyd's credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to Carpenter had the essential "ring of truth." The trial court thus erred insofar as it admitted Carpenter's testimony to indicate his assessment of Boyd's credibility.(*Id.*, at 744-745. Emphasis added.)

Similarly in this case, the "instant record does not establish that [Detective Barling] is an expert on judging credibility .... The trial court thus erred insofar as it admitted [Detective Barling's] testimony to indicate his assessment of [Connor's, Jelks' and James'] credibility." (Paraphrasing *People v. Melton* (1988) 44 Cal.3d 713, at 744-745.) See also, *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.

Third reason: Even if Barling was a qualified expert on the credibility of individuals when they speak to the police or when they testify at trial, his expert

opinion testimony was still inadmissible because the subject the opinion related to was not "sufficiently beyond common experience" that it would "assist the trier of fact."

Expert opinion testimony is limited to those subjects that are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" in properly understanding the subject matter. (Evid. Code, § 801)

Expert opinion testimony is normally *not* admissible to "bolster" the credibility of other witnesses who have testified at trial. In *People v. Smith* (2003) 30 Cal.4th 581, the defense offered a psychiatrist as an expert witness regarding the defendant's credibility when he made certain statements. This Court explained the impropriety of presenting *opinion* testimony of an expert for this purpose:

> [T]he jury was as able as an expert to judge that question [the defendant's credibility] for itself. Credibility questions are generally not the subject of expert testimony, or at least a court could so conclude in a given case. (*People v. Anderson* (2001) 25 Cal.4th 543, 576 [" 'the psychiatrist may not be in any better position to evaluate credibility than the juror' "]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39 [trial court abused its discretion in *admitting* expert opinion that a prosecution witness was credible]. (*People v. Smith* (2003) 30 Cal.4th 581, 628.)

A police officer's opinion regarding the truthfulness of a suspect's confession is generally inadmissible. (*People v. Anderson* (1990) 52 Cal.3d 453, 478; *People v. Cole* (1956) 47 Cal.2d 99, 103; *People v. Arguello* (1966) 244 Cal.App.2d 413, 421.) In *Anderson*, an investigating officer testified for the prosecution regarding the results of his investigation of several murders.

> He recounted defendant's confession to those crimes as well as defendant's vague statements concerning other murders he purportedly committed in Las Vegas. On cross-examination, Thompson admitted that he doubted the veracity of defendant's confession to the Las Vegas killings, and he observed that no law enforcement officers contacted by him credited it. On redirect, Thompson stated his further belief that defendant's confession to the Glashien and Blundell killings, being supported by sufficient details, was true. (Id., at p. 478. Emphasis added.)

This Court held the trial court erred when it allowed into evidence the officer's opinion that the defendant's confession was true. (*Id.*, at p.478.) The same rationale applies to a police officer's ability to evaluate the truthfulness of a witness' statement to him or the truthfulness of a witness' testimony at the trial.

In *People v. Sergill* (1982) 138 Cal.App.3d 34, 39, the reviewing court discussed whether the trial court erred when it admitted expert opinion testimony by a police officer regarding a child victim's credibility:

> We first consider whether this evidence was admissible as expert-opinion testimony, as it is apparent from the court's comments that it considered the officers as experts in assessing veracity of those who make reports to police. (*Id.*, at p. 39.)

In rejecting the trial court's determination that investigating police officers qualify as experts in evaluating the credibility of witnesses, the *Sergill* court explained:

> We recognize that the trial court is given considerable latitude in determining the qualifications of an expert, and that its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. (*People v. Kelly, supra.*, 17 Cal.3d at p. 39; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 701.) Nevertheless, we find no basis for admitting this opinion evidence as expert testimony. We find no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require the testimony of an expert. Moreover, even if this were a proper subject for expert testimony, nothing in this record establishes the qualifications of these officers as experts. The mere fact that they had taken numerous reports during their careers does not qualify them as experts in judging truthfulness. (Evid. Code, § 720, subd. (a).) (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40. Emphasis added.)

According to Sergill, it would be *an abuse of discretion* for a trial court to rule that a police officer qualifies as an expert on witness credibility absent an adequate foundation for the officer's expertise. It would also be *an abuse of discretion* for a trial court to rule "that the veracity of those who report crimes to

the police is a matter sufficiently beyond common experience to require the testimony of an expert."

California courts have held that in certain circumstances, expert opinion testimony is admissible on subjects that are related to the credibility of witnesses. However, these cases pertain to subject matter that "is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Examples of this are cases involving "syndrome" issues. (See *People v. Humphrey* (1996) 13 Cal.4th 1023, 1083 [Battered Spouse Syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 247 [Rape Trauma Syndrome]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 [Child Sexual Assault Accommodation Syndrome]; *People v. Housley* (1992) 6 Cal.App.4th 947, 954-957 [same].

In each of these cases, the expert opinion testimony was rendered by qualified experts in the respective syndromes, and the expert opinion testimony was admissible to support/rehabilitate the credibility of an individual when that individual's post-offense conduct was seemingly inconsistent with the conduct a juror would have expected of an individual who was testifying truthfully. That is, the expert opinion testimony was admitted to "disabuse the jury of some widely held misconceptions" (*People v. Bledsoe, supra*, 36 Cal.3d at pp. 247-248.) about how victims of domestic abuse, victims of rape or parents of child molestation victims react. In this regard, the expert opinion testimony "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)

In the instant case, there was no need to "disabuse the jury of some widely held misconceptions" about gangs and the potential threat of retaliation against witnesses who testify against members of the gang. This was a subject that was certainly *not* "sufficiently beyond [the] common experience" of Los Angeles County jurors "that the opinion of an expert would assist" the jury in understanding the subject of witness retaliation in gang prosecutions.

Fourth reason: Barling's opinion testimony was inadmissible lay opinion testimony because it was not based on facts of which he had personal knowledge nor was it "[h]elpful to a clear understanding of his testimony."

In *People v. Melton* (1988) 44 Cal.3d 713, 744, this Court discussed the propriety of a witness rendering his lay opinion regarding the credibility of another individual and held it was improper:

> Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40), the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. (*People v. Hurlic* (1971) 14 Cal.App.3d 122, 127 [92 Cal.Rptr. 55]; see Jefferson, Cal. Evidence Benchbook (1972) § 29.1, pp. 495-496.) Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*id.*, § 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (*Id.*, §§ 210, 350.) (*Id.*, at p. 44. Emphasis added.)

In the *Melton* case, this Court wrote that Officer Carpenter was neither an expert on credibility nor was his opinion admissible as lay opinion because it was not "helpful to a clear understanding of his testimony":

> The instant record does not establish that Carpenter is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations. He knew nothing of Boyd's reputation for veracity. He was able to describe his interviews with Boyd in detail, leaving the factfinder free to decide Boyd's credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his

> statements to Carpenter had the essential "ring of truth." The trial court thus erred insofar as it admitted Carpenter's testimony to indicate his assessment of Boyd's credibility.(*Id.*, at 744-745. Emphasis added.)

In *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 -41, as in *Melton*, the officer who rendered the lay opinion as to the credibility of another individual had personal knowledge of the interview. In the instant case, Detective Barling had *no* personal knowledge of Connor's, Jelks' and James' statements to the police, nor did he have personal knowledge of the content of their testimony at the trial. Further, even if Barling had interviewed Connor, Jelks and James, and even if he had been present when they testified, Barling would have been "able to describe [his] interviews with the [three witnesses] in concrete detail and [his] opinions or conclusions as to [their] truthfulness" would not have been "helpful to a clear understanding of [their] testimony." (Paraphrasing *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 -41)

Accordingly, Barling's testimony, if offered as lay opinion testimony, would also have been inadmissible.

Fifth reason: Barling's personal beliefs or opinions were not relevant.

If the gang investigator does *not* qualify as an expert on the subject of witness credibility, and if the gang investigator also has *no personal knowledge* of the facts upon which his lay opinion is based, then his testimony regarding the credibility of a particular witness is simply his *personal belief* as to what he thinks about the credibility of that witness. In that case, his personal beliefs are *irrelevant* and *inadmissible*.

A case in which the police gang expert's opinion testimony was held to be irrelevant and inadmissible because it was simply an expression of his own personal beliefs is *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656 -658. According to the *Killebrew* court, such testimony reflects no more than the witness' personal belief about, for example, the credibility of a witness (*Killebrew,*

at p. 658.) A witness' personal belief about the credibility of a witness does not assist the trier of fact in understanding a matter beyond their personal experience, but instead draws conclusions on issues reserved for the jury. (*Killebrew*, at p. 658.)

In *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 -41, the reviewing court also concluded that the police officer's opinion testimony as to the credibility of the victim was not relevant, even though the definition of relevant evidence in California is quite liberal. The Sergill court discussed the facts of that case, then held the trial court abused its discretion and erred when it allowed the officer to render his opinion as to the credibility of the child victim:

> This opinion testimony did not fall within any of the categories listed in Evidence Code section 780, which enumerates the most common factors bearing on the question of credibility. [Citations omitted.] As we have stated, these officers neither knew the child, nor knew her reputation for truthfulness. (See *People v. Mendoza*, *supra.*, 37 Cal.App.3d 717, 724.) Instead, their conclusions that she was telling the truth were based on their own self-proclaimed expertise in assessing victim veracity, but the record is devoid of any evidence to establish their qualifications in this regard. We conclude that the officers' opinions on the child's truthfulness during their limited contacts with her did not have a *reasonable* tendency to prove or disprove her credibility and were therefore not relevant. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40)

As in *Sergill*, Detective Barling did not know Connor, Jelks or James. He did now know their reputation for truthfulness. "Instead, [Barling's conclusion] that [they were] telling the truth [was] based on [his] own self-proclaimed expertise in assessing victim veracity, but the record is devoid of any evidence to establish [his] qualifications in this regard." (Paraphrasing *People v. Sergill* (1982) 138 Cal.App.3d 34, 40-41. Detective Barling's opinion testimony in the instant case amounted to no more than his own personal belief as to the credibility of Connor, Jelks and James, and as such, was not relevant.

H. The Trial Court's Rulings Were Erroneous and an Abuse of Discretion.

In *People v. Sergill* (1982) 138 Cal.App.3d 34, the defendant was charged with orally copulating his 8 year old niece. (Penal Code, § 288a, subd. c) The young girl testified at the trial. During the defense case, the defendant called two police officers who investigated the matter to testify as to certain discrepancies between what the 8 year old told told them and her trial testimony. "During cross-examination of Officer Anderson, who interviewed the child at Kaiser Hospital, the prosecutor asked the officer if he had formed an opinion as to whether the child was telling the truth, and then asked for that opinion. Defense counsel objected, on the grounds of lack of foundation and irrelevancy; counsel also complained that the question invaded the province of the jury. The court overruled the objection...." After rendering his opinion that the young girl had been truthful, Anderson was allowed to give the underlying reasons for his opinion. The second police witness, Officer Wells, testified she spoke to the young girl two days after Officer Anderson's interview. She, too, was permitted to express an opinion that the girl told the officer the truth. Officer Wells also explained the basis for her opinion. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 38.) The *Sergill* court then explained:

> We recognize that the trial court is given considerable latitude in determining the qualifications of an expert, and that its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. (*People v. Kelly*, *supra.*, 17 Cal.3d at p. 39; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 701.) Nevertheless, we find no basis for admitting this opinion evidence as expert testimony. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40. Emphasis added.)

In reversing that defendant's conviction, the *Sergill* court stated the trial court erred when it permitted opinion testimony by two police officers as to the victim's credibility. The court stated neither officer qualified as an expert in the field of witness credibility, the opinion testimony of both officers regarding the young girl's credibility was inadmissible expert opinion testimony, their opinions

were inadmissible lay opinion testimony, and their opinions were also not relevant. Although the *Sergill* court never expressly stated the trial court abused its discretion when it admitted the opinion testimony of the two officers, that conclusion is inherent in that court's holding.

Appellant respectfully submits that for all the above reasons, the trial court abused its discretion and erred when it allowed Detective Barling to render expert testimony regarding whether the witnesses testified truthfully when they stated they feared retaliation because of their testimony (i.e., their expressions of fear were "legitimate.").

e. The trial court's error was prejudicial.

The trial court's error in allowing Detective Barling to render the above described "expert" testimony significantly exceeded the *Watson* "reasonable probability" test for "harmless error."

In determining whether the erroneous admission of gang-expert opinion evidence was prejudicial, the Court must examine the entire record and determine whether it is reasonably probable that a result more favorable to Appellant would have been reached had this evidence not been admitted. [*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Malone* (1988) 47 Cal.3d 1, 22; Evid. Code, section 353.

The critical issue in this case was the credibility of witnesses Connor, Jelks and James. They were the witnesses whose testimony connected Appellant to the murders of Loggins and Beroit. Their credibility was vigorously challenged by the defense. The only "corroboration" for their identification of Appellant as the shooter was each other. The prosecution presented *no* evidence, other than Connor's own testimony, to corroborate the fact that he was even present at the time of the shootings. The same was true with Jelks and James. Further, Appellant's alleged "confessions" to Jelks and James, given under circumstances in which it could not be independently confirmed that the conversations even occurred, much less that they could be reviewed under cross-examination, was

inherently suspect. Under the totality of these circumstances, the "expert opinion" of a respected and experienced gang/homicide detective that each of the three witnesses was willing to testify *truthfully* in spite of their very real and legitimate personal concerns for their safety, as well as for the safety of their family members, would have had a very persuasive impact on the jury. The obvious inference drawn by the jury would have been that these three witnesses would certainly not have been willing to testify under these conditions if they were not telling the truth! Appellant asserts "it is reasonably probable that a result more favorable to Appellant would have been reached had this evidence not been admitted." (People v. Watson (1956) 46 Cal.2d 818, 836; People v. Malone (1988) 47 Cal.3d 1, 22; EC section 353.)

The Trial Court's Error Also "Lightened" the Proscution's Burden of Proof, thereby Depriving Appellant of his Fourteenth Amendment Due Process Rights.

This Court has also held that if the erroneous admission of evidence lightens the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States constitution. (*People v. Garceau* (1993) 6 Cal.4th 140, 186.] Under these circumstances, Appellant's conviction must be reversed unless the state can establish that the erroneous admission of Barling's testimony was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Carl Connor, Freddie Jelks and Marcellus James were the *only* witnesses who provided testimony that Appellant was the shooter who killed Loggins and Beroit. The identity of the shooter was the only disputed element of the charged offenses.

In this Opening Brief, Issues I through III address Connor's utter lack of credibility as a witness. Issues IV through IX address Jelks' lack of credibility. Issue X addresses the lack of credibility of James. In summary, each of these witnesses did not speak to the police until more than three years had passed. Connor "just happened" to come forward at the same time a hefty financial

reward was being offered for information relating to homicides that had been committed in that area of the city. Jelks was *coerced* into telling the police and prosecutor what they wanted to hear in order for him to receive protection for himself and his family for telling the police about the Mosley murder, as well as to receive consideration and prosecutorial assistance in his own pending murder case. James only provided information to the police about homicides in the area when he was in custody, the obvious inference being he had a motive to tell the police and prosecution what they wanted to hear about some murder case with the hope of receiving assistance in the case for which he was in custody. Each of these witnesses had a motive to ingratiate themselves with the police and prosecution, and telling the truth was not necessarily a requirement.

Further, each of the three witnesses was impeached with evidence that they had made prior statements to the police that were inconsistent with their testimony. The inference from this defense evidence was that they a) had difficulty recalling what they had previously said because it was not the truth, and/or b) they were adding fictitious details and embellishing their testimony to garner additional assistance from the police and prosecution for their own personal difficulties (or, in Connor's case, to justify his receiving the $25,000 reward.).

Simply put, the credibility of each of these three witnesses was vigorously disputed by the defense, and there was a significant possibility the jury would reject their testimony outright. If that occurred, Appellant and co-defendant Johnson would have been found "not guilty."

D. <u>Conclusion</u>.

Because Barling was surrounded by an aura of credibility, Barling's erroneously admitted testimony *lightened* the prosecution's burden of proof and, therefore, *prejudicially harmed* Appellant in three ways.

First, Barling's testimony that strongly suggested the members of the 89 Family Bloods gang, including Appellant and co-defendant Johnson, possessed a vicious and savage propensity to harm others was devastating to Appellant and it

undermined any hope he had of receiving a fair trial. Because Appellant was a member of this gang whose members possessed such a resolute and vile propensity to commit violent acts against decent law abiding citizens and their loved ones, it was a natural and reasonable inference that Appellant would willingly act *in conformity* with that character trait and murder encroaching rival gang members. Appellant's propensity to violently assault others, the jury would have concluded, manifested itself when he shot and killed Loggins and Beroit.

Second, Barling's testimony that strongly suggested the members of the 89 Family Bloods gang, including Appellant and co-defendant Johnson, possessed a vicious and savage propensity to harm others, retaliate against not only each of the three witnesses but their innocent children and other family members as well, was devastating to Appellant because it undermined any hope he had of receiving a fair trial for an additional reason. The jury had been given numerous "reasons to hate" Appellant because of his affiliation with this gang; a gang whose members had such an utter lack of appreciation for life; a gang whose members literally terrorized the decent law abiding citizens of that neighborhood for their own selfish reasons; a gang whose members deprived the residents of that community of any semblance of a peaceful and nourishing environment in which to live and raise their children in safety. To say the jury *loathed* Appellant and his homeboys would be a gross understatement. To suggest the jurors were capable of ignoring these incredibly intense and emotional feelings of antipathy would be to ignore reality. The jury would have had an overwhelming urge to punish Appellant because of his being associated with this degrading lifestyle, and not necessarily because he committed a crime. Barling's expert testimony simply cemented into place these reasons to hate, and therefore punish, Appellant by finding him guilty and sentencing him to death.

Finally, Barling was allowed to render to the jury his expert opinion, based on his many years of experience as a police detective and gang expert, that *each of the three witnesses had testified truthfully* when they explained the reason they

delayed speaking to the police, and the reason there were inconsistencies between their previous statements and their testimony, was because they were afraid they and their innocent family members would be the victims of retaliation from members of the gang if they told the truth. This testimony, coming from a respected member of law enforcement who had no apparent reason to lie, would have been particularly persuasive to the jury in determining the believability of Connor, Jelks and James. This was particularly true with witness Jelks because of the corroborative value of Barling's testimony regarding the internal thought processes and conduct of the gang; Barling's testimony made "a silk purse out of a sow's ear." Without Barling's expert opinion testimony, the likelihood of conviction was remote.

Accordingly, and for all the above reasons, the trial court's error in allowing the above described "expert" testimony was prejudicial to Appellant under either the *Watson* or the *Chapman* standard on appeal. Appellant respectfully requests this Court overturn his convictions and sentence of death.

XIII.

The Trial Court Erred and Abused Its Discretion When It Allowed the Prosecution to Introduce Voluminous, Irrelevant, and Highly Inflammatory Gang Evidence. This Error Was Prejudicial, and It Requires Appellant's Convictions and Judgment of Death Be Overturned.

A. Introduction.

Although the prosecution had the burden of proving the existence of each element of murder beyond a reasonable doubt, the facts of this case demonstrate the *only* element that was actually disputed by Appellant was the element of *identity of the shooter*. The other elements were basically uncontested. Hence, gang evidence introduced to circumstantially prove any element of murder other

than the identity of the shooter had little probative value, but possessed great potential for undue prejudice. (See Evid. Code, § 352.)[267]

The defense objected to the introduction of gang evidence; however, the trial court ruled that gang evidence would be admissible to prove this was a gang homicide involving rival gang members, and that gang evidence would be "highly relevant" to prove "motive and intent." [RT, 15:3203-3206]

Throughout the trial, however, the prosecution introduced gang evidence for numerous and varied reasons. (See discussions in Issues XI, XII, XIV, XV and XXII of Appellant's Opening Brief.) Some gang evidence was simply not relevant; it had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action," (Evid. Code, § 210), and therefore was not admissible. [Evid Code, § 350] Some gang evidence may have had some probative value, but because it was cumulative of other evidence or was inherently inflammatory its "probative value [was] substantially outweighed by the probability that its admission ... create[d] substantial danger of undue prejudice ..." to Appellant. [Evid. Code, § 352]

B. <u>The Applicable Law</u>:

1. <u>Relevance and Evid. Code, § 352</u>.

Appellant acknowledges that evidence of motive may be relevant and often admissible to prove *circumstantially* the identity of the criminal offender. That is, proof that a particular individual had a motive to kill the victim has a "tendency in

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[267] For co-defendant Johnson, the "disputed elements" that were "of consequence to the determination of the action" against him may have extended to issues beyond motive to circumstantially prove identity. To the extent that gang evidence was introduced against co-defendant Johnson for purposes other than motive to circumstantially prove identity, that gang evidence would be part of the prejudice suffered by Appellant because he was tried jointly with co-defendant Johnson. See Issues XII and XXI (Lack of Severance Denied Appellant Due Process) in Appellant's Opening Brief.

reason to prove ... any disputed fact that is of consequence to the determination of the action [i.e., identity]." (Evid. Code, § 210.)

> "[I]t has repeatedly been held that it is proper to introduce evidence which is even unpleasant or negative pertaining to an organization in issue which is relevant on the issue of motive or the subject matter at trial." (*People v. Frausto* (1982) 135 Cal.App.3d 129, 140.) Here, the evidence introduced logically and naturally aided the prosecution in rebutting the presumption of innocence by showing a reason for defendant's criminal behavior. (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 552 -553)

In determining whether gang evidence is admissible at trial, therefore, the trial court should be guided by the familiar principle that gang evidence may have a "highly inflammatory impact" on a jury and may create the risk that the jury will infer guilt and criminal disposition merely from gang membership. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Cox* (1991) 53 Cal.3d 618, 660.) Therefore, gang evidence should be admitted to circumstantially prove the accused committed the underlying offense (i.e., the killer had a motive to kill) only after carefully balancing the probative value against the possible prejudice as required under Evidence Code § 352. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905)

This is because gang evidence uniquely tends to evoke an emotional bias against the defendant as an individual, has very little direct relevance to the issue of guilt of the underlying charge and can so readily deprive the accused of a fair trial. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.)

Gang evidence is frequently more prejudicial to the accused than "other acts" evidence (Evid. Code, § 1101, subd. b) or prior felony convictions used to impeach. (Evid.Code, § 788) In both of these situations, the accused's prior potentially prejudicial conduct may have occurred several years earlier. When the accused's prior conduct is admitted for either of these purposes, a limiting instruction *shall* be given upon request (Evid. Code, § 355) because the danger exists that the jury may consider it as "propensity" evidence or evidence of the

defendant's bad character. A jury's emotions are far more likely to be triggered by gang evidence, which regularly includes reference to drugs, violence, witness intimidation, vicious retaliation, drive-by shootings, and turf wars, all of which are presented as the *ongoing* activities of a gang to which the defendant currently belongs. In addition to the gang evidence itself, jurors frequently bring with them their own strong emotions, based on media coverage, personal experiences, or both. The negative impact of the bad character quality of the gang testimony often far outweighs that of an accused's prior conduct/convictions, illustrating the inherent undue prejudice of gang evidence.

Finally, it should be noted that the probative value of gang evidence of "the culture, habits and social behavior of street gangs" in so many of the more recent California appellate cases involve defendants charged with violations of the "California Street Terrorism Enforcement and Prevention Act." , the "S.T.E.P. Act." (See Penal Code, § 186.20-186.33) In cases where violation of the S.T.E.P. Act is alleged, the prosecution has been allowed to introduce gang evidence to prove the offenses were committed "for the benefit of, at the direction of, or in association with [a] criminal street gang" within the meaning of Pen. Code, § 186.22. In cases without "S.T.E.P. Act." allegations, *such as Appellant's case*, introduction of gang evidence for the purpose of proving a violation of the "S.T.E.P. Act." is not relevant and is inadmissible. In non-"S.T.E.P. Act." cases, the probative value of this type of gang evidence decreases dramatically and often disappears altogether. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617, *People v. Killebrew* (2002) 103 Cal.App.4th 644.

Evid. Code § 355 provides that a limiting instruction shall be given, upon request, when evidence is offered for one purpose and is inadmissible for another purpose. However, when the "inadmissible purpose" of the evidence involves an emotional reaction to the evidence, limiting instructions have little value in curing the resulting problem of undue prejudice. Many courts have held that admonitions were insufficient to cure the error. "It is the essence of sophistry and lack of

realism, however, to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Ca.App.3d 119, 130; see also *Krulewitch v. United States* (1949) 336 U.S. 440, 453, 69 S.Ct. 716, 93 L.Ed. 790 [Jackson, J. concurring] ["The naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."]; *People v. Guerrero* (1976) 16 Cal.3d 719, 729 ["No limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds [the inadmissible evidence]"; *People v. Coleman* (1985) 38 Cal.3d 69, 94 [limiting instruction inadequate to ensure that jurors would consider inflammatory hearsay only for limited purpose of supplying basis for expert opinion].)

When reviewing on appeal whether the trial court erred when it admitted gang evidence, the abuse of discretion standard is applied. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Champion* (1995) 9 Cal.4th 879, 923.) For Evid. Code, § 352 purposes, prejudice refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

A trial court's erroneous admission of gang evidence does not require reversal, however, unless it is reasonably probable the defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, this Court has also held stated that if the trial court's error "lightens" the prosecution's burden of proof, the *Chapman* "harmless error" analysis applies. (*People v. Garceau* (1993) 6 Cal.4th 140, 186.

The erroneous introduction of violent and inflammatory gang evidence that incites jurors and proves the gang-member-defendant's propensity to commit violent acts can have the effect of "lightening" the prosecution's burden of proof.

It may also violate the Fourteenth Amendment due process clause if it renders the trial fundamentally unfair. (*McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1383-1386 [erroneous introduction of propensity evidence violates due process]; *United States v. Brown* (9th Cir. 2003) 327 F.3d 867, 871-872 [Court found that the introduction of propensity evidence required reversal, despite an admonition.].)

3. Discussion.

In this case, the prosecution had to prove the identity of the shooter. As part of their proof that Appellant was the shooter, evidence was introduced to establish he had a motive to kill Loggins and Beroit. Appellant was a member of the 89 Family Bloods gang. Rival East Coast Crips had entered the neighborhood "claimed" by Appellant's gang. Hence, Appellant had a motive to shoot the invading rival gang members. Appellant acknowledges that based on the prosecution's theory, some understanding of gangs was relevant in this case and, as a result, certain gang evidence was admissible. Without an appropriate gang context to explain the murders in the present case, the killings would appear inexplicable, a reasonable inference being that someone other than a Bloods gang member committed the murders for some other reason. According to the facts, the victims did nothing to provoke the shootings. They were unarmed and merely seated in a car on Central Avenue in front of a car wash waiting for Beroit's car to be cleaned. There was no evidence the victims knew Appellant or that Appellant knew the victims. Although Appellant's "gang membership and [his] gang activities were prejudicial to a certain degree, the evidence was highly relevant to the prosecution's theory of how and why" the victims were killed. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; see *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.)

Appellant asserts in this argument, however, that the trial court allowed the introduction of gang evidence that went *far beyond* the relevant and admissible purposes.

Just prior to opening statements, the court made an initial determination that gang evidence would be admissible to prove this was a gang homicide involving rival gang members, and that gang evidence would be "highly relevant" to prove "motive and intent." [RT, 15:3203-3206] Additionally, the court heard argument on the admissibility of gang "monikers." The court held that the relevance of gang monikers to establish the identity of individuals "outweighs the prejudice, if any." Recognizing the inherent prejudice of gang evidence, however, the court told defense counsel it would give the jury an appropriate limiting instruction, if requested. [RT, 15:3206-3217] The court also warned the prosecution against over- emphasizing gang monikers during the trial. [RT, 15:3217-3218]

1. The Trial Court "Opened the Flood Gates" for the Admission of Voluminous, Inflammatory, and Highly Prejudicial Gang Evidence when It Erroneously Overruled the Initial Defense Objection That Was Timely, Specific and Legally Correct.

During the early portion of direct examination of Freddie Jelks, his testimony covered acts, events and conversations that he had perceived personally; that is, he had personal knowledge of the events about which he was testifying. (See Evid. Code, § 702) However, the prosecutor suddenly began asking Jelks a series of questions that called for Jelks' to speculate and render his personal beliefs regarding the 89 Family Bloods gang:

DDA: What happens if somebody that's not 89 Family is in the [89 Family Bloods gang's] neighborhood?
ORR: Calls for speculation.
CRT: Overruled. Go ahead and answer.
FJ: There's a lot of discipline going on.
DDA: What do you mean by discipline?
FJ: If you get, you know, if you [rival gang member] get caught up in the neighborhood, you probably get hurt, beat up or, you know, worse.
DDA: What's worse?
FJ: Shot. [RT, 16:3538-3539]

The prosecutor's question called for Jelks' *opinion* as to what he thought would happen if a rival gang member was caught in the 89 Family neighborhood by members of the gang.[268] Phrased another way, Jelks was asked to *predict* how his homeboys would react if they saw a rival gang member in the neighborhood. Jelks was *not* asked to render an opinion as to the more general character trait of a homeboy whom he personally knew well.[269] What Jelks personally thought might happen was *not* relevant. The trial court erred when it overruled the defense objection.

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, the prosecutor asked a police gang *expert* to render his opinion regarding the conduct of a specific individual in the past ... not a future prediction as here. The court of appeals called the officer's opinion "rank speculation":

> In Killebrew, the gang expert (Darbee) rendered his expert opinion "that Killebrew was the 'shot caller' for the East Side Crips that day; i.e., he ordered the drive-by shooting at Casa Loma Park. This rank speculation should never have been submitted by the prosecution and undoubtedly increased the prejudice of the Casa Loma Park testimony. (*Id.*, at p. 651, fn. 6.)

Despite any concern the trial court may have expressed regarding the prejudicial nature of gang evidence, an *astounding* amount of gang evidence was thereafter introduced in this case. (See discussions in Issues XI, XII, XIV, XV and XXII of Appellant's Opening Brief.) Much of the gang evidence was simply not relevant; it had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action," (Evid. Code, § 210), and therefore was not admissible. (Evid Code, § 350) Much of the gang evidence may

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[268] The question, by its careless wording, called for Jelks to *speculate* as to what the gang members' reaction would have been *at the present time* (i.e., 1997). The prosecutor asked the question, however, so Jelks would help provide a motive for Appellant to shoot Loggins and Beroit in 1991.

[269] If this was the prosecutor's reason for asking the question, it would have been *in*admissible character evidence to prove that person's propensity to act a particular way on a specific occasion. See Evid. Code, § 1101, subd. a.

have had some probative value, but because it was cumulative of other evidence or was inherently inflammatory its "probative value [was] substantially outweighed by the probability that its admission ... create[d] substantial danger of undue prejudice ..." to Appellant. (Evid. Code, § 352)

2. Illustrations of the Erroneous Admission of Gang Evidence.

The following testimony regarding gangs was either not relevant to prove any disputed fact that was in issue in this case, or the danger of undue prejudice far exceeded any probative value the gang evidence may have had:

Example #1: The extent of the gang problem in the Los Angeles area.

Detective Barling testified regarding the history of gangs in Los Angeles generally.[270] There were two basic gangs in Los Angeles; the Crips whose members associated with the color blue, and the Bloods whose members associated with the color red. [RT, 19:4295] In Los Angeles, in each of these gangs "you have many small groups of gangs." Many are identified by a street in their neighborhood. Of these groups or "sets" of Bloods such as the Swans, there would also be many "subsets" of that Bloods set. The 89 Family was one of five "subsets" of the Swans. The Swans was a "set" of the basic Bloods gang in Los Agneles. [RT, 19:4294-4295]

This testimony did *not* "have any tendency in reason to prove or disprove" the identity of the shooter. This evidence simply informed the jury of the extent of the gang problem in Los Angeles. It was inflammatory, not probative of any disputed fact, and should have been excluded by § 352.

Example #2: Violent rivalries between enemy gangs throughout Los Angeles.

Barling testified about the rivalries between gangs throughout Los Angeles. The 89 Family Bloods gang "got along" with the Bloods gang members who were

[270] Barling's testimony was apparently limited to African-American street gangs in the Los Angeles area. He said nothing about Hispanic gangs or other ethnicity based gangs. Indeed, he was not qualified to talk about those gangs.

affiliated with the Swans. However, "*all* Crips gangs and the 89 Family Bloods gang had rivalries at that time (Summer of 1991) and they still do (i.e., August of 1997)". This rivalry with Crips gangs extended to other Bloods gangs as well. [RT, 19:4294-4295] That is, throughout the Los Angeles area, bitter and violent rivalries between Crips and Bloods gangs was the general rule that was still on-going six years later at the time of trial.

The evidence regarding other gangs in the Los Angeles basin, the violent rivalries between the Crips and Bloods gangs throughout Los Angeles, and the rivalries that were *still* on-going did *not* "have any tendency in reason to prove or disprove" the identity of the shooter. That information simply informed the jury of the frightening problem gangs have created in Los Angeles. This evidence was quite inflammatory, not probative of any disputed fact, and should have been excluded by § 352.

Example #3: Gang Tattoos, Gang Hand Signs, and Gang Grafitti.

Detective Barling testified regarding gang tattoos, gang hand signs and gang graffiti, none of which was relevant to *any* issue in this case. It was totally unnecessary, and its only purpose was to inflame the jury. It, too, should have been excluded. [RT, 19:4319]

However, Barling's testimony, taken in conjunction with People's Exhibits #48 and #49 that were introduced in the People's rebuttal case, dramatically increased the potential that this testimony prejudiced Appellant. (See Issue XV in Appellant's Opening Brief for a discussion of these photographic exhibits displaying members of the 89 Family Bloods gang menacingly posing amidst extensive gang graffiti and "throwing" gang hand signs.)

Further, Barling's testimony regarding tattoos was *particularly prejudicial* to Appellant:

> DDA: What is the significance of having 89 Family tattoos?
> BAR: Shows that you are willing to be part of that gang and associate yourself with that gang pretty much for life.
> DDA: Are you familiar with the initials N.H.F.?

BAR: Yes.
DDA: What is the relationship between those initials and 89 Family?
BAR: N.H.F. stands for Neighborhood Family and 89 will say they are Neighborhood Family Bloods.
DDA: Is wearing a tattoo on your body a sign of respect for your gang?
BAR: Yes, it is.
DDA: Does gang membership fade away?
BAR: No. [RT, 19:4319-4320 (Emphasis added.)]

There was *no* testimony presented from any witness that the shooter could be identified by a tattoo. Hence, the existence of a tattoo would have had no "tendency to prove or disprove" that issue that was disputed." (Evid. Code, § 210) There was simply no relevance to this testimony, except as circumstantial evidence that Appellant was a member of that gang. However, witnesses Connor, Jelks, James and Adams had all testified earlier in the trial that Appellant was a member of 89 Family. Detectives Barling and McCartin did likewise. Offering evidence of Appellant's tattoo for this purpose would have been so cumulative, it would have had little probative value, and the prejudice of bearing a gang tattoo would have substantially outweighed the probative value per § 352.

However, Appellant submits it was absolutely clear *why* the prosecutor had Barling testify to the significance of gang tattoos, particularly when she asked Barling about the initials N.H.F. in relation to gang tattoos. Those initials "just happened" to be the small tattoo that, upon close inspection, was evident on Appellant's face and was barely visible in the photograph of Appellant that was in evidence. The prosecutor subsequently asked Barling to look at People's Exhibit #10, and directed his attention to photograph number 5 in that exhibit, the photograph of Appellant:

DDA: Showing you what's been marked as People's 10, and drawing your attention to photograph number 5. Who is in that picture?
BAR: Michael Demone Allen, the defendant sitting at the far end.

DDA: Drawing your attention to what appears to be the left side of Mr. Allen's face, or right side as you look at it, there appears to be a green mark on the photograph. Do you recognize what that mark is?
BAR: Yes. It's a tattoo.
DDA: And what – Does Mr. Allen in fact have a tattoo on his face?
BAR: Yes, N.H.F.
DDA: What does N.H.F. stand for?
BAR: Neighborhood Family. [RT, 21:4791]

By having Barling, the prosecution's respected and experienced gang expert, testify about the significance of gang tattoos, then by referring specifically to the initials N.H.F., it was evident the prosecutor had the intent at that time to subsequently introduce evidence that Appellant had that very tattoo! The significance of this testimony, Appellant submits, was absolutely unfair and unduly prejudicial to Appellant. The prosecutor successfully introduced evidence that Appellant was "willing to be part of that gang and associate [him]self with that gang pretty much for life." It was Appellant's "sign of respect for [his] gang" and indicated he would remain a member of that vile and hated gang for the rest of his life because his loyalty to the gang, like the tattoo, would never "fade away."

There was *no other reason* for the prosecutor to introduce evidence of Appellant's tattoo, except to unduly prejudice the jury against Appellant. Throughout the trial, the prosecutor inundated the jury with a voluminous amount of highly inflammatory and prejudicial gang evidence. She constantly introduced gang evidence to illustrate the propensity of members of the 89 Family Bloods gang to commit heinous and atrocious acts of retaliatory violence on decent law abiding residents of the neighborhood; on individuals who had the "courage" to willingly place their lives at risk to assist law enforcement in bringing these "neighborhood terrorists" to justice. Now the prosecutor introduced evidence that Appellant's *intense* loyalty and commitment to that gang, as well as his propensity

to commit those extreme acts of gang violence, *would continue throughout his life*, even if he were to spend the remainder of his life in prison.

The prejudicial impact of this evidence on the jury as they deliberated his guilt, *and subsequently his punishment*, was patent.

Example #4: Members of the 89 Family Bloods gang were not afraid of the police and would often manipulate the police to obtain useful information for the gang.

Detective Barling rendered his "expert opinion" that gang members usually did not fear the police. In fact, he explained that gang members often "used" the police to obtain information to further their gang interests.

> DDA: Did gang members appear to be afraid of the police?
> BAR: Depended on the contact. But, usually no. In my dealings with gang members and what you are talking about, a lot of times they would want to talk to us to find out what we know and tell us what they know because it may be a fact of protecting the neighborhood from the rival gangs coming in and out. So they will tell us what is going on so they get a little protection so they are not getting shot back and forth.
> DDA: Is it fair to say that in some circumstances gang members would talk to you so they could use your information?
> BAR: Oh, most definitely. [RT, 19:4291-4292]

Immediately thereafter, Detective Barling testified that as a gang detective, there were "a couple of particular areas" he worked, and "one happened to be the area of 88th and Central", the neighborhood claimed by the 89 Family Bloods gang. [RT, 19:4292] The obvious inference from this testimony was that he was referring to the 89 Family Bloods gang members when he opined they were normally not afraid of the police and had ulterior motives for talking to the police.

This "lack of fear" toward police, and the gang's derogatory and self-serving motive for talking to the police, were simply *not* relevant to any issue in the case. The detective then subtlety told the jury he was referring to the 89 Family Bloods gang in particular. It was simply one of many efforts by the prosecution, Appellant asserts, to literally "bury" Appellant with emotionally

inflammatory and revolting, yet irrelevant, information about gangs and Appellant's gang in particular.

Example #5: Members of the 89 Family Bloods Gang Had a Propensity to Be Extremely Violent, to Commit Murders, Drive-By Shootings and Walk-Up Shootings. "Respect" or "Reputation" Was a Gang Member's Most Important Accomplishment.

Undue prejudice of this type of evidence was substantial for two reasons: First, It suggested that Appellant, a member of that gang, shared that propensity to be violent and retaliatory. Second, it possessed such an inflammatory nature that there was a real danger that jurors convicted Appellant because of his gang affiliation and not because they were convinced beyond a reasonable doubt that he was the shooter.

Freddie Jelks testimony was replete with references to the meaning and significance of "respect", and applied it to members of the 89 Family Bloods gang as well as Appellant and co-defendant Johnson.:

Detective Barling's "expert" testimony that gang members have a psychological need for "respect" or a "reputation" amongst rival gangs aggravated the problem..

Detective Barling testified regarding the gang concept of "respect". "It is the most important thing to a gang member. The respect that he gets from other people by his actions or his reputation is what he or she is going to rely on as how much power, pull and influence they have over other people and how they can travel from different parts of the city within the gang culture." It is important, he testified, for gang members to earn respect. Respect could be earned in different ways. "If you are known for a violent reputation, you will have more respect because the guys will be afraid of you and intimidated by you and will want you along with them if they have to travel in rival gang territories of if they need to do a mission against another gang." [RT, 19:4296-4297]

Barling testified that certain gangs have more "respect", reputation-wise, than other gangs. [RT, 19:4297] He then quickly volunteered an example, one that was devastatingly prejudicial to Appellant:

> BAR: Certain gangs have more respect of their reputation of that specific gang (sic) as opposed to other gangs. Like the 89 Family were known for committing homicides, for doing shootings. [RT, 19:4297 (Emphasis added)]

Barling testified further that gang members committed homicides, drive-by shootings, and walk-up shootings to increase the "respect" their gang had on the street with rival gangs.

> DDA: On the issue of respect, are gang members – do gang members participate in gang activities to increase the respect their gang has on the street?
> BAR: Yes.
> DDA: What – What are those kinds of acts called?
> BAR: Homicides, drive-by shootings, walk-up shootings. [RT, 19:4298 (Emphasis added)]

Example #6: Members of the 89 Family Bloods Gang Would Violently Attack Rival Gang Members Who Entered the Neighborhood "Claimed" by the Gang.

Freddie Jelks testified that members of the 89 Family Bloods gang would protect their neighborhood from penetration by rival gang members by patrolling the neighborhood every day. The purpose of patrolling the neighborhood was to make the neighborhood "safe". [RT, 16:3538-9] Jelks then rendered his opinion as to what would occur if a rival gang member were caught in the neighborhood claimed by the 89 Family Bloods gang:

> DDA: What happens if somebody that's not 89 Family is in the neighborhood?
> ORR: Calls for speculation.
> CRT: Overruled. Go ahead and answer.
> FJ: There's a lot of discipline going on.
> DDA: What do you mean by discipline?

FJ: If you get, you know, if you get caught up in the neighborhood, you probably get hurt, beat up or, you know, worse.
DDA: What's worse?
FJ: Shot. [RT, 16:3538-3539. Emphasis added.]

The prosecution's purpose in soliciting this testimony was to establish Appellant's conduct in killing Loggins and Beroit was consistent with what other members of the gang would also have done. It was more likely that a member of the 89 Family Bloods gang was the shooter because that was how members of that particular gang would react in that situation, in Jelks' opinion, and since Appellant was a member of that gang, an inference could be drawn that he was the shooter.

Mr. Orr's objection to this testimony was timely, specific, and legally correct. (See Evid. Code, § 353) This testimony was inadmissible opinion evidence. It did not matter whether it was offered as expert or lay opinion evidence. It called for Jelks to *speculate,* unless it was offered as his opinion of the existence of the group character trait of his homeboys to react violently in this situation. That, of course, would have been inadmissible character evidence that members of the 89 Family Bloods gang had a propensity to viciously assault, if not kill, *any* individual who for *any* reason came into their neighborhood. It would not matter whether the individual was an avowed gang member or an innocent individual who was simply visiting a friend or family member. If the gang thought the individual did not belong there, he would be attacked.

In that case, the probative value (i.e., Appellant had a propensity to commit a violent act in that situation because he was a member of a gang whose members also had a propensity, in Jelks' opinion, to act violently; therefore, Appellant was probably the shooter!) of this testimony, even if it were admissible, would have been substantially outweighed by the danger of undue prejudice that resulted and would have been inadmissible for the additional basis of § 352.

However, the prosecutor introduced much more gang evidence to prove this point. Freddie Jelks was asked by the prosecutor to explain the need for the 89

Family Bloods gang to maintain "respect" from other gangs. It was his opinion that to members of the 89 Family Bloods gang, it was important "to make sure that every other gang that's in the area, you know, pays respect to the neighborhood." [RT, 16:3539] Jelks told the jury that if a rival gang member were to simply come into the neighborhood claimed by the 89 Family Bloods gang, this would be a sign of disrespect. [RT, 16:3539-40] The natural inference drawn from this testimony was that each time a rival gang member expressed his "disrespect" for the 89 Family Bloods gang by entering onto their turf (or anyone the gang thought was a rival gang member, regardless of the truth), the gang members had to retaliate if they were to maintain an acceptable level of gang "respect" in the minds of rival gang members.

The same three bases for inadmissibility of this evidence are present here just as they were in the preceding illustration. It was inadmissible opinion evidence, it was inadmissible group character evidence to establish the gang's violent propensity, and even if admissible, it would have been excluded by the balancing provisions of § 352.

Jelks also testified that members of the 89 Family Bloods gang were not considered equal to one another. He said that prior to the murders of Loggins and Beroit, Appellant was "just another member of the gang." [RT, 16:3550] Each gang member's "performance" distinguished him from other gang members. When a member of Jelks' gang "performed", he was doing things that maintained the respect level of the 89 Family Bloods gang in the eyes of other gangs. For the 89 Family gang to gain the respect of other gangs, the members of the gang had to do things to "keep your neighborhood on top." [RT, 16:3550-3551] Jelks told the jury that one way to "keep the gang on top" was for 89 Family Bloods gang members to "eliminate your enemies." Keep your enemies from your neighborhood and things like that.". [RT, 16:3551] The clear inference from this testimony was that this type of conduct by the 89 Family Bloods gang had occurred in the past, and would continue in the future. In fact, Appellant's act of murdering these

two individuals was simply one of many violent and deadly acts that the gang's members had committed and *would continue* to commit.

The prosecutor then pointed Jelks' testimony directly at Appellant and the creation of a motive for the killings. If a rival gang member came into the 89 Family Bloods neighborhood, the "respect" of the gang would be violated. Jelks further told the jury that the "respect" of the gang would be violated if a Crip brought his car into the 89 Family Bloods neighborhood. [RT, 16:3540] When the gang is "respected" by other gangs, it meant every other gang pays respect to the neighborhood. They don't disrespect the neighborhood by entering it. [RT, 16:3539]

Posing a series of leading questions on direct examination to Freddie Jelks[271], the prosecutor returned to how members of the 89 Family Bloods gang would "discipline" rival gang members, in JELKS' opinion:

> DDA: Is part of being a member of 89 that you have to know who your enemies are?
> JLK: Yes.
> DDA: Is part of the 89 Neighborhood – 89 neighborhood discipline?
> JLK Yes.
> DDA: How is discipline enforced?
> JLK: Numerous ways. Physically or, you know, shootings and things of that nature.
> DDA: Is there a way for a member who is in 89 to gain respect of his other 89 members?
> JLK: Yeah.
> DDA: How do you do that?
> JLK: Either you can help, you know, bring money to the neighborhood or you can, you know, take care of business as far as shooting your enemies and getting rid of your enemies. [RT, 16:3551 (Emphasis added.)]

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[271] Unfortunately, Appellant's counsel *never* objected to the prosecutor's use of leading questions; hence, the prosecutor asked numerous, and inflammatory, leading questions. One wonders if Jelks was simply agreeing with whatever the prosecutor asked in her leading questions. Jelks rarely, if ever, responded in the negative to her leading questions.

Jelks also testified that members of the 89 Family Bloods gang would "patrol" their neighborhood on a daily basis to protect it, assumedly from encroachment by enemy gang members. If someone entered into the neighborhood that the 89 Family Bloods gang claimed as their own, one would expect "a lot of discipline going on." [RT, 16:3838-9] Jelks was asked to explain what he meant when he used the term "discipline":

> FJ: If you get – you know, if you [i.e., a rival gang member] get caught up in the neighborhood, you probably get hurt, beat up or, you know, worse.
> DDA: What's worse?
> FJ: Shot. [RT, 16:3839 (Emphasis added)]

Jelks, in effect, rendered his opinion to the jury that members of the 89 Family Bloods gang, including Appellant, had a propensity to be extremely violent with any "enemy" intruders.

To the individual jurors, this testimony would have been chilling, as well as upsetting. First of all, the neighborhood that the 89 Family Bloods gang claimed as their own was *not* their own to claim! Second, because of the constant threat of violence and retaliation directed at anyone who opposed the gang's actions, even decent law-abiding residents of the neighborhood had to accept that "rule of the jungle" and thereby live in fear . . . fear for themselves, fear for their family members, and fear for their friends. That is, each time a relative or friend of a resident drove into that neighborhood, they risked being "hurt, beat up, or shot." No one should have to live with this constant apprehension of being injured or killed just by leaving one's house or by walking or driving into a neighborhood! The prosecution, through Jelks' testimony now, had just given the jurors another "reason to hate." Their emerging feelings of resentment at the very existence of this gang and its members, including Appellant, would have been unmistakable, even tangible.

This improper evidence of the gang members' propensity to retaliate against even a slight encroachment by a rival gang member was utilized by the

prosecution to support the theory of the motive for the murders. [RT, 16:3542-4] For the same reasons expressed previously, this gang evidence was also inadmissible opinion, inadmissible character evidence, and inadmissible per § 352. It was inadmissible and the prosecution should not have been allowed to use it as the evidentiary basis for establishing Appellant's alleged motive for the killings.

Example #7: Members of 89 Family Bloods gang were expected to demonstrate their loyalty and support for the gang by committing acts of violence.

Detective Barling further testified that some gang members would "do a mission" at the request of another highly "respected" gang member because they both wanted the mission "to be done to show that our gang is still way up here above everybody else." [RT, 19:4298-4299] Responding to the prosecutor's leading questions, he told the jury that serving the mission would be, in part, a show of loyalty on the part of the gang member who committed the mission, and it would also be "a show of respect" to the more highly respected gang member.[RT, 19:4298-4299] The prosecutor had Barling talk about Appellant's membership in the gang and his gang moniker, then had Barling do the same regarding co-defendant Johnson. [RT, 19:4299-4301] Conveniently sandwiched between the discussion of the two defendants was Barling's testimony, again in response to leading and suggestive questions by the prosecutor, that loyalty or respect was a matter of pride for a gang member, the obvious inference for the jury being that Appellant's motive for shooting Loggins and Beroit was his "loyalty" or "respect" that he had for Johnson and the gang. [RT, 19:4300]

Although there was a modicum of evidence that the gang's respect may have been the motive for the shootings,[272] and thereby overcoming any issue as to "relevance", the obvious prejudice inherent in Barling's testimony far outweighed

[272] See the previous footnote.

any probative value.[273] In effect, under the guise of "expert testimony regarding gangs generally, the prosecution established the shooter's possible motive for the killings. The prosecution then introduced clearly *inadmissible character evidence* that the 89 Family Bloods gang had a *propensity* "for committing homicides, for doing shootings"[274] as well as committing "[h]omicides, drive-by shootings, walk-up shootings."[275] It was not a coincidence that the evidence in this case involved Appellant, a member of the 89 Family Bloods gang, committing a "walk up shooting" and homicide. After all, 89 Family Bloods gang members had a propensity to do those very acts!

Appellant's savage and senseless murders of Loggins and Beroit were just another in a series of unnecessary and violent killings perpetrated by members of the gang for this purpose. This was the prejudicial inference the jury would have drawn from this testimony.

The undue prejudice of this inflammatory gang evidence to Appellant was exacerbated when this inadmissible evidence was presented to the jury through the "expert" testimony of a respected police gang expert. There would have been no doubt in the jury's collective mind that Appellant was probability guilty because of his propensity to commit these types of acts. In any event, the jury would punish Appellant because he chose to be a member of this frightening gang.

It would also have been difficult, if not outright impossible, for any reasonable juror to consider Appellant's guilt of the crimes charged without having been simultaneously influenced by their hatred of Appellant because of his membership in such a vile and abhorrent gang.

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[273] Barling's testimony was also cumulative of Jelks' testimony. [See RT, 16:3538-3540]

[274] This particular character trait of the gang was presented in the form of "reputation" evidence. See RT, 19:4297.

[275] This particular character trait of the gang was presented in the form of "opinion" testimony. See RT, 19:4298.

Example #8: The 89 Family Gang's Violent Response to Its Own Members Who Displayed "Disrepect" and Were "Disloyal" to their Gang.

Barling gave his expert opinion that the most important thing to a gang member was "respect"; that "disrespect is the thing that they fear most." [RT, 19:4305] He then explained that "disciplining in a gang" meant "taking care of a problem whether it is physically beating them, physically beating that member, or maybe even shooting that member or pushing that member aside as a black sheep of that gang." [RT, 19:4305 (Emphasis added)] Barling was then asked to render his opinion as to how the 89 Family gang dealt with disciplining its members:

> DDA: In 89 Family, how is discipline doled out?
> BAR: Doled out in the ways that I just said as well as other ways, I am sure.
> DDA: Were there any people who had the reputation for being disciplinarians within the gang?
> BAR: Yes.
> DDA: Who was that?
> BAR: Mr Johnson had the reputation of calling meetings and handing out discipline if things were not up to the satisfaction.
> ...
> DDA: Did disciplining include showing your loyalty for the gang?
> BAR: Yes.
> DDA: And would a failure to do those kinds of things or not show your loyalty result in discipline?
> BAR: It could. [RT, 19:4306]

Why and how the 89 Family Bloods gang disciplined a fellow gang member was simply *not* relevant. It had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action." (Evid. Code, § 210.) This testimony, therefore, should not have been admitted. (Evid. Code, § 350.)

It's admission, however, was not harmless. Once again, the jury was told of the violent nature of the members of the 89 Family Bloods gang. In this instance, the evidence of violence was directed toward the gang's own gang

members. Offending members of the 89 Family Bloods gang would often be physically beaten, if not shot! This was simply opinion evidence that members of the gang had a propensity to commit violent acts against their own members. It was inadmissible character evidence of the violent nature of the gang's members. (Evid. Code, § 1101, subd. a)

The even more sinister nature of the undue prejudice contained in this portion of Barling's testimony, however, was manifested by the prosecutor's question, "Would a failure to ... show your loyalty result in discipline? Barling's affirmative response provided an explanation why Appellant would commit such a heinous act; it was an opportunity for Appellant to demonstrate his loyalty and respect for the gang. This was an *additional* motive to the "protecting the 'hood from rival gang members" motive. It was based entirely on speculation and conjecture, but it nevertheless could be considered by the jury for that purpose because a "gang expert" said so.

The evidence should not have been admitted. It's erroneous admission was very prejudicial to Appellant because a) it was added evidence of the gang's (and Appellant's) propensity to commit violent acts, and b) it provided an additional, but speculative, motive for why Appellant would simply kill two people for no "apparent" reason.

Example #9: Members of 89 Family intimidated and retaliated against those who cooperated with the police and/or testified. They killed "snitches".

Appellant respectfully incorporates herein by reference as though fully set forth herein the extensive discussion in Issues XI and XII of Appellant's Opening Brief in which additional examples are provided. Either intentionally, or simply through careless questions, the prosecutor successfully introduced additional and extensive testimony in which members of the 89 Family Bloods gang engaged in activities to intimidate and retaliate against witnesses.

Additionally, Detective Barling testified that individuals who cooperated with the police were "disdained" by members of the 89 Family Bloods gang. [RT,

19:4313] Subsequently, the prosecutor asked Barling to tell the jury the more regarding the 89 Family Bloods gang in relation to "snitches."

DDA: Are you familiar with the term "snitch"?
BAR: Yes.
DDA: What does that mean?
BAR: A snitch is somebody who id going to tell on us or tell on our gang whether they are a member of that gang or a citizen of the community.
DDA: How are snitches viewed by 89 Family?
BAR: They would rather see them dead than have somebody testify against them.
DDA: By testifying, is that witness showing some sort of disrespect to the gang?
BAR: Yes, it is.
DDA; And with respect to being a witness in a case, are those threats leveled only at the witness or can they be leveled at family members?
BAR: They can be leveled at family members and even as far as friends of the witnesses. [RT, 19:4317]

This testimony was simply Barling's opinion testimony regarding the gang members' character trait for violence as it pertained to "snitches." It was *not* introduced to circumstantially establish a witness was fearful. Rather, it was introduced for the sole purpose of proving members of the gang disdained or reviled those who cooperated with law enforcement. Further, this scorn was so intense that the gang members "would rather see them dead." The inference was obvious and unambiguous. Members of the 89 Family Bloods gang, in Detecive Barling's opinion, had a propensity to retaliate violently, if not kill, "snitches." The testimony was inadmissible for this purpose, and was obviously prejudicial.

However, the prosecutor succeeded in establishing this propensity to retaliate against "snitches" in additional ways. A portion of Detective Barling's testimony on direct examination illustrates another tactic used by the prosecutor in literally "hammering over and over again" the fact that the members of the 89 Family Bloods gang really do retaliate against potential witnesses. Her initial questions pertained specifically to the fears citizens in that neighborhood have

regarding retaliation by 89 Family Bloods gang members. (RT, 19:4311). Direct examination continued:

> DDA: In your experience as a gang investigator, is retaliation a legitimate concern for potential witnesses?
> BAR: Yes. It can be depending upon the situation and the totality of what is being investigated and being said and who we are dealing with. [RT, 19:4312 (Emphasis added)]

Just moments later, the prosecutor asked the *same* question of Barling:

> DDA: Has it been your experience that 89 Family engages in any kind of attempts to prevent people from talking to the police?
> BAR:Yes.
> DDA: And with respect to retribution, is it fair to characterize the fear of retribution that the citizens and other gang member have as being legitimate?
> BAR: Yes. [RT, 19:4313]

After two other questions, the prosecutor asked the *same* question of Barling *twice more*!

> DDA: As you sit here today, are they legitimate bases of fears of retribution by witnesses?
> BAR: Could you repeat that?
> DDA: Are the legitimate – Is it your opinion the fears expressed by witnesses on gang homicides are legitimate?
> BAR: Yes.
> DDA: With respect to 89 Family, if you were told that a witness was concerned about retribution; would it be your opinion that is a legitimate fear?
> BAR: Yes.
> DDA: Is that based on your years of experience with 89 Family?
> BAR: Yes. [RT, 19: 4313-4314]

If asking that *same* improper question *four* times in just *three* pages of the Reporter's Transcript were not sufficient to cause concern, the prosecutor asked that *same* improper question of Detective Barling *three more* times during direct

examination! [RT, 19:4324-4325] (The prosecutor asked the *same* improper question of Detective McCartin only once, however! [RT, 18:4171])

However, by far the most egregious and prejudicial example of the 89 Family Bloods gang's propensity to retaliate against potential witnesses was the *specific act* evidence the prosecution was allowed to introduce over defense objection; the execution style murder of Nece Jones because she testified against a member of the 89 Family Bloods gang.

The propensity of the 89 Family Bloods gang members to threaten, intimidate, and savagely retaliate against potential witnesses was well established by the prosecution. The prosecution was allowed to introduce a voluminous amount of this inadmissible character evidence. Even if some of the evidence was admissible for a different purpose (i.e., a witness' fear of cooperating), the extensive amount of evidence introduced by the prosecution through numerous witnesses made any limiting instruction useless. The danger that jurors would assume Appellant possessed this violent character trait was clearly present. The danger that jurors would become inflamed by the amount and nature of this evidence was such that it would have been a rare juror indeed who did not want to punish Appellant because of his membership in this dreadful and appalling gang. For both reasons, the potential of undue prejudice to Appellant was substantial.

Example #10: Members of the 89 Family Bloods Gang Threatened the Innocent Family Members of Those Who Cooperated with the Police and/or Testified to Discourage "Snitches".

Appellant submits the following testimony be Detective Barling was absolutely devastating to Appellante and undermined any chance he may have had of receiving a fair trial.garding the 89 Family Bloods gang in relation to "snitches."

DDA: Are you familiar with the term "snitch"?
BAR: Yes.
DDA: What does that mean?

BAR: A snitch is somebody who is going to tell on us or tell on our gang whether they are a member of that gang or a citizen of the community.
DDA: How are snitches viewed by 89 Family?
BAR: They would rather see them dead than have somebody testify against them.
DDA: By testifying, is that witness showing some sort of disrespect to the gang?
BAR: Yes, it is.
DDA; And with respect to being a witness in a case, are those threats leveled only at the witness or can they be leveled at family members?
BAR: They can be leveled at family members and even as far as friends of the witnesses. [RT, 19:4317]

In addition to that portion of the Reporter's Transcript quoted in Example #8 [RT, 19:4317], Appellant respectfully incorporates herein by reference as though fully set forth herein the discussion in Issue XI and XII of Appellant's Opening Brief. Witnesses Connor, Jelks and James were all asked specifically by the prosecutor about threats to their family members. Since the jury was aware of the young innocent children that made up the families of Jelks and James, this testimony by a respected and experienced police gang expert was particularly inflammatory. It was simply not necessary for the prosecutor to ask this additional question of Barling. Examples of this *extremely* prejudicial testimony are found therein. Even if some of the evidence was admissible for a different purpose (i.e., a witness' fear of cooperating), the voluminous and incendiary nature of this evidence introduced by the prosecution over defense objections through numerous witnesses made any limiting instruction useless.

Appellant asserts the danger that jurors would assume Appellant also was willing to threaten and/or murder innocent young children or other family members in retaliation against a witness for testifying is enormous. The danger that jurors would be infuriated at Appellant because of his association with a group of people who would commit such unthinkably vile acts is, Appellant

respectfully asserts, simply staggering. For both reasons, the potential of undue prejudice to Appellant was substantial.

Example #11: People in the neighborhood were fearful of speaking to the police because of their fear of retaliation by members of the 89 Family Bloods gang.

Barling testified that the citizens in that neighborhood were afraid of the members of the 89 Family Bloods gang. He explained "[t]hey are afraid of the gang members, and specifically the gang activity and the ongoing shootings between them and rival gangs that would take place in the neighborhood. [RT, 19:4311]

He testified the "level of cooperation" he received from the residents in that area was not good "due to the fear factor". [RT, 19:4312] The following testimony was then elicited:

> DDA: What were these fears of? Of the police?
> BAR: They are afraid if they spoke to the police that some sort of retaliation may come to them, whether it be actual or perceived.
> DDA: In your experience as a gang investigator, is retaliation a legitimate concern for potential witnesses?
> BAR: Yes. It can be depending upon the situation and the totality of what is being investigated and being said and who we are dealing with. [RT, 19:4312]

Barling rendered his opinion that for potential witnesses, fear of retaliation was a real or *legitimate* concern for them. The fear of retaliation, originally introduced to circumstantially prove the state of mind of witnesses Connor, Jelks and James, was now expandewd to include all *potential* witnesses. A natural inference from this expert testimony was that many *additional* witnesses would have come forward and testified against Appellant and co-defendant Johnson *but for* this fear of retaliation created by members of the 89 Family Bloods gang and that permeated throughout the entire community.

This testimony, in the form of his opinion, was simply another example of character evidence introduced to prove the propensity to retaliate against potential witnesses by members of the 89 Family Bloods gang. It was not admissible for that purpose (Evid. Code, § 1101, subd. a.), and there was no other purpose in presenting that testimony.

Barling then testified the fear would not be alleviated if the gang member were taken into custody because he could still phone from the jail and tell a fellow gang member to "do whatever you have to do" to intimidate witnesses. [RT, 19:4312-4313]

Thereafter, to make sure she had made her impermissible point with the jury (See Issue XI and XII in Appellant's Opening Brief), she once against asked Barling if the fears of witnesses were *legitimate* concerns.

Example #12: Individual Members of the 89 Family Bloods Gang Would Commit Violent Acts to Increase their Reputation or "Respect" Within the Gang Itself.

Jelks testified that, in his opinion, not all members of the 89 Family Bloods gang were equal; that the gang members distinguished themselves from one another by their "performance":

> DDA: When you are talking about performance, what are you talking about?
> JLK: The respect line and things that you may do to keep the neighborhood going, gain respect. Things of that nature.
> DDA: How do you gain respect?
> JLK: Numerous ways. Just trying to keep your neighborhood on top.
> DDA: What kinds of things do you do to keep your neighborhood on top?
> JLK: Bring money to the neighborhood. Eliminate your enemies. You know. Keep your enemies from your neighborhood and things like that. [RT, 16:3550-1 (Emphasis added)]

The inferences the jury would have drawn from this testimony is obvious. Each of Appellant's homeboys, as well as Appellant, had this additional

frightening reason to commit senseless and violent acts against others. They not only wanted to demonstrate their loyalty to the gang by keeping its respect level high, but they also sought to increase their own personal level of respect within the gang.

Example #13: Appellant and co-defendant Johnson had a propensity to be extremely violent.

Detective Barling testified earlier on direct examination that "respect" or his reputation "is the most important thing to a gang member." It is what the gang member relies on for "power, pull and influence they have over other people." He explained, "If you are known for a violent reputation, you will have more respect because the guys will be afraid of you and intimidated by you and will want you along with them if they have to travel in reval gang territories or if they need to do a mission against another gang." [RT, 19:4296-4297] In other words, the amount of respect a gang member had was synonymous with his reputation for violence, according to Barling's expert opinion. And, of course, if a gang member had a reputation for violence, jurors would naturally infer he had a character trait for violence. Jurors would then infer the gang member had a propensity to commit violent acts. (See Evid. Code, § 1101, subd. a.) Therefore, the greater the "respect level " a gang member had, according to Barling's expert opinion, the greater propensity that gang member had for violence. It is with this understanding in mind that the prosecutor's questions and Barling's responses were so extremely and unduly prejudicial to Appellant and co-defendant Johnson:

> DDA: Now you indicated the reputation was very important. Is that correct?
>
> BAR: Yes.
>
> DDA: What were the respect – What were the respective positions, if that is appropriate, of Mr. Allen and Mr. Johnson in the gang as of August of 1991?
>
> BAR: You don't have positions like president, vice-president or captain or lieutenant. You have positions by the respect and how you command yourself. Mr. Johnson had a lot more respect than other members of that gang that I dealt

with. Mr. Allen had a little bit less respect. He had just recently rejoined the gang.

...

DDA: What is the consequence of having been out of the neighborhood for a while?

BAR: It usually means that you have to come back and do something to reshow that you are still part of the neighborhood and still down for the 'hood and you are willing to do stuff for that gang.

DDA: Would that include doing missions to show your loyalty?

BAR: Yes. [RT, 19:4302-4303]

The prosecutor then had Detective Barling testify that co-defendant Johnson's respect level (i.e., reputation for violence) among gang members was so strong that few, if any, gang members on the street had as great a respect level (i.e., reputation for violence) as co-defendant Johnson:

DDA: And back in August of 1991, what was Mr. Johnson's level of respect in 89 Family?

BAR: My dealings with him is that he had a lot of respect, a lot more respect than most – than a majority of the 89 Family.

DDA: In respect to Mr. Johnson's status in the gang in August of 1991, can you think of anybody else who was on the street at the time who had an equal or greater amount of respect?

BAR: There were a couple of other people that had maybe just as much respect as he did. [RT, 19:4303-4304]

This testimony was particularly inflammatory and prejudicial because earlier in his testimony Barling told the jury that the 89 Family Bloods gang was "known for committing homicides, for doing shootings." [RT, 19:4297] In effect, Barling testified that co-defendant Johnson and Appellant were two of the most violent gang members of one of the most violent street gangs in Los Angeles! Barling had earlier told the jury that they "earned" their reputations for violence, or their levels of gang "respect", by committing "[h]omicides, drive-by shootings, walk-up shootings." [RT, 19:4298] It was no coincidence that the last phrase just happened to describe the murders allegedly committed by Appellant.

Later on direct examination, the prosecutor continued to ask Barling questions regarding the reputation of co-defendant Johnson. Barling testified that co-defendant Johnson had the reputation for meting out discipline when members of the 89 Family Bloods gang displayed disrespect to the gang or acted in a disloyal fashion. [RT, 19:4305-4306] The prosecutor and the police expert witness then engaged one more time in a testimony regarding who was fearful of co-defendant Johnson. Barling took full advantage to talk about how wide-spread Johnson's reputation or respect level was; Members of his gang knew him and his propensity for violence, as did the citizens in the community. "Most of his rivals" knew of his reputation for violence, in particular the rival Main Street Crips. The extent of co-defendant Johnson's "respect level" or his reputation for violence was "unique", according to this experienced C.R.A.S.H[276] gang investigator.

> DDA: When you say that Mr. Johnson was respected in the gang, was Mr. Johnson feared?
> BAR: Yes.
> DDA: By whom?
> BAR: By his fellow gang members as well as other citizens.
> DDA: Was Mr. Johnson -- How was Mr. Johnson's reputation with respect to rivals, if you know?
> BAR: Most of the rivals knew of his reputation or knew of his name which, also, as a police officer working C.R.A.S.H., spoke to his respect within the gang. They had heard his name. When I went to the Main Street Crips, one of the gangs that I spoke to which is a rival gang, they would know of his name and reputation, which is unique that a rival gang would know of a person' nickname and reputation within that gang. [RT, 19:4306-4307]

Although this evidence pertained to the co-defendant, similar evidence was introduced against Appellant. Jelks testified:

> DDA: At that point in time, back in August of 1991, what was Mr. Allen's sort of position or status in the gang, in 89 Family?
> FJ: He was just another member.

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[276] CRASH is the Los Angeles Police Department's gang unit. It stands for Community Resources Against Street Hooliganism. [RT, 19:4289]

DDA: Are all members equal in the gang?
FJ: No.
DDA: What distinguished one from the other?
FJ: The things you do basically, your performance.
. . . [RT, 16:3550-3551]

Jelks then explained that "performance referred to the acts a gang member did to keep the gang on top; that is, bring in money and committing violent acts against others. [RT, 16:3551]

Evidence that Appellant had a character trait for violence that established, among other things, that he had a propensity to commit "walk-up" shootings and "homicides" was simply not admissible. (Evid. Code, § 1101, subd. a.) There was no other relevant reason to offer this testimony. The excessive undue prejudice to Appellant of this gang testimony, therefore, is glaringly apparent, and the prejudice was exacerbated to an even greater extent because it was presented by a respected and experienced police gang investigator.

The gang testimony cited above was highly prejudicial evidence, it was *at best* only marginally relevant to any disputed issue in this case, and it went well beyond proving the motive for Appellant to shoot the victims in this case. While motive is always relevant, it is *not* an element of the crime and the balance between the probative value and prejudicial effect was clearly slanted toward undue prejudice because of the volume and the inflammatory nature of the gang testimony.[277]

3. The Trial Court's Errors Significantly Exceeded the *Watson* "Reasonable Probability" Standard for Determining "Harmless Error."

[277] Additional gang evidence, particularly from a gang expert, might have been admissible if there had been an actual gang allegation in this case. However, since the prosecution elected not to make that allegation, the extensive testimony about gang culture and behavior was admitted in error.

The trial court's erroneous admission of the evidence requires reversal if it is reasonably probable Appellant would have obtained a more favorable outcome had the evidence been excluded. (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836)

4. The Trial Court's Errors in Admitting this Evidence Also Involved Violations of Appellant's Federal Constitutional Rights that Are Applicable to California's State Courts by the Due Process Clause of the Fourteenth Amendment.

This Court has recognized, however, that when the erroneous admission of irrelevant and prejudicial evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. *People v. Garceau* (1993) 6 Cal.4th 140, 186. In this situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24.

a. The gang evidence "lightened" the prosecution's burden of proof.

Appellant respectfully refers the Court to its discussion of the relevant case law regarding this standard on appeal for determining prejudice, as well as the impact of the erroneous introduction of gang evidence, found at Issue XI in Appellant's Opening Brief.

b. The Trial Court Failed to Ensure that the Evidence Possessed Even Greater Reliability than Normal Because This Was a Capital Case.

Appellant respectfully refers the Court to its discussion of the relevant case law regarding this standard on appeal for determining prejudice, as well as the impact of the erroneous introduction of gang evidence, found at Issue XI in Appellant's Opening Brief.

D. Conclusion.

In Appellant's case, the trial court failed to require that the prosecution seek a conviction solely through the use of relevant evidence, but, instead, permitted them to tip the scales in their favor through the use of gang evidence which was both unrelated to the murders and highly inflammatory. Thus Appellant was deprived of the due process of law and fundamental fairness which are the cornerstone of our judicial system. (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381,389; 5th Amendment and 14th Amendment, U.S Const.) Although the courts have struggled to define Due Process, the United States Supreme Court in *Medina v. California* (1992) 505 U.S. 437, 446, 120 L.Ed.2d 3531, 112 S.Ct.2572, found that there was a violation of due process where the facts "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." There are few traditions held more dearly in this Republic than the right to a fair trial, a trial in which one's guilt is judged by the admission of relevant evidence, not by bad character evidence which poisons and inflames the jury, and obscures their vision in the rendering of the verdicts.

Given the lack of credibility of witnesses Connor, Jelks and James, the glaring and inexplicable inconsistencies in the testimony of Connor, Jelks and James, and the massive amount of unduly prejudicial gang evidence introduced, Appellant asserts the trial court's error in admitting the gang evidence was not "harmless beyond a reasonable doubt." That is, the introduction of such extensive and inflammatory gang evidence was prejudicial unless the state can show beyond a reasonable doubt that the constitutional error "did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the court were to use the lesser standard, Appellant asserts it is also "reasonably probable" that, but for these errors, Appellant would have achieved a better result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

For the above reasons, Appellant respectfully urges this Court reverse his convictions and sentence of death.

XIV.

The trial court erred when it allowed the prosecution to introduce irrelevant and inadmissible opinion evidence by Detective Tiampo that numerous eye-witnesses at the scene refused to talk to the police because of their fear of retaliation by members of the 89 Family Bloods gang. The error was prejudicial and requires Appellant's convictions and sentence of death be overturned.

A. Introduction:

Detective Tiampo testified that he was the "investigating officer" for the shootings of Loggins and Beroit on Central Avenue on August 5, 1991. [RT, 17:3762-3765] He arrived at the scene more than an hour *after* the shootings occurred. [RT, 17:3765] When he arrived, the crime scene had already been cordoned off by yellow police tape. He saw one body in the white Toyota. There were also "several" civilians watching from outside the police crime-scene-tape. [RT, 17:3766-3767]

At this point the trial court allowed the prosecution to introduce, over objection, erroneous and highly prejudicial evidence that numerous potential eye-witnesses were too afraid to say anything to the police:

> DDA: How would you describe the level of cooperation that you received?
> ORR: Excuse me. That's irrelevant.
> CRT: Overruled. Go ahead.
> TMP: Very non-cooperative. An atmosphere of fear.
> DDA: How many people did you attempt to contact that day?
> TMP: I think we attempted to talk to at least 25 or 30 people.
> DDA: How many of those people talked to you that day?
> TMP: None. [RT, 17:3773 (Emphasis added.)]

B. The Applicable Law.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is defined as evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Additionally, unless a witness is testifying as an expert witness pursuant to Evid. Code, § 801, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge." (Evid. Code, § 702.) And if the lay witness renders an opinion, the opinion must be "rationally based on the perception of the witness" and the opinion must be "helpful to a clear understanding of his testimony." (Evid. Code, § 800.)

C. Discussion.

1. The objection based on a lack of relevance should have been sustained.

Whether onlookers at the crime scene cooperated with the police or did not cooperate with the police had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action." (Evid. Code, §§ 210, 350.) It had no tendency to prove who the shooter was, what the shooter's intent was, or any other issue in dispute.

Why onlookers at the scene were unwilling to talk to the police was also *not* relevant. The subjective state of mind of onlookers at the crime scene had no "tendency in reason to prove" who shot Loggins and Beroit.

If evidence had been introduced that Appellant intimidated or threatened any of these onlookers, the intimidation or threats would have been relevant to establish Appellant's state of mind; that is, his consciousness of guilt. There was no evidence of this, however.

If an onlooker *subsequently* spoke to the police and became a witness at Appellant's trial, the state of mind of the onlooker/witness at the time of the investigation that day might have been relevant to explain why the witness said nothing that day. That is, he was fearful of retaliation if he said anything to the police in front of others. There was no evidence of this, however.[278]

[278] This was the position the prosecution took with respect to Carl Connor, an alleged onlooker who said nothing at the time but later became a witness. His

Since the credibility of the onlookers to whom the detective had reference was not "a disputed fact that [was] of consequence to the determination of the action" (Evid. Code, § 210), evidence of their subjective state of mind (i.e., their fear of talking to the police) was not relevant nor admissible.

Further, the detective quickly volunteered an inadmissible, non-responsive, and *unduly prejudicial comment* that arguably reflected the *real* reason why this question was asked. After answering the question ("The onlookers were very non-cooperative."), Detective Tiampo rendered his opinion as to *why* the onlookers were non-cooperative; that an "atmosphere of fear" permeated the entire area. The inadmissible inference was that this fear of retaliation had been created and was enforced by members of the 89 Family Bloods gang against anyone who spoke to the police.

Since Detective Tiampo was not testifying as an expert, any testimony he provided was inadmissible unless he had personal knowledge of the matter. (Evid. Code, § 702) Further, if he rendered a lay opinion, that opinion had to be based on his rational perception (i.e., his personal knowledge of the underlying facts) and the opinion had to be helpful to a clear understanding of his testimony. (Evid. Code, § 800.) It was apparent that Detective Tiampo did not have personal knowledge of why the various onlookers were not "cooperating." He testified that "we attempted to talk to at least 25 or 30 people" at the scene that day. This was a clear illustration that Detective Tiampo did not have personal knowledge as to what the other officers encountered as they spoke with the onlookers. This obvious lack of personal knowledge on Tiampo's part was underscored by the fact that he was wrong! At least three of the onlookers did, in fact, talk to the police that day![279] Further, there was nothing about the underlying basis of his opinion

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state of mind at that time and place was relevant because it explained why he said nothing that day to the police.

[279] Witnesses Willie Clark and Eulas Wright both testified at the trial that they told the police that day what they had seen and heard. [RT, 15:3256-3310; 17:3868-

that could not have been clearly expressed to the jury. His lay opinion was not "helpful to a clear understanding of his testimony." (Evid. Code, § 800)

Even though Mr. Orr did not object to Detective Tiampo's additional comment as non-responsive and inadmissible opinion evidence, the detective would never have had the opportunity to volunteer that additional comment if the trial court had sustained Mr. Orr's specific, timely and legally proper objection. The court's error was the cause of the improper admission of this evidence.

2. California's Appellate Standard for Determining if the Erroneous Admission of Evidence Was Prejudicial.

The erroneous admission of evidence requires reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Gurule* (2002) 28 Cal.4th 557, 625 ["...we conclude it is not reasonably probable that the admission of the [evidence] affected the jury's verdict."]; *People v. Scheid* (1997) 16 Cal.4th 1, 21 ["...the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded."]; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [same]; Evid. Code, § 353 [Error must result in a "miscarriage of justice."].

3. The *Chapman* "harmless beyond a reasonable doubt" standard applies if the state court's erroneous admission of evidence implicated Appellant's federal Constitutional rights.

This Court has recognized, however, that when the erroneous admission of irrelevant and prejudicial evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. *People v. Garceau* (1993) 6 Cal.4th 140, 186. In this

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3905] A third witness, Robert, testified before the grand jury that he told the police that day what he had seen and heard. [CT, 1:37-55]

situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24.

Appellant's Fourteenth Amendment due process rights were also violated if the state trial was conducted "in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice." (*Chavez v. Dickson* (9th Cir. 1960) 280 F.2d 727, 735; *Osborne v. Wainwright* (11th Cir. 1983) 720 F.2d 1237, 1238-1239 [remanding for habeas hearing to determine whether admission of gruesome photographs constituted fundamental unfairness violating due process].)

In this case, however, Appellant submits Detective Tiampo's testimony played a *major* role in Appellant's conviction and sentence of death, particularly when it is considered in combination with other erroneously admitted gang evidence. (See Issues XI, XII, XIII, XV, XVII, XXI and XXII in Appellant's Opening Brief.)

Where the probative value of evidence is so substantially outweighed by its inflammatory content, the admission of such evidence violates a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. *Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 (and cases cited therein).

In addition, both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens* (1983) 462 U.S. 862, 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328).

If Appellant's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of the Fifth, Eighth and Fourteenth

Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

The admission of unduly inflammatory evidence is "an irrelevant consideration" and often leads to "an unguided emotional response" by the jury. It undermines the reliability required by the Eighth And Fourteenth Amendments for a conviction of a capital offense (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and it deprived Appellant of the reliable individualized capital sentencing determination guaranteed by the Eight Amendment. *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.

Finally, to the extent the error was solely one of state law, it nevertheless violated Appellant's right to due process by depriving him of a state-created liberty interest. Thus, California deprived Appellant of his due process rights which are guaranteed by the Fourteenth Amendment of the United States Constitution if the court does not follow its own statutory provisions, particularly where those provisions provide important procedural safeguards against unreliable capital verdicts. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1296-1303.)

4. Under either test, the trial court's error in admitting this portion of Detective Tiampo's testimony was highly prejudicial, particularly when viewed in combination with other gang evidence that was admitted at trial.

It was the natural and reasonable *inference* drawn from Detective Tiampo's testimony that was highly prejudicial. Of the approximately 25 or 30 people whom the police spoke to that day, each was uncooperative because of the fear that permeated the crime scene area. The *only* fear that, from the prosecution's point of view, had any probative value to any issue in this case was the fear of

retaliation that had been expressed by witnesses who spoke to the police and subsequently testified. Now, however, the prosecution was allowed to introduce evidence that there were undoubtedly other potential eye-witnesses who were still present at the scene; eye witnesses who *would have cooperated* with the police *but for* the fear of retaliation that members of 89 Family Bloods gang had generated. This inference drawn from Detective Tiampo's testimony was the *only* conceivable purpose for producing this testimony. The inference was based on speculation, but the trial court's error in admitting the testimony allowed the jury to do just that. There could have been as many as 25 or 30 additional eye-witnesses to these murders but for the "legitimate", incredibly malevolent, and far-reaching fear of retaliation engendered in the residents of the area by members of the 89 Family Bloods gang.

Appellant submits that *if* this were the only error committed by the trial court regarding gang evidence and the resultant fear of retaliation, this error may have been harmless. However, when combined with the extensive and highly inflammatory gang evidence erroneously introduced and discussed at Issues XI, XII, XIII, XV, XVII, XXI and XXII in Appellant's Opening Brief, Appellant respectfully submits it is "reasonably probable" that Appellant would *not* have been convicted; that Appellant would have been acquitted or, at a minimum, the trial would have resulted in a hung jury.

Detective Tiampo's testimony that the "atmosphere of fear" created by the 89 Family Bloods gang members was so prevalent and potent that no one who witnessed these ruthless and malicious murders had the courage to tell the police what happened simply added to the already overwhelming and prejudicial result of the gang evidence introduced. With this additional evidence, the jury was given just one more "reason to hate" the 89 Family Bloods gang and its members, including Appellant. Appellant submits the likelihood that the jury reached its verdicts, at least in part, because of Appellant's status as a member of that hated gang is great. The likelihood that at least one juror was determined to convict

Appellant even though he or she had a reasonable doubt as to his being the shooter is surpassing. Hence, the erroneous admission of gang evidence of this magnitude and nature "lightened" the prosecution's burden of proof. *People v. Garceau* (1993) 6 Cal.4th 140, 186. Where the probative value of evidence is so substantially outweighed by its inflammatory content, the admission of such evidence violates a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 [and cases cited therein].).

The admission of Detective Tiampo's testimony was unduly inflammatory evidence that was "an irrelevant consideration" (*Zant v. Stephens* (1983) 462 U.S. 862, 885) and was the type of improper evidence that often leads to "an unguided emotional response" by the jury. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256]). It was an example of trial court that did *not* take extra precautions to ensure that a juror's decisions were not influenced by "irrelevant" considerations or "an unguided emotional response." Rather, the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments mandate that trial courts should take added steps at each stage of a capital trial to ensure greater reliability of the evidence used to convict and impose death. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Appellant asserts the trial judge did just the opposite in this capital trial. The resultant danger, of course, is that if Appellant's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of the Fifth, Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

Applying the *Chapman* "harmless beyond a reasonable doubt" standard or the *Watson* "reasonable probability" standard, Appellant submits the State cannot convince this Court that the admission of this inordinate amount of inflammatory gang evidence did not contribute in significant measure to his convictions.

D. Conclusion.

Appellant respectfully urges this Court overturn his convictions and judgment of death on this basis.

XV.

The trial court erred and abused its discretion during the prosecution's rebuttal case when it allowed the prosecution to introduce photographs of "89 Family Bloods" gang members who were 1) prominently clad in red gang clothing, 2) standing amidst extensive gang grafitti, 3) ominously "throwing" gang hand signs, and 4) conspicuously clutching deadly firearms.

A. Introduction: The Setting in Which this Issue Arose:

1. Eulas Wright's Testimony:

During the prosecution's case-in-chief, witness Eulas Wright testified. He was washing a black 1965 Chevrolet with Dayton rims when he heard shots being fired. He ducked behind the front of the car. After the shooting stopped, he raised up and looked toward the street. [RT, 17:3868-3873, 3876] He saw the shooter running north bound on Central Avenue. [RT, 17:3873] He was asked to describe what the shooter was wearing:

> DDA: What was the guy that was running wearing?
> EW: He had on a black Raider jacket, and had on must have been shorts or something, because you could see the bottom portion of his legs. [RT, 17:3875 (Emphasis added)]

During cross-examination by Mr. Lasting, Wright confirmed the shooter was wearing a jacket that had the word "Raiders" or "Oakland Raiders" written on it:

> RL: Now, after the shooting you saw somebody that you described as a husky black male running from the area; is that right?
> . . .
> EW: Yes.
> RL: And did you say he was wearing a long black Raiders jacket?

EW: Yes, a Raider coat.
RL: Did it actually say Raiders on it?
EW: Yes, it says Oakland Raiders or – Raiders. [RT, 17:3888 (Emphasis added)]

During Appellant's cross-examination of the witness, Wright added that the shooter was also wearing a hood with the jacket that went up over his head. [RT, 17:3892-3893].

2. Expert Witness James Galipeau's Testimony.

During the defense case-in-chief, the defense sought to prove the shooter was a "Crips" gang member, not Appellant. The defense called deputy probation officer James Galipeau who testified as an expert on the Crips and Bloods gangs in south central Los Angeles. [RT, 22:4869+][280] Galipeau testified that in 1991 Crips gangs began wearing black Oakland Raiders jackets in addition to their blue clothing. [RT, 23:4944-46]

Galipeau further explained that Crips gang members unilaterally adopted the black Kings and Raiders jackets "to the point where L.A. Unified School District would not allow students to wear the black Raider jackets and the black Kings jackets to – you know, to L.A. Unified Schools. [RT, 23:4945] At the same time, members of Bloods gangs began wearing red San Francisco 49'ers jackets. These jackets were also banned from being worn at the L.A. Unified Schools. [RT, 23:4945

The defense then asked Galipeau whether he was familiar with the adjacent Kitchen Crips gang, and whether members of that gang wore the black Raiders' jackets. Galipeau confirmed he knew of the Kitchen Crips gang, and "Yes, they do" wear the black Raiders' jackets. [RT, 23:4946] According to Galipeau, during the summer of 1991 the Kitchen Crips were at war with the 89 East Coast Crips. [RT, 23:4958-4959] and he testified that at that location on Central Avenue during

[280] The prosecution stipulated that Galipeau was an expert in gangs in south central Los Angeles. [RT, 22:4871-4872]

the summer of 1991 "I would say that, you know, a Kitchen would be just as likely to shoot an East Coast, as a Family Blood would have been to shoot an East Coast." [RT, 23:4959]

Since witness Eulas Wright had testified during the prosecution's case-in-chief that the shooter was wearing a black Raider jacket [RT, 17:3875] or a black Oakland Raiders jacket [RT, 17:3891], the relevant inference to be drawn from the testimony of Wright and Galipeau was that the shooter was a rival Crips gang member, and not Appellant, who claimed to be a Blood.

On cross-examination, the prosecutor confronted Galipeau as to whether "Bloods" gang members also wore "black Raiders jackets." Galipeau responded, "No." In responding further to her questions, Galipeau was careful to distinguish between black jackets, black windbreakers, and black Raiders jackets. He testified that if an individual was merely wearing a dark or black jacket, *nothing* could be inferred as far as any gang affiliation. [RT, 23:4956] Indeed, he testified that Bloods had been known to wear black windbreakers, but *not* black Raiders jackets. [RT, 23:4952-4954] Galipeau consistently distinguished between black jackets, black windbreakers and black Raiders jackets. Bloods did *not* wear black Raiders jackets. Bloods did wear black jackets or black windbreakers on occasion, however. [RT, 23:4955-4956]

3. Expert Witness Barling's Rebuttal Testimony.

During the State's rebuttal and in response to the testimony of Galipeau, the prosecution re-called Detective Barling. When asked if he had ever observed 89 Family Bloods gang members wearing "Raiders jackets", he replied that he had. The prosecutor then asked a compound question about the significance of wearing "Raider jackets or Raider-type jackets". In reply, Barling explained that both Crips and Bloods "began wearing Raiders jackets as a kind of city pride." Barling then added that wearing a black jacket or black clothing was "kind of a neutral color: [RT, 24:5033-4]

Both Galipeau and Barling, therefore, testified that Crips and Bloods would, on occasion, wear black jackets or black clothing. The *difference* in their expert testimony was whether Bloods gang members would ever wear black Raiders jackets. Again, this was significant because witness Eulas Wright had testified that the shooter was wearing a black Oakland Raider's jacket and hood, thereby suggesting inferentially that the shooter was a "Crip", not a "Blood" gang member. [RT, 17:3891]

To contradict probation officer Galipeau's testimony, and to corroborate Detective. Barling's testimony that 89 Family Bloods also wore black Oakland Raiders jackets, the prosecution sought to introduce into evidence, and display to the jury, three photographs: People's Exhibits #47 (a photo containing 16 smaller photos of individuals), #48 (a 3x5 photo of a group of people) and #49 (a photo of 4 individuals standing in front of a wall). [RT, 24:5035-6] Each of the exhibits depicted members of the 89 Family Bloods gang; however, *none* of the photographic exhibits depicted a member of the gang wearing an *Oakland Raiders jacket*. A view of each photograph, however, vividly typifies and reinforces the ominous and threatening impression the public has of dangerous and violent gang members posing proudly amidst their weaponry, tattoos, graffiti and gang clothing.

B. The Applicable Law.

1. Relevance and Evid. Code, § 352 Restrictions.

Only relevant evidence is admissible. (Evid. Code, § 350) Relevant evidence is defined as evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." If the credibility of a witness is a "disputed fact", evidence that tends to impeach or support that witness' credibility is relevant. (Evid Code, § 210) If proffered evidence is *not* relevant, the trial court has *no* discretion as to whether it should be admitted. This Court has written:

> Under this section, irrelevant evidence must be excluded and a trial court has no discretion to admit it. [Citations.] Relevant evidence is defined as evidence which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the ... action." *People v. Hall* (1980 28 Cal.3d 143, 152. (See also *People v. Poggi* (1988) 45 Cal.3d 306, 322-323.

If the trial court determines that the proffered evidence has some relevance, the trial court then has the discretion to exclude that relevant evidence "if its probative value is substantially outweighed" by the probability of substantial danger of undue prejudice, of confusing the issues, of misleading the jury, or whose admission necessitates an undue consumption of time. (Evid. Code, § 352)

The prejudice referred to in Evid. Code, § 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Evidence must, therefore, be excluded under Evid. Code, §§ 350-352 if either 1) it is not relevant (i.e. it is not probative of the existence on non-existence of a material and disputed issue, or 2) the evidence creates a substantial danger of undue prejudice that substantially outweighs its probative value. (*People v. Turner* (1984) 37 Cal.3d 302, 320-321.)

C. Discussion.

1. <u>The prosecutor's offer of proof, the defense objections, and the trial court's ruling</u>.

The defense objected to the introduction of these photos on relevance and §352 grounds, as well as improper rebuttal evidence. [RT, 24:5018-5023] The prosecutor's offer of proof was that the photographs depicted 89 Family Bloods gang members wearing "<u>black jackets</u> at 89 Family functions." [RT, 23:4982 (Emphasis added)] The prosecutor further stated,

> DDA: I have photographs which appear to depict individuals in <u>Raider-style jackets</u>. One of them includes the defendant [Johnson]. . . . In addition, there are two other photographs

which depict 89 Family members. One of them is wearing a black windbreaker-style jacket similar to a Raiders' jacket, and the other one is a black jacket also similar to a Raider' jacket. [RT, 24:5019 (Emphasis added)]

The basis for the defense objections to the photographs could not have been more clear:

RL: Your honor, they don't contradict the testimony of Mr. Galipeau. Mr. Galipeau said that Bloods don't wear Raiders jackets. He said that anybody could wear a black windbreaker. And there is no photograph of somebody in a Raiders jacket. So, the fact that they have photographs of people in black windbreakers tends to substantiate Mr. Galipeau's testimony, it doesn't rebut it.

The defense immediately added Evid. Code, § 352 concerns. The trial court's response was not only a rather cavalier rejection of the basis for the objections but also illustrated the trial court was not even considering the undue prejudice factors that the defense objections were based on:

RL: I would object, your Honor, to the fact that people are posing with firearms in the pictures.
CRT: That's what gang members do. Are you talking about the one where the guy's got the short barrel shotgun, the other guy's got an SKS or something?[281]
RL: That's the one I'm talking about.
ORR: Is that going to come in, too?
RL: I'd like to be heard.
ORR: May I see that one, your Honor?
CRT: I'll hear you.
ORR: How about a 352 argument –
CRT: How about it. You want to make it?[282]

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[281] The issue with the photographs was the existence, or lack thereof, of *Raiders' jackets* on any of the men. The fact that various gang members were posing with deadly weapons in a scowling most intimidating fashion seemed lost on the trial court.

[282] The trial court's response to Mr. Orr's Evid. Code, § 352 objection also seemed to be a sarcastic comment that conveyed to the defense that their objections were useless and a waste of time.

ORR: -- about guns? And that further outweighing the probative value.
CRT: You want to join in that objection?
RL: I'll join in that objection, too, your Honor, but my –
CRT: Overruled.[RT, 24:5020-5021]

The trial court overruled the defense objections. The court's comments to defense counsel just moments later revealed his seeming indifference or ambivalence to the concept of undue prejudice that gang evidence inherently brings with its admission.

RL: My primary point is that there wasn't anything about gang members not having guns in the defense presentation. And to now come in in the guise of rebuttal and introduce a photo of two people, who will be identified as Bloods, with automatic weapons is not rebuttal of the defense case.
CRT: I don't think anybody's got an automatic weapon in here.
RL: Whatever they are.
ORR: Any weapon –
CRT: One guy's got a shotgun, and one guy's got an SKS rifle, both of which are legal to possess last time I looked. Are you suggesting that the jury is not aware at this point in time that gang members often possess guns? My lord, they've heard enough testimony.[283] Is it the fact you don't want them to see *somebody with a gun*?
ORR: Look at the way it's coming in, though, through rebuttal of jackets. I don't know if that's really the most right way to put it in. All we are talking about is clothing, and here the district attorney puts in weapons which kill.
RL: It seems to me that the –
CRT: I don't find anything particular prejudicial, frankly, about a picture of a gang member holding a gun – [RT, 24:5020-5021. Emphasis added.]

[283] The irony of this comment by the trial court ("My lord, they've heard enough testimony about gangs.") is the very basis for this issue on appeal. Appellant asserts the jury heard so much evidence of gangs, killings, shootings, intimidation of witnesses and retaliatory violence because the trial court declined to exercise its discretion and limit the gang evidence to reasonable limits.

Realizing the trial court was about to overrule their objections, both defense counsel made additional suggestions in an effort to try to minimize the undue prejudice. Mr. Lasting suggested the photo that contained the two gang members holding the weapons be "cropped" so that the photo only displayed the gang member who was clad in black. The trial court's response? "I'm not going to cut that photograph up" because "it does tend to suggest ... that the fella in the black jacket might be a gang member, as he is flanked by two of them brandishing their weapons." [RT, 24:5022]

Lastly, Mr. Orr requested the photos be "cropped" to eliminate the gang graffiti that appeared on every available surface surrounding the forebodingly posed gang members. [RT, 24:5022-5023] The trial court's response? "I don't buy that one either." [RT, 24:5023]

These comments, taken together with the vast amount of gang evidence the court allowed into evidence reflect the trial court's willingness to literally "bury" Appellant and co-defendant Johnson with highly inflammatory and voluminous evidence of the gang's propensity for violence.

2. Testimony Regarding People's Exhibit #47.

The prosecutor's tactic became evident when she asked Detective Barling questions about People's Exhibit #47, a collection of 16 photographs of gang members with co-defendant Johnson pictured in photograph #3 slot. Barling's description of the Raiders'-type jacket was "It's puffy like a down feathered ski jacket such as a Raiders jacket, except in this jacket there's yellow zippers and orange lining, and there's no Raiders logo on it." [RT, 24:5036] The prosecutor retorted, "But is it similar in style to a Raiders' jacket?" Barling's response? "Sure, it could be described as such."

Appellant suggests the photograph of the co-defendant in a puffy down-feathered ski jacket that had yellow zippers and orange lining would be considered just what it was by people in Los Angeles; a black ski jacket, not a Raiders jacket. On cross-examination Barling's admitted the jacket was not a black Oakland

Raiders' jacket. [RT, 24:5042] It had no probative value and was, therefore, simply not relevant.

3. Testimony Regarding People's Exhibit #48.

On further direct examination, the prosecutor asked Detective Barling to describe People's Exhibit #48, which subsequently was introduced into evidence and was displayed to the jury:

> DDA: What does it show?
> BAR: It shows a group of people flashing hand signs, one person with their back towards the picture with an 89 Family black shirt with gang writing on it.
> DDA: Is that black shirt similar to the kind of material that you would see in a windbreaker or Raiders jacket?
> BAR: It would be more along – I think along a khaki, like a khaki shirt, would be more appropriate.
> DDA: Are you referring to khaki as a color or khaki as a fabric?
> BAR: Khaki as a fabric.
> DDA: And in that particular photograph are there any indications on the photograph as to what gang the people in the photograph are affiliated with?
> BAR: Yes.
> DDA: What?
> BAR: 89 Family Bloods, or 89 Family Swans.
> DDA: How do you know?
> BAR: It's written right on the back of the shirt.
> Q: Are there any hand signs being shown?
> A: Yes.
> Q: Any other attire that would be significant?
> A: And the red coloring. [RT, 24:5038-9 (Emphasis added)]

This series of questions illustrateed how far the prosecutor was stretching to somehow respond to the testimony of Eulas Wright and Probation Officer Galipeau. The photo shows a gang member in a black *shirt* made of a *khaki-like* material. Even Detective Barling had a hard time testifying that this looked like a Raider's jacket. As to People's Exhibit #48, cross-examination of Det. Barling revealed there was *nothing* in that photographic exhibit that reflected a member of 89 Family Bloods wearing a "black Oakland Raider's jacket" or a "black Raiders

jacket." [RT, 24:5042-5043] However, the prosecutor made sure that Detective Barling emphasized that the ominous appearing men in the photo were 89 Family Bloods gang members, that they were dressed in their reputed red gang colors and they were all throwing gang hand signs. [RT, 24:5038-5039]

4. Testimony Regarding People's Exhibit #49.

Finally, the prosecution asked Detective Barling if one of the 89 Family Bloods gang members in Exhibit #49 was wearing a "Raiders-style jacket":

DDA: Showing you what's been marked as People's 49. Do you recognize what that shows?
BAR: Yes, I do.
DDA: What does it show?
BAR: It shows 4 individuals in the 89 Family Bloods.
DDA: Who are the individuals shown?
BAR: Melkean Huff, Keion Reilly, Timothy Johnson, Rico Wilson[284], as I look at the photograph from left to right.
DDA: And with respect to one of those individuals, do you see one of those individuals attired in what is a Raiders-style jacket?
BAR: Yes.
DDA: Who?
BAR: Keion Reilly.
DDA: And where is he from the right margin?
BAR: He's the second person – excuse me, he's the third person from the right margin.
DDA: Do you have – Well, are these people members of 89 Family?
BAR: Yes, they are.
DDA: How do you know?
BAR: I've spoken to every one of these individuals.
DDA: And do each of those individuals have street names?
BAR: Yes.
DDA: The Timothy Johnson that's in that photograph, is that the defendant's [i.e. Cleamon Johnson] brother?

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[284] The jury was quite familiar with Reco Wilson and his propensity for violence. The prosecution previously presented evidence that Reco Wilson had been convicted of murdering Nece Jones, a witness in a case involving co-defendant Johnson. They were aware that Wilson had, in effect, executed Jones the day after co-defendant Johnson told him to eliminate her. [RT, 15:3383; RT, 21:4780; People's Exhibits #39 (edited tape recording) and #39A (transcript of #39) located at CT Supp IV, 2:397-399]

BAR: Yes, he is.
DDA: Is that the person known as "Sinister"[285]?
BAR: Yes.
DDA: Are there any other indications in that photograph that these people are members of 89 Family?
BAR: Yes.
DDA: What are those indications?
BAR: Standing in front of gang graffiti of 89 Family. [RT, 24:5039-5041 (Emphasis added)]

On cross-examination of Detective Barling regarding People's Exhibit #49, the defense brought out once again that this exhibit (as well as the two previous exhibits) contained nothing that would resolve the "disputed issue" of whether Bloods gang members wore black Oakland Raiders jackets:

RL: And this picture of these 4 young men, there's one gentleman wearing a black jacket, right?
BAR: Correct.
RL: Is that an Oakland Raiders' jacket?
BAR: No, it's not. [RT, 24:5043 (Emphasis added)]

The "disputed fact" on rebuttal that was "of consequence to the determination of the" issue (See Evid. Code § 351) was whether Bloods gang members wore black Raiders jackets, *not* black jackets, black windbreakers, or black clothing. Both expert witnesses acknowledged that Bloods gang members, including 89 Family Bloods gang member, wore black jackets, black windbreakers or black clothing on occasion.

A close reading of the prosecutor's questions and Barling's responses illustrate the prosecutor's *carefully phrased* questions were offered to prove an issue that was *not* in dispute, much less that it pertained to a disputed fact that was

[285] Although the names and gang monikers of the individuals in the photograph have little relevance, it is indicative of the prosecutor's on-going tactic of "burying" the defendants in savage and senseless gang violence and thereby further frightening and inflaming the jury. She asked the detective only about the individual in the photograph who "just happens" to be co-defendant Johnson's brother (thereby showing the Bloods gang is a "family affair") and who "just happens" to have a portentous and foreboding gang moniker.

of any "consequence" or that was "material." (Evid. Code, § 210) The photographic exhibits were simply not relevant, and the trial court had "no discretion to admit [them]." *People v. Hall* (1980) 28 Cal.3d 143, 152; *People v. Poggi* (1988) 45 Cal.3d 306, 322-323.

As such, the photographs "supplied no more than a blatant appeal to the jury's emotions" (*People v. Smith* (1973) 33 Cal.App.3d 51, 69.), a form of undue prejudice that in this case clearly outweighed the probative value of the evidence. Permitting the prosecution to introduce evidence that has *no* probative value but will have an enormous prejudicial impact thus violates state law. (Evid. Code §§ 350, 352; see generally, *People v. Cummings* (1993) 4 Cal.4th 1233, 1295; *People v. Williams* (1988) 44 Cal.3d 883, 909; *People v. Hendricks* (1987) 43 Cal.3d 584, 594; *People v. Turner* (1984) 37 Cal.3d 302, 320-321. Whereas the two gang experts used the phrase "Oakland Raiders jackets" or "Raiders jackets" [RT, 23:4944-4956; 24:5033-5034], the prosecutor used the phrase "Raiders type jackets" in a subtle effort to mislead and confuse the jurors as to whether members of Appellant's Bloods gang were also known to wear "black Oakland Raiders jackets" as witness Wright had described in referring to the shooter's clothing.

Even assuming the photographs were in some manner relevant, however, any probative value was minimal at best, and the prejudicial nature of the evidence was substantial. Weighing the probative and prejudicial value of proffered evidence requires a court to consider several factors. The probative value of evidence is assessed by considering whether the evidence is cumulative, relates to an uncontested issue, or is necessary to support or illustrate the government's case. (*People v. Allen* (1986) 42 Cal.3d 1222, 1257; *People v. Marsh* (1985) 175 Cal.App.3d 987, 998.) To determine the extent of undue prejudice, the court should assess the inflammatory nature of the evidence and the prosecution's use and presentation of it. (*People v. Marsh*, (1985) 175 Cal.App.3d 987, 996-999; *People v. Smith* (1973) 33 Cal.App.3d 51, 69, disapproved on other grounds, *People v. Wetmore* (1978) 22 Cal.3d 318, 327, fn.7.)

Applying these considerations to Appellant's case, it was evident that 89 Family Bloods gang members wore black. Galipeau testified to that fact. Barling testified to that fact. There was no contradictory testimony. Therefore, the three exhibits were "cumulative." The exhibits were offered to prove an "uncontested issue." The exhibits were also not "necessary to support or illustrate the government's case."

On the opposing side of the § 352 scale is the "undue prejudice" contained within the exhibits. Appellant respectfully requests this Court simply view the three exhibits, particularly People's Exhibits #48 and #49, and then "assess the inflammatory nature of the evidence."

"A picture is worth a thousand words." In frightening and full-color detail, every repulsive thing the jury had been told about Bloods gangs was revealed in those photographs. Members of the 89 Family Bloods gang are readily observed. Each is "dressed-down" fully in his baggy gang clothing, all are prominently flaunting their message-conveying red colors, some are "throwing" gang hand-signs, and each is observed standing defiantly amidst the gang's symbol that they control that area; the graffiti-laden walls and fences that surround them. With two "homeboys" cradling a sawed-off shot gun and an SKS rifle in their arms, they are all poised to act swiftly and violently against any perceived intruders. Reco Wilson, the man who retaliated with lethal force and executed Nece Jones because she testified against a member of the 89 Family Bloods gang, was singled out by the prosecutor's questions as one of the two men cradling a deadly firearm. Co-defendant Johnson's brother, aka "Sinister", was also singled out by the prosecutor.

These photographic exhibits provided each juror with tangible, full-color confirmation of a very frightening concern they unquestionably shared as Los Angeles County residents. As they viewed these photographic exhibits, they would have been reminded of the "actual" danger that Connor, Jelks, James and their innocent family members might indeed be future victims of grisly and bloody

gang retaliation because they testified in this case. After all, Detective Barling, a respected and experienced police expert in gangs, had told the jury the danger these witnesses faced and expressed fear over was "legitimate" or real. And since Appellant proudly claimed he was an associate of these menacing and savagely violent individuals pictured in the photos, the jury now would have had an even stronger "reason to hate" Appellant ... because he was a Bloods gang member.

Further, Appellant was unduly prejudiced by "the prosecution's use and presentation of" the photographic exhibits. Earlier in the trial, the defense presented evidence that a "Kitchen Crip" gang member was just as likely to shoot and kill an "East Coast Crip" as was a Bloods gang member during the summer of 1991. [RT, 23:4959] The defense presented evidence that Crips gang members wore black Raiders jackets and that members of Bloods gangs did not. [RT, 17:3875, 3891; 23:4552-4556] Prosecution eye-witness Eulas Wright testified that the shooter was wearing a black Raiders jacket or a black Oakland Raiders jacket. If any single juror believed that Wright's testimony was accurate and that Galipeau's expert opinion was correct, that juror would have had more than a reasonable doubt as to whether Appellant was the shooter. This was affirmative evidence that, if believed, was substantial proof that Appellant was *not guilty* of these shootings.

However, the prosecutor "used" these photographic exhibits along with her carefully crafted questions to confuse and mislead the jury into thinking that Bloods gang members also wore black Raiders jackets; hence, even if jurors believed Wright's description of the shooter's clothing was accurate, there was no cause for concern about any reasonable doubt as to the identity of the shooter. Further, the jurors had tangible evidence they could view as often as they desired during deliberations that would remind them of the prosecution's response to the defense evidence. By phrasing her questions as she did, the prosecutor was able to insinuate to the jury that they should not be concerned about the defense evidence. Her "presentation" of the photographic exhibits was misleading and confusing to

the jurors. She buried any further juror concerns about the identity of the shooter with the contents of the exhibits: frightening gang hand-signs, gang graffiti, gang clothing, gang colors, and finally gang members brandishing deadly "killing machines." The prosecutor effectively blurred the significance of the difference between "a black Raiders jacket" and "a black Raiders-type jacket."

If and when the trial court applied the balancing test of Evid. Code, § 352, the danger of undue prejudice substantially outweighed the probative value because the photo exhibits had *no* probative value. And even if there was some minor probative value, Appellant contends the substantial danger of undue prejudice far outweighed any probative value.

1. If the trial court had discretion as to the admission of the three exhibits on rebuttal, the standard of review on appeal would be for an abuse of discretion.

If the photographic exhibits had some probative value, then the trial court's ruling to allow this evidence to be admitted over a §352 objection is reviewed for an abuse of discretion. *People v. Valdez* (2004) 32 Cal.4th 73, 109; *People v. Hillhouse* (2002) 25 Cal.4th 469, 496; *People v. Lewis* (2001) 26 Cal.4th 334, 372-373. In that situation, a conviction should be reversed if the trial court's ruling was "arbitrary, capricious, or patently absurd" and caused a "manifest miscarriage of justice." *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.

Of course, if the evidence was not relevant, the trial court had no discretion as to whether it should admit the evidence. (Evid. Code, §§ 210; 351; *People v. Hall* (1980 28 Cal.3d 143, 152; *People v. Poggi* (1988) 45 Cal.3d 306, 322-323. Evidence is simply not admissible if it is not relevant. In this situation, the trial court's ruling is *not* reviewed for an abuse of discretion.

2. California's Appellate Standard for Determining if the Erroneous Admission of Evidence Was Prejudicial.

The erroneous admission of evidence requires reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have

reached a different result had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Gurule* (2002) 28 Cal.4th 557, 625 ["...we conclude it is not reasonably probable that the admission of the [evidence] affected the jury's verdict."]; *People v. Scheid* (1997) 16 Cal.4th 1, 21 ["...the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded."]; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [same]; Evidence Code § 353 [Error must result in a "miscarriage of justice."].

3. The *Chapman* "harmless beyond a reasonable doubt" standard applies if the State court's erroneous admission of evidence implicated Appellant's federal Constitutional rights.

This Court has recognized, however, that when the erroneous admission of irrelevant and prejudicial evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. *People v. Garceau* (1993) 6 Cal.4th 140, 186. In this situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24.

Appellant's Fourteenth Amendment due process rights were also violated if the state trial was conducted "in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice." (*Chavez v. Dickson* (9th Cir. 1960) 280 F.2d 727, 735; *Osborne v. Wainwright* (11th Cir. 1983) 720 F.2d 1237, 1238-1239 [remanding for habeas hearing to determine whether admission of gruesome photographs constituted fundamental unfairness violating due process].) Appellant acknowledges the courts have indicated that erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a " 'crucial, critical, highly significant factor' in the [defendant's] conviction" (*Williams v. Kemp* (11th Cir.1988) 846 F.2d 1276, 1281, *cert. denied* (1990) 494

U.S. 1090, 110 S.Ct. 1836, 108 L.Ed.2d 965.), and that the introduction of graphic photographic evidence rarely renders a proceeding fundamentally unfair. (*Futch v. Dugger* (11th Cir. 1 989) 874 F.2d 1487 [photograph of victim, nude, showing wounds made by gunshot]; *Evans v. Thigpen* (5th Cir. 1987) 809 F.2d 239, 242, *cert. denied* (1987) 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 [nine color slides of homicide victim]; *Jacobs v. Singletary* (11th Cir. 1992) 952 F.2d 1282 [because the photographs served a minor role in the state's case, their admission if erroneous did not deprive Jacobs of her right to a fair trial]; *People v. Heard* (2003) 31 Cal.4th 946, 978 ["...we nonetheless would conclude that any error in admitting such [photographic] evidence was harmless under the *Watson* standard."; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 ["We therefore conclude it is not reasonably probable the jury would have reached a different result had the photographs been excluded."].)

In this case, however, Appellant submits these graphic and frightening gang-related photographs played a *major* role in Appellant's conviction and sentence of death, particularly when they are considered in combination with other erroneously admitted gang evidence. (See Issues XI, XII, XIII, XIV, XVII, XXI and XXII in Appellant's Opening Brief.)

Where the probative value of evidence is so substantially outweighed by its inflammatory content, the admission of such evidence violates a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. *Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 (and cases cited therein).

In addition, both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens* (1983) 462 U.S. 862, 885) or are the product of "an unguided emotional response"

to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256]).

If Appellant's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of the Fifth, Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

The admission of unduly inflammatory evidence is "an irrelevant consideration" and often leads to "an unguided emotional response" by the jury. It undermines the reliability required by the Eighth And Fourteenth Amendments for a conviction of a capital offense (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and it deprives Appellant of the reliable individualized capital sentencing determination guaranteed by the Eight Amendment. *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.

Finally, to the extent the error was solely one of state law, it nevertheless violated Appellant's right to due process by depriving him of a state-created liberty interest. Thus, California deprived Appellant of his due process rights which are guaranteed by the Fourteenth Amendment of the United States Constitution if the court does not follow its own statutory provisions, particularly where those provisions provide important procedural safeguards against unreliable capital verdicts. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1296-1303.)

4. <u>The Error Was Prejudicial.</u>

Under either appellate standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818) the admission of these photographic exhibits on rebuttal was prejudicial, whether considered by

themselves or in conjunction with the other errors in this case. (See *Mak v. Blodgett* (9thCir. 1992) 970 F.2d 614, 622.)

The prosecutor was allowed to focus the jury's attention on photographs to improperly generate additional antipathy toward Appellant, thereby increasing the likelihood that the jury would convict him. (*People v. Hendricks* (1987) 43 Cal.3d 584, 694-696; *People v. Scheid* (1997), 16 Cal.4th 1, 20 [suggesting impropriety of "unduly belaboring' issue by using potentially inflammatory photographs extensively during witness examination].) The photographs would have increased the jury's "reason to hate" Appellant because of his gang membership, and any evidentiary shortcoming in the prosecution's evidence would have been "more than made up for" by the jury's intense desire to punish Appellant for being involved in such a repugnant and vile gang lifestyle. In effect, these emotional "reasons to hate" Appellant "lightened" the prosecution's burden of proof. The trial court's decision to admit such inflammatory photographs when they had no probative value was a "disregard of that fundamental fairness essential to the very concept of justice."

The prosecution's use of the photographs played a *major* role in Appellant's conviction and sentence of death because, along with the prosecutor's careful crafting of her questions, they blurred the important distinctions the jury had to make to understand the significance of the defense's evidence that a Crip, not a Blood, gang member was the actual shooter.

Finally, the error was prejudicial when viewed in context with the remaining evidentiary considerations:

First, the case against Appellant was not strong. There was *no* physical evidence that connected Appellant, directly or indirectly, to the murders. The credibility of each of the three witnesses who did connect Appellant to the murders was highly suspect.

Second, police detectives, cloaked in the aura of respectability and credibility, were erroneously allowed to render opinions that the three witnesses

were telling the truth in spite of the existence of extensive impeachment evidence. In effect, the police witnesses testified that any prior inconsistent statements, claims of faulty memory, or unusual demeanor were attributable to their "legitimate" fear of retaliation.

Third, the trial court erroneously allowed the prosecution to "bolster" the credibility of Connor, Jelks and James, thereby undermining defense efforts to demonstrate the three witnesses were not truthful when they spoke to the police or testified.

Fourth, Appellant was prohibited from cross-examining and dramatically impeaching Jelks and James because of the trial court's rulings.

Fifth, the prosecution was allowed to introduce an exorbitant amount of prejudicial gang evidence, much that was simply not relevant and much that should have been excluded as being too prejudicial pursuant to Evid. Code, § 352. Appellant asserts the erroneous introduction of these photographs was sufficient standing alone to be prejudicial. Taken in conjunction with other improperly received gang evidence, the photographs were certainly "the straw that broke the camel's back"; that is, if the camel's back was not already broken.

4. Conclusion.

Appellant respectfully asserts Respondent cannot establish that the trial court's erroneous evidentiary ruling that admitted these three exhibits was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24) It is also "reasonably probable" that without the three photographic exhibits at least one juror's conclusion would have been more favorable to Appellant. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-695; *People v. Watson (1956)* 46 Cal.2d 818, 836) It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Appellant respectfully urges this Court reverse his conviction and judgment of death on this basis.

XVI.

Appellant was deprived of his due process right to confront and cross-examine his accusers when the court allowed Donnie Ray Adams to testify regarding an inadequately redacted statement made to Adams by the non-testifying co-defendant Johnson that incriminated Appellant. The error was prejudicial and requires Appellant's convictions and judgment of death be overturned.

A. Introduction.

Near the conclusion of the prosecution's case-in-chief, the prosecution called Donnie Ray Adams to testify regarding an alleged confession made by co-defendant Johnson to Adams that incriminated Appellant by name. Counsel for Appellant objected, citing *Bruton v. United States* [(1968) 391 U.S. 123] and *People v. Fletcher* [(1996) 13 Cal.4th 451] in support of his objection. The trial court overruled Appellant's objection, stating that a redacted version of Johnson's statement to Adams would be admissible. The trial court further indicated that it would give a limiting instruction to the jury, directing them to consider Johnson's statement to Adams against Johnson only.

B. The Applicable Law:

1. The Constitutional Right to Confrontation and Cross-Examination:

In *Bruton v. United States* (1968) 391 U.S. 123, the Supreme Court held that an accused's 6th Amendment right to confront and cross-examine his accusers is violated by the admission of a non-testifying co-defendant's confession that implicates the accused. Even if the trial court provides the jury with a limiting instruction that tells the jury to consider the statement only as to the declarant,[286] the Supreme Court held that

[286] Normally, if a witness' testimony at a joint trial is offered only against the co-defendant and the jury is instructed to consider that evidence only as to the co-defendant, there is no Confrontation Clause problem because the jury is assumed

> . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations] Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." (*Bruton v. United States, supra,* at pp. 135-136)[287]

Nineteen years later in *Richardson v. Marsh* (1987) 481 U.S. 200, the United States Supreme Court limited the scope of its *Bruton* holding. The Supreme Court explained that the confrontation clause is not violated by the admission of a co-defendant's confession if it has been redacted "to eliminate not only the defendant's name, but any reference to his or her existence," even if the confession becomes incriminating to the accused when it is considered together with other evidence introduced at the trial. (*Richardson v. Marsh, supra,* 481 U.S. at p. 211) In these situations, the Supreme Court wrote that the co-defendant's confession is not as incriminating to the accused; hence, the jury should be able to follow the limiting instruction given by the court and consider it only as to the non-testifying co-defendant. (*Richardson v. Marsh, supra,* 481 U.S. at p. 208)

In commenting on *Bruton* and *Richardson*, one California appellate court explained that "[w]hile *Bruton* required that the admission be 'powerfully' incriminating, *Richardson* required that it also be 'incriminating on its face....'" (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1386.)

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to have followed the court's instructions. *Francis v. Franklin* (1985) 471 U.S. 307, 325, n.9; *Richardson v. Marsh* (1987) 481 U.S. 200.

[287] Three years earlier, the California Supreme Court reached a similar conclusion on non-constitutional grounds. (*People v. Aranda* (1965) 63 Cal.2d 518, 528-530.) The *Aranda* holding was not abrogated by the 1982 adoption of Proposition 8, the "Truth-in-Evidence provision (section 28, subdivision (d) of Article I of the California Constitution) as long as it did not extend to the accused rights beyond that of *Bruton* and its progeny. (*In re Lance W.* (1985) 37 Cal.3d 873, 890.)

However, when the prosecution redacts the declarant/co-defendant's out-of-court statement, it must be done in a manner that does not prejudice the declarant/co-defendant. Counsel for the declarant/co-defendant has the right to confront and cross-examine the witness as counsel would any other witness who provides incriminating evidence. (*People v. Ervin* (2000) 22 Cal.4th 48, 87; *People v. Douglas* (1991) 234 Cal.App.3d 273, 282-7; *People v. Matola* (1968) 259 Cal.App.2d 686.)

In *People v. Fletcher* (1996) 13 Cal.4th 451, this Court addressed an issue that was not addressed by *Richardson*; that is, whether a violation of the confrontation clause can be avoided if the non-testifying co-defendant's out-of-court statement is edited or redacted by replacing the accused's name with a neutral pronoun or some other neutral, non-identifying device. This Court adopted the "contextual linkage" or "contextual implication" approach[288] to this analysis in an effort to balance the competing interests of both parties. This Court also recognized the necessity of evaluating this issue on a case-by-case basis. (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 468.)

In determining whether the redacted statement violates an accused's Sixth Amendment right to confront his accusers, this Court explained when a redacted statement will not satisfy the confrontation clause:

> The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the co-participant designated in the confession by symbol or neutral pronoun. (*People v. Fletcher, supra*, 13 Cal.4th at p. 456.)

This Court thereafter added:

> As we have seen, redaction that replaces the non-declarant's name with a pronoun or similar neutral and non-identifying term will adequately safeguard the non-declarant's confrontation rights unless the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference

[288] *People v. Fletcher, supra*, 13 Cal.4th at 467 and 468, respectively.

> that the non-declarant is the person so designated in the confession and the confession is "powerfully incriminating" on the issue of the non-declarant's guilt. (*People v. Fletcher, supra*, 13 Cal.4th at p. 467. Emphasis added.)

The redacted confession of the non-testifying co-defendant, therefore, will be deemed constitutionally inadequate when the reference to the accused is sufficiently direct, as well as "powerfully incriminating" on the issue of the accused's guilt. (*People v. Fletcher, supra*, 13 Cal.4th at p. 456, 467.) This Court added that its two-step inquiry is consistent with the language found in the *Richardson* opinion:

> Whether instructing the jury to disregard a non-testifying co-defendant's confession in determining a defendant's guilt adequately protects the defendant's Sixth Amendment right of confrontation depends upon whether the jurors can reasonably be expected to obey the instruction. (Citations) In turn, the jurors' ability to obey the instructions depends upon how directly and how forcefully the co-defendant's confession incriminates the non-declarant defendant. *Richardson v. Marsh, supra*, at p. 208. (*People v. Fletcher, supra*, 13 Cal.4th at p. 465. Emphasis added.)

The United States Supreme Court subsequently reached a similar conclusion in *Gray v. Maryland* (1998) 523 U.S. 185:

> The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. (*Id.*, at p. 196.)

2. *Bruton/Fletcher* error implicates the *Chapman* "beyond a reasonable doubt" test to determine if the error was prejudicial to Appellant's right to due process.

In *People v. Anderson* (1987) 43 Cal.3d 1104, 1128, this Court held that *Bruton* error is not prejudicial *per se*. However, "because it implicates a federal constitutional right, such error must be scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18;

[remaining citations omitted]." [*People v. Anderson*, supra, 43 Cal.3d at p. 1128.) Under that test, this Court stated,

> [W]e must determine on the basis of "our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury," [citation], whether the co-defendant's admissions were sufficiently prejudicial to defendant as to require reversal. (Citations.) (*People v. Anderson, supra,* 43 Cal.3d at p. 1128.)

The standard of *Chapman v. California* (1967) 386 U.S. 18, expressed in *People v. Anderson*, *supra*, 43 Cal.3d at p. 1128 states that reversal is required unless the reviewing court can say that, in the minds of the average juror, the error was harmless beyond a reasonable doubt.

C. <u>Discussion</u>:

1. <u>Co-defendant Johnson's out-of-court statement to Donnie Ray Adams that incriminated Appellant</u>.

On January 30, 1997 FBI agents Vasley and Bernardino in Los Angeles interviewed Donnie Ray Adams. [CT Supp. IV, 5:1170-1177] During that discussion, Adams spoke of a conversation he had with co-defendant Johnson on the day of the Loggins/Beroit murders. One of the agents dictated what Adams said regarding those killings, as follows:

> "Evil" told Adams that "Fat Rat" (Michael Allen, DOB September 2, 1972) had not really done much for the gang, so he ("Evil") sent "Fat Rat" on a mission so "he ('Fat Rat') could say he was down for the 'hood." "Evil" told Adams that he had given "Fat Rat" a gun and a ski mask for his mission. "Evil" said that the victims were 89 East Coast Crips, remarking, "That's two more Crabs gone." [CT Supp. IV, 5:1176; RT, 19:4373-4375]

Prior to Donnie Ray Adams testifying for the prosecution, Appellant objected to the introduction of co-defendant Johnson's out-of-court statement even though it was to be introduced only as to co-defendant Johnson. The court, prosecutor and Appellant all agreed that the introduction of the statement as

worded in the FBI report would violate the *Aranda/Bruton*[289] rule. [RT, 19:4222-4, 4384]

The prosecutor proposed redacting the portions of the statement that contained Appellant's name, and substituting therein the words "someone" and "that person":

> DDA: Mr. Adams will testify that Mr. Johnson told Mr. Adams that he knew about the shooting; that he sent someone on a mission to get the 2 crabs, the 2 crips; that he provided that person a gun and a ski mask and then said, "That's 2 more crips gone." [RT, 19:4223 (Emphasis added)]

The court agreed with the prosecutor and responded:

> Crt: It would seem that the statement could be sufficiently edited to remove reference to Mr. Allen and still get the import of the statement across, to wit that Mr. Allen [*sic*] purportedly said to Mr. Adams that he, Johnson, had sent somebody out to do this killing. [RT, 19:4224 (Emphasis added.)]

Appellant continued to object to the proposed redaction and cited the then-recent California Supreme Court case, *People v. Fletcher*, *supra*, in support of his position that any reference by Johnson to another individual within the statement itself that could be linked reasonably to Appellant by other trial evidence must also be removed. [RT, 19:4224-4225]

At this point counsel for co-defendant Johnson argued that he needed to make sure the proposed redaction to Johnson's statement was done "without prejudice" to co-defendant Johnson (See *People v. Ervin* (2000) 22 Cal.4th 48, 87; *People v. Douglas* (1991) 234 Cal.App.3d 273, 282-7; *People v. Matola* (1968) 259 Cal.App.2d 686.). He renewed the severance motion if his client's rights were not adequately safeguarded by the court's ruling. [RT, 19:4226-9] The trial court

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[289] *People v. Aranda, supra*, 65 Cal.2d 518; *United States v. Bruton, supra*, 391 U.S. 123 .

took the matter under submission so that it could read the *Fletcher case*. [RT, 19:4229-30]

Later that day, the court had further discussion with counsel regarding the proposed redaction of Johnson's statement to Adams. Appellant's counsel again argued that the rationale of *Fletcher* should prohibit using the words "somebody", "someone" or "that person" in lieu of Appellant's name or moniker. [RT, 19:4384-94] The court finally overruled objections by both defense counsel and stated Adams' testimony as to what Johnson had told him should be redacted to "the case involved a mission for the gang; that the killing involved a mission for the gang; and that Johnson provided the gun used in the killing." [RT, 19:4391]

2. The "Redacted Statement" that was presented to the jury.

The prosecution then called Donnie Ray Adams to testify. The relevant portion of Adams' testimony follows:

> DDA: Did Mr. Johnson tell you what happened?
> DRA[290]: Yeah. He said someone got shot up there off Central.
> DDA: Did you ask Mr. Johnson who it was that got shot?
> DRA: Yes.
> DDA: And what did Mr. Johnson tell you about who it was that got shot?
> DRA: Some guy named "BaaBaa", and someone else.
> DDA: Now, did Mr. Johnson tell you that "BaaBaa" got shot?
> DRA: That's who he thought it was, I guess.[291]
> DDA: Now when you talked to Mr. Johnson both times, did Mr. Johnson both times tell you that the killing involved a mission?
> DRA: Yes.
> DDA: Did Mr. Johnson tell you that he had given – he had provided a gun and a ski mask?
> DRA: Yes. [RT, 19:4414 (Emphasis added)]

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[290] "DRA" is Donnie Ray Adams.

[291] On cross-examination, Adams looked at the FBI report that contained his statement, then admitted there was nothing in that report regarding Johnson referring to a "BaBa." [RT, 19:4434]

On cross-examination by counsel for co-defendant Johnson, attempts were made to impeach the credibility of Adams by a) confronting Adams with prior statements he had made to the FBI agents that were inconsistent with his testimony, and b) establishing that Adams' testimony regarding co-defendant Johnson's alleged admission contradicted the testimony of witnesses Carl Connor and Freddie Jelks.[292] This was done to ensure that co-defendant Johnson was not unfairly prejudiced by the introduction of a redacted version of what he allegedly had told Adams.[293]

> RL[294]: Did you tell the agents that Mr. Johnson told you that the person who did the killing wore a ski mask?
> DRA: Yes.[295]
> RL: Did you tell the agents that Mr. Johnson told you that the person who did the shooting went and got his own gun?
> DRA: No. I didn't say whose gun he got.[296] [RT, 19:4433(Emphasis added)]
> . . .

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[292] Counsel for co-defendant Johnson was entitled to cross-examine Adams regarding Johnson's alleged statement and to bring out information that would impeach Adams or undermine the prosecution's case. Here, references to a "ski mask" were totally new. No witness testified the shooter wore a ski mask. The reference to a ski mask also contradicted Freddie Jelks' version of what was said. Further, counsel for co-defendant Johnson was entitled to confront Adams as to his statement to the FBI agents that co-defendant Johnson told the shooter to go get his own gun to do the shooting. That prior statement by Adams contradicted Freddie Jelks' version, also.

[293] See *People v. Ervin* (2000) 22 Cal.4th 48, 87; *People v. Douglas* (1991) 234 Cal.App.3d 273, 282-7; *People v. Matola* (1968) 259 Cal.App.2d 686

[294] "RL" is Richard Lasting, co-defendant Johnson's trial attorney..

[295] This question and answer were relevant to impeach Adams because no other witness, including Jelks, Connor or other witnesses to the shootings, said anything about a "ski mask" being worn by the shooter, or even that it was discussed. In effect, co-defendant Johnson demonstrated Adams' testimony may not have been accurate nor truthful because of this "added" detail that was not correct.

[296] Again, this question and answer were relevant to impeach Adams because Jelks claimed Johnson went into the backyard, obtained the gun, returned to the front of his house and gave the gun to Appellant, the alleged shooter. Adams' statement as to what Johnson allegedly told him was inconsistent with, and contradicted, Jelks' testimony regarding how the shooter obtained the gun.

RL: Did you tell the officers that interviewed you that what Mr. Johnson had told you was that he had sent the shooter to go get a gun and then go do the shooting?
DRA: Yes.[297] [RT, 19:4434 (Emphasis added)]

On re-direct examination, the prosecutor attempted to rehabilitate Adams' credibility and further incriminate Johnson. In so doing, the prosecutor asked a leading question of Adams that, combined with Adams' answers, directly referred to a second individual who was involved in the shootings, and who could readily and reasonably be linked to Appellant; that is, Adams testified that Johnson told him "he had given *the shooter* a gun . . . for his mission":

DDA: Did you tell the agents back in February that Evil told you that he had given the shooter a gun and a ski mask for his mission?
DRA: Yes. [RT, 19:4438-4439 (Emphasis added.)]

Note that the prosecutor, in her zeal to rehabilitate Adams' credibility, asked the very question and obtained the very answer that the court, the prosecutor and defense counsel had all previously agreed would be in violation of the *Aranda/Bruton* rule if presented in that manner to the jury; that is, the statement in the FBI report was, "'Evil' told Adams that he had given 'Fat Rat' a gun and a ski mask for his mission." The prosecutor's leading question to which Adams answered "yes" literally quoted the FBI report, but simply substituted "the shooter" in place of "Fat Rat." (See RT, 19:4223]

Adams also testified that Johnson told him, "That's two crabs gone." Adams further explained that a "crab" was a derogatory name that a "Blood" would use when referring to a "Crip", and that Johnson was referring to the two shooting victims when he made that statement. [RT, 19:4415-6]

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[297] Again, this question and answer were relevant to impeach the credibility of Adams and/or Jelks because it contradicted Jelks' testimony regarding the same event.

The jury was now aware that co-defendant Johnson initially told Adams that he (Johnson) gave the gun to the shooter for a mission in which two Crips were killed. Based on this testimony, it was obvious to the jury that co-defendant Johnson was referring to the Loggins/Beroit murders when he made these statements to Adams, the same murders for which Appellant was being tried.

3. The Limiting Instruction:

In an effort to minimize the prejudice Appellant's confrontation rights, the trial court provided the jury with the following "limiting instruction":

> CRT: Ladies and gentlemen, before the witness [Adams] is excused, one admonition. The testimony from this gentleman having to do with statements to Mr. Johnson are admissible as to Mr. Johnson only. They are not as to Mr. Allen. Everybody clear on that?
>
> (The jurors answered in the affirmative.)
>
> CRT: The testimony of this witness [Adams] is admissible as to each defendant except for those portions of his testimony that dealt with statements that he said related – that he said – things that he said Mr. Johnson told him. All of those things, that is related to Johnson only and cannot be considered at all as to Mr. Allen. All right?
>
> (The jurors answered in the affirmative.)
>
> CRT: Everyone clear?
>
> (The jurors answered in the affirmative.)
>
> CRT: No. 5, are you clear?
> J#5: Yes.
> CRT: I thought you had your head cocked looking at me.
> J#5: Just tired.
>
> (Laughter) [RT, 19:4440-2]

Appellant asserts it would appear rather *unlikely* that the jury actually understood the meaning of this instruction as the trial court phrased it. As the trial

judge gave the limiting instruction, he apparently misspoke. He instructed the jury that "the statements to Mr. Johnson are admissible as to Mr. Johnson only." Witness Adams never testified about statements that were made to Mr. Johnson; hence, that portion of the limiting instruction would have made no sense and would only have confused the jury. The trial court's attempt thereafter to clarify what he meant was also somewhat ambiguous and confusing. Even though the jurors claimed they were "clear" about the meaning of the instruction, it is not at all apparent that their response was accurate. This ambiguity as to whether the jury understood the meaning of the limiting instruction became even more significant, however, when the prosecutor gave her closing argument and further confused the jury as to what evidence they could consider, and what evidence they could not consider, as to Appellant.

Further, Appellant asserts it was highly unlikely that the jury actually paid strict heed to this rather confusing limiting instruction, *even if* they had correctly understood it. Justice Kennard, in authoring the *Fletcher* opinion for this Court, cited *People v. Aranda* and *Richardson v. Marsh* to reiterate in rather clear terms the reasons why limiting instructions do not always "cure the error." First, they often require jurors to perform a "mental gymnastic that [is] beyond their powers":

> In *Aranda*, however, we acknowledged that this procedure [providing a limiting instruction to the jury] had been criticized on the ground that it required jurors to perform a "mental gymnastic" that was beyond their powers (citation), and we concluded that jurors "should not be permitted to be influenced by evidence against a defendant that as a matter of law they cannot consider but as a matter of fact they cannot disregard." (*People v. Fletcher, supra*, at p. 460, citing *People v. Aranda, supra*, at pp.525, 528.)

Further, limiting instructions are <u>not</u> based on the "absolute certitude" that jurors are willing and able to follow the dictates of the instruction. Justice Kennard reasoned further:

> In conclusion, the high court observed: "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less

in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. [*People v. Fletcher, supra*, 13 Cal.4th at p. 464, citing *Richardson v. Marsh, supra,* 481 U.S. 200, 211.]

Appellant asserts that in the context of the facts of this case, the court's limiting instruction served little or no purpose.

4. The Evidence that "Contextually Linked" Appellant to the 3rd Party Referred to in the Redacted Statement was "sufficiently direct" and "powerfully incriminating."

In *Fletcher*, the Court explained that redacting the non-declarant's name (i.e., "Fat Rat") with a similar neutral, non-identifying term (i.e., "the shooter") will NOT always adequately safeguard the non-declarant's confrontation rights if

> . . . the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the non-declarant is the person so designated in the confession and the confession is "powerfully incriminating" on the issue of the non-declarant's guilt. (*People v. Fletcher, supra*, 13 Cal.4th at p. 467.)

Appellant asserts the "only" reasonable inference the jury could possibly have drawn was that Johnson was referring to Appellant when he told Adams he gave the shooter the gun for a mission in which two Crips gang members were killed.

Additionally, Appellant asserts the redacted version of Johnson's statement to Adams was more direct, substantial and forceful in incriminating Appellant than other California cases in which the courts have held the accused's confrontation rights were violated; that is, the "contextual linkage" evidence in the instant case that connected Appellant with "the shooter" in Johnson's statement was more direct, substantial and forceful than other California cases in which the courts have

held the accused's confrontation rights were violated. Appellant cites but three (3) cases as examples:

a. Example #1: *People v. Fletcher* (1996) 13 Cal.4th 451

In *People v. Fletcher*, *supra*, co-defendant Fletcher's redacted confession to witness Kramer was introduced wherein Kramer testified, according to the opinion:

> "[Fletcher] told me that he and a friend were on a freeway ramp and had a cab or a vehicle -- like there was a cab or something there, and they were using jumper cables or some kind of ruse to get people to stop," and "that they were doing that so when people would stop that they could rob them, take their money." (*People v. Fletcher, supra*, 13 Cal.4th at p. 459; Emphasis added.)

The trial court gave a limiting instruction to the jury that co-defendant Fletcher's confession was admissible only against Fletcher, but was not admissible against the non-declarant/defendant Moord. (*People v. Fletcher, supra*, 13 Cal.4th at p. 459.)

The evidence that provided the "linkage" between the "other person" referred to in co-defendant Fletcher's redacted confession and defendant Moord was the testimony of a witness who knew both individuals and who related that moments after the fatal shooting, both co-defendant Fletcher and defendant Moord came to her house together and remained for a period of time. Other witnesses stated there were two people who were involved in the killing. Hence, the jury in *Fletcher* could reasonably infer that "they" and "he and a friend" in co-defendant Fletcher's confession referred to defendant Moord as well as the confessing co-defendant Fletcher. This "linkage" between the "other person" in co-defendant Fletcher's redacted confession and defendant Moord was "sufficiently direct" for a jury to infer Fletcher was referring to Moord when he spoke of the "other person."[298]

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[298] In *Fletcher*, the identification of Moord as the other person in the redacted statement was "sufficiently direct." Since the witness who "linked" Moord to

Appellant asserts the evidence that "linked" Moord to the "other person" referred to by the confessing co-defendant in *Fletcher* is less direct, less substantial and less forceful than the "linkage" evidence in the instant case.

b. Example #2: *People v. Archer* (2000) 82 Cal.App.4th 1830

In *People v. Archer* (2000) 82 Cal.App.4th 1830, co-defendant Baserga's out-of-court statement was redacted to delete any mention of defendant Archer by name, but defendant Archer was "unmistakably implicated in several aspects of the statement." (*People v. Archer, supra*, at p. 1389.) The victim, according to co-defendant Baserga's statement, was to be taken to a particular residential address where he (the victim) was to be "taken by surprise." Co-defendant Baserga stated he knew the victim was being set up when he was taken to that residence, and that the stabbing of the victim began immediately upon arriving at that residence. That address was proven through other evidence to be the residence of defendant Archer. The victim was stabbed more than 10 times, and most of the stab wounds were inflicted by someone other than co-defendant Baserga. The vehicle that was used to transport the victim's body from defendant Archer's residence was described by co-defendant Baserga, and it was established by other independent evidence that that vehicle was owned by defendant Archer. The remainder of co-defendant Baserga's statement contained various deletions where a person's name would have fit conveniently.

The *Archer* court then explained that the redacted statement violated the Sixth Amendment confrontation rights of defendant Archer:

> While [defendant Archer's] name is not mentioned in the statement, the existence of another participant is obvious from the

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Fletcher was credible, the impact of the redacted statement's reference to Moord as the other person was apparently not "sufficiently substantial" to violate Moord's confrontation rights. However, because the inference from the redacted statement also helped establish Moord's "intent" as an aider and abettor, this further inference was deemed "sufficiently substantial" or "forceful" that, taken together with the identification of Moord, it amounted to a violation of Moord's confrontation right.

> statement itself. This distinguishes our case from *Richardson.* Moreover, [defendant Archer's] home address and car license plate number figure prominently in the description of the commission of the crime. A juror who wonders who the other participant is "need only lift his eyes to [Archer], sitting at counsel table, to find what will seem the obvious answer, ..." (*Gray v. Maryland*, *supra*, 523 U.S. at p. 193.) The statement, even with redaction, facially incriminates [Archer]. "[T]he average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the non-declarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the non-declarant's guilt. (*People v. Fletcher*, *supra,* 13 Cal.4th at p. 467.) Admission of the statement in this form was a violation of [Archer's] Sixth Amendment right of confrontation. (*People v. Archer*, *supra*, 82 Cal.App.4th at 1390.)

c. Example #3: *People v. Jacobs* (1987) 195 Cal.App.3d 1636

In *People v. Jacobs* (1987) 195 Cal.App.3d 1636, a cellmate of the declarant/co-defendant Owens testified that Owens admitted involvement in the murder, and also stated "the 'other guy' had been seen by a man on the night of the homicide. A witness named Debois testified he observed two men exit the murder victim's home that night. Debois selected Jacob's photograph from other photos as one of the two men ("the other guy") who exited the home.

Another cellmate of declarant/co-defendant Owens testified and related several incriminating statements made by Owens. The statements were redacted to eliminate "all reference to defendant Jacobs by name." On each occasion, "'the other guy' or a similar phrase was substituted whenever Jacob's name would have been mentioned." [*People v. Jacobs, supra*, 195 Cal.App.3d at 1646-1647.]

On appeal, the government did not argue the redactions were sufficient to avoid the *Bruton* issue. The *Jacobs* court wrote:

> The omission is understandable; there was error in the redaction. Owen's confessions were redacted to delete all identifying references to Jacobs. But the editing out of statements of identification is not always enough, and was not sufficient in this case. (*People v. Jacobs, supra*, 195 Cal.App.3d at p. 1651)

The Jacobs court held it violated the *Bruton* rule, in part, because the redacted statement "corroborated Debois's identification evidence, a contested issue at trial." [*People v. Jacobs*, *supra*, 195 Cal.App.3d at p. 1652.][299]

d. <u>The evidence in this case that "contextually linked" Appellant with the "shooter" to whom Johnson told Adams he gave the gun was "sufficiently direct" and "powerfully incriminating"</u>:

Donnie Ray Adams testified that co-defendant Johnson admitted to him "that he [Johnson] had given the shooter a gun . . . for his mission", and the shooter's mission resulted in "two crabs gone." [RT, 19:4415-6, 4438-9]

The "linkage" evidence that was introduced in the "context" of the case that directly connected Appellant with "the shooter" was:

- Freddie Jelks testimony that he actually *saw* Johnson *give* the gun to Appellant for him to use on "his mission" [RT, 16: 3652-3, 3655, 17:3741 ("gave gun"); RT, 16:3624, 3626 ("mission"); and then Appellant later admitting he had shot "both crips" RT, 17:3700 ("2 crabs gone")];
- Carl Connor's initial statement to the police, introduced as a prior inconsistent statement at trial, in which he told the detectives that he observed Appellant walk to Johnson's house, obtain the gun, walk back and shoot "two crips", then return to Johnson's house with the gun [RT, 15:3349; CT Supp IV, 2:377]; and
- Marcellus James' testimony in which Appellant admitted to him that he had shot and killed "both crips." [RT, 18:4041-3, 4163]

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[299] As in the instant case, defendant Jacobs initially objected to admissibility of the redacted statement. Although he did not renew the objection when the redacted statement was admitted, the court held under those circumstances, the failure to renew the objection did not constitute a waiver of that issue on appeal. [*People v. Jacobs, supra*, 195 Cal.App.3d at p. 1652. See also *People v. Smith* (1970) 4 Cal.App.3d 41, 50 [counsel's silence when evidence presented to jury, after having previously objected, was not a waiver].)

Could "the average juror, viewing [Johnson's redacted confession] in light of the other evidence introduced at trial [i.e., the testimony of Jelks, Connor and James] . . . avoid drawing the inference that [Appellant] was the person so designated in [Johnson's] confession"? (See the language in *People v. Fletcher, supra*, 13 Cal.4th at p. 467. Appellant asserts a juror would have to have completely abandoned his/her common sense if he/she had *not* drawn that inference! The "linkage" was "sufficiently direct." As this Court acknowledged when it quoted *Richardson v. Marsh:*

> . . . [W]here any reasonable juror must inevitably perceive that the defendant on trial is the person designated by pronoun or neutral term in the co-defendant's confession, an assumption that a limiting instruction could "be successful in dissuading the jury from entering onto the path of inference (citation) would be little short of absurd. (*People v. Fletcher, supra*, 13 Cal.4th at p. 466)

Johnson's redacted confession was also "powerfully incriminating on the issue of the defendant's guilt." It was "substantial" and "forceful." It not only identified Appellant as the "triggerman" in a double murder, but it also corroborated the key prosecution witnesses whose credibility was vigorously disputed and upon which the jury's verdicts depended.

5. <u>The *Bruton/Fletcher* Error Was Prejudicial</u>:

Reversal is required in the instant case unless the reviewing court concludes that the *Bruton/Fletcher* error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Anderson, supra*, 43 Cal.3d at p. 1128). Appellant maintains that the *Bruton/Fletcher* error was prejudicial beyond a reasonable doubt for three different reasons:

a. <u>Reason #1: The *Bruton/Fletcher* error was prejudicial to Appellant's right to a fair trial because a) the properly admitted evidence of Appellant's guilt was not overwhelming, and b) the evidence provided by the co-defendant's extrajudicial statement was not cumulative of other evidence.</u>

This Court in *People v. Anderson, supra*, provided guidance in determining if the *Bruton/Fletcher* error was prejudicial or harmless beyond a reasonable doubt:

> [W]e must determine on the basis of "our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury," [citation], whether the co-defendant's admissions were sufficiently prejudicial to defendant as to require reversal. (Citations.) (*People v. Anderson*, *supra*, 43 Cal.3d at p. 1128.)

After reviewing the cases that addressed this issue, this Court explained further:

> In each of the cases in which the error was held harmless, two elements were present: (1) the properly admitted evidence was overwhelming; and (2) the evidence provided by the incriminating extrajudicial statement was cumulative of other direct evidence presented either through eyewitness testimony (citation), or out of the defendant's own mouth (citations) or both. (citations) In contrast, in *In re Sears*, *supra*, 71 Cal.2d at pages 383-388, in which the error was not held harmless, neither element was present. (*People v. Anderson*, *supra*, 43 Cal.3d at pp. 1128-9; Emphasis added.)

This Court thereafter wrote:

> From these cases, therefore, the following rule may be derived: If the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless. (*People v. Anderson*, *supra*, 43 Cal.3d at pp. 1128-1129.)

Appellant asserts that in determining if the *Bruton/Fletcher* error in the instant case was prejudicial beyond a reasonable doubt or merely "harmless", the Court must determine:

> First, was the "properly admitted" evidence that Appellant was the shooter "overwhelming"?

The credibility of Carl Connor, Freddie Jelks and Marcellus James was highly suspect. Each was significantly impeached. Each had a very strong motive

to tell the prosecution what he thought the prosecution wanted to hear, regardless of whether it was true or not. In fact, the prosecution presented no *independent* evidence that *corroborated* the fact that any of the three witnesses was even present at the time he said he was present, much less that their identification of Appellant as the shooter was true. The *only* corroboration for their respective testimony identifying Appellant as the shooter came from each other.

Carl Connor's testimony that Appellant was the shooter was not properly admitted. Appellant respectfully requests this Court incorporate herein Arguments I and III in Appellant's Opening Brief.

Appellant asserts that Carl Connor was not present at the scene when victims Loggins and Beroit were murdered. His testimony, as well as his prior statement to the police, was therefore false and not based on his personal knowledge. The prosecution was either aware of this, or with any reasonable effort, would have been aware of it. Connor's entire testimony should have been excluded or stricken. (See Evid. Code, §702 [a witness' testimony is inadmissible unless he has personal knowledge of the matter]; Evid. Code, §800 [a witness' lay opinion must be based on factors the witness rationally perceived]) Carl Connor should never have been allowed to testify.[300]

Appellant also asserts that those portions of Detective Sanchez's testimony identified in Argument III that pertained to Connor's credibility were not properly admitted and should be excluded from consideration.

Freddie Jelks' testimony that Appellant was the shooter was not properly admitted. Appellant respectfully requests this Court incorporate herein Arguments IV, VI, VII, VIII and IX in Appellant's Opening Brief.

Because Appellant's right to confront and cross-examine Jelks was improperly limited by the trial court, his entire testimony was not properly

[300] Appellant acknowledges that trial counsel did not object to Connor's testimony on the basis of "lack of personal knowledge."

admitted, and it should have been stricken. (See Argument IV in Appellant's Opening Brief)

Freddie Jelks' testimony was the product of ongoing police coercion, it was inherently untrustworthy, and it should have been excluded from evidence, or stricken, on this basis. (See Argument VI in Appellant's Opening Brief.)

Additionally, evidence presented by Detective McCartin that improperly bolstered Jelks' credibility (Argument IX in Appellant's Opening Brief) was not properly admitted, and it should have been stricken.

Marcellus James' testimony that Appellant was the shooter was not properly admitted and should have been stricken. Appellant respectfully requests this Court incorporate herein Argument X in Appellant's Opening Brief.

Second, was co-defendant Johnson's out-of-court statement (through witness Adams) "merely cumulative" of "other direct evidence" that established Appellant was the shooter.

If the prosecution's evidence that Appellant was the shooter had been established by credible witnesses, if physical evidence (i.e., fingerprints, DNA, clothing, a vehicle, etc.) had been introduced to link Appellant with the shooter, or if Appellant's confession had been recorded in some manner, then Johnson's redacted statement that linked Appellant to "the shooter" would have been "merely cumulative" to such "other direct evidence".

Appellant respectfully asserts, however, that such was *not* the situation in this case. If anything, Johnson's redacted statement that linked Appellant to "the shooter" actually had the opposite effect on the jury. It was used by the prosecution to *corroborate* the credibility of the witnesses whose testimony was the crux of the prosecution's case. After hearing Adams testify regarding Johnson's redacted statement, the jury was aware that co-defendant Johnson himself had admitted his involvement and thereby had "corroborated" the identification testimony of Connor and Jelks.

b. Reason #2: The *Bruton/Fletcher* error was prejudicial to Appellant's right to a fair trial because of the unique nature and circumstances of this case that practically guaranteed the *Bruton/Fletcher* error was prejudicial.

Prior to jury deliberations, the jury was instructed by the court to consider the evidence against each defendant separately. As the jury deliberated the evidence as it applied to co-defendant Johnson, the credibility of witnesses Connor and Jelks would have been discussed. If the jury found that either, or both, of these witnesses testified truthfully as to Johnson's involvement, the jury would have found Johnson guilty of both murders, found the enhancement allegations to be true, and found the special circumstance of multiple murders to be true. One of the keys in determining whether Connor and Jelks testified truthfully regarding Johnson's involvement, according to the prosecutor in her closing argument, was to determine if other evidence corroborated their testimony regarding Johnson's involvement.

According to Adam's testimony, co-defendant Johnson himself admitted his involvement in the murders, and he did so in considerable detail. Johnson told Adams that two people were murdered, the victims were "crabs" or Crip gang members, they had been shot, the killings occurred off Central Avenue, the killings involved a "mission", another person had been the shooter, and he had provided the gun to the shooter. [RT, 19:4414-16, 4433-4, 4438-9]

The jury was aware that Freddie Jelks had previously testified to *each* of the above details that Johnson admitted to Adams. The jury was also aware that Connor had previously testified that two Crip gang members had been murdered, they were sitting in a car on Central Avenue at the time, they had been shot to death, the shooter was someone other than Johnson, the shooter had walked to Johnson's house where he obtained the gun, and the shooter then returned to Johnson's house with the gun.

Johnson's confession to Adams was not only incriminating to Johnson, but it also provided *strong* "corroboration" of Jelks' and Connor's testimony. If the jury entertained any doubts about the credibility of Jelks and Connor, those doubts would have been resolved by Johnson's own confession. His confession to Adams, if believed, would have had a powerful, persuasive effect on the jury as they deliberated Johnson's involvement in the two murders, not just because of its incriminating nature, but because it would have helped resolve the issue of whether Jelks and Connor were truthful witnesses. Johnson's confession, therefore, provided the jury with corroborating evidence that Connor and Jelks were truthful when they testified about co-defendant Johnson's involvement in the murders.

Since the corroborative nature of Johnson's confession had a direct, substantial and forceful incriminating impact on the jury as they considered Johnson's guilt, the impact of the *same* evidence (Johnson's admission) on the *same* jury during the *same* deliberations as to the *same* issue (the credibility of Connor and Jelks) as the jury deliberated Appellant's guilt would likewise have been direct, substantial and forceful. Appellant asserts this would have occurred regardless of the limiting instruction given to the jury.

Appellant asserts it would have been practically *impossible* for the jury to *ignore* the impact of Johnson's redacted confession on the credibility of Connor and Jelks as they deliberated Appellant's guilt. For example, a) if the only evidence the prosecution presented in this case that identified the killers was the testimony of Connor and Jelks, and b) if the jury was convinced only by a preponderance of evidence that Appellant and Johnson were the killers, then the jury would acquit both Appellant and Johnson of the murders. However, if the jury was also presented the redacted confession of Johnson through the testimony of Adams such that the jury was now convinced Connor and Jelks testified truthfully and the jury was now convinced beyond a reasonable doubt that Johnson was guilty, would that same jury, after being given an appropriate limiting

instruction, convict Johnson, yet simultaneously acquit Appellant because they were not convinced sufficiently that Connor and Jelks were credible? That would be highly doubtful. Once the jury determined that Connor and Jelks were credible (based in part on the corroborative nature of Johnson's confession) as they deliberated Johnson's liability, the jury would have found Connor and Jelks to be equally credible as they deliberated Appellant's liability. To expect a jury to convict Johnson and simultaneously acquit Appellant in this example "would be little short of absurd." (*People v. Fletcher, supra*, 13 Cal.4th at p. 466.) This is an example of the problem created by a trial court when it:

> . . .required jurors to perform a mental gymnastic that was beyond their powers, and we concluded that jurors should not be permitted to be influenced by evidence against a defendant that as a matter of law they cannot consider but as a matter of fact they cannot disregard. [*People v. Fletcher, supra*, 13 Cal.4th at p. 460 (Quotation marks and citations omitted.)]

The rational and reasonable inference from this evidence was that if Connor and Jelks had testified truthfully regarding co-defendant Johnson's involvement in the murders, they also probably testified truthfully as to Appellant's involvement in the murders. After all, the jury would have surmised, why would Connor and Jelks lie about Appellant's involvement, yet be truthful about Johnson's involvement?

c. Reason #3: The *Bruton/Fletcher* error was prejudicial to Appellant's right to a fair trial because the prosecutor, in her closing argument, blurred the distinction as to what Adams' testimony could be considered for, thereby exacerbating the limited admissibility problem.

Throughout her closing argument, the prosecutor "lumped together" the testimony of all the witnesses and explained to the jury how the testimony of all the witnesses was sufficient to convict both Appellant and co-defendant Johnson of the murders, the enhancements and the special circumstances. At no time did the prosecutor during her closing argument tell the jury that Adams' testimony, as it

related to co-defendant Johnson's admission, could *only* be considered as to co-defendant Johnson. At no time did the prosecutor tell the jury that they could *not* consider that portion of Adams' testimony as to Appellant.[301] Appellant asserts this omission was significant a) because of the ambiguous limiting instruction previously given to the jury by the trial court and b) because the prosecutor used Johnson's confession to corroborate the testimony of Jelks and Connor, thereby enhancing the credibility of Jelks and Connor as to both Appellant and Johnson.

The prosecutor initially explained to the jury the law regarding murder. After this, she described the law regarding parties to a crime. (RT, 19:5101-5109) She then began applying the law to the evidence that had been presented during trial as it pertained to both Appellant and Johnson. She reminded the jury that Johnson and several of his homeboys were standing together in front of his house just as Loggins and Beroit were sitting in the white Toyota on Central Avenue. She reminded the jurors that Johnson asked who wanted to go "serve" them or who wanted "to go on the mission" to execute or kill them. [RT, 19:5111]

The prosecutor continued:

> DDA: So Mr. Johnson went into his backyard, came back with a weapon, the uzi, and provides it to Mr. Allen. (RT, 19:5112)
>
> . . .
>
> Mr. Johnson intended that the mission be conducted, "That's 2 more crabs gone," he said.
>
> . . .
>
> He [Appellant] made a choice, and he killed. And he [Appellant] was aided in that killing by the person that

[301] The only comment by the prosecutor in her closing argument that even approached the issue of limiting Johnson's admission (made to witness Adams) to Johnson himself was: "The intention to kill was illustrated by witnesses' statements. And one of the things that you've had to learn is this particular setting is what it is that you can and can't consider. Okay? You heard a lot of evidence. You heard a lot of stuff that may not seem to have much to do with anything. But one of the things I would ask you to do is to consider this: When you started this trial you promised that you would keep an open mind. With respect to the witnesses who came and testified, each one of them has a slightly different story, in terms of their life history. [RT, 19:5114-5115 (Emphasis added)]

> assisted him, facilitated him, and gave him the weapon to use. (RT, 19:5114)

The prosecutor did not identify the witness(es) who testified to the facts that formed the basis for the above portion of the prosecutor's closing argument. However, the jurors knew who the sources of those facts were. Freddie Jelks was the only *percipient* witness at Johnson's house who testified to those facts. And the jurors recalled Donnie Ray Adams' testimony regarding co-defendant Johnson's confession also included many of those same facts. In other words, two witnesses testified to the facts that formed the basis for the above closing argument by the prosecutor; Freddie Jelks and Johnson's confession provided through witness Donnie Ray Adams.

It was proper for the jury to consider Jelks' testimony, as well as Johnson's confession, as they evaluated these facts while deliberating co-defendant Johnson's guilt. However, it was *not* proper for the jury to consider Johnson's confession as they evaluated these same facts while deliberating Appellant's guilt. The jury was *supposed to be* limited to Jelks' testimony to establish these facts. The prosecutor, however, never differentiated between Appellant and Johnson as she made this argument. She "lumped together" the evidence of guilt as to both Appellant and Johnson. Even if the jurors could recall and understand the court's limiting instruction regarding use of Johnson's redacted confession, it would have been extremely confusing and difficult for the jury to follow that limiting instruction when the prosecutor's argument did not.

The prosecutor *never* clarified to the jury the limitation that had been placed on the use of Johnson's confession. In fact, the prosecutor's argument ignored the court-imposed limitation, as she continued to "lump together" the testimony of the witnesses as to both Appellant and Johnson. As to both defendants, she argued why the jury should believe the various prosecution witnesses, even though each came "with baggage" as far as their credibility was concerned. (RT, 19:5115) She then "urged" the jury to "listen in [their] hearts and

think back in [their] minds" to the witnesses they had seen and to the testimony they had heard, and to

> . . . consider these kinds of factors: What the person's demeanor was. What the character and quality of their testimony was. Whether they had a reason to express what they expressed. Whether the mere fact that they had a criminal history, or that they had a case pending would direct them to tell facts which are corroborated by the statements of other witnesses.
>
> You need to look at each witness and not only think about the truth of what they say, but look for other sources of that same information. It's called corroboration.
>
> So, you look to see whether or not, for instance, a given fact is corroborated either by another witness or by the physical evidence.
>
> In this particular case there are plenty of circumstances which corroborate the testimony of the witnesses. [RT,19:5116 (Emphasis added)]

The prosecutor never distinguished that part of Adams' testimony regarding Johnson's confession from the remaining testimony of the other witnesses. She never told the jury that Johnson's confession could be used to corroborate the testimony of other witnesses, but only when the jury was deliberating Johnson's guilt. She simply included Johnson's confession with all of the other testimony as she discussed why both Appellant and Johnson were guilty.

At one point in closing argument, the prosecutor discussed the testimony and credibility of each witness. (RT, 19:5123-5131) Concerning Jelks' credibility, she argued:

> Why should you believe what Mr. Jelks said? You should believe it because it makes sense, because it's corroborated, ... ([RT, 19:5124 (Emphasis added)]

The prosecutor immediately thereafter told the jury that Jelks

> . . . told you about a scenario which was consistent with other information available from other sources in this case. He [Jelks] told you that it was Johnson's idea. He [Jelks] told you that it was Johnson who asked who wanted to serve, and he [Jelks] told you that

> it was Michael Allen who agreed to go do the mission. [RT, 19:5125 (Emphasis added)]

The only "other source" that corroborated Jelks' testimony that the shooting "was Johnson's idea", or that "it was Johnson who asked who wanted to serve . . . the mission" was the redacted confession of Johnson that Adams testified to. (RT, 19:4414-16, 4433-4, 4438-9) Yet the prosecutor was arguing at this point why the jury should believe the testimony of Jelks as to both Appellant and co-defendant Johnson.

While still addressing the evidence that pointed to the guilt of both defendants, the prosecutor concluded her discussion of Jelks by reiterating the theme of corroboration:

> And the remarkable thing is what he [Jelks] tells you is corroborated from other sources,"
> . . .
> The reason that what Freddie Jelks says rings true is because it is. Because it's been corroborated by a variety of different sources. [RT, 19:5130 (Emphasis added)]

Johnson's redacted confession was one of those "other sources", one of the "variety of different sources" that corroborated Jelks' testimony. Once again, however, the prosecutor "lumped together" Adams' testimony regarding Johnson's admission with all other witnesses. That would have been proper if she were discussing the evidence as it pertained exclusively to Johnson.

When the prosecutor subsequently argued the credibility of Donnie Ray Adams, she clearly erred as that evidence related to Appellant. She was, once again, discussing how Adams' testimony pointed to the guilt of both defendants when she included in her closing argument the following:

> Donnie Ray Adams. Donnie Ray Adams was interviewed on January 10th, 1997 by FBI agents. . . . The police get information from him on a variety of issues and they ask him specifically about this case and he says I remember the case. I heard about it. I went over to find out what happened. And where did he go? He parked his car in Wadsworth and walked over to Mr. Johnson's house. And

> when he got there, the person he saw was Mr. Johnson. So he asked Mr. Johnson what happened. And he [Johnson] said two crabs got killed and he [Johnson] said there was a mission and he [Johnson] said he provided a gun.[RT, 19:5138 (Emphasis added)]

The underlined portion of the above closing argument by the prosecutor was based exclusively on the contents of the redacted statement by Johnson that was inadmissible as to Appellant. Even here, the prosecutor did not tell the jury that Johnson's statement to Adams was to be considered only as to Johnson. By not distinguishing what evidence was admissible against Appellant and what evidence was not admissible against Appellant, the prosecutor led the jury to believe it could consider Johnson's redacted confession as corroboration of Jelks as the jury deliberated the guilt of Appellant. [302]

The prosecutor compounded the error later in her closing argument. In urging the jury to find both Appellant and Johnson guilty, she implored the jury to believe the testimony of Adams because his testimony was corroborated by other witnesses. And, of course, the opposite was also true. The prosecutor inferentially argued the jury should find Jelks and Connor credible, in spite of the impeachment evidence, because their testimony was corroborated, in part, by Johnson's redacted statement to Adams. The prosecutor told the jury:

> He [Adams] didn't elaborate; he left it simple. You had a chance to listen to him and to see him. And what's remarkable about what Donnie Ray said in Shreveport in January of 1997 to FBI agents is it is corroborated by a variety of other sources that describe what happened, when it happened, and how it happened. How would Donnie Ray Adams know that if he hadn't gotten it from Mr. Johnson himself? [RT, 19:5139 (Emphasis added)]

As the prosecutor concluded her closing argument, she commented:

> Again, I'm not going to belabor the evidence of intent. It is shown over and over and over again. Mr. Johnson created a game plan. He

[302] At a minimum, the prosecutor's closing argument would have thoroughly confused those jurors who could recall and understand the court's limiting instruction.

> identified the victims, he solicited somebody to serve. He provided a gun. He devised a route to travel. He retrieved the gun from Mr. Allen when he returned. And he got rid of it. And then he told people that a mission had been done and he sent – and he provided the gun. [RT, 19:5142 (Emphasis added)]

To whom did Johnson solicit to serve a mission? To whom did Johnson provide the gun for that mission? Here, the jury did not even need to refer to the testimony of Jelks, Connor and James to answer these questions. The prosecutor herself answered these questions for the jury by *quoting* Johnson's statement to Adams: "He [Johnson] retrieved the gun from Mr. Allen when he [Appellant] returned."

The prosecutor's closing argument accomplished exactly what the *Bruton/Fletcher* rule is designed to prohibit. When deliberating Appellant's criminal liability, the jury was *not* to infer nor conclude that Johnson was referring to Appellant when he told Adams that he "provided a gun." Yet that very inference was argued by the prosecutor.

D. Conclusion:

The evidence that established Appellant shot and killed Loggins and Beroit came from three witnesses; Carl Connor, Freddie Jelks, and Marcellus James. The credibility of each of these witnesses was seriously challenged. It is the ultimate in "bootstrapping" to have one "inherently unbelievable" witness corroborate another "inherently unbelievable" witness, particularly when numerous sources of information abounded on the neighborhood streets as to the details of the killings and who may have been the shooter.

In the instant case, when the prosecution was allowed to introduce co-defendant Johnson's redacted confession to the jury, the prosecution was able to "shore up" and solidify the "legs" that supported its "3-legged stool." The jury was now aware that co-defendant Johnson himself had admitted that he had given Appellant the gun to do the shooting, just as Jelks testified it had happened. Johnson himself had *corroborated* the testimony of Connor, Jelks, and James

regarding the identity of the shooter and how the shooter obtained the murder weapon. Even though the jury, up until this moment in the trial, may have had significant doubts as to the truthfulness of the testimony of Connor, Jelks, and James, their knowledge that co-defendant Johnson had said basically the same thing would have had a strong tendency to remove any reasonable doubt from jurors' minds that Connor, Jelks and James had testified truthfully.

Johnson told Adams that he provided the gun to the shooter for a mission, and the result was that two Crips gang members were killed. Jelks' testimony, as well as the testimony of Connor and James "linked" Appellant to "the shooter." The linkage between the statement and the testimony of other witnesses was "direct." Because the redacted statement directly incriminated Appellant as the shooter, and because it also provided crucial corroboration to the testimony of the key prosecution witnesses, the *Bruton/Fletcher* error was "substantial" and "forceful."

Appellant respectfully urges this Court to reverse his convictions and overturn his judgment of death on the basis of this error because it cannot be said beyond a reasonable doubt that Appellant would still have been convicted if Johnson's redacted confession had not been introduced.

XVII:

The trial court abused its discretion when it denied Appellant's Motion to Select Two Juries or Motion to Sever his Case from that of co-defendant Johnson on the basis of prejudicial association and *Aranda/Bruton* grounds. Appellant was denied his constitutional right to due process and a fair trial because he was jointly tried with co-defendant Johnson.

A. Introduction.

1. Appellant's Initial Motion to Sever.

On August 26, 1996, Appellant filed his Motion to Sever with the court. It was accompanied by counsel's "Motion to Sever Defendants" and, in the

alternative, his "Motion for Separate Juries." [CT, 3:470-482] The grounds for the motion were a) "prejudicial association", b) incompatible defenses, and c) *Aranda/Fletcher/Bruton* issues. The Motion to Sever included both the guilt phase of the trial and well as the penalty phase of the trial. On November 4, 1996, the prosecution filed its response to Appellant's Motion to Sever. [CT, 3:487-492]

On November 5, 1996, the trial court denied Appellant's Motion to Sever and his Motion for Separate Juries on each ground and as to both the guilt and the penalty phases of the trial. [CT, 3:493; RT, 4:993]

2. Appellant's Subsequent Motion to Sever Prior to the Cross-Examination of Freddie Jelks.

On August 6, 1997, just prior to Freddie Jelks testifying, the prosecution requested a ruling by the court regarding the scope of cross-examination by the defense as to the facts of Jelks' pending murder case. Concern was expressed that co-defendant Johnson would be significantly prejudiced if the jury heard testimony that he was a charged co-defendant in that murder case also. [RT, 16:3495-3511]. Counsel for co-defendant Johnson intended to object to any reference to Johnson as being the charged co-defendant in Jelks' pending murder case [RT, 16:3507-8]. Appellant objected to any limitation the court might impose on his right to cross-examine Jelks. [RT, 16:3601-3603] Appellant also reminded the court of his motion to sever based on prejudicial association that the court earlier had denied. [RT, 16:3601] The trial court overruled Appellant's objection, said nothing about Appellant's motion to sever, and ruled that Appellant would *not* be allowed to confront and cross-examine Jelks regarding any details of Jelks' pending murder case because of the court's concern that the prejudice to co-defendant Johnson would be too great. [RT, 16:3608-3617]

3. Appellant's Third Motion to Sever Prior to the Testimony of Donnie Ray Adams.

On August 11, 1997, and prior to the testimony of Donnie Ray Adams, Appellant renewed his motion to sever based on *Fletcher/Bruton* grounds. The

trial court requested that issue be raised later when Adams was ready to testify. [RT, 18:3932, 4038]

The issue of severance was subsequently raised again and briefly discussed by the court and Appellant's trial counsel. [RT, 19:4222-4229] Thereafter, the court and counsel discussed Adams' proposed testimony and specifically co-defendant Johnson's admissions to Adams that incriminated Appellant. [RT, 19:4369-4375, 4384-4395] Mr. Orr objected to the proposed redacted version of Johnson's statement to Adams. [RT, 19:4395] The trial court overruled Appellant's objections and allowed the prosecution to introduce the co-defendant's statements to Adams. [RT, 19:4395-4398]

4. Appellant's Fourth Motion to Sever Prior to the Introduction of Several Telephone Calls Made by co-defendant Johnson.

Prior to the introduction of several tape recordings of jail telephone conversations in which co-defendant Johnson could be heard talking to individuals, (People's Exhibits #38/38a, #39/39a and #40/40a.), Appellant once again renewed his motion to sever based on *Bruton* and *Fletcher* grounds. Appellant also argued that a limiting instruction would not adequately protect Appellant's right to a fair trial because the jury would not be able to abide by a limiting instruction. [RT, 21:4677-4678] The motion was renewed as each tape recorded conversation between co-defendant Johnson and others was discussed. [RT, 21:4697] Appellant's objections and his motion to sever were overruled and denied, respectively. [RT, 21:4677, 4697-4698, 4705, 4706]

B. The Applicable Law.

1. Denial of the Defendant's Motion to Sever his Trial from the Trial of the Co-Defendant.

a. State law governing joinder and severance.

California Penal Code, §1098 governs joinder and severance in California state prosecutions. That statute provides in pertinent part:

> When two or more defendants are jointly charged with any public offense, ... they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants.

In *People v. Massie* (1967) 66 Cal.2d 899, this court identified some of the problems inherent in jointly trying defendants that would warrant a trial court ordering separate trials for co-defendants. They include 1) an out-of-court admission by a non-testifying co-defendant that incriminates the defendant; 2) the defendant being unduly prejudiced because of his association with a co-defendant; and/or 3) likely confusion resulting from evidence introduced solely against the co-defendant (*Id.* at p. 917.)

In *Zafrio v. United States* (1993) 506 U.S. 534; 539 [122 L.Ed.2d 317, 325], the Supreme Court stated the risk of compromising a specific trial right of a jointly tried defendant could occur

> ... when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. ... Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. [citation] Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. [citation]. (*Id.*, at p. 539. Emphasis added.)

On appeal, review of the trial court's denial of a motion for severance is based upon what was before the trial court at the time of the motion. (*People v. Romo* (1975) 47 Cal.App.3d 976, 985, disapproved on another point in *People v. Bolton* (1979) 23 Cal.3d 208.) The review standard is for abuse of discretion.

However, in *People v. Turner* (1984) 37 Cal. 3d 302 (overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104), this court held that, "[a]fter trial...the reviewing court may nevertheless reverse a conviction where,

because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 313; see also *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Pinholster* (1992) 1 Cal.4th 865, 933.)

In *People v. Greenberger* ( )58 Cal.App4th 298, the court summarized the procedure used by California courts in evaluating the denial of a defendant's severance motion:

> Thus, there are two levels of review when a defendant alleges prejudicial error in the denial of a motion to sever. The first level of review determines whether the trial court abused its discretion in denying the motion. If it is concluded that there was no abuse of discretion, the next level of review determines whether the failure to sever resulted in gross unfairness which denied the defendant a fair trial or due process. The first level of review focuses on what was presented to the trial court at the time it made its decision. The second level of review focuses on what actually happened in the joint trial. (*Id.*, at p. 343.)

b. Capital cases, due process and severance.

Since this is a capital case in which Appellant claims his due process rights were violated because of the court's failure to grant his motion to sever, it is not enough for a reviewing court to simply defer to the trial court's exercise of discretion. In a capital case, Penal Code, §1098 must be applied in a manner consistent with Eighth and Fourteenth Amendment requirements. This is so because there are three considerations unique to capital cases, and error in any involves constitutional dimensions.

First, when evidence admitted against a co-defendant is voluminous and extremely inflammatory, there exists a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (People v. Garceau ((1993) 6 Cal.4th 140; *Zafrio v. United States,* (1993) 506 U.S. 534, 544 (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of

whether the prosecutor has proven guilt beyond a reasonable doubt].) If a jury *wants* strongly enough to convict the defendant because of its hatred of the defendant's gang and the repugnant lifestyle it represents, jurors will overlook any weakness in the prosecution's case because of their intense desire to punish the defendant because of his gang affiliation.

Second, there is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case," (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama*(1980) 447 U.S. 635, 637-638.)

Third, there is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockeft v. Ohio* (1978) 438 U.S. 586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

Together, these three constitutional concerns demand a much stricter scrutiny of motions for severance in a capital case than is required in a non-capital case. (*People v. Keenan* (1988) 46 Cal. 3d 478, 500 ["Severance motions in capital cases should receive heightened scrutiny for potential prejudice"].)

Therefore, whether the operative legal provision is Penal Code section 1098 or the rights included within the Eighth Amendment as applied to the states through the Fourteenth Amendment, the *danger* to be avoided is the same: that the jury will treat the co- defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v. North Carolina*(1976) 428 U.S. 280, 304.) Appellant submits it is within this context that the trial court's exercise of discretion in refusing to sever these trials should be evaluated. The essential consideration for the reviewing court in determining whether defendants should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078: *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511.) "The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict." (*Tootick, supra,* 952 F. 2d at 1082.)

c. Judicial Economy Does Not Outweigh Fundamental Fairness.

The only announced rationale for joint trials in California is judicial economy. (*People v. Keenan, supra,* 46 Cal.3d at p. 501.) While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441,451-452.)

Moreover, given the extraordinary requirement for individualized consideration and heightened reliability in capital cases, a procedural rule of joinder predicated on judicial economy must be applied very cautiously. Indeed, the United States Supreme Court has made it very clear that its concern for heightened reliability extends not only to sentencing, but to the guilt phase of trial

as well. Long before the modern era of capital jurisprudence announced in *Furman v. Georgia* (1972) 408 U.S. 238 (overruled in part by *Gregg v. Georgia* (1976) 428 U.S. 153), the Supreme Court recognized that capital proceedings required special procedural rules and protections not extended to noncapital defendants. For example, in *Powell v. Alabama* (1932) 287 U.S. 45, the Court held that at least some capital defendants had a right to effective appointed counsel thirty years before extending that right to others accused of noncapital felonies. (Compare *Gideon v. Wainwright* (1963) 372 U.S. 335; see also *Bute v. Illinois* (1948) 333 U.S. 640, 674 (no obligation on part of state court to inquire whether noncapital defendant wished to be represented by counsel; contrasting due process right of capital defendant to appointed counsel); *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.")

More recently, recognizing that "[t]he quintessential miscarriage of justice is the execution of a person who is actually innocent," *Schlup v. Delo* (1995) 115 S.Ct. 851, 866, the current Court also has imposed special procedural requirements on determinations of guilt and innocence in capital cases that it has not imposed in noncapital cases. As Justice Stevens explained in *Beck v. Alabama* (1980) 447 U.S. 625, "we have invalidated procedural rules that tend to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Id.* at 638 (note omitted).)

As the Court subsequently explained, the *Beck* rationale was not limited to the specific issue of an all-or-nothing jury instruction [the precise issue in that case], but represented a more general principle requiring enhanced reliability in guilt phase determinations: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.)

Later cases have reiterated the Supreme Court's belief that the potential danger of executing the "actually innocent," *Schlup,* 115 S.Ct. at 866, requires special guarantees of reliability where the conviction of a capital defendant is at issue. (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (in capital guilt phase "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case"); *Herrera v. Collins* (1993) 506 U.S. 390, 399 ("[i]n capital cases, we have required additional protections because of the nature of the penalty at stake"); *Gray v. Mississippi* (1987) 481 U.S. 648, 669 (Powell, J., concurring) (declining to find harmless error because "[g]iven our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire 'definitely' would have been the same").

d. Limiting Instructions Do Not Provide Adequate Protection in this Type of Case.

The court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S. 756, 764, 97 L.Ed.2d 618; 107 S.Ct. 3102.) This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208, 95 L.Ed.2d 176, 107 S.Ct. 1702.)

As noted in *Old Chief v. United States* (1997) 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574, " [a]lthough ... propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance." (Internal quotation marks omitted.)

Although the trial court instructed the jury on several occasions that they were to consider certain evidence solely as to co-defendant Johnson, the highly

inflammatory nature of the evidence, as well as Appellant's alleged motive for murdering Loggins and Beroit, Appellant's submits it became impossible for any juror, regardless of their desire to follow the court's instructions, to actually not allow the evidence introduced against the co-defendant to influence the jurors as they deliberated Appellant's guilt. As Justice Jackson trenchantly observed; "[t]he naive presumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440.)

3. Discussion.

A. The Trial Court Abused It's Discretion when It Denied Appellant's Motion to Sever his Case from the Co-Defendant's Case on the Basis of Prejudicial Association.[303]

Of the three grounds upon which Appellant's initial motion to sever was based, Appellant challenges the trial court's ruling in this argument only as to the "prejudicial association" basis.

At the hearing on Appellant's Motion to Sever, the trial court had before it Appellant's written motion to sever, counsel's declaration in support of the motion, and the points and authorities in support of the motion to sever. [CT, 3:470-482] The prosecution's response was filed with the court the day before the hearing. [CT, 3:487-492] In his moving papers, Appellant represented to the trial court that the prosecution may seek to introduce solely against co-defendant Johnson at either the *guilt phase* or the penalty phase of the trial the following:

> a) Evidence of two (2) additional murders committed by co-defendant Johnson;

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[303] Because the defense had not been advised that Donnie Ray Adams would be called to testify as to co-defendant Johnson's out-of-court admission, that issue was not raised in Appellant's original motion to sever. The Bruton issue raised by Appellant pertained to potential issues that were dependent on which of the telephone tape recorded telephone calls the prosecutor sought to introduce. The issue regarding Adams' testimony is raised at Argument XVI in Appellant's Opening Brief, *supra*.

b) Evidence of five (5) additional attempted murders or solicitations to commit murder by co-defendant Johnson, including one murder in which the targeted victim was in fact murdered, as well as the solicitation to murder a Los Angeles Police Department detective;

c) Evidence of at least four (4) robberies committed by co-defendant Johnson;

d) Evidence of five (5) separate rape/forced oral copulation crimes committed by co-defendant Johnson, all involving females under the age of 14;

e) Evidence of "sundry other crimes" committed by co-defendant Johnson;

f) Evidence that co-defendant Johnson possessed a deadly weapon while in custody [CT, 3:472-473, 479];

g) Evidence of 882 covertly recorded telephone conversations between co-defendant Johnson and other individuals while he was incarcerated at the Los Angeles County jail between August 9, 1995 and November 29, 1995, in which co-defendant Johnson is heard plotting additional uncharged crimes, including a sollicitaion to murder [CT, 3:473-474];

h) Evidence of 2,590 covertly recorded telephone conversations from the home telephone of co-defendant Johnson between October 4, 1995 and December 3, 1995. [CT, 3:473]

The prosecutor's responding Points and Authorities cited case authority but conspicuously omitted any response to the numerous factual allegations alleged by Appellant in his motion to sever. [CT, 3:487-492]

At the hearing the trial court stated it had read Appellant's motion and the district attorney's response. [RT, 4:989] The trial court heard brief argument from Appellant's counsel[304] regarding possible *Aranda/Fletcher* problems with numerous telephone conversations involving co-defendant Johnson [RT, 4:989-

[304] Ed Murphy was co counsel with Mr. Orr on behalf of Appellant. [RT, 4:989]

992] The only response by the prosecutor pertained to the Aranda/Bruton issues related to the telephone calls. She said nothing in response to Appellant's prejujdicial association argument if Appellant were tried jointly with co-defendant Johnson.[305] [RT, 4:992] The prosecutor then told the court, "And if there is any issue there, I am sure the court will be more than willing to issue a curative instruction to the jury out of an abundance of caution." [RT, 4:993]

The trial judge's immediate response thereafter was, "I am going to deny the severance motion." The court said nothing about any potential prejudice concerns at the guilt phase of the trial.[306] [RT, 4:993]

The trial court had heard of an astounding number of violent crimes that *might* be introduced against co-defendant Johnson during the guilt phase of the trial. Some of these crimes were very similar crimes to those crimes charged against both defendants. Some had the potential for being highly inflammatory and prejudicial, and some were of a different class of crimes altogether. The prosecution did not deny the existence of these offenses and the evidence that supported them, nor did she say which, if not all, of the offenses she would seek to introduce during the guilt phase of the trial.

Despite this lack of information, the trial court did not ask a single question of the prosecutor regarding the numerous criminal offenses mentioned by Appellant. The court did not ask the prosecutor if she planned to introduce any of them (or all of them) during the guilt phase. The court did not inquire of the prosecutor concerning her theory of the case to determine if the introduction of this evidence might have a "spill over" effect on Appellant. The trial court did nothing ... except to deny the motion to sever.

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[305] The prosecutor did mention that Appellant had a prior 187 conviction, apparently suggesting that would mitigate any prejudice Appellant would suffer from being jointly tried with co-defendant Johnson. [RT, 4:992-993]

[306] The trial court did indicate at the penalty phase he thought the jury would be able to differentiate and focus on which defendant the evidence in aggravation would pertain to. [RT, 4:993]

Appellant asserts the trial court abused its discretion when it ruled on the motion in such a cavalier fashion. The court literally ruled blindly, not knowing if Appellant would be unduly prejudiced if tried jointly with co-defendant Johnson. Trial court judges are vested with great discretion in rulings such as this. When the trial court properly exercises that discretion in ruling on this type of motion, the reviewing court affords the trial court's ruling wide latitude, and will not find the ruling was error unless it clearly was an abuse of discretion.

However, Appellant asserts it is obvious the trial court made little or no effort to understand the actual basis for the defense's motion to sever. It did nothing to determine if any, or all, of the other crimes evidence against co-defendant Johnson would be introduced during the guilt phase of the trial. It made no effort to determine if Appellant might suffer prejudice if jointly tried with the co-defendant. The court simply did not exercise any discretion. Rather, the trial court denied the motion out of hand. This, Appellant submits, is particularly egregious in a capital case where the life of the accused in involved. If the trial court did not properly exercise any discretion in ruling on the motion to sever, there is no reason the reviewing court should view it for an abuse of discretion.

Appellant asserts the trial court erred because it did not exercise any discretion in ruling on Appellant's Motion to Sever. If this Court were to find the trial court did, in fact, exercise some discretion in ruling on this motion, Appellant submits the trial court abused that discretion when it ruled in the manner above described.

B. The prosecution's theory of the case exacerbated the problems of undue prejudice and confusion when Appellant was tried jointly with co-defendant Johnson. It was this combination that resulted in Appellant being denied his constitutional right to due process and a fair trial.

The prosecutor articulated her theory of the case very succinctly when she made an offer of proof regarding the testimony of Detective Barling:

DDA: I want to elicit from him the manner in which 89 Family operates; which is the fact that Mr. Johnson is a person who occupies a position of great respect; that he is a person who is able to get his business done; that he uses other gang members and other gang members do things for Mr. Johnson to gain respect in the neighborhood; that Mr. Johnson is somebody who is feared by members of the gang because of his position of respect;

...that Mr. Allen had returned to the neighborhood after a short period – after being out of the neighborhood; and that part of the way that a gang member (i.e., Appellant) reenters the neighborhood and regains respect is to go on missions; that this [shooting of Loggins and Beroit] was in fact a mission; that it had all of the markings of a mission; . [RT, 19:4266-4267]

Throughout the trial, the prosecution emphasized this theory of the case. The 89 Family Bloods gang controlled a specific neighborhood in Los Angeles, the rival East Coast Crips gang controlled a neighborhood just east of the 89 Family Bloods turf, and Central Avenue was the dividing line. Further, 89 Family Bloods gang members thought it was a display of "disrespect" when a rival gang member encroached into their neighborhood. To maintain their level of respect in the eyes of rival gangs, 89 Family Bloods gang members had to react violently and "discipline" the offending rival gang members. Cleamon Johnson was one of the most influential members of the 89 Family Bloods gang. He reached this position of leadership through intimidation and because of his reputation for extreme violence; his level of "respect" among gang members was very high. Being a "shotcaller", Johnson could direct other 89 Family Bloods gang members to go on "missions" or commit murders on behalf of the gang. In this manner, the gang's level of respect would remain high. If a gang member refused to go on a "mission" when directed to do so, that gang member would be disciplined or beat up by Johnson or one of his followers.

Appellant, because he had been absent from the neighborhood for a period of time, was very anxious to acquire a high level of "gang respect" among his homeboys and rival gang members, and that he would be able to accomplish this by performing "missions" for the gang's "shotcaller", Cleamon Johnson. Hence, whatever "mission" Johnson wanted done or whomever Johnson wanted "served", Appellant was willing to do it. To gain the "respect" of Johnson and other members of the gang was a sufficient motive, according to the prosecution, for Appellant to simply execute two men whom he had never met and whom he knew nothing about.

In effect, by pursuing this theory of the case and to provide Appellant with some type of motive to simply kill two individuals who were sitting in a car, the prosecution argued throughout the entire trial that a) Appellant wanted to establish a high level of "gang respect" and to accomplish this, Appellant would do anything Johnson requested because Appellant wanted to demonstrate his loyalty to the gang and its "shotcaller", Cleamon Johnson. Therefore, the Loggins and Beroit murders were illustrative of the prosecution's theory of the case.

In other words, evidence presented by the prosecution during the trial that established Johnson wanted a witness killed or a rival gang member murdered was a "mission" that Appellant would have been willing to perform. The jury was urged by the prosecutor throughout the trial to consider that evidence against Appellant because it furnished his motive for committing such violent crimes for little or no apparent motive.

However, this *same* jury was instructed by this *same* court that they were *not* to consider *some* of the *same* type of evidence of Johnson's *same* homicidal desires presented by the *same* prosecutor because that evidence was to be considered only as to co-defendant Johnson. The potential for confusion was obvious. One moment the jury was urged to consider the evidence against Appellant to prove his motive. The next moment the jury was instructed to not consider very similar evidence against Appellant to prove his motive.

Appellant did not create this potential for confusion. The prosecutor did when she chose to pursue this theory of the case, yet insisted on trying both defendants jointly. This volitional choice by the prosecution made it far more difficult, if not impossible, for each individual juror to follow the court's limiting instructions. Appellant asserts the potential prejudice to Appellant was matched only by the potential confusion in the jurors' minds as to what evidence they could, and could not, consider against Appellant. The State should not be allowed to benefit from this confusion, particularly since the State's theory of the case was the factor that created the confusion. It was simply not fair to Appellant.

For example, when the prosecution presented evidence that Johnson wanted Loggins and Beorit killed, the jury was urged to consider this evidence against Appellant. When the prosecution presented evidence that Jelks was told that Johnson had put out a contract to kill him, the jury was instructed to disregard this as to Appellant and Johnson, and to consider it only as to Jelks' state of mind. However, when Johnson was heard telling Bill Connor to "school" his brother Carl, the jury was told to consider that for the state of mind of Johnson, but to not consider it as to Appellant. When the jury heard that Johnson wanted Reco Wilson to kill Nece Jones, it was to be considered by the jury as they evaluated Johnson's state of mind as well as that of Connor, but not Appellant! Appellant asserts it was impossible for the jurors to keep straight what evidence they could consider for what purpose and against whom.

Keeping in mind the prosecution's theory that Appellant was willing to do anything that Cleamon Johnson wanted done, it becomes apparent how difficult it was for the jury to follow the court's myriad of limiting instructions.

1. Co-Defendant Johnson's Statements to Detective McCartin[307]:

[307] The jury was instructed by the court to consider Johnson's statements to Detective McCartin only as to Johnson and not against Appellant. [RT, 18:4177]

Detective McCartin testified that in June of 1994 he and two other detectives spoke with co-defendant Johnson about the Albert Sutton murder case, a case they were investigating. During the discussion Johnson intimated rather clearly that Sutton deserved to be killed, that he should not have brought any "Crips" into the "hood". The detective asked Johnson if he was aware that one of the Crips that Sutton brought into the 89 Family Bloods neighborhood was Sutton's brother? Johnson responded, "It doesn't matter. You don't bring Crips into the 'hood." Johnson further stated that Sutton "had to be disciplined." Detective McCartin commented that Johnson seemed "nonchalant" when he said this. "That is just the way business is; that is the way things are." [RT 18:4173-4178]

Johnson said Sutton had to be *disciplined* by members of the 89 Family Bloods gang because he brought *his brother* into the neighborhood. What was the discipline? He was murdered! And Johnson was "nonchalant" about it as though a murder was "no big deal."

Freddie Jelks also referred to "discipline" when he testified. He testified that members of the 89 Family Bloods gang would protect their neighborhood from penetration by rival gang members by patrolling the neighborhood every day. The purpose of patrolling the neighborhood was to make the neighborhood "safe". [RT, 16:35389] Jelks then rendered his opinion as to what would occur if a rival gang member were caught in the neighborhood claimed by the 89 Family Bloods gang:

DDA: What happens if somebody that's not 89 Family is in the neighborhood?
ORR: Calls for speculation.
CRT: Overruled. Go ahead and answer.
FJ: There's a lot of discipline going on.
DDA: What do you mean by discipline?
FJ: If you get, you know, if you get caught up in the neighborhood, you probably get hurt, beat up or, you know, worse.
DDA: What's worse?

FJ: Shot. [RT, 16:3538-3539 (Emphasis added)]

The prosecution's purpose in soliciting this testimony was to establish Appellant's conduct in killing Loggins and Beroit was consistent with what other members of the gang would also have done. It was more likely that a member of the 89 Family Bloods gang was the shooter because that was how members of that particular gang would react in that situation, in Jelks' opinion, and since Appellant was a member of that gang, an inference could be drawn that he was the shooter. Now, the jury heard co-defendant Johnson say the same thing. Obviously, Jelks must have been telling the truth, the jury would have inferred, when he testified because his testimony was corroborated by Johnson. Further, Jelks' testimony that Appellant would have shot and killed rival Crips who entered the gang neighborhood was now not unrealistic or unbelievable. After all, Johnson had nonchalantly said that was "just the way things are." Al Sutton had been murdered simply because he brought his brother (i.e., a Crip) into the gang's neighborhood; certainly it was now believable that Appellant would have murdered suspected Crips who had encroached on gang territory.

However, Jelks provided additional testimony that was incriminating to Appellant and was now corroborated by Johnson's own statements. Freddie Jelks was asked by the prosecutor to explain the need for the 89 Family Bloods gang to maintain "respect" from other gangs. It was his opinion that to members of the 89 Family Bloods gang, it was important "to make sure that every other gang that's in the area, you know, pays respect to the neighborhood." [RT, 16:3539] Jelks told the jury that if a rival gang member were to simply come into the neighborhood claimed by the 89 Family Bloods gang, this would be a sign of disrespect. [RT, 16:3539-40] The natural inference drawn from this testimony was that each time a rival gang member expressed his "disrespect" for the 89 Family Bloods gang by entering onto their turf (or anyone the gang thought was a rival gang member,

regardless of the truth), the gang members had to retaliate if they were to maintain an acceptable level of gang "respect" in the minds of rival gang members.

More testimony was elicited from Jelks regarding "discipline" that was admissible for consideration as to Appellant. Posing a series of leading questions on direct examination to Freddie Jelks, the prosecutor returned to how members of the 89 Family Bloods gang would "discipline" rival gang members, in Jelks' opinion:

> DDA: Is part of being a member of 89 that you have to know who your enemies are?
> JLK: Yes.
> DDA: Is part of the 89 Neighborhood – 89 neighborhood discipline?
> JLK Yes.
> DDA: How is discipline enforced?
> JLK: Numerous ways. Physically or, you know, shootings and things of that nature.
> DDA: Is there a way for a member who is in 89 to gain respect of his other 89 members?
> JLK: Yeah.
> DDA: How do you do that?
> JLK: Either you can help, you know, bring money to the neighborhood or you can, you know, take care of business as far as shooting your enemies and getting rid of your enemies. [RT, 16:3551+ (Emphasis added.)]

Although the above testimony by Jelks may have been rather hard to believe by a juror who had never lived in this type of neighborhood, Jelks' testimony was now very believable because it had been corroborated by the statements of one of the charged defendants sitting in front of the jury. The jury could consider this evidence and its impact on the believability of Jelks as they deliberated Johnson's guilt, but the same jury was expected to disregard this evidence and its impact on the believability of Jelks as they deliberated Appellant's guilt. Appellant submits that was an impossible expectation.

Johnson's statements to Adams, inadmissible against Appellant but nonetheless presented to the jury, would *not* have been presented to the jury if a

separate jury had heard the evidence against Appellant. Jelks' credibility as a witness would not have been corroborated in this manner at a separate trial.

And because the prosecution insisted that Appellant's motive was to increase his gang respect until he was like Johnson, the gang's shotcaller, and because Appellant would do whatever Johnson wanted him to do to demonstrate Appellant's respect for Johnson and to demonstrated his loyalty to the gang, Appellant would have had the same state of mind as Johnson. The jury had, in effect, been told this over and over the above by the prosecutor as she asked leading and suggestive questions of each witness. To Appellant, Loggins and Beroit "had to be disciplined" for entering into the gang's neighborhood. "That is just the way business is; that is the way things are." The jury would have drawn the very same inference from this testimony that they had previously done with other testimony presented by the prosecution, and Appellant submits that the jury would have drawn this inference from this evidence, even though they were told to disregard it. To suggest otherwise ignores reality.

Accordingly, Appellant was prejudiced at the joint trial when the jury was presented this evidence.

2. Donnie Ray Adams Testimony[308]:

Appellant respectfully incorporates herein by reference the discussion of Issue #19 in Appellant's Opening Brief (the *Fletcher/Bruton* constitutional violation) as though fully set forth herein.

Any out-of-court statements by co-defendant Johnson that facially incriminated Appellant violated Appellant's Due Process right to confront and cross-examine his accusers. It was a basis for Appellant being unduly prejudiced because he was jointly tried with co-defendant Johnson. Further, as indicated

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[308] The trial court instructed the jury that they were not to consider anything co-defendant Johnson told Adams against Appellant. However, the remainder of Adams' testimony was admitted against both Appellant and co-defendant Johnson. [RT, 19:4441]

previously in Issue XVI and XVII, Johnson's out-of-court statements that facially incriminated Appellant were unduly prejudicial even though the trial court gave the jury a specific instruction to *not* consider the statements against Appellant.

However, Adams testified to *additional* statements by co-defendant Johnson that were hearsay and inadmissible as to Appellant, but were *not* facially incriminating of Appellant. These out-of-court statements by Johnson would have been excluded completely as hearsay if Appellant had been tried separately. The jury would never have been exposed to them. The *only* reason they were introduced at the joint trial of Appellant and co-defendant Johnson was because they were admissions by Johnson (See Evid. Code, § 1220) that incriminated Johnson. (See Evid. Code, §§ 210, 350.).

DDA: Now, when you talked to Mr. Johnson, did Mr. Johnson both times tell you that the killing involved a mission?[309]
DRA: Yes.
DDA: Did Mr. Johnson tell you that he had given – he had provided a gun and a ski mask?
DRA: Yes.
...
DDA: Now, did Evil tell you that, that's two crabs gone?[310]
DRA: Yes.
DDA: What are crabs?
DRA: Crips. [RT, 19:4414-4415 (Emphasis added.)]

Previously, Freddie Jelks testified, in response to the prosecutor's leading and suggestive question, that the shootings of Loggins and Beroit "constituted a mission:

DDA: Would this shooting [of Loggins and Beroit have constituted a mission?
FJ: Yeah.

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[309] This question is simply one more example of the numerous questions posed by the prosecutor that were leading and suggested the answer to the witness.

[310] This was another question posed by the prosecutor that was leading and suggested the answer to the witness. It was as though Adams was simply a conduit through which the prosecutor presented her opinion as to what she wanted the evidence to be.

DDA: What's a mission?
FJ: When you - - when you go out and commit murder." [RT, 16:3624

When the jury heard Adams testify that co-defendant Johnson told Adams the killings were considered a "mission", Jelks' credibility received a powerful, positive jolt. And the corroboration came from one of the two charged defendants who was sitting in front of the jury. Jelks' testimony that Appellant had gone on a *mission* at the behest of co-defendant Johnson was now much more believable because Johnson himself had admitted it to Adams. However, Jelks' credibility received additional positive reinforcement from Johnson. Jelks testified that Johnson provided a gun to be used on the mission. The jury now knew that Johnson had admitted the same thing to another individual separate and distinct from Jelks. Reasonable and natural inferences drawn from these out-of-court statements by Johnson to Adams were that Jelks must have been telling the truth; otherwise, one of the charged defendants would never have related the same facts. This inference drawing process used by the jury was prejudicial to Appellant.

If Appellant had been tried separately from co-defendant Johnson, these additional statements would *not* have been introduced to the jury. There would have been *no* possibility that the jury would have considered these statements by Johnson against Appellant because the jury would not have been aware that Johnson had made the statements.

These hearsay statements made by Johnson, inadmissible against Appellant, corroborated Jelks' testimony. They bolstered the credibility of Jelks in the minds of the jurors because the jurors were now aware that the co-defendant himself had made statements that were consistent with Jelks' testimony. Appellant submits it would have been *impossible* for jurors, when they deliberated Johnson's guilt, to consider Johnson's statements for the bolstering effect they had on Jelks' credibility, yet these same jurors, when deliberating Appellant's guilt, would have ignored the impact of this same evidence on the same witness' (i.e., Jelks')

credibility. To suggest a limiting instruction would have cured this problem, Appellant submits, flies in the face of common sense. Once the jury determined that Jelks was credible and believable as his testimony pertained to Johnson (in part because of Adams' testimony about Johnson's admissions), those same jurors would *not* have consciously stopped their deliberations, eliminated any impact Johnson's statements to Adams had on their decision to believe Jelks, then *re-evaluate* Jelks' credibility as his testimony pertained to Appellant as though they had never heard Adams' testimony regarding Johnson's out-of-court statements.

Since Jelks's testimony was perhaps the most incriminating evidence the prosecution presented to prove Appellant's guilty, any evidence used by the jury to determine Jelks credibility would have impacted the jury's determination as to Appellant's guilt. At a separate trial, a separate jury would have never heard evidence of Johnson's out-of-court admissions; hence, there would have been *no danger* Appellant's jury would have been improperly influenced by this evidence.

3. Co-Defendant Johnson's Prior Testimony[311]:

On May 20, 1992 (9½ months after the Loggins/Beroit murders, and 2½ years before charges were filed), co-defendant Johnson testified as a defense witness in a jury trial in which three Crips gang members were being prosecuted.[312] The prosecutor was allowed to read to the jury a portion of Johnson's testimony at that earlier trial.

On that occasion Johnson testified that he was a Bloods gang member and he "hated" Crips [RT, 19:4450], Crips and Bloods were "enemies", "natural enemies", and they would *never* get along. [RT, 19:4448-4449] Johnson testified that he and one of the Crips gang members in that case spoke about a possible

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[311] All parties stipulated that co-defendant Johnson's testimony in the prior case would be admissible only against Johnson. The trial court told the jury both before and after the reading of Johnson's prior testimony that the evidence was admissible only as to Johnson. [RT, 19:4445-4447; 4456]

[312] The case was *People v. Glass, Mills and Carroll*, Los Angeles Superior Court case #BA019941. [CT, 4:676-717]

"truce" between the gangs. Johnson said he told him "what I was going to do to his homeboys." Johnson then told that jury:

> CJ: ...[J]ust a couple of days ago his homeboys shot one of my homeboys in the head during the riot and he was – we started talking about the truce and everything and I told him, you know, that there won't be no truce due to the fact that his homeboys shot one of my homeboys in the head in the riot and there won't be no truce. [RT, 19:4452-4453]

When asked why he made that statement, Johnson testified he said that "[b]ecause sooner or later I probably will" retaliate against the Crips for shooting his homeboy in the head. Johnson added, "I mean to me beating up a Crip is nothing." [RT, 19:4452] He admitted he would retaliate against any Crip in a gang. [RT, 19:4454]

He Crips and Bloods were "enemies", "natural enemies", and they would *never* get along. [RT, 19:4448-4449] said he was an O.G. an "original gangster." That meant "I don't have to answer to nobody." "What I do is what I want to do and when I want to do it. I want to do it and it's up to me." He also testified that he did not answer to anyone, that "other people answer to" him. [RT, 19:4455-4456]

Johnson's testimony in that prior unrelated case, admissible only against Johnson, illustrated how difficult it was for the jury to consider Johnson's testimony only as against Johnson. It was clear from other testimony at the trial that Appellant was a member of Johnson's 89 Bloods Bloods gang; hence, Johnson's testimony (Crips and Bloods were "enemies", "natural enemies", and they would *never* get along. [RT, 19:4448-4449]) meant that Appellant also "hated Crips" and would *always* hate Crips, thereby providing Appellant with a motive to kill Loggins ande Beroit.[313] Appellant's claim that the jury would have considered

[313] This testimony by Johnson would also have influenced the jury in the penalty phase as they considered the appropriate penalty to impose on Appellant. Since Bloods, including Appellant, would always have a motive to kill Crips, Appellant

this testimony against him, even though they were instructed not to do so, has merit because with the constant barrage of evidence the jury would have lost track of that evidence that could be considered against Appellant and that evidence that could not be considered against Appellant.

Further, the prosecution's *theory* as to *why* Appellant killed Loggins and Beroit once again exacerbated the prejudicial impact Johnson's prior testimony would have had on Appellant, even though the jury was instructed to consider it only as to Johnson. Appellant had a tremendous desire to "perform" acts that would maintain the "respect" of the gang in the eyes of rival gangs. Appellant had a tremendous desire to demonstrate his loyalty for the gang, and to display his respect for Johnson. According to the prosecution's theory that was presented over and over, Appellant would accomplish these goals by going on missions for the gang; by doing anything that Johnson requested. Appellant would then become like Johnson, a gang shotcaller who didn't "answer to nobody." Appellant's state of mind regarding Crips was the same as Johnson's: "I mean to me beating up a Crip is nothing."

4. Recordings of Telephone Conversations Between Co-Defendant Johnson and Others[314]:

The prosecution presented evidence of four edited recordings of telephone conversations between co-defendant Johnson and others during the months of August and September 1995. This was after Johnson had been indicted and while he was awaiting this trial to begin. They were seized pursuant to a wiretap of telephone calls made from the Los Angeles County jail.

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would always have a motive to kill any Crip, and that would include while Appellant was serving a life without possibility of parole prison term. If executed, Appellant would cease to be a danger to Crips gang members.

[314] The trial court instructed the jury before the four conversations were introduced that the jury was to consider them only as to co-defendant Johnson and his "membership and status within the 89 Family gang." RT, 21:4773]

In the first telephone call, Johnson could be heard telling Bill Connor, the brother of Carl Connor, that he [Johnson] suspected that Carl Connor was one of the individuals who had snitched him off before the grand jury. Johnson could be overheard telling Bill Connor to "school" his brother Carl Connor, and to give him a "crash course." Johnson directed Bill Connor to tell his brother that even if Carl Connor had talked to the police or had testified, things could still be "worked out." Finally, Johnson told Bill Connor that he had to go to trial in this case; he had no choice because he had been offered the "death penalty plus life." Johnson could then be overheard at the conclusion of this conversation making a not-so-veiled threat that Bill Connor should tell his brother Carl Connor that, from Johnson's point of view, he (Johnson) really had nothing to lose. The inference was that if Carl Connor knew what was good for him, he would not testify against Johnson at the trial. [RT, 21:4779; People's Exhibits #38 (edited tape recording) and #38A (transcript of #38), located at CT Supp IV, 2:383-96]

In the second telephonic conversation, Johnson could be overheard speaking with a visitor at the jail. It pertained to Johnson's belief that Carl Connor was one of the witnesses who had testified before the grand jury. Johnson also mentioned that Connor was the person responsible for providing the information that allowed the police to arrest Reco Wilson in the Nece Jones murder. [315] [RT, 21:4780; People's Exhibits #39 (edited tape recording) and #39A (transcript of #39) located at CT Supp IV, 2:397-399]

In the third telephonic conversation, Bill Connor (the brother of Carl Connor) and Johnson can again be overheard discussing whether Carl Connor had testified against Johnson at the grand jury hearing. [RT, 21:4784; People's

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[315] Reco Wilson, a member of Johnson's gang, was arrested, prosecuted and convicted of the murder of Nece Jones. Jones was a witness to another murder for which Johnson's homeboy Charles Lafayette was alleged to have committed. Det. Sanchez testified that Connor had initially contacted her regarding his knowledge of Nece Jones' murder. Connor subsequently received $25,000 for his assistance in that case.

Exhibits #40 (edited tape recording) and #40A (transcript of #40) located at CT Supp IV, 2:400-404.]

Detective Barling read the transcript of the fourth telephonic conversation to the jury. Johnson discussed with the person he was speaking to whether Bill Connor had "run into" his brother yet, the inference being that Johnson was trying to dissuade Carl Connor from testifying against him. [RT, 21:4785-47866]

Jurors had heard from practically every prosecution witness, including Detectives Barling and McCartin, that the witnesses' fears of retaliation were "legitimate." Now the jury had first hand knowledge that this was true! They heard Johnson attempting to intimidate witness Connor into not testifying. They were left to consider what Johnson meant when he directed Bill Connor to "school" his brother Carl; that Bill should give Carl a "crash course." They heard Johnson tell Bill to tell Carl that he (Johnson) had "nothing to lose", and inferentially, that Carl Connor had better consider what that meant. Even worse, however, was Johnson's reference to Reco Wilson and his arrest for the Nece Jones murder. Connor previously told the jury that he testified against the killer of Nece Jones, a woman who was assassinated because she had testified against a member of the 89 Family Bloods gang. The killer of Nece Jones, Reco Wilson, had been convicted in that case. And the jury heard Johnson referring to it as he spoke about Connor testifying against him.

This evidence would have been horrifying to each individual juror. The jurors now knew that the witnesses' fears were, in fact, legitimate. Clearly, those witnesses must have been telling the truth, and any inconsistencies or discrepancies in their testimony would have obviously been the result of this fear. Not only would this emotionally frightening testimony have caused the jury to find the witnesses credible, but it also was proof that Appellant and his homeboys were, in fact, deadly killers. This evidence, inadmissible for consideration against Appellant but admissible for consideration against co-defendant Johnson, is an example of the type of testimony for which a limiting instruction has no impact.

5. Co-Defendant Johnson's hand written note[316]:

The prosecutor read to the jury a portion of a hand-written note that had been found on co-appellant Johnson's person on October 25, 1995 when he was in-custody at the Los Angeles County jail. The prosecutorial inference to be drawn from this letter was that Johnson was telling the intended recipient of the letter to relate to an individual who was in disfavor with him (Johnson) that he (Johnson) had the means to kill him at any time if he wanted to do so, but had chosen not to. ."[RT, 21:4803-5; People's Exhibit #44]

According to the prosecution's theory of the case, Appellant would have been willing to kill this individual if co-defendant Johnson requested he do it. Appellant would have been one of the means by which Johnson could accomplish this mission even when in custody. This was the message the prosecution urged upon the jury. To now suddenly tell the jury to ignore that message because this evidence was not introduced for that purpose is to ask the jury to do something almost impossible to do. In fact, the limiting instruction itself reminds the jury of the prosecution's theory of the case which they then are told to ignore.

Appellant asserts he was prejudiced when this evidence was introduced, in spite of the limiting instruction.

6. Johnson's Telephone Conversations with his Mother Regarding Someone "Contacting" Freddie Jelks.

Co-defendant Johnson called his mother Allene Johnson to testify. She related that on August 5, 1991 she drove home sometime in the afternoon. She noticed an emergency vehicle with lights on at Central near 88th Street, and a small crowd was beginning to gather. She did not see any police cars nor police "crime scene" tape, however. She went home to see if her sons were safe. She saw her sons (including the co-defendant) at her home. [RT, 23:4961-73]

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[316] The trial court instructed the jury they were to consider the contents of the note only as to co-defendant Johnson and his "membership and status within the 89 Family gang." RT, 21:4805]

On cross-examination by the prosecution, however, Mrs. Johnson testified she did not recall her son asking her to contact relatives or friends of "NaNa" (Marcellus James). She also denied that her son ever asked her to find out where "FM" (Freddie Jelks) was located. [RT, 23:4976]

In the prosecution's rebuttal case, the prosecution introduced the contents of three (3) telephone conversations that occurred on September 2, 5 and 8, 1995, wherein co-defendant Johnson (who was in custody at the time) and Mrs. Johnson spoke about efforts to "contact" Freddie Jelks. [RT, 24:5028 and People's Exhibit #45A; RT, 24:5031-2 and People's Exhibit #46A; RT, 24:5032 and People's Exhibit #47A]

The prosecutor read from the September 8, 1995 transcript of the recorded conversation between the co-defendant and his mother. Therein, co-defendant Johnson ominously told his mother that he was going to have someone else "talk to" Jelks, since she hadn't yet told "Ray" (co-defendant Johnson's brother) to do it. [RT, 24:5031-2; People's Exhibit #46A]

C. <u>Proof that the court's limiting instructions were ineffective</u>.

In the instant case, one incident during the trial dramatically illustrated that at least one juror was literally *unable* to follow the court's various limiting instructions when highly frightening and inflammatory evidence was admitted solely as to co-defendant Johnson. In a most unique and unusual occurrence during the penalty phase of the trial, "alternate juror #2" sent a handwritten note to the judge at a time when the prosecution was presenting evidence in aggravation against co-defendant Johnson. [CT, 5:975, 977; RT, 32:6553] In the note the juror expressed fear for her safety <u>because Attorney Joe Orr and Appellant were "looking" at her!</u> Not only was this juror <u>unable</u> to abide by the limiting instruction (the jury was instructed *not* to consider the evidence as to Appellant), but she was unable to abide by the limiting instruction as to Appellant's attorney Joe Orr! Her deep seated fear of simply being in that courtroom had completely taken over her ability to be rationale. Other jurors undoubtedly had similar

misgivings about serving as jurors because of the fear that permeated the courtroom. Other jurors were also aware of Alternate Juror #2's fear. They were aware she passed the note to the judge. They were aware of the contents of the note. [RT, 32:6571-6572] In these circumstances, and realizing the effect the evidence had on that particular juror – evidence that the jury had been expressly instructed was not to be considered as to Appellant -- it is hard to imagine Appellant was not unduly prejudiced by being tried jointly with co-defendant Johnson. This juror was part of the jury that unanimously found Appellant guilty of both murders. This juror was part of the jury that voted unanimously that Appellant should be executed.

Certainly there must exist doubt in everyone's mind as to whether these decisions by the jury were made rationally or whether these most-important-of-all decisions were unduly influenced by their fear that if they didn't convict Appellant and impose death, the very safety of the jurors themselves could be in jeopardy.

As stated previously, the Supreme Court in *Zafrio v. United States* (1993) 506 U.S. 534; explained that the risk of compromising a specific trial right of a jointly tried defendant (i.e., Appellant) could occur

> ... when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. ... Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. [citation] (*Id.*, at p. 325.)

D. Inability to Adequately Confront and Cross-Examine Freddie Jelks.

Appellant respectfully requests his discussions contained in Arguments IV, VI, VII, VIII, IX and X of Appellant's Opening Brief be incorporated herein by reference as thought fully set forth.

The trial court refused to let counsel for Appellant confront and cross-examine Freddie Jelks regarding any details of his pending murder case primarily because it might result in the jury being told that co-defendant Johnson was a charged co-defendant in that case also. That, according to the trial court, would have been *too unduly prejudicial to the co-defendant*. Hence, Appellant was not allowed to confront and cross-examine Jelks in this joint trial to the extent he would have been allowed to confront and cross-examine Jelks if his trial were separate from that of the co-defendant. (See Arguments IV and VI in Appellant's Opening Brief.) The same ruling prohibited Appellant from adequately cross-examining Detectives McCartin and Sanchez because Appellant and co-defendant Johnson were jointly tried. (See Issues VII and VIII in Appellant's Opening Brief.) And the same ruling prohibited Appellant from confronting and cross-examining Marcellus James because Appellant and co-defendant Johnson were jointly tried. (See Issue X in Appellant's Opening Brief.)

Again, the Supreme Court in *Zafrio v. United States* (1993) 506 U.S. 534, explained that the risk of compromising a specific trial right of a jointly tried defendant (i.e., Appellant) could occur and cause prejudice to the defendant when "essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." (*Id.*, at p. 534) That is what happened in this trial when Appellant was limited in his ability to present exculpatory evidence through cross-examination of Jelks because of the co-defendant's presence at this joint trial.

E. The prosecution's burden of proof was lightened, thereby violating Appellant's constitutional right to due process and a fair trial..

Because this evidence admitted against the co-defendant was highly inflammatory and frightening, and because it was very similar to evidence presented during the trial as to both Appellant and the co-defendant, the resulting emotional reaction to this evidence by each juror would have been cumulative.

That is, it was not the type of evidence that a juror could rationally turn on and turn off as they deliberated the fate of Appellant and co-defendant Johnson. This evidence would have provided them with just that much more of a "reason to hate" the 89 Family Bloods gang, its members, and everything that lifestyle represented. That hatred, when transferred to Appellant as a member of that gang, would have accumulated. The accumulated hatred of the gang and its members creates a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (*People v. Garceau* (1993) 6 Cal.4th 140; *Zafrio v. United States* (1993) 506 U.S. 534, 544 (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt].) If a jury *wants* strongly enough to convict the defendant because of its hatred of the defendant's gang and the repugnant lifestyle it represents, jurors will overlook any weakness in the prosecution's case because of their intense desire to punish the defendant because of his gang affiliation.

F. The evidence admitted against the co-defendant cast doubt on the heightened reliability of the verdicts in this capital case.

There is the requirement of heightened reliability of verdicts in capital cases. "[T]he Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case," (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) This heightened reliability requirement, included within the Eighth Amendment and applicable to the states through the due process clause of the Fourteenth Amendment, applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama (*1980) 447 U.S. 635, 637-638.)

Appellant asserts that because of the prosecution's theory of the case, a substantial doubt was created as to the impact the above described evidence had on the jury's deliberations as to Appellant's guilt. Appellant argues that it was asking the impossible for the jury to ignore this evidence and to ensure it would

have *no impact* on their deliberations. Because this was a capital case, the trial court should have "erred on the side of caution" and granted Appellant's motion to sever. Since the court denied the motion, Appellant asserts the requirement of heightened reliability of the verdicts is lacking.

G. Because this evidence, admissible only as to the co-defendant, may have impacted the jury's deliberations concerning Appellant, any individualized consideration of his guilt was compromised.

There is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockeft v. Ohio* (1978) 438 U.S. 586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

At a separate trial, the above described evidence would simply not have been presented to the jury. There would have been no doubt that the jury gave individualized consideration to Appellant. That is, there would have been no doubt as to whether the above described evidence played a part in the jury's deliberations as to Appellant. The evidence would not have played any part in the jury's deliberations because the jury would not have been aware of the evidence, regardless of the fact it was to be considered only as to the co-defendant.

As the Ninth Circuit observed in *Tootick, supra,* "[p]rejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual basis." (*Id.* 952 F.2d at 1082.)

> "the ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct." (*United States v. Brady* (9th Cir. 1979) 579 F.2d 1121, 1128; see also *United States v. Marshall* (9th Cir. 1976) 532 F.2d 1279, 1282; *United States v. Donaway* (9th Cir. 1971) 447 F. 2d 940, 943.)

Even though there were brief instructions telling the jury to give each defendant individual consideration, the presumption that limiting instructions can cure any prejudice from joinder is inconsistent with the truth of trial practice. In this case, it was simply unrealistic to expect that a jury could limit its consideration of numerous and extremely inflammatory items of evidence solely to co-defendant Johnson. This is particularly true when the prosecution introduced a substantial amount of evidence that Appellant had a strong motive to commit similar acts of violence that the co-defendant committed, and further, that Appellant had a strong motive to do any act requested of him by co-defendant, regardless of its savage and violent nature

D. <u>Conclusion</u>.

Even if none of the evidence discussed above was sufficient to require severance standing alone, they do not stand alone. Cumulatively, they show severe undue prejudice that prevented Appellant from obtaining a fair trial and individualized consideration by the jury at during the guilt phase. The above discussed evidentiary problems distorted the fact finding process and lightened the prosecution's burden of proof.

The failure to grant Appellant's motion to sever his trial from that of codefendant Johnson thus deprived Appellant of his right to due process and to fair, individualized and reliable guilt phase verdicts, in violation of the Eighth and Fourteenth Amendment of the federal constitution and article I, §§ I, VII, XV, and XVII of the California Constitution. Under these circumstances, reversal is required as to Appellant's convictions.

XVIII:

The trial court abused its discretion and prejudicially erred when it dismissed Juror #11 who had doubts about the credibility of the prosecution's case. The error deprived Appellant of his right to a unanimous jury and requires his convictions and sentence of death be reversed.

A. Introduction.

Appellant's jury began its deliberations at 10:50 A.M. on Wednesday August 20, 1997. [RT, 25:5237] At the end of Day #2 of the deliberations (Thursday), the jury posted a note to the court, signed by the foreperson Juror No. 5, with two specific questions regarding the testimony of prosecution witness Freddie Jelks.[317] [RT, 26:5246-5247] The relevant portions of Mr. Jelks testimony were reread for the jury the same day.[318] [RT, 26:5253, 5259]

At the conclusion of Day #3 of deliberations (Monday), the jury posted a second note to the court as they left as they left the courtroom. This note was also signed by the foreperson, Juror No. 5. [RT, 26:5262] The note asked if there were "any reward monies in any way associated with this case?" [RT, 26:5263, 5270] The question directly related to whether prosecution witness Carl Conner had received a reward in exchange for his testimony. [RT, 26:5265-5268]

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[317] The jury's questions were: First, Was the fight over the girlfriend prior to the murder? [i.e., referring to a fight over a girl between Jelks and Defendant Johnson] (RT, 26:5250); When [was the fight]?; Was it a "physical" fight? Second, When did Jelks actually leave the 89 Family Bloods? (RT, 26:5247) The testimony covered if the fight was why Jelks left the gang; other reasons Jelks left the gang; Jelks told no one he was leaving, but just moved away; and was Jelks in the gang on the day of his interview with the police. (RT, 26:5250-5252)

[318] Shortly before 4:00 P.M., while the court and counsel were reviewing the record for the answer to the jury's inquiry, the bailiff approached the court with the jury's request to go home at 4:00 P.M. The court stated to the bailiff that "they are not going home until we do this." (RT, 26:5253) The jury was not dismissed until 4:15 P.M., after Mr. Jelks' testimony was reread to the jury. (RT, 26:5259)

The following morning, deliberation Day #4, the jury resumed its deliberations while the court and counsel discussed the jury's Day #3 question regarding rewards, which seemed ambiguous and open-ended. [RT, 26:5265-5269] Subsequent discussion to clarify the jury's question revealed that the jury had spent considerable time discussing the issue of a potential reward for Connor or any other witness who may have testified in this case. The foreperson, Juror #5, admitted "we didn't know if we would be able to have anything beyond the testimony as an answer to the question." [RT, 26:5271] Juror #6 also attempted to clarify the jury's inquiry, explaining that "everybody was kind of wondering" if there was a tax-payer fund available to pay rewards, or was "there any other way that money [could] be brought together as a reward," or were there "any different types of rewards" available. [RT, 26:5271-5272] Juror No. 5 further confirmed that in their discussions of this issue, the jury actually "had a lot of questions about reward[s]." [RT, 26:5272] The trial court concluded it would reread to the jury the testimony which focused on the portions of Detective Sanchez' testimony where she denied that there was a reward offered, or that Mr. Conner had been given anything in connection with this case. [RT, 26:5268, 5270]

The jury's deliberations resumed and continued throughout Day #4 [RT, 26:5282]. At the conclusion of that day, and after all other jurors had departed, Jurors #4 and #5 met and conferred privately. [RT, 26:5283] When the bailiff discovered them alone together in the jury room, they demanded an audience with the judge: "We want to see the judge. We need to see the judge." [RT, 26:5284] Even after the bailiff refused their request; after he properly directed them to put their concerns in a note; and after he explained that it violated the court's rules requiring the presence of counsel at any such meeting, they continued to be demanding and insistent. [RT, 26:5284] "We don't want the lawyers. We want to talk to [the judge] now." [RT, 26:5284-5285] When their adamant approach failed to win them an audience with the judge, the jurors tacked, and claimed "We don't have the courage to write it out. And if we don't deal with it today, we probably

won't have the courage to deal with it tomorrow." [RT, 26:5285] The two jurors refused to leave a note, and ultimately the bailiff had to demand they leave. [RT, 26:5286]

Apparently, neither Juror #4 nor Juror #5 intended to bring the matter to the court's attention the following morning, Day #5 of deliberations. According to the record, the jury deliberated for more than an hour that morning while the court and counsel discussed the available options by which to diplomatically address the unknown concerns of Jurors #4 and #5. [RT, 26:5283, 5311] During this time, the jury posted no notes to the court, nor was there any indication that Jurors #4 and #5 had any problem with the jury, with the deliberations, or with any particular juror's deliberations.

B. The Applicable Law.

The trial court was appropriately troubled about the mysterious problem that caused two jurors to act in such an unusual fashion.[319] Their unexplained conduct was sufficient to alert the court of a possible jury problem. [RT, 26:5284]

Penal Code § 1089 and Code of Civil Procedure §233 authorize a court to dismiss a juror before the jury has returned a verdict if "at any time . . . upon [] good cause shown to the court [a juror] is found to be unable to perform his or her duty . . .." (See Pen. Code §1089 [death, illness, or inability of juror to perform duty constitutes "good cause shown" for removal of juror]; Code Civ. Proc., §§233, 234 [A juror may be dismissed prior to a returned verdict upon good cause shown.]; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1332.) These statutes "permit the removal of a juror who refuses to deliberate, on the theory that such a juror is 'unable to perform his duty' within the meaning of Penal Code section 1089." (*People v Cleveland* (2001) 25 Cal.4th 466, 475 [no refusal to deliberate where juror relies upon faulty logic or fails to deliberate well]; (*People v. Bowers*

[319] One of the two jurors, No. 5, was the foreperson and a very experienced juror. He had been on five other juries. He was the foreperson at least once previously, which coincidentally, was before this very court. [RT, 26:5336, 5254, 5255]

(2001) 87 Cal.App.4th 722, 729 [no refusal to deliberate where juror listens to the evidence presented, is willing to follow the court's instructions, consider all the evidence and ultimately reach a conclusion based thereon]; *People v Johnson* (1993) 6 Cal.4th 1, 21 [refusal to deliberate where juror sleeping during trial, and smuggling trial notes home in his socks despite court prohibition]; *People v. Engelman* (2002) 28 Cal.4th 436 [refusal to deliberate exists where juror proposes reaching a verdict in complete disregard of the law and evidence]; *People v. Collins* (1976) 17 Cal.3d 687, 696 [inability to perform duties found where juror was upset all through the trial, wanted to be excused, and claimed an emotional inability to follow the court's instructions to decide the case based on the law and evidence].)

It is well-settled that the determination of "good cause" lies in the discretion of the trial court and is reviewed under an abuse of discretion standard. The trial court's decision will be upheld on appeal where there is substantial evidence supporting it. (*People v. Boyette* (2002) 29 Cal.4th 381, 462 [a trial court has "broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve"]; *People v. Millwee* (1998) 18 Cal.4th 96, 142, fn.19 [decision to remove juror reviewed for abuse of discretion]; *People v. Ray* (1996) 13 Cal.4th 313, 343 [same]; *People v. Beeler* (1995) 9 Cal.4th 953. 989 [same].)

A juror's inability to perform his or her duties will *not be presumed*, and must appear on the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Williams* (2001) 25 Cal.4th 441, 448-49 [juror unable to perform his duties shown as a demonstrable reality where juror expressed unwillingness to follow the court's instructions because he objected to the law]; *People v Van Houten* (1980) 113 Cal.App.3d 280, 285-86 [jurors inability to perform shown as a "demonstrable reality" where juror testified the graphic nature of the evidence was so physically and emotionally upsetting that she was losing her composure, crying, having difficulty sleeping, and was actively

tuning out the witnesses to keep from becoming physically ill]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 729 [court may not presume the worst of a juror]; and *People v. Hamilton*, (1963) 60 Cal.2d 105, 126 [no basis to find inability to perform duties where juror read entire Penal Code simply to become better informed, but gave no indication she would disregard the court's instructions or attempt to influence other jurors based on her reading].)

This Court in *Cleveland* identified specific conduct attributable to a juror's refusal to deliberate, including "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." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485,) However, a single remark, even an improper remark, such as a "fixed conclusion", does not amount to prejudicial misconduct. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1352 [where jurors expressed a fixed view of the case prior to a complete review of all the evidence, no misconduct or basis to dismiss the jurors found because they continued deliberations].) So long as jurors continue to deliberate, even inappropriate and improper remarks are not the sole measure of whether the juror has the ability to perform his or her duties. (*People v. Cleveland* (2001) 25 Cal.4th 466, 479-480.) And any single statement must also be placed in the context of the jurors' accompanying conduct before a finding of misconduct can be supported. (*People v. Cleveland* (2001) 25 Cal.4th 466, 479-480.) Additionally, when a juror deliberates for a reasonable time, he cannot be dismissed for failing to deliberate. (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067 [where allegations of non-deliberation arose 3½ days into deliberations and only after the juror expressed a set mind].)

1. **The trial court's inquiry must focus on the conduct of the juror, and *not* the content of jury deliberations**.

When the *validity of a verdict* is questioned because of juror misconduct, the California evidence code *excludes* evidence of jurors' subjective reasoning

processes to impeach their verdict. (*People v. Hill* (1992) 3 Cal.App.4th 16; Evid.Code, §1150, subd. (a).) Statements made in the jury room that are of such a character as are likely to have influenced the verdict improperly are admissible. However, no evidence is admissible to show the effect of such a statement on the mental process by which the verdict was determined. (*People v. Hedgecock*, (1990) 51 Cal.3d 395, 415.) Except in rare instances when a juror's statement during deliberations may itself be an act of misconduct, and thus admissible, permitting testimony about statements made by jurors during deliberations violates Evidence Code section 1150. Similarly, when the trial court makes inquiry *during* jury deliberations regarding juror misconduct, the same principle applies. When a juror during deliberations gives the reasons for his or her vote, those "words are simply a verbal reflection of the juror's mental processes," and are barred under Evidence Code section 1150. (*People v. Hedgecock*, (1990) 51 Cal.3d 395, 415)

Under the principles provided in *Cleveland*, the trial court's inquiry must, therefore, focus on the *conduct* of the jurors in its determination of whether misconduct existed. "The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) In *People v Thomas* (1994) 26 Cal.App.4th 1328, the juror was dismissed "for good cause" [where juror acted as if he had already made up his mind before hearing the whole case, did not answer questions posed by other jurors, did not sit at the table with the other jurors during deliberations, did not look at the two victims in the courtroom, juror smuggled deliberation notes home in his socks in direct opposition to courts' warning against such conduct, etc.]. "If transient comments made in the heat of discussion in the jury room become a potential vehicle for attacking the verdict of the jury [i.e., or removing a juror for misconduct during deliberations], freedom of discussion during deliberations in the jury room is chilled, and the free exchange of ideas is inhibited." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977.)

2. The nature and scope of the court's inquiry should be as limited as possible to avoid intruding unnecessarily upon the sanctity of the jury's deliberations.

Where allegations of juror misconduct become apparent, a court is authorized to conduct "whatever inquiry is reasonably necessary to determine" the existence and extent of any misconduct. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) Although the trial court may have grounds "to make reasonable inquiry into the factual explanation for that possibility" (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838), such "inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*Cleveland* (2001) 25 Cal.4th 466, 485)

Because of this Court's grave concern that the trial court's inquiry may unreasonably trespass in the jury deliberations, the trial court must use caution and the inquiry "should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*Cleveland* (2001) 25 Cal.4th 466, 485.) In fact, "it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further inquiries that could intrude upon the sanctity of deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 480; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1352 [no abuse of discretion where court conducted only *minimal* inquiry into jury misconduct, *and* chose to reread jury instructions referencing jury's duty to deliberate, and directed hostile jurors to put aside hard feelings and recommence deliberations].)

The continuing concern with each of these principles is the importance of protecting jury deliberations and the need "to avoid the potential chilling effect on the jury's deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

C. Discussion.

Appellant contends that his convictions and sentence of death must be overturned because the trial court improperly discharged Juror #11, thereby causing prejudice to Appellant. The court asserted a) that Juror #11 prejudged the outcome of the case prior to deliberations, and b) that Juror #11 prejudicially introduced outside facts and evidence into the deliberations. The trial court explained that for *both* reasons Juror #11 should be removed.

1. At all times, Juror #11 was able and willing to perform his duty as a juror. He was a willing participant in jury deliberations.

a. The trial court erred when it exceeded the permissible scope of inquiry by failing to *stop its inquiry* after acknowledging the absence of any juror misconduct.

The court's initial query into the cause of the previous day's unusual conduct involving Jurors #5 and #4 began with Juror # 5. [RT, 26:5311] Juror # 5 began his testimony by stating he was "very uncomfortable with this whole procedure." [RT, 26:5312] He explained his previous day's conduct by alleging that Juror No. 11 had prejudged the outcome of the case prior to the beginning of deliberations. [RT, 26:5313; 5316] Although Juror No. 5 was "suspicious of it from the beginning, I took him at his word" when Juror No. 11 claimed to be undecided. [RT, 26:5313-5314; 5317] Juror #5 based his accusation on a comment he said Juror # 11 made on Thursday, Day 2 of deliberations: "Well, you know, when the prosecution rested, I knew she didn't have a case." [RT, 26:5314; 5317] Juror No. 5 claimed he immediately and expressly asked Juror #11 if his mind was set and that Juror #11 hesitated before denying the charge and asserting he was undecided. [RT, 26:5314; 5317] Although the jury then "went on with deliberations," Juror #5 complained "that there is not one piece of evidence that is acceptable to [Juror #11]." [RT, 26:5314] As further verification of his allegations, Juror #5 added that "whenever anybody would speak, [Juror #11] would make some remark that was contrary to what the person was saying" [RT,

26:5316-5317; 5335], or there was "some comment made by [Juror #11], which deprecated that particular argument, or particular opinion." [RT, 26:5335] Juror #5 then testified as to his understanding of the process of jury deliberations:

> I've been on five other cases, and I don't ever recall anything like this happening before. [And what is different this time is that] from the beginning it's the same attitude, it's the same -- there's no evolution. There's no -- you can see as people deliberate there's a process that takes place, and I was hoping for that process, but I just -- I never -- I never saw it happen. [By "the process" I mean that] usually people will come in and they are eager to discuss the case, and they're -- they usually will go around and deal with it, with the questions that they have on points of law or on -- "Did you understand certain things?" They'll go through their notes. They'll ask people, "Is this what you understood?" "Is this what you heard?" That's what I mean by the process. [RT, 26:5336]

Juror #5 seemed to blame Juror #11 for undermining this "process":

> [T]hough [Juror #11] participates in the discussions, it's the same position from what it was in the beginning. I mean -- what I mean by that is the same -- and then when you add to that what I think are these comments when other people are speaking, it's been a most unpleasant foreperson job because of that. [RT, 26:5337; Emphasis added.] ... I ...was hoping [the process] would have happened. [RT, 26:5337] ... And the process can take time. But by Monday [Day #4] I felt, you know, it's a useless process. [RT, 26:5340]

More than once, Juror #5 referenced how uncomfortable he was and expressed his concern that "other people are suspicious and will be more suspicious now." [RT, 26:5315] By way of explanation, Juror #5 testified that Juror #8 had unexpectedly returned to the jury room the day before and discovered Jurors #4 and #5 alone together. When Juror #8 confronted them about their conduct the next morning, Juror #5 admitted lying to him, saying "it was just a personal issue." [RT, 26:5318] He added that Juror #4 also lied to Juror #8 by stating that "we were straightening things out, which we did. It was a mess and the evidence was all over the place." [RT, 26:5319]

Juror #4 also testified that Juror #11 had decided the case before deliberating, and was "misconstruing evidence to support" his position. [RT, 26:5348] Although Juror #11 claimed to be undecided, she didn't believe him because he "would make very strong pronouncements" of his opinion that she felt often were illogical. [RT, 26:5349] Juror #4 offered an example of Juror #11's failure to apply logic:

> [W]hen we were discussing one of the witnesses [Carl Conner] and there was an issue of timecards. And [Carl Conner] had mentioned that he had a person named Jose punch in for him. And [Juror #11] said: That's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion. [RT, 26:5350]

Juror #4 explained that Juror #11's pre-deciding the case was a problem right from the beginning of deliberations. [RT, 26:5349] Candidly, she admitted that her failure to notify the court of the problem sooner was because she "was waiting to see whether there would be any -- if he would listen to others' opinions and modify his own opinions in light of that, and there was never any indication that he -- he changed or deviated from his original belief." [RT, 26:5352]

After questioning Jurors #5 and #4, the trial court should have stopped its inquiry into allegations about Juror #11's alleged unwillingness to participate in the jury deliberations because "once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists", the inquiry should cease. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) Thus far, there was *no apparent misconduct* by Juror #11. Despite their accusations, Jurors #5 and #4 both admitted that Juror #11 *was deliberating.* Juror #5 testified:

> "[T]here is not one piece of evidence that is acceptable to [Juror #11]." [RT, 26:5314]; "[W]henever anybody would speak, this juror would make some remark ..." [RT, 26:5316]; "Well, though he participates in the discussions ..." [RT, 26:5337]; "Every time a

> comment was made ... there usually was some comment made by that juror...." [RT, 26:5335]

Juror #4 testified that Juror #11 was deliberating, even though he was...

> "misconstruing evidence to support" his position." [RT, 26:5348]; "...whatever piece of evidence we addressed he would make very strong pronouncements about how he felt about it." [RT, 26:5349]; His pronouncements "often really had no logic to them at all." [RT, 26:5349]; and "he was very forceful about his opinions." [RT, 26:5350]

Even Juror #5's description of the problem was more indicative of a personality clash, and something the jury was working through, rather than jury misconduct.

> "Part of me wants to say that the situation has been resolved, but I know it has not been." [RT, 26:5313]; "Monday and Tuesday [deliberation Days 3 and 4] I was hoping things would kind of level out ...." [RT, 26:5315]; "So on Thursday [Day 2] I had already felt that there was a tension because I was trying to bring the thing back around." [RT, 26:5317]; "...and [Juror #8] confronted us this morning. And I said [to him]: No, it was just a personal issue." [RT, 26:5318]; "[A]nd then when you add to that what I think are these comments [that Juror #11 makes] when other people are speaking, it's been a most unpleasant foreperson job because of that." [RT, 26:5337]; "Someone says, "Well, maybe he's telling the truth" [and Juror #11 says] "Yeah, maybe he's lying," while the person is still speaking, you know." [RT, 26:5337]; "I knew [Juror #4] had had a couple of verbal situations with [Juror #11]. And I knew she was -- on Monday she just didn't want to speak on the case, because she felt every time she opened her mouth, you know -- and they kind of settled that in the afternoon. And then yesterday there were some situations, and I just sensed that she felt similar to the way I did." [RT, 26:5338]

Furthermore, neither Jurors #5 nor #4 intended to bring the matter to the courts attention on Day 5 of the deliberations. According to the record, the jury deliberated for more than one hour on the morning of deliberation Day 5, while the court and counsel discussed the available options by which to diplomatically

address the unknown concerns of Jurors #4 and #5. [RT, 26:5283-5311] During this time, the jury posted no notes to the court, nor was there any indication that Jurors #4 and #5 had any problem with the jury, with the deliberations, or with Juror #11's participation in the deliberations that morning.

The most striking consistency between Jurors #4 and #5's testimony, however, was their rationale that because Juror #11 failed to change his mind over the course of the four days of deliberations, he must have pre-decided the outcome in advance. Juror #5's testimony can be summarized as follows: a) Juror #11's attitude did not evolve as was necessary for the process to work, as Juror #5 thought is should work; b) Juror #11 was opinionated and rude and interrupted other jurors while they were talking, and c) Juror #11 made Juror #5's job as foreman so unpleasant that he'd "be very uncomfortable continuing with the process" at that point. (RT, 26:5311-5321, 5333-5343, 5342, 4-6) However, "rude outbursts are not necessarily misconduct, and it is not unusual during deliberations for one juror to express frustration, temper, and strong conviction against the contrary views of another panelist." (*People v. Cleveland* (2001) 25 Cal.4th 466, 476. Internal quotation marks omitted.)

Juror #4 unequivocally stated that she didn't approach the court about the Juror #11 "problem" for four full days because if Juror #11 had modified or changed or deviated from his original opinion, it would not have been necessary. [RT, 26:5352] This testimony speaks *not* of juror misconduct.

Jurors #4 and #5 presented no evidence to the court supporting their allegations of misconduct by Juror #11. Additionally, there were serious credibility concerns for both jurors; that is, both jurors breached their jurors' oath when they met secretly and discussed the deliberations, and both admitted lying to Juror #8 about the reason for their rendezvous. Even should the testimony of Jurors #4 and #5 be accepted at face value, however, both provided ample evidence that demonstrated Juror #11 was fully and actively participating in the deliberations. According to their own testimony, Juror #11 listened to others

sufficiently to make comments in rebuttal. They also stated that Juror #11 answered questions put to him.

As stated previously, a juror's inability to perform his or her duties will *not be presumed*, and must appear on the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Williams* (2001) 25 Cal.4th 441, 448-449; *People v Van Houten* (1980) 113 Cal.App.3d 280, 285-86; *People v. Bowers* (2001) 87 Cal.App.4th 722, 729; *People v. Hamilton*, (1963) 60 Cal.2d 105, 126. Since there was nothing that even approached a "demonstrable reality" that Juror #11 was refusing to deliberate, it was error for the trial court to pursue further inquiry after questioning Jurors #4 and #5.

b. The trial court's manner of inquiry was *anything but cautious* and clearly intruded upon the sanctity of the jury's deliberations.

Assuming, for argument's sake that the trial court's decision to extend the inquiry was proper, the trial court's aggressive manner of questioning became immediately noticeable when the next juror, Juror #1, was interrogated. The court's questions were themselves leading and suggestive, they were often compound and contained more than one question, and they were sometimes confusing.

Juror #1's responses to the court's inquiries.

The court's first question of Juror #1 was, "Has there been any juror or jurors to your way of thinking who have failed to meaningfully participate in deliberations, or who appeared to have gone into the deliberations with a very fixed immutable position, prior to actually discussing the case?" [RT, 26:5362] Juror #1 responded that all jurors were participating meaningfully, but that one juror said upon entering the jury room that "they didn't prove their case." [RT, 26:5362] The court then *rephrased* its question, narrowing it to any "particular juror." Juror #1 responded that "*three jurors* have had the mindset from the beginning [that] all the witnesses are unreliable, all the testimony is unreliable,

[and] everything is unreliable and untruthful that the prosecution presented." [RT, 26:5363. Emphasis added.] The court *rephrased* the question *again*, asking "if any juror at the outset, that is right at the get go of deliberations, already had their mind made up to the degree that deliberations were a sham, or were meaningless, or weren't real deliberations?" [RT, 26:5363] When Juror #1 restated his original answer, the court *rephrased* the question *a fourth time*, "Did you hear any juror make any comment, any juror, 1 through 12, at any point during the deliberations, make any comment to suggest that that juror had decided the case prior to the deliberations?" [RT, 26:5364] Juror #1 testified that he'd "heard comments that [deliberations were] just confirming what they had already decided." [RT, 26:5364]

The trial court then pressed Juror #1 for the identity of *any* of the jurors who had made that comment: Who [said that]? [What juror] number? I don't want names. What's the guy wearing today? What's the juror's name? And what was the comment? Do you recall the exact words used by the juror? [RT, 26:5364-5366] In response to this series of aggressive questions, Juror #1 testified that on Day 5 of deliberations, *Juror #12* said "he had already determined from the evidence before we were dispatched to the jury room that the defendants in his mind were, you know, one way or the other … but the deliberations just confirmed his feeling toward it." [RT, 26:5365, 5466]

The trial court then *rephrased* its original question *a fifth* time and *again* asked Juror #1, "[I]s there anybody who is actually failing to deliberate in a meaningful way and listen to other jurors give his or her views back there?" [RT, 26:5366] Juror #1 testified that he personally spoke to Juror #11 who seemed to be nodding off at one point, but "he's been involved in the deliberations." [RT, 26:5367] He further testified that it [i.e., the apparent "nodding off"] occurred only once, and now Juror #11 stands up if he feels sleepy. [RT, 26:5368] When asked whether he remembered "somebody making a comment back there, something about Hispanics, the way they do or don't fill out timecards as a group,"

Juror #1 thought it was possible that *Juror #4* had made such a remark, but he wasn't paying close attention, and he wasn't sure who had said what in reference to the time card. [RT, 26:5369]

Juror #2's responses to the court's inquiries.

The court also began a similar inquiry of Juror #2, asking whether there were any jurors who had decided the case prior to the deliberations. [RT, 26:5371] Juror #2 immediately spoke of the vote earlier that morning (i.e., deliberation Day 5), where some strong opinions had surfaced. "[A]s each person had an opportunity and did speak as to how they came to vote the way we voted this morning", more than one juror indicated that "as they left the courtroom, the evidence was either sufficient or not sufficient" and some jurors had at that time, a "semi conviction about guilt or innocence." [RT, 26:5371-5372] The court pressed Juror #2 to identify these jurors: "How many jurors said something like that today? ... Which ones? ... Either by name or number ... I know you are reluctant, but do your best to recall." [RT, 26:5373-5374] Juror #2's testimony about *Juror #12* was a product of this pressure. Juror #2 was concerned about identifying any one individual because he'd "heard so much from these people ... [and] we all did a lot of expressing this morning as to how we arrived at the vote that we verbally expressed this morning" (i.e., early morning of deliberation Day 5). [RT, 26:5373-5374] Juror #2 stated that at the close of the case, *Juror #12* "was almost sold on his belief that -- that supported the way he voted this morning." [RT, 26:5374] At the same time, Juror #2 admitted that ...

> ... what I'd heard had me very undecided, but I tended to lean one way as to the impressions I had gotten from the evidence, what I had heard, and that as we convened and met and expressed and recounted and reread what we had heard in [the courtroom], that I wanted to know if someone heard what I didn't hear, someone believed what I didn't believe, and had already made up their minds. I didn't hear anyone say, "I didn't need to come in here to anything." [RT, 26:5375]

The questioning of Jurors #5, #4, #1, and #2 thus complete, the court felt it had a "clear sense" of the problem: "I'm not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody ... convince me there's been misconduct at this point." [RT, 26:5379]

At this point in the inquiry, there was ample support in the record for the court's conclusion that there was no jury misconduct. Jurors #1 and #2 both testified that everyone was deliberating. Both also testified that there was more than one juror expressing doubts about the prosecution's case. Juror #1 said that from the beginning there were at least *three (3)* jurors with the mindset that "all the witnesses are unreliable [and] all the testimony is unreliable." [RT, 26:5363] Juror #2 testified that there was "more than one" juror convinced about how they would vote as they left the courtroom. [RT, 26:5372-5373] Ironically, as the court pressed for a detailed description of *Juror #12's* predetermined mind-set, both Juror #1 and Juror #2 described how very *appropriate* jury deliberations had been taking place. Juror #1 stated that "the deliberations have just more or less confirmed [Juror #12's] decision, or his solution, as we've been deliberating here. It strengthened ... his opinion or his decision." [RT, 26:5366] Juror #2's final response to the court's *rephrasing* of the same question perfectly described the ideal deliberative process of a jury. The court asked no other questions of him:

> ... since about half of us heard things and were impressed about things we heard in different ways - it was interpreted differently, and it supported their vote this morning.... [I]t did help me and make me more confident in which way I was leaning based on what I heard [in the deliberations]. ... I did need to go through this process of getting to the point of casting a vote this morning with some kind of conviction. And most of us stated that one way or the other ... I didn't hear anyone state specifically what you've asked, that when they left [the courtroom], and this morning, they are unchanged about anything they heard in [the courtroom]. People are tending to justify, 'Oh, I heard it this way, and that way, and this is the way I felt,' and it was along those lines." [RT, 26:5374-5376]

Furthermore, the trial judge's own conclusion was unambiguous. The court had heard no evidence that any misconduct had occurred, much less evidence on the record illustrating misconduct as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Williams* (2001) 25 Cal.4th 441, 448-49.) Although the trial court may have had grounds "to make reasonable inquiry into the factual explanation for that possibility" (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838), such inquiry should have ceased "once the court [was] satisfied that the juror at issue [was] participating in deliberations and [had] not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exist[ed]." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485) It is because of this Court's grave concern that the trial court's inquiry may unreasonably trespass in the jury deliberations that the trial court's inquiry "should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*Id.*, at p. 485.)

But the trial court's inquiry was prejudicial to Appellant's right to a fair and impartial jury for two additional reasons. First, not only did the trial court not "use caution in its inquiry" (*Id.*, at p. 485.), but jurors #1 and #2 clearly felt they had been subjected to a vigorous interrogation by a trial judge who was obviously displeased that they had not yet reached a unanimous verdict. Second, even after placing jurors in such a defensive posture, the trial court declined to make any effort to mitigate any damage it may have caused by reinstructing the jury giving the jurors an appropriate instruction. (*People v. Cleveland* (2001) 25 Cal.4th 466, 480; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1352.)

c. The trial court's decision, assumedly made in good faith, to continue its inquiry into juror misconduct did not lessen nor eliminate the error. Rather, it *exacerbated* the already existing error.

In deciding to continue its investigation into the alleged misconduct of Juror #11, the court commented:

> CRT: I want to talk to 11 and 12, because there's an allegation still floating around out there directed at 11 and now 12, to wit, sleeping on the job, coming in with a fixed opinion saying, I had an opinion at the time the people rested their case. Now, I know those things are ambiguous and in dispute. It seems to me that I want to hear it from the horse's mouth as to number 11. As to number 12, it's a similar situation. One juror has now indicated, as I recall, that 12, as I recall it, indicated that he had an opinion before being dispatched to the jury room. I think that's what I heard, mind made up before deliberations, Number 12 ... I just want to see what that juror's answer is. [RT, 26:5379-5380]

The court's justification for the continued inquiry into the *possible* misconduct of Juror No. 11, and now Juror #12 (i.e., because the court wanted to hear it "from the horse's mouth"), was an unacceptable basis to pursue alleged misconduct. In *People v. Compton*, this Court held that the good intentions of the trial court would not excuse the courts' abuse of discretion. (*People v. Compton* (1971) 6 Cal. 3d 55, 60 [abuse of discretion requiring reversal "where trial court expressly found juror's remarks did not show he "'would be unable to serve'" but nevertheless dismissed him "'out of an abundance of caution ...'"].)

Because the court stated unequivocally that there was no misconduct, and because there were no further indications of jury misconduct, the court abused its discretion and erred in its' decision to pursue the investigation. The trial court's continued inquiry into juror misconduct "intrud[ed] unnecessarily upon the sanctity of the jury's deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

A review of the record demonstrates how damaging the trial court's inquiry was to Appellant's right to a fair and impartial jury. Once begun, the inquiry seemed to propel itself. As the court moved from one juror to the next, the courts' manner became more abrasive. For example, Juror #7, a woman, initially thought

the court was targeting her: "No. I didn't [prejudge]. But some did." (5395, 6-7) Juror # 7 then endured a barrage of questions clearly aimed at uncovering who the jurors were to whom Juror #7 referred when she claimed that "some did" prejudge the case, as well as what each one specifically said during deliberations:

> CRT: Which juror or jurors? ... Do it by seat number. It would be simpler. ... Do you remember who? ... What is the person's name? ... Is it more than one person or one person? ... How many? ... About 5 people? ... You can't tell me which ones? Can you tell me where they are sitting or anything like that? ... Where? ... No.9. Who else? Anybody else that you can think of? What led you to believe that -- Well, lets find out who else. Anybody else? ... What sorts of things were said that made you believe that these folks had already decided the matter? ... What did they say that led you to believe that they had made up their minds already? ... My question is what did the people say to cause you to conclude that they already had their mind made up before you guys even deliberated? [RT, 26:5395-5397]

Juror #7 finally claimed to have heard somebody say "I had my mind made up before I already came in here." [RT, 26:5398] The trial court's reaction was comparable to a hunter with a deer in the crosshairs: "That is the person that I am interested in. Who was that person? Name? Seat? Description? However you want to do it." [RT, 26:5398] When Juror #7 struggled to remember, the court demanded, "Do it anyway." [RT, 26:5398-5399] When Juror #7 hedged and wasn't sure, the court stated, "We will have to have you sit there until you recall for me." [RT, 26:5399]

The court maintained this pressure with Juror #8, stating, "You will have to sit and think for a while and tell me by name or seat or description or some other way. So take your time." [RT, 26:5403-5404] And as with Juror #7, the court bombarded the juror with a series of accusatory questions: "Men or women or a mixture?; ... What did they look like? Black? White? Old? Young?" [RT, 26:5404] The courts' pressure lead Juror #8 to state, "Let me make sure I get this

right [trying to recall exactly what Juror #12 said]. I don't want to make a mistake and implicate anybody." [RT, 26:5407]

This aggressive and intrusive manner of questioning was employed by the court throughout the inquiry. The effect on the individual jurors was readily apparent. Juror #1 asked if he was under oath prior to answering the court's *fifth rephrasing* of "who is failing to deliberate?" [RT, 26:5366] Jurors #7 and #8 floundered as they tried to recall specifics while being verbally badgered and scolded like children. [RT, 26:5398-5399, 5403-5407] The court did not confine its inquiry to a determination of whether Juror #11 was deliberating. Rather, it used the inquiry as a fishing expedition - an opportunity to discover where the jury deliberations were heading.

The court's intimidating questions far exceeded the boundaries of caution. Clearly, the "sanctity of deliberations" cannot exist where jurors respond to the court's questions by asking, "Am I under oath?" or by worrying about "implicating" another juror before answering a question by the court. The highly intrusive interrogation-style tactic employed by the court created fear in the jurors and "deprive[d] the jury room of its inherent quality of free expression." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

d. The trial court's inquiry impermissibly focused on the *content* of juror deliberations, not on the *conduct* of jurors.

Under the principles provided in *Cleveland*, the trial court's inquiry, assuming for purposes of argument that it was otherwise proper, should have focused on the *conduct* of the jurors in its determination of whether misconduct existed. "The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) The continuing concern with each of these principles is the importance of protecting jury deliberations and the need "to avoid the potential chilling effect on the jury's deliberations." (*Id.*, at p. 485.)

Here, the trial courts' focus was on the content of the deliberations. In fact, the court directed each juror to relate with specificity what was said, when it was said, and by whom it was said. The court accomplished this by repeatedly rephrasing and narrowing the questions, and by pressuring the individual jurors to respond.

Juror #2 expressed concern about pointing the finger at any one juror because "we all did a lot of expressing this morning as to how we arrived at the vote that we verbally expressed this morning." [RT, 26:5373-5374] Jurors #7 and #8 were reprimanded by the court and told that they would have to "sit there" until they could specifically identify the jurors they thought pre-judged the case and why. [RT, 26:5399, 5403-5404] Juror #8 worried about "implicating" a co-juror when the court pressured him to recall exactly what that juror had said. [RT, 26:5407] When Juror #10 struggled to remember "exactly" what Juror #11 had said, the court asked, "Are you reluctant to tell me?" implying that Juror #10 was not cooperating. [RT, 26:5416] Other court questions included:

> Did you hear anybody, any juror or jurors, make a statement to the effect: when the D.A. rested, I knew they didn't have a case? [RT, 26:5384]
>
> I wanted to know if anybody said something like that: I knew which way I was going to vote half way through this case; or I knew how I was going to vote as soon as the people rested; or I knew how I was going to vote as soon as the defense rested. That is the kind of thing that I was interested in. [RT, 26:5397-5398]
>
> Did you hear anybody make any statement to the effect, talking about time cards: I know about Hispanics. They would never cheat on a time card. Words to that effect. Something like that." [RT, 26:5384]
>
> Did you hear anybody say something about Hispanics not -- with a time card. I know Hispanics wouldn't falsify a time card, or something like that? [RT, 26:5401]

Appellant respectfully submits the trial court's manner of questioning was a manifest abuse of discretion. By the nature of its questions, the court did nothing "to avoid the potential chilling effect on the jury's deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

2. The record does not support a finding of misconduct under the standard set forth in *People v. Cleveland*. Further, it is not at all clear exactly what standard the trial court applied in removing Juror #11.

Assuming the full inquiry was warranted, and further assuming that it was conducted in an appropriate manner, it is also necessary to examine the inquiry in terms of the applicable standard for a finding of misconduct.

In *Cleveland*, this Court defined a juror's refusal to deliberate as the "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." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) Further, the determination of "good cause" for removal lies within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. The trial court's decision, however, will be upheld on appeal *only* where there is substantial evidence supporting it. (*People v. Boyette* (2002) 29 Cal.4th 381, 462)

Finally, as stated previously, a juror's *inability* to perform his or her duties will *not be presumed.* There must appear on the record evidence of juror misconduct as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Williams* (2001) 25 Cal.4th 441, 448-449.)

Here, the record is replete with testimony affirming Juror #11 was *fully engaged* in the deliberations, was willing to listen to others, and was willing to express his own views. In fact, Juror #11's highly *active* participation appears to have generated Jurors #4 and #5's allegations against him. In fact, Juror #5's own statements to the court overwhelmingly supported Juror #11's active participation in the jury deliberations:

"[T]here is not one piece of evidence that is acceptable to [Juror #11]." [RT, 26:5314]

"[W]henever anybody would speak, [Juror #11] would make some remark that was contrary to what the person was saying." [RT, 26:5316-5317]

"Every time a comment was made, or any time someone was speaking, there usually was some comment made by that juror, which deprecated that particular argument, or particular opinion." [RT, 26:5335]

Juror #11 "participates in the discussions." [RT, 26:5337]

"[Juror #11 makes comments] when other people are speaking." [RT, 26:5337]

"Someone says, 'Well, maybe he's telling the truth' [and Juror #11 says] 'Yeah, maybe he's lying,' while the person is still speaking, you know." [RT, 26:5337]

"I knew [Juror #4] had had a couple of verbal situations with [Juror #11]." [RT, 26:5338]

Juror No. 4's statements to the court further buttressed the fact that Juror #11 was actively participating in the jury's deliberations. Juror #11, however, was not agreeing with either Juror #4 or Juror #5's viewpoint:

"Because whatever piece of evidence we addressed, [Juror #11] would make very strong pronouncements about how he felt about it." [RT, 26:5349]

"[A]n example would be when we were discussing one of the witnesses [Carl Conner] and there was an issue of timecards. And [Carl Conner] had mentioned that he had a person named Jose punch in for him. And [Juror #11] said: That's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion." [RT, 26:5350]

"[W]e expressed how we were leaning, and [Juror #11] was very forceful about his opinions." [RT, 26:5350]

"[I]t was obvious which way [Juror #11] felt the case should go." [RT, 26:5352]

Even those jurors who specifically identified Juror #11 as pre-deciding the case prior to deliberations testified that he was actively involved in the jury's deliberations. Juror #6 testified that it seemed "more of a thing in passing, you know. ... [Jurors #7 and #11] felt a little bit as though nothing was proved beyond a reasonable doubt." Juror #9 testified that Juror #11 seemed "a bit less open-minded, I guess"[320], but added that Juror #11 "talks about the case, ... says he is willing to hear the others, [and] seems willing to listen." [RT, 26:5411-5412] Juror #10 testified that although Juror #11 stated his mind was set prior to deliberations, "he recanted in the end," and "I didn't put too much thought to it because he said he was willing to [be open-minded]." [RT, 26:5416]

This Court in *Cleveland* identified specific conduct attributable to a juror's refusal to deliberate, including "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." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) The record in the instant case demonstrates Juror #11 did deliberate, did discuss his point of view with the other jurors, and did *not* separate himself from the remainder of the jury. What the record *also* shows, however, is that Juror #11 did *not* agree with Jurors #4 and #5 as to how the evidence should be viewed.

Here, even if Juror #11's remark about the prosecution's case was made on the morning of deliberation Day 2 (which it wasn't[321]) as Juror #5 indicated, the statement standing alone does not amount to a "fixed conclusion" wherein Juror #11 refused to consider the other jurors points of view. As indicated above, Juror #11 surely considered other points of view long enough to formulate a counter-

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[320] Juror #9 was parroting the words from the courts' third rephrasing of the "anyone pre-judge" question.

[321] See the discussion, *infra*.

argument to some of the views that were expressed by other jurors. A single remark, even an improper remark that on its surface indicates a "fixed conclusion", does not necessarily amount to juror misconduct. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1352 [where jurors expressed a fixed view of the case prior to a complete review of all the evidence, no misconduct or basis to dismiss the jurors found because they continued deliberations].) So long as jurors continue to deliberate, even inappropriate and improper remarks are not the sole measure of whether the juror has the ability to perform his or her duties. (See also *Cleveland* (2001) 25 Cal.4th 466, 479-480.)

Lastly, one of Juror #5's foremost complaints about Juror #11 was that he did not deliberate well: Juror #11 interrupted people while they were talking and interjected a counter argument at every turn. [RT, 26:5335-5337] He verbally sparred with Juror #4 such that she didn't even want to speak [RT, 26:5338], and he created a "most unpleasant foreperson job" for Juror #5. [RT, 26:5337] Juror #4 alleged Juror #11 was "misconstruing the evidence" [RT, 26:5348], and that he "would make very strong pronouncements" in support of his opinion, which "often really had no logic to them at all." [RT, 26:5349] But under *Cleveland*, the fact that a juror does not "deliberate well", or the fact that a juror relies on faulty logic, does *not* equate to a refusal to deliberate. This Court explained that 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 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." (*Cleveland* (2001) 25 Cal.4th 466, 485)

Appellant submits that the actual underlying complaint expressed by Jurors #5 and #4 was that Juror #11 consistently disagreed with the majority, or at least

with Jurors #4 and #5. Juror #4 testified that "it was obvious which way [Juror #11] felt the case should go, and it was obvious that he wasn't going to change from that." [RT, 26:5352] As stated above, when a juror deliberates for a reasonable time, he cannot be dismissed for failing to deliberate. (*Id.*; *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067 [where allegations of non-deliberation arose days into deliberations and only after the juror expressed a set mind].) In this case, it was only after more than three and one half days of deliberations that Jurors #4 and #5 sought to express their protests to the court. Yet, as grave as their concerns supposedly were, they were not important enough to raise the next day. (See *People v Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067, 55 Cal.Rptr.2d 151 [where the record indicated that the jury was deadlocked and that the claim of non-deliberation arose only after a juror refused to change her view].)

In summary, during the court's inquiry each and every juror, including #4 and #5, indicated that an appropriate deliberative process was taking place. The record simply does *not* support a finding by a "demonstrable reality" that Juror #11 refused to deliberate, or was unwilling to participate in the ongoing jury discussions. The trial court abused its discretion and erred when it removed Juror #11.

a. Even if the trial court's inquiry had revealed evidence of juror misconduct, the court applied the *wrong standard* in determining if the misconduct was sufficient to establish "good cause" to remove Juror #11.

The trial court justified its finding partly because so many jurors felt that Juror #11 had prejudged the case:

> CRT: It would appear to me that ... juror [#11] made it relatively clear to a *majority of the jurors* here that he had decided the case; that he had his mind made up at a time before the matter had been submitted to the jury." [RT, 26:5448. Emphasis added.]

> And I am not trying to be super technical or picky with this, but it is a situation that with all things considered, the opinions of a *large number of jurors*, including the foreperson. ... I find that he made the statements attributed to him in having made up his mind...." [RT, 26:5451-5452. Emphasis added.]

The record, however, clearly contradicts the court's assertion that "a majority of the jurors", or "a large number of jurors", believed Juror #11 prejudged the outcome of the case. Even if the record did reveal to a "demonstrable reality" that the majority of jurors *were* convinced that Juror #11 prejudged the evidence and refused to deliberate, the "Majority of the Jurors Test" is *not* the applicable standard. It is the juror's inability to perform his duty that must be shown to a demonstrable reality under the *Cleveland* standard.

Excepting the allegations of Jurors #4 and #5, not one single juror indicated there was a problem with the deliberations. When pressed by the court, and when attempting to answer narrowly tailored and leading questions, the jurors began to label various co-jurors as "pre-judgers". Three jurors[322] identified Juror #12 as pre-judging the outcome prior to the deliberations. Jurors # 3, #6, #7, and #9 were also labeled pre-judgers during the court's inquiry by fellow jurors.[323] Three jurors held firm that everyone was deliberating and identified no one in particular as a pre-judger.[324] Juror #12 admitted that the "pre-judger" remark about the prosecution's case might have been made by him. [RT, 26:5425] Four jurors testified that there were at least two "pre-judgers" in the jury,[325] and one juror[326] claimed there were as many as five "pre-judgers." Juror #6 suspected that both Jurors #7 and #11 were "pre-judgers", but stated it was "more of a thing in passing...you know...they felt a little bit as though nothing was proved beyond a

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[322] Jurors #1, #2, and #8.
[323] Jurors #6, #7, and #8.
[324] Jurors #3, #11, and #12.
[325] Jurors #1, #6, #7, and #8
[326] Juror #7.

reasonable doubt." [RT, 26:5389-5390] Juror #8 specifically eliminated Juror #11 as a "pre-judger": "It is not that guy." [RT, 26:5405] Juror #9 twice stated that no juror had more than an impression of "which direction they might go" and everyone agreed to listen and "go through the deliberations" before they came to a conclusion. [RT, 26:5410-5411] In response to the courts' rephrased and narrowed question whether everyone "appear[ed] to have an open mind," Juror #9 testified that Juror #11 seemed "a bit less open-minded, I guess." [RT, 26:5411] Juror #9 was also unable to offer any reasons for this assertion and admitted that Juror #11 "talks about the case" and "seems willing to listen." [RT, 26:5412] Juror #10 testified that although Juror #11 had decided the outcome prior to deliberations, he "recanted in the end...and was willing to be opened-minded. ... I just didn't put too much thought to it because he said he was willing to [be open-minded]." [RT, 265414]

Thus, as far as the record illustrates, the *only* jurors who alleged that Juror #11 conclusively pre-judged the case prior to the deliberations were Jurors #4 and #5. With a grand total of two jurors thus convinced[327], the trial court could not accurately state that "a majority of the jurors", or even "a large number of jurors", was convinced of such.

3. The Discharge of Juror #11 Violated Appellant's Rights under the Constitutions of California and the United States.

The trial court's inquiry and ultimate removal of Juror #11 deprived Appellant of a) his right to have his trial completed by a particular jury, b) his Sixth and Fourteenth Amendment rights to a full and fair trial by an impartial jury, c) his Due Process right to procedures mandated by California law, and his Eighth Amendment right to a reliable sentencing determination in a capital case.

A defendant who is prosecuted in a California State court has a federal constitutional right to an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145

[327] And even these two jurors acknowledged that Juror #11 deliberated with the other jurors. See *supra*.

[Sixth Amendment right to a jury trial]; *Irwin V. Dowd* (1961) 366 U.S. 717, 722 [due process right to trial by impartial jury]; *Ross v. Oklahoma* (1988) 487 U.S. 81, 85 ["It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury."] Further, the United States Supreme Court has recognized in the context of the Fifth Amendment that a defendant has a "valued right to have his trial completed by a particular tribunal." (*Wade v. Hunter* (1949) 336 U.S. 684, 689.)

Justice Werdegar stated in her concurring opinion in People v. Cleveland (2001) 25 Cal.4th 466 that the "substitution of a juror after the jury has retired to deliberate may trench upon a defendant's right to a trial by jury. U.S. Const. amend. VI; Cal.Const. artI, § 16[.]" (*Id.*, at p. 487, citing *People v. Collins* (1976) 17 Cal.3d 687, 692.) Therefore, the "discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimo7us jury decision." (*Id.*, at p. 487. See also *Sanders v. Lamarque* ( ) 357 F.3d __, 944.)

Pursuant to California's constitution, "[e]very criminal defendant is entitled to a unanimous verdict" (*People v. Wheeler* (1978) 22 Cal.3d 258, 265), and "to be valid a criminal verdict must express the independent judgment of each juror." (*People v. Karapetyan* ( ) 106 Cal.App.4th __, 621, citing *People v. Gainer* (1977) 19 Cal.3d 835, 848-849.) The improper removal of a deliberating juror thuys violated Appellant's state constitutional right to a unanimous jury verdict, including the right to the independent and impartial decision of each juror. Cal. Const. art. I, § 16.

Appellant's Sixth and Fourteenth Amendment rights are also implicated by the trial judge's misapplicationof Penal Code, §1089. The purpose behind the substitution procedure set forth by that statute is to preserve "the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995; see also *People v. Bowers* (2001) 89 Cal.App.4th 722 , 729 ["The California process for substitution of jurors under Penal Code,

§1089 and Code of Civil Procedure, § 233, preserves the essential features of the jury trial required by the Sixth Amendment and Due Process Clause of the Foiurteenth Amendment." The trial court's improper application of §1089 infringed upon Appellant's Sixth and Fourteenth Amendment rights to an impartial jury and arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause. See *Hicks v. Oklahoma* (1980) 447 U.S., 343, 346-347.

Finally, the trial judge's actions in dismissing Juror #11, a move that strongly signaled to the members of the jury (particularly the other two "holdout" jurors) that a) its deliberations would be subject to scrutiny and that b) the court disapproved of a juror who favored the defense, adversely impacting not only the guilt phase, but also the penalty phase in which the newly constituted jury rendered a sentence of death. As the United States Surpeme Court had stated, "[t}he fundamental respect for humanity underlying the Eight Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

4. <u>The Removal of Juror #11 Was Prejudicial</u>.

The dismissal of a deliberating juror is the type of error which warrants reversal *per se*. The improper removal of a deliberating juror cannot reasonably be assessed by resort to harmless error analysis. See Sullivan v. Louisiana (1993) 508 U.S. 275, 280-282 [harmless error analysis is inappropriate where jury given deficient reasonable doubt instruction.] In *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, for example, that court found the mid-trial exercise of a peremptory challenge against a seated juror by the prosecutor to constitute automatic reversal. The court observed that there was no way to "assess how the makeup of the jury may have impacted the decision making process." (*Id.*, at p. 545.) The court stated, "[n]o one argues that the alternate who replaced Juror M was somehow

biased, and it is impossible to determine what impact, if any, the substitution had on the jury's ultimate decision." (*Id.*)

The identical situation exists in Appellant's case. Trying to evaluate the prejudice created by the trial judge's improper discharge of a juror would amount to "speculation run riot." (*People v. Bigelow* (1984) 37 Cal.3d 731, 745-746. [impossible to assess prejudice from denial of advisory counsel].)

However, if this Court declines to find the improper removal of Juror #11 is reversal *per se*, reversal of Appellant's convictions and sentence of death is still required under the test used in *People v. Cleveland* (2001) 25 Cal.4th 466, 486. Therein, this Court, relying on *People v. Hamilton* (1963) 60 Cal.2d 105, 128, overruled on other grounds in *People v. Morse* 91964) 60 Cal.2d 631, held that the trial court's erroneous excusal of a deliberating juror was prejudicial and required reversal. In *Hamilton*, this Court held that "if the record shows ... that [the discharged] juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side." (*Id.*, at p. 128.) In the instant case, juror #11 was removed precisely because he had indicated that he did not believe the prosecution had proven its case.

D. Conclusion.

Appellant respectfully submits that, under the above described circumstances, the trial court's errors require Appellant's convictions and sentence of death be reversed.

IXX.

Two jurors who met privately during a recess in deliberations to discuss the conduct of another juror committed prejudicial misconduct. The trial court's refusal to remove both jurors deprived Appellant of his constitutional right to a fair and impartial jury. The error was prejudicial and requires his convictions and sentence of death be overturned.

A. Introduction.

As discussed in Argument XVIII, *supra*, jurors #4 and $5 met privately at the end of deliberation Day #4 to discuss the behavior of juror #11. The following morning, the trial court described to counsel in chambers what had occurred:

> As the jury left at 4:00, the bailiff went to lock the room and there were two jurors left in the room. 4 and 5. [The jury] left at about 4:00 and it was probably about 4:10, or thereabouts, that [Jurors #4 and #5] were found back there. [RT, 26:5283-5384]

When the bailiff discovered them alone together in the jury room, they demanded an audience with the judge: "We want to see the judge. We need to see the judge." [RT, 26:5284] Even after the bailiff refused their request; after he properly directed them to put their concerns in a note; and after he explained that it violated the court's rules requiring the presence of counsel at any such meeting, they continued to be demanding and insistent. [RT, 26:5284] "We don't want the lawyers. We want to talk to [the judge] now." [RT, 26:5284-5285] When their adamant approach failed to win them an audience with the judge, the jurors tacked, and claimed "We don't have the courage to write it out. And if we don't deal with it today, we probably won't have the courage to deal with it tomorrow." [RT, 26:5285] The two jurors refused to leave a note, and ultimately the bailiff had to demand they leave. [RT, 26:5286]

The trial court individually questioned Juror #4 and Juror #5 the next morning, as described in Argument XVIII, *supra*. The recitation of each of the two jurors was contrary to the observations of the other jurors regarding whether Juror #11 was participating in the deliberation process. (See Argument XVIII, *supra*.)

Juror #5 told the court that he and Juror #4 had discussed their concerns about Juror #11 the previous day after the jury recessed. [RT, 16:5317-5318] He explained that while they remained in the jury room after the other jurors had left for the day, another of the jurors came in to get his badge and asked the what they were doing. Juror #5 related that Juror #4 responded in an *untruthful* fashion; that

they were *only* straightening up the jury room. [RT, 26:5319] In reality, Juror #5 and Juror #4 were discussing the nature of the deliberations, and specifically, the arguments of Juror #11.

Juror #5 further described his meeting with Juror #4 further, and maintained that they did not discuss the facts of the case, the witnesses or the law. Juror #5 stated that because of the encounters Juror #4 had during deliberations with Juror #11, he "sensed" that she agreed with him about Juror #11. During a break in deliberations that day, he said he asked her if she felt the same way he did. When she said she did, they agreed that the situation should be brought to the court's attention, and they both agreed to remain after the jury left for the day in order to speak with the court. [RT, 26:5338-5339]

After Juror #5 was questioned by the court, counsel for co-defendant Johnson commented that

> ... one of the court's instructions is that the matter not be discussed unless all jurors are present. It also appears that the foreman [Juror #5] and Juror #4 violated that order and engaged in juror misconduct ... by remaining in the jury room and continuing to have discussions about this case out of the presence of the other jurors." [RT, 16:5326-5327, 5330-5331]

Juror #4 was subsequently questioned by the trial court. She admitted that she and Juror #5 remained alone in the jury deliberation room the previous day, but she insisted that they did not discuss the facts of the case of the law. Rather, they discussed Juror #11, and what they perceived was his inappropriate conduct during deliberations. [RT, 26:5355-5356]

The trial court thereafter questioned every other juror. It became apparent that Jurors #5 and #4 were the *only* jurors who were disturbed by Juror #11's conduct. In fact, their description of the proceedings, although relatively consistent with each other, was *contrary* to that of Jurors #5 and #4. [See Argument XVIII for a detailed discussion of the questions and answers.]

While the prosecution argued that Juror #11 should be removed, the defense disagreed and argued that Jurors #5 and #4 should be removed for misconduct because they had violated the court's order to not discuss the case among themselves without all jurors present.[328] Mr. Lasting articulated the defense position:

> RL[329]: It seems to me that what has happened here is that two jurors were in the jury room. The foreman approached #4 and wanted to know if she thought there was a problem with deliberations and they forged at the break this tentative alliance in terms of how to attempt to get rid of a juror who disagreed with them in terms of the outcome of the case.
>
> They then hung back after the bailiff had directed the jurors to leave. They remained in the jury room to have a private, secret discussion in which they formed an alliance among themselves to the exclusion of the other jurors. And the other jurors were not present.
>
> And although they did not discuss the law, and they did not discuss the facts of the case, they did discuss a subject connected with the trial. They discussed the jury deliberations among themselves out of the presence of the other jurors.
>
> They discussed whether – what means they would employ to try to have the court's assistance in removing Juror #11 who appears to be a juror who is voting "not guilty."
>
> I think the obvious inference is to find that these other jurors are voting guilty, and the majority of the jurors are voting guilty, and what way to get this juror out of the jury room so they can proceed to come back with a guilty verdict.

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[328] The court instructed the jury that "you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room. [CT, _:913]

[329] The quotation from the reporter's transcript is Mr. Lasting, co-defendant Johnson's counsel, speaking. Appellant's counsel joined in the argument. [RT, 26:5443]

> I think it is highly inappropriate and in violation of the court's instructions for two jurors to sit back there and form this mini-alliance to try to get rid of another juror. [RT, 26:5441-5442. Emphasis added.]

B. The Applicable Law.

Every person accused of criminal conduct has a federal and state constitution right to trial by a fair and impartial jury. U.S. Const. amends. VI, XIV; Cal.Const. art.I, §16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Colllings* () 26 Cal.4th , 304; *People v. Diaz* (1984) 152 Cal.App.3d 926, 933 ["The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." In deliberating on questions of fact, the jury has the duty to follow the law in the trial court's instructions. (See Cal. Penal Code, §1126.)

"A sitting juror commits misconduct by violating [his or] her oath, or by failing to follow the instructions and admonitions given by the trial courts." (*In re Hamilton* () 20 Cal.4th , 305.) "To succeed [on a claim of jury misconduct], defendant must show misconduct on the part of a juror; if he does, prejudice is presumed; the state must then rebut the presumption or lose the verdict." (*People v. Marshall* (1990) 50 Cal.3d 907, 949.)

C. Discussion.

The uncontradicted facts illustrate the two jurors met privately and discussed the case. Although they did not discuss the facts or the law, they did not have to. They both knew the position of the other regarding the facts and the law. They both knew that the position of Juror #11 was contrary to their position. Hence, as they met and discussed how to remove Juror #11, they were in effect discussing how they could prevail during deliberations. If persuasion would not work with Juror #11, then removal for alleged misconduct (i.e., an abrasive personality) might. That was the plan that was formulated. Whether they expressly articulated it in those terms or not; that was the result.

When questioned by the trial judge, their responses illustrate they were not speaking for any of the other jurors. Their responses, in contrast to the responses of the other jurors, pointed to Juror #11 as the only *difficult* juror. The mere fact that they provided such consistent observations, observations that were contrary to the observations of the other jurors, substantiates Appellant's claim that they had, in fact, forged a secret alliance to try and have Juror #11 removed by the court.

The jury was instructed with CALJIC 17.52, and in accordance with Penal Code §§ 1121 and 1122, they were told that during periods of recess from deliberations "you must not discuss with anyone any subject connected with this trial and you must not deliberate further upon the case until all 12 of you are together and re-assembled in the jury room." [RT, 25:5096-5097] It is serious misconduct to violate this duty. (See *In re Hitchings* (1993) 6 Cal.4th 97 [juror conversing with co-worker violates Penal Code §1122 and constitutes serious misconduct.].)

The trial court acknowledged that Jurors #5 and #4 committed misconduct, but held their conduct was not grounds for dismissal. The court determined that the misconduct was harmless because the jurors were acting in good faith in discussing what to do about a juror who they believe had made up his mind about the case. [RT, 26:5446-5448] However, once the court found the two jurors committed misconduct, a rebuttable presumption of prejudice was created. (*In re Hamilton* ( ) 20 Cal.4th , 295) Such a presumption can only be rebutted "if the entire record in the particular case, including the nature of the misconduct and the surrounding circumstances, indicates there is no reasonable probability of prejudice ...." (*Id.*, at p. 296, citing *In re Carpenter* ( ) 9 Cal.4th , 653, and *In re Hitchings* (1993) 6 Cal.4th 97, 121.)

Appellant submits there is nothing in the record that sufficiently rebuts the presumption of prejudice that arose when these two jurors committed misconduct by meeting outside of deliberations to discuss how to resolve the dispute involving Juror #11. After meeting privately, these two jurors insisted on bringing their

concerns to the court's attention. It not only resulted in the improper removal of a deliberating juror (See Argument XVIII, *supra*), but it also had a chilling effect on the subsequent guilt and penalty phase deliberations.

D. Conclusion.

Appellant respectfully submits that, for all the above reasons, his convictions and sentence of death must be reversed.

XX.

The trial court gave the deadlocked jury a supplemental instruction that placed "undue pressure" on the jury to teach a verdict and violated Appellant's due process right, as well as his constitutional right to a fair trial.

A. Introduction.

After four (4) full days of guilt-phase deliberations two jurors complained that a third juror was not participating in the deliberations. [RT, 26:5283+] In the ensuing judicial inquiry, the court determined that the split in the voting was 9 to 3, with the "questionable" juror having expressed his feelings that there was insufficient evidence to prove Appellant guilty beyond a reasonable doubt. That juror was removed by the trial court. (RT, 26:5452; CT, 4:8367)[330] An alternate juror was selected to replace the "questionable" juror, the new jury was re-instructed in the law, and it commenced deliberations anew. [RT, 26:5473] At the conclusion of the following day's deliberations, the foreman sent a note to the court that read: "The jury is unable to reach a unanimous verdict re Mr. Allen." [RT, 26:5478-9; CT, 4:840]

The following morning, Appellant's motion for mistrial was denied. [RT, 26:5479] After a brief conversation with the jury foreman, the trial court instructed the jurors to continue their deliberations until they, in effect, reached a unanimous verdict. Appellant's claim of error is that the trial court's supplemental

[330] See Appellant's discussion at Issue XVIII, *supra*, regarding the court's erroneous removal of that juror.

jury instruction, because of its coercive nature, placed "undue pressure" on the jury to reach a unanimous verdict as to Appellant. The result was a miscarriage of justice and requires reversal of Appellant's convictions and judgment of death.

B. The Applicable Law.

"Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241; *United States v. Sawyers* (4th Cir. 1970) 423 F.2d 1335, 1341 [defendant has "the right to have the jury speak without being coerced."]

In *Allen v. United States* (1896) 164 U.S. 492, 501, the Supreme Court approved a charge (the Allen charge) which encouraged a minority of jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided. "An Allen charge is traditionally understood as an instruction to work towards unanimity. In the archetypal Allen charge context, the jude instructs a deadlocked jury to strive for a unanimous verdict." *Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 365.

In *People v. Gainer* (1977) 19 Cal.3d 835 this Court held that it was error for a trial court to give an "*Allen* Instruction"[331] to potentially deadlocked juries. The decision addressed the controversial aspects of the "*Allen* instruction" that was oft-times referred to as a "dynamite instruction"[332] because of its intended desire to dislodge hold-out jurors and thereby generate a unanimous verdict. This Court explained,

> The first and most questionable feature is the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views. A second controversial element in *Allen*-type instructions, not approved in *Allen* itself, is the direction given by the court below that "You should consider that the case must at some time be decided." (*People v. Gainer*, *supra*, 19 Cal.3d at 843.)

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[331] *Allen v. United States* (1896) 164 U.S. 429 [41 L.Ed. 528, 17 S.Ct. 154].
[332] *People v. Gainer, supra,* 19Cal.3d at 842.

In *Gainer*, this Court made it clear that an instruction that places "undue pressure" on a jury because of its "coercive" nature will be deemed error. This Court reviewed how other jurisdictions had addressed the problem and concluded that "*Allen*-type" instructions "have been subjected to a withering barrage of attacks, largely on the grounds they are coercive or inaccurate. [Footnote omitted.]" (*People v. Gainer, supra*, 19 Cal.3d at 846. Emphasis added.)

This court added:

> Because it [i.e., an "*Allen*-type" instruction] instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice, we conclude that further use of the charge should be prohibited in California. (*Id.*, at 842-3. Emphasis added.)

This Court explained that if the erroneous supplemental jury instruction was directed toward the minority jurors, rather than to the jury as a whole, any subsequent conviction would be "a miscarriage of justice" within the meaning of article VI, §13, of the California Constitution, and would require reversal *per se*. (*People v. Gainer, supra*, 19 Cal.4th at 855 and footnote 19.)

On the other hand, if the supplemental jury instruction given to a divided jury erroneously misstates the law, but does not threaten to distort the process of jury decision-making, in contrast to an instruction directed solely to the dissenters, a miscarriage of justice can be avoided if the appellate court conducts a review of the facts and then applies the *Watson* "reasonable probability" test to those facts. (*People v. Gainer, supra*, 19 Cal.3d at 855-856)

C. Discussion:

Once the trial court and counsel discussed the jury's note that they were deadlocked, the court had the following conversation with the jury:

Crt: Back on the record now. We have the 12 jurors with us. Welcome back. How is everybody today?
Jry: Fine.

Crt: We have your note, folks, that you dropped off yesterday afternoon. It says, "We, the jury, are unable to reach a unanimous decision – or verdict – rather – re Mr. Allen. That is signed by the foreperson in seat no. 5.

I will ask you some questions and I want you to answer specifically what I ask and if I need additional information, I will inquire. Let me say at the outset, the instructions that we gave to you, as I recall them, both written instructions and then later the day before yesterday afternoon, were as follows: If you arrived as to a verdict as to a particular defendant, you were to take those verdict forms and hand them to the bailiff or clerk and we would seal them up. I don't recall that we asked you specifically to report a deadlock as to a particular defendant. Was that your understanding, however?

J#5: You are speaking to me?

Crt: Yes.

J#5: I didn't know how we were to handle an inability to reach a unanimous decision.

Crt: I indicated that you can deliberate in any fashion that you wish or any order that you want as to one defendant or both. All we asked is if there was a point where the jury arrived at a verdict as to a particular defendant to let us know that and we would seal them up for future reference. In any event, we will deal with the note that you sent out. [RT, 26:5481-5482 (Emphasis added)]

In this discussion with the jury foreman (with all jurors present, including the two minority jurors) [See RT, 26:5482-5], the court in effect asked the foreman why he had sent a note to the court when the court had specifically instructed the jury to notify the court *only* when they had reached a verdict as to either or both defendants. That was, apparently, the jury foreman's understanding of the court's previously given instruction; hence, the foreman had written the note asking the court what the jury should do if they were *unable* to reach a verdict as to one or both defendants.

The court's response, again made in the presence of *all* jurors, appears on paper at least to be a somewhat sarcastic, condescending, and impatient retort to the jury: "All we asked ..." was that you do the following, etc., then almost

begrudgingly concluded, "In any event, we will deal with the note that you sent out." [RT, 26:5481-2]

The discussion that ensued between the court and the jury foreman revealed that the newly constituted jury had taken one vote as to Appellant, and the jury split was 10 to 2. [RT, 26:5482-5485] The court's discussion with the jury foreman proceeded as follows:

> Crt: Do you feel, Mr. Foreman, that further deliberations would be of assistance and might potentially, as to Mr. Allen, result in a verdict one way or the other?
> J#5: I would say probably not.
> Crt: All right. Do you believe that further reading of testimony to the jury or clarification of any legal instruction might be of assistance to the jury in arriving at a decision as to Mr. Allen?
> J#5: I would like to think it would, but I really can't speak for the other jurors in that regard.
> Crt: Well, you have been elected to the position to speak at this point and so I am asking you for your estimation. You have been back there.
> J#5: It is just what I answered. I would like to think that more time could possibly be helpful, but I have doubts about that. [RT, 26:5486]

1. <u>The supplemental jury instruction</u>.

After the court and counsel discussed the situation at the bench, the court decided to send the jury back to deliberate further:

> Crt: The court is not convinced that there is no reasonable possibility of a verdict. So I will require you to continue deliberations on the case. And if there is anything that the jury needs or feels might be helpful, do not hesitate to ask. In the meantime, go back into the jury room and continue your deliberations. [RT, 26:5488]

At no time did the trial court indicate to the jury that they were under no legal obligation to return with unanimous verdicts; and at no time did the trial court explain to the jurors that it was not trying to pressure them in any way to reach unanimous verdicts.

Later that day, the jury requested the testimony of Freddie Jelks be re-read to them. The following day, the jury returned verdicts of guilty as to Appellant and co-defendant Cleamon Johnson.[333] (RT, 27:5514-23; CT, 4:916-940)

2. The trial court's instructions and comments exerted "undue pressure upon the jury to reach a verdict"[334] and thereby violated Appellant's right to due process and a fair trial:

What caused these two minority jurors to change their minds and vote with the majority, thereby enabling the jury to reach unanimous verdicts? Was it the re-reading of Jelks' testimony? Or was it the "undue pressure" brought to bear on them because of the trial court's response that they were to continue deliberating until they reached verdicts . . . however long that might take! In *Gainer*, this Court explained the difficulty of resolving whether an "Allen-type instruction" may have unduly pressured the minority jurors into agreeing with the majority:

> As observed above, the ability of courts to gauge the precise effect on a jury of A*llen*-type instructions is limited, both by the traditional secrecy of jury deliberations and by the inherent difficulties of estimating the impact of only one factor injected into the subjective processes of each juror. Many of these problems confront attempts to determine the effect of any error, but the difficulties are multiplied in the situation of the discriminatory admonition to dissenters delivered as a supplementary instruction to a divided jury. (Id., at page 854.)

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[333] The lack of an objection to the court's supplemental jury instruction should not be deemed a waiver to Appellant's right to raise this issue. In *Gainer*, this Court stated, "Clearly defendants cannot be required to anticipate supplemental instructions a judge might give, upon pain of inviting error. Nor was defense counsel required to interrupt the judge's charge at every controversial phrase, thereby courting the animosity of thejury and implying that the charge hurt his client's case. Indeed common courtesy, and respect for the dignity of judicial proceedings, caution against interruption of a judge who is advising the jury." (*People v. Gainer, supra*, 19 Cal.3d at 843.)

[334] *People v. Gainer*, supra, 19 Cal.3d at 850.

The Court in *Gainer* further commented that to resolve this issue, the reviewing court should "make a generalized assessment of the potential effect of [the] instruction on the fact finding process":

> This determination of whether the instructions "operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency" (*People v. Carter* (1968) 68 Cal.2d 810, 817) is perhaps best characterized as requiring a generalized assessment of the potential effect of a given instruction on the fact finding process, rather than as an attempted inquiry into the actual volitional quality of a particular jury verdict. (*People v. Gainer*, *supra*, 19 Cal.3d at 850. Emphasis added.)

Initially, as this Court begins "a generalized assessment of the potential effect of [the] instruction on the [jury's] fact finding process", Appellant asserts that the trial court began placing "undue pressure" on the minority jurors when it inquired, on two separate occasions, into the numerical split of the deadlocked jury. (*Brasfield v. United States* (1926) 272 U.S. 448 [47 S.Ct. 135; 71 L.Ed. 345]; *State v. Maupin* (1975) 42 Ohio St.2d 473 [a trial court's inquiry into the numerical split of a deadlocked jury amounts to an "aggravating circumstance" in the evaluation of the coercive impact of the supplemental jury instruction].

Appellant acknowledges that California law is contrary to federal law when the issue is whether it is legal error, in and of itself, for the trial court to inquire into the numerical split of a deadlocked jury. See *People v. Carter* (1968) 68 Cal.2d 810, 815; *People v. Rodriguez* (1986) 42 Cal.3d 730, 776; *People v. Proctor* (1992) 4 Cal.4th 499.[335] However, regardless of whether the inquiry of itself constitutes legal error in California or not, the underlying basis for concern still exists *in fact*, in that undue pressure is brought to bear on minority jurors.

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[335] Appellant respectfully raises this issue in this appeal but acknowledges this Court has repeatedly rejected this issue in the past. Hence, Appellant does not formally address this issue except in this footnote. See *People v. Price* (1991) 1 Cal.4th 281, 319; *People v. Breaux* (1991) 1 Cal. 4th 281, 319; *People v. Proctor* (1992) 4 Cal.4th 499.

The trial court's initial inquiry resulted in it becoming public knowledge that the jury was split 9 to 3. At that time, two of the nine jurors had "complained" to the court that one of the three minority jurors was not deliberating. After inquiry, that juror was removed by the court and replaced by an alternate. Now, just a day later, the trial court again inquired into the numerical split of the jury. Certainly to no one's surprise, the split was now 10 to 2. Both minority jurors knew at that moment it was public knowledge that two jurors were still "holding things up." As far as these two jurors were concerned, it was then just a matter of time before another juror would complain, the court would inquire, and one or both minority jurors would also be removed. It would have been difficult enough for either of the two jurors to continue to withstand the will of the majority over several days, but to have either of these minority jurors believe the court would likely remove one or both of them from the jury for "not deliberating" would be utterly humiliating. In effect, the minority juror, knowing he/she had been deliberating with other jurors, would conclude he/she was about to be removed from serving on the jury because the trial judge was of the opinion he/she had poor judgment or lacked common sense. The embarrassment to the minority juror of being removed from the jury and replaced by an alternate would have been obvious and unmistakable. The inherent pressure on that minority juror to avoid being publicly disgraced in this manner would be enormous. The natural and probable result would be for that juror to simply submit to the will of the majority. In this way, the minority juror would a) avoid the stinging indictment of being removed from the jury, b) ensure the previous two months' efforts as a juror were not in vain, and c) make everyone happy.

Recognizing the delicate balance the trial court must maintain when making inquiry into the nature and scope of the reasons that underlie a jury's belief it is deadlocked, a review of the trial court's conduct in *People v. George* (1980) 109 Cal.App.3d 814 is helpful. That case is illustrative of a situation wherein the trial court did *not* place undue pressure on a jury that had announced it was deadlocked

to continue deliberating in an effort to reach unanimous verdicts. Therein, the jury returned to court after deliberating for only two hours and requested clarification regarding an element of the crime of escape. The trial court re-read to the jury the instructions regarding the crime of escape, and the jury returned to continue deliberating. Shortly thereafter, the jury foreman advised the trial judge that the jury was deadlocked 9 to 3. The trial judge gave the jury what the appellant in that case referred to as a "mini-*Allen* instruction." In the supplemental instructions the trial court gave to that supposedly dead-locked jury, the trial court stated:

> . . . And I want to preface this by saying, I do not mean to indicate in any way that you must reach a verdict. I don't want to pressure you in any way. If the jury cannot reach a verdict — a jury cannot reach a verdict, you are the jury. I do want to suggest that you give this a further try and sit down calmly and go over this evidence. (*People v. George*, *supra*, footnote 2 at page 820. Emphasis added)

After the trial court in *George* told the jury that it would do anything in its power to assist the jury in its deliberations, the trial court added:

> If you think you might be able to arrive at a verdict, and again I say I'm not pressuring you into it. I want to suggest you give this a little further try. Look at the evidence clearly; you do have the instructions with you. And I would like you to give this a little bit further of a try before we give this up completely.
>
> And again, if I can assist you in any way in either of those two areas, either in the law or you felt you needed some testimony read, but if there's anything I could do within my authority, I'd be happy to. But I would like you to go out and make one more effort to sit down and look at evidence, instructions and see and then, if it's still that way, okay. But I'd like you to give that try. All right. (*People v. George*, *supra*, footnote 2 at p. 820. Emphasis added)

Upon holding that the trial court's supplemental jury instruction was not improper, the court of appeal added, ". . . all that the court did was to request that the jury try to reach a verdict by going over the evidence once more. At the same time the trial court was emphatic to point out that it did not intend to put any

pressure on the jury and that the jury was entirely free not to reach any verdict at all." *People v. George*, *supra*, 109 Cal.App.3d at p. 822(Emphasis added).

The conduct of the trial court in *George* stands in marked contrast to that of the trial court in the instant case. In the instant case, the trial court's statements, in the mind of each juror, amounted to a not-so-subtle threat of continued deliberation for an extended and indefinite period of time until a unanimous verdict was reached. Each juror would have realized the only way this could be avoided would be if the two minority jurors acquiesced to the will of the majority. The minority jurors were thus tempted, if not out-right pressured by the majority, to relinquish their positions simply because of expediency.

The facts in the older case of *People v. Talkington* (1935) 8 Cal.App. 75, were similar to the instant case. Therein, the trial court inquired of a deadlocked jury as to their numerical split (9 to 3), then directed them to continue deliberating. Late that night (11:25 P.M.), while the jury was still deliberating, they met with the judge again. After determining the split was still 9 to 3, a juror remarked, "I think an agreement can be had." At that time, the trial court stated, "Well, if it can be reached within the next two hours (i.e., that would have 1:25 A.M.!), well, as far as that is concerned, you are not going to get away from here for some time, and you needn't worry about that at all; you needn't talk about that if you don't agree. As far as talking to me about getting away, forget it; just retire. (*Id.*, at page 83-4.)

In holding that the jury's subsequent guilty verdict against *Talkington* was the product of a coercive jury instruction, the court of appeals wrote that based on the trial court's words:

> . . . that the court expected the jury to bring in a verdict of guilty inside of two hours, and then the jury is informed that if they do not do so, they are not going to get away for some time, and further, that they need not think about that, or rather, that they need not worry about that, need not talk about it if they did not agree, and that they need not talk to the court about getting away if they did not agree. Such language, we hold, necessarily tended to coerce the jury, and

> induce the belief in the minds of the jurors that they were not going to get away unless they agreed upon a verdict of guilty, such as outlined by the court in its comments, before the jury would be discharged. (*Id.*, at page 88. Emphasis added.)

The *Talkington* court further stated the instructional error was prejudicial and tended to prevent the appellant from having a fair and impartial trial; that is, it violated Talkington's constitutional right to due process, and a fair and impartial trial.

> In view of the authorities cited and what is disclosed by the record as hereinabove set forth and considered, we think it must necessarily be held that the court erred in its inquiry as to the status of the jury on the question of the guilt or innocence of the defendant, and also in the statement to the jury that they need not talk about getting away if they did not agree; and that such errors were prejudicial and tended to prevent the appellant from having a fair and impartial trial. (*Id.*, at page 90. Emphasis added.)

In the instant case, Appellant asserts the trial court's supplemental instruction brought undue pressure on the two dissenting jurors to change their position. Paraphrasing this Court's language in *People v. Gainer*, *supra*, 19 Cal.3d at p. 850:

> The [two] dissenters, struggling to maintain their position in a protracted debate in the jury room, are led into the courtroom and, before their peers, specifically [told by the judge that the jury will continue deliberating until unanimous verdicts are reached]. ... It matters little that the judge does not know the identity of the particular dissenters; their fellow jurors know, and the danger immediately arises that [the court's instruction to continue deliberating until verdicts are reached] can compound the inevitable pressure to agree felt by [the two] minority jurors."

In contrast to the instant case, the trial judge in *Gainer* concluded its supplemental "Allen-type" jury instruction with language that told the jury they may not be able to reach a unanimous verdict, but that they should "if at all possible" try to reach a verdict.

> So, ladies and gentlemen of the jury, I'm going to ask you – after lunch – to retire and continue with your deliberations and see if it is at all possible to resolve the matter. I understand that, of course, on occasions it is impossible to do so, but – based upon the instruction I have just given to you – I would appreciate that after lunch – if you would go back and resume your deliberations and see if you can arrive at a verdict and that the deadlock can be broken. (*People v. Gainer, supra*, 19 Cal.3d at 842. Emphasis added.)

Yet, even with the "conditional language" used by the trial court in *Gainer*, that case was reversed. In the instant case, the trial judge used no "conditional language." As far as the jury was aware (and particularly the two minority jurors), they were to continue deliberating until they reached a unanimous verdict, regardless of the time necessary to accomplish this task.

Five years after *Gainer*, the court of appeals in *People v. Peters* (1982) 128 Cal.App.3d 75 wrote about the underlying "evil" that that is created when "coercion" or "undue pressure" is brought to bear on a juror who had been given an "Allen-type" instruction; a juror substitutes compromise and expedience in place of deliberation when determining the accused's guilt:

> Deliberation must be the very essence of the jury's function. Thus the question of what, if any, is the coercive impact of these jury charges can only be answered after an evaluation of whether the deliberative process has been undermined. Coercion refers to that which operates to displace deliberation "in favor of consideration of compromise and expedience." (*People v. Gainer*, *supra*, 19 Cal.3d 835, 850.) It deprives the defendant of the benefit of the jury's full and independent consideration of his guilt or innocence and undermines the right to a unanimous verdict. (*People v. Peters*, supra, 128 Cal.App.3d at 90-91. Emphasis added).

And even if only one of the minority jurors acquiesced to the will of the majority because of expediency, Appellant's conviction should not be allowed to stand. This court, albeit in a different context, has stated that a conviction "cannot stand if even a single juror has been improperly influenced." *People v. Pierce*

(1979) 24 Cal.3d 199, 208 [juror misconduct when a juror spoke with a witness for the state outside of court regarding the case].

Since the trial court's comments should be evaluated from the perspective of the minority jurors (See *United States v. Burgos* (4th Cir. 1995) 55 F.3d 933, 940), Appellant asserts that the trial court's instructions and comments created a reasonable and strong inference in the mind of at least one, if not both, of the minority jurors that the court expected the jury to continue deliberating until the jury had reached unanimous verdicts. After all, the jurors had been told they were *not* to contact the court for any other reason. Hence, the only hope the jurors had of concluding this portion of their jury service within a realistic time frame was to reach unanimous verdicts. One can almost feel the pressure that was brought to bear on the two holdout jurors; each of the 12 jurors was fully aware of what needed to be done so the trial could move forward without further unnecessary delay.

Further, it should not be forgotten that both minority jurors could recall that a juror who had been in agreement with them had been removed from the jury. This, Appellant asserts, is a reasonable and "generalized assessment of the potential effect of [the] instruction on the fact finding process"[336] in the instant case. Therefore, the trial court's instructions and comments to the jury "operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency."[337] The court's instructions and comments exerted "undue pressure upon the jury to reach a verdict."[338]

3. <u>The trial court's error was prejudicial to Appellant</u>:

In *Gainer* this Court addressed the appropriate appellant standard to be used to determine if the error regarding a supplemental jury instruction was prejudicial or merely harmless. Although reversal *per se* is appropriate in

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[336] See *People v. Gainer*, supra, 19 Cal.3d at 850.
[337] *Id.*
[338] *Id.*

circumstances in which the jury instruction focuses exclusively on the minority jurors, this Court held the *Watson* "reasonable probability" test was appropriate since *Gainer* was decided on "a judicially created rule of criminal procedure." (*People v. Gainer*, supra, 19 Cal.4th at 852)

Because Appellant's assignment of error is similar to, but not identical with, the basis for error in *Gainer*, Appellant asserts the trial court's error violated not only the "judicially created rule of criminal procedure" enunciated in *Gainer*, but the error also violated his due process right to a fair trial and his constitutional right to trial by a jury of his peers. Accordingly, the *Chapman* "reasonable doubt" standard should apply.

However, regardless of whether the *Watson* or *Chapman* standard for review is applicable, the *Gainer* decision provided an important caveat that modifies both the *Watson* and the *Chapman* analysis. Paraphrasing the applicable language in *Gainer*:

> When the [trial court's] statement is part of a supplementary charge to a divided jury, there is a significant danger that the verdict will be influenced by a false belief that [the jury must continue deliberating indefinitely until verdicts are reached]; on the other hand, the statement does not threaten to distort the process of jury decision-making to the same degree as the admonition to dissenters. Accordingly, a *per se* rule of reversal is not required when only this erroneous statement is included in otherwise correct instructions, even if given to a deadlocked jury. In such cases a miscarriage of justice will be avoided if the reviewing court makes a further examination of all the circumstances under which the charge was given to determine whether it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (See *People v. Watson* (1956) 46 Cal.2d 818, 8360) In so doing, however, the court should recognize that the more the erroneous statement appears to have been a significant influence exerted on a jury after a division of juror opinion had crystallized, the less relevant is the court's own perception of the weight of the evidence presented to the jury before the impasse. [*People v. Gainer, supra*, 19 Cal.3d at 855. (Emphasis added)]

This case was not complicated factually. The primary issues were a) Who was the shooter? and b) Was Johnson an aider and abettor to the killings? Connor and Jelks both testified that Appellant was the shooter and that Johnson was an aider and abettor. James testified that Appellant admitted to being the shooter. Adams testified that Johnson admitted to being an aider and abettor. There was no significant defense. If the jurors believed the testimony of these four (4) prosecution witnesses (3 as to Appellant), guilty verdicts would have been readily forthcoming. However, guilty verdicts were *not* readily forthcoming. Various factors suggest the jurors firmly disagreed with one another in their assessment of the credibility of these witnesses.

For example, jury deliberations began at about 11:00 AM on August, 20, 1997. Deliberations continued throughout that day, as well as August 21, 25 and 26, 1997. At about 10:30 AM on August 27, 1997, the court initiated a hearing regarding juror misconduct. During the hearing, it was revealed that the jury was seemingly at an impasse at the end of four full days of deliberations with the jurors split 9 to 3. Subsequently, one of the 3 minority jurors was removed and replaced with an alternate juror.

At about 3:30 PM, the newly reconstituted jury began deliberations anew. At the end of another full day of deliberations (August 28, 1997), the jury notified the court that it was deadlocked and was unable to reach a verdict on Appellant's case. The following morning (August 29, 1997) the court determined, not surprisingly, that the numerical split of the jurors was now 10 to 2. The court instructed the jury to continue deliberating.[339] The jury deliberated through the remainder of that day and until 2:00 PM the following day (September 2, 1997) when the jury announced that verdicts had been reached.

In summary, the initial jury deliberated four (4) full days, were split 9 to 3, and had reached an apparent impasse. The newly constituted jury deliberated one

[339] The jury instruction given by the court at this point, as well as the court's comments at this point, are the subject of this appellate issue.

(1) full day before announcing that it, too, was deadlocked[340] with jurors split 10-2. The new jury deliberated for another 1½ days, or 2½ days total before finally reaching verdicts. It is apparent that jurors struggled through almost seven (7) full days before they finally reached unanimity. The credibility of the prosecution witnesses was hotly contested.

Further, it seems apparent the jurors struggled over the credibility of the prosecution's two key witnesses, Carl Connor and Freddie Jelks. This is evidenced by the questions the jury asked of the court: Did Connor or anyone else receive any financial reward for testifying in this case? [CT, 4:831] When did Jelks have the fight with Johnson over the latter's girl friend, and when did Jelks actually leave the gang? [CT, 4:829] Finally, the jury requested that Jelks' entire testimony be re-read. [CT, 4:846] The jurors obviously disagreed repeatedly over the credibility of key witnesses Connor and Jelks.

A brief review of the evidence presented by the prosecution also illustrates that each prosecution witness had strong motives to lie, they were inconsistent with each other in many areas, they were impeached with inconsistencies between their testimony and their prior statements, etc.[341] One would expect that jurors would deliberate the credibility of these witnesses rather extensively, and it would only be normal that jurors would continue to disagree concerning who to believe and who not to believe.

Finally, it should again be noted that the two minority jurors had observed what happened to one of their number. Even though the trial court instructed the jury to draw no inference as to why the juror was dismissed, the fact that he was one of the minority jurors would not have been lost in the minds of the remaining minority jurors. If they don't keep "deliberating", they too will be removed.

These factors indicate that during jury deliberations, there existed reasonable differences of opinion between reasonable people. With this in mind,

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[340] See CT, 4:840.

[341] Please refer to the Statement of Facts in this Opening Brief.

the language of the court in *People v. Sellars* (1977) 76 Cal.App3d 265 sheds significant light on the likelihood that this court's instruction "exert[ed] undue pressure upon the jury to reach a verdict."[342] Regardless of the standard of review (i.e., *Watson* versus *Chapman*), the circumstances surrounding *when* the erroneous instruction was given strongly suggest "it is more likely to have tainted [the jury's] verdict."

> An erroneous instruction such as this is not reversible error per se. In such cases the reviewing court is to examine the "circumstances under which the charge was given to determine whether it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." [Citation] But we are further directed that "when the statement is the central feature of instructions given to a deadlocked jury, it is more likely to have tainted their subsequent verdict than when the panel has evinced no division and the statement merely accompanies a requested rereading of portions of the testimony or previous instruction. In the former case, the standard of reversible error presumably would be met, as there would be little to indicate that the heightened potential for prejudice had not been realized." [Citation] (*People v. Sellars*, supra, 76 Cal.App.3d at 270-271)

In considering a claim of coercion from an Allen instruction, the reviewing court must consider "the supplemental charge given by the trial court 'in its context and under all the circumstances.'" *Lowenfield v. Phelps* (1988) 484 U.S. 231, 236, quoting *Jenkins v. Unites States* (1965) 380 U.S. 445, 446. "Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241; *United States v. Sawyers* (4th Cir. 1970) 423 F.2d 1335, 1341 [defendant has "the right to have the jury speak without being coerced."] Appellant submits that under the totality of the circumstances, the trial court's comments were coercive. The resulting verdict violated California law as well as Appellant's right to due process and to a fair and impartial jury under the Sixth and

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[342] People v. Gainer, supra, at 850.

Fourteenth Amendments, and the state constitutional right to a unanimous verdict. Cal. Const. art. I, section 16; *People v. Collins* (1976) 17 Cal.3d 687, 692; *People v. Gainer* (1977) 19 Cal.3d 835, 848-849.

4. Conclusion:

Appellant asserts that in consideration of all of the circumstances discussed above, had the court not given this erroneous jury instruction it is reasonably probable that a result more favorable to Appellant would have been reached.[343] Accordingly, Appellant respectfully requests this Court reverse his conviction on this legal basis.

XXI.

The trial judge's denial of Appellant's motion for a separate penalty phase trial was prejudicial error, requiring reversal of the judgment of death.

A. Introduction.

Penal Code, § 190.3 states that in the penalty phase of the trial, jurors are instructed to consider "the nature and circumstances of the present offense" as part of the evidence they evaluate regarding the aggravating circumstances and the mitigating circumstances that may exist. Because of the broad and open-ended language of this statute, the jury is entitled to consider *anything* admitted during the *guilt phase* that bears upon the issue of penalty.

Accordingly, Appellant respectfully inserts herein by reference as though fully set forth his Argument XVII of his Opening Brief, *supra*, regarding severance issues raised and discussed during the guilt phase of the trial

B. The Applicable Law.

[343] Appellant uses the language of the *Watson* "reasonable probability" standard of review here, rather than the *Chapman* test, because Appellant asserts that even under the "reasonable probability" standard, the error was prejudicial.

In a capital case in which Appellant claims his due process rights were violated because of the court's failure to grant his motion to sever, it is not enough for a reviewing court to simply defer to the trial court's exercise of discretion. In a capital case, the legislative language of Penal Code, § 1098 must be applied in a manner consistent with Eighth and Fourteenth Amendment requirements. This is so because there are three considerations unique to capital cases, and error as to any of these has constitutional ramifications:

1. "Lightening" the Prosecution's Burden of Proof.

When evidence admitted against a co-defendant is voluminous and extremely inflammatory, there exists a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (*People v. Garceau* (1993) 6 Cal.4th 140 ; *Zafiro v. United States* (1993) 506 U.S. 534, 544 (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt].) If a jury *wants* strongly enough to convict the defendant because of its hatred of the defendant's gang and the repugnant lifestyle it represents, jurors will overlook any weakness in the prosecution's case because of their intense desire to punish the defendant because of his gang affiliation. In effect, the jurors' hatred toward the accused' life style will "fill in the gaps" in the prosecution and the accused may be convicted because of his status as a gang member, and not because of a crime he committed.[344]

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[344] If enough highly repugnant and inflammatory gang evidence is introduced against one defendant but not against the other, the mere fact that the defendants are members of the same game, and the mere fact that the prosecutor refers to them together will tend creat a "slop over" effect, in that the evidence that was offered solely against co-defendant Johnson that was inadmissible against Appellant will have a tendency to "sop over" and onto Appellant, thereby "lightening" the prosecution's burden of proof against Appellant

2. The Requirement of Heightened Reliability of Findings and Verdicts in Capital Cases.

There is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case."[345] (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) The Eighth Amendment requires greater consideration by the reviewing court in determining whether defendants should be separately tried because "there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants[346], or prevent the jury from making a reliable judgment about guilt or innocence." Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

3. The Requirement of a Truely Individualized Consideration of the Accused Prior to Imposition of a Death Sentence.

There is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockeft v. Ohio* (1978) 438 U.S.

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[345] For example, in a capital case it is important that when the court exercises its discretion as to introducing inflammatory gang evidence, it is incumbent on the court to carefully restrict the nature of the evidence and the amount, more so than if the trial were a non-capital case. Otherwise, the reliability of the verdict will be undermined.

[346] For example, during the guilt phase Appellant was not allowed to adequately confront and cross-examine Freddie Jelks because of the trial court's concern that co-defendant Johnson's name might accidentally be disclosed, thereby unduly prejudicing Johnson. At a separate trial, Appellant's right to confront and cross-examination Jelks would not have been limited in that regard.

586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

Together, these three constitutional requirements demand a much stricter scrutiny of motions for severance in a capital case than is required in a noncapital case. (*People v. Keenan* (1988) 46 Cal. 3d 478, 500 ["Severance motions in capital cases should receive heightened scrutiny for potential prejudice"].)

Therefore, whether the operative legal provision is Penal Code section 1098 or the rights included within the Eighth Amendment as applied to the states through the Fourteenth Amendment, the *danger* to be avoided is the same; that the jury will treat the co- defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Appellant submits it is within this context that the trial court's exercise of discretion in refusing to sever these trials should be evaluated. The essential consideration for the reviewing court in determining whether defendants should be separately tried is whether by doing so the prosecution's burden of proof was "lightened", or whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or whether joinder prevented the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S.Ct. 933, 938; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078: *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511.) "The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict." (*Tootick, supra,* 952 F. 2d at 1082.)

4. Judicial Economy Does Not Outweigh Fundamental Fairness. On the Contrary, Judicial Economy Should Give Way to Issues Involving Fundamental Fairness.

The only announced rationale for joint trials in California is judicial economy. (*People v. Keenan* (1988) 46 Cal.3d 478, 501.) While joint trials save time and expense, "the pursuit of judicial economy and efficiency may *never* be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441,451-452.)

Moreover, given the extraordinary requirement for individualized consideration and heightened reliability in capital cases, a procedural rule of joinder predicated on judicial economy must be applied very cautiously. Indeed, the United States Supreme Court has made it very clear that its concern for heightened reliability extends not only to sentencing, but to the guilt phase of trial as well. Long before the modern era of capital jurisprudence announced in *Furman v. Georgia* (1972) 408 U.S. 238 (overruled in part by *Gregg v. Georgia* (1976) 428 U.S. 153), the Supreme Court recognized that capital proceedings required special procedural rules and protections not extended to noncapital defendants. For example, in *Powell v. Alabama* (1932) 287 U.S. 45, the Court held that at least some capital defendants had a right to effective appointed counsel thirty years before extending that right to others accused of noncapital felonies. (Compare *Gideon v. Wainwright* (1963) 372 U.S. 335; see also *Bute v. Illinois* (1948) 333 U.S. 640, 674 (no obligation on part of state court to inquire whether noncapital defendant wished to be represented by counsel; contrasting due process right of capital defendant to appointed counsel); *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.")

More recently, recognizing that "[t]he quintessential miscarriage of justice is the execution of a person who is actually innocent," *Schlup v. Delo* (1995) 513

U.S. 298, the current Court also has imposed special procedural requirements on determinations of guilt and innocence in capital cases that it has *not imposed* in noncapital cases. As Justice Stevens explained in *Beck v. Alabama* (1980) 447 U.S. 625, "we have invalidated procedural rules that tend to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Id.* at 638 (note omitted).)

As the Court subsequently explained, the *Beck* rationale was not limited to the specific issue of an all-or-nothing jury instruction [the precise issue in that case], but represented a more general principle requiring enhanced reliability in guilt phase determinations: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.) Later cases have reiterated the Supreme Court's belief that the potential danger of executing the "actually innocent," *Schlup,* 513 U.S. 298, requires special guarantees of reliability where the conviction of a capital defendant is at issue. (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (in capital guilt phase "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case"); *Herrera v. Collins* (1993) 506 U.S. 390, 399 ("[i]n capital cases, we have required additional protections because of the nature of the penalty at stake"); *Gray v. Mississippi* (1987) 481 U.S. 648, 669 (Powell, J., concurring) (declining to find harmless error because "[g]iven our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire 'definitely' would have been the same").

C. Discussion.

Penal Code, § 190.3 states that in the penalty phase of the trial, jurors are told to consider "the nature and circumstances of the present offense" as part of the evidence they evaluate regarding the aggravating circumstances and the mitigating circumstances that may exist. Because of the broad and open-ended

language of this statute, the jury is entitled to consider *anything* admitted during the guilt phase that bears upon the issue of penalty. The jury in the guilt phase of this trial was presented a considerable amount of evidence that was admissible only as to co-defendant Johnson. For this reason, Appellant respectfully incorporates herein by reference as though fully set forth, his argument made in Issue #17 of this Opening Brief pertaining to the lack of severance during the guilt phase of this trial

Whether the jury considered the inadmissible evidence against Appellant in determining his guilt of the charged crimes is unknown. However, whatever evidence the jury did consider, and whatever evidence they were instructed to not consider, all carried over into the penalty phase of the trial. That is human nature, and to suggest otherwise is nonsensical. The potential danger that a jury will improperly consider inadmissible and prejudicial evidence in the penalty phase of the trial, therefore, increases as they hear more of the *same type* of evidence that is admitted solely against the co-defendant. This is particularly true in the instant case where the prosecution's theory was that Appellant was willing to do anything Johnson asked of him because he wanted to show his "respect" to his gang's shot caller. At the same time the prosecution claimed Fat Rat wanted to build up the "respect level" of his gang as well as himself since he had been gone for a period of time.. Hence, evidence admitted solely against Johnson in the penalty phase quite naturally would be considered by the jury against Appellant even if they were instructed not to do so. Why? Because the prosecution's theory of the case urged them to do just that.

As will be shown below, the trial court's refusal to sever the penalty phase trials of the two defendants violated appellant's Eighth and Fourteenth Amendment rights to individualized consideration, as well as his Fifth and Fourteenth Amendment rights to due process and a fair trial. In the Penalty Phase of the trial, extensive and highly inflammatory evidence relating to co-defendant Johnson was presented that otherwise would have been inadmissible at a separate trial for

Appellant, thereby "lightening" the prosecution's burden of proof. Further, the prosecutor, as she did in the guilt phase, encouraged the jury to judge and condemn the two defendants as a single entity.

1. Evidence Admitted Solely Against Johnson During the Penalty Phase.

a. The September 14, 1991 Tyrone Mosley Murder; Johnson's Attempt to Suborn Perjury; and Johnson's Attempt to Eliminate the Person Who Refused to Perjure Himself for Johnson's Benefit:

The prosecution introduced evidence that about five (5) weeks after the Loggins/Beroit murders, Johnson, Freddie Jelks and "Jelly Rock" drove into the rival 97 East Coast Crips gang territory to do a drive-by gang-related shooting at a large party that was being held in that neighborhood. As the car approached the party, the driver slowed and blinked the car's headlights, indicating they were friends of those at the party. One of the partygoers approached the car, leaned down to look in the window, and was shot and instantly killed. Johnson and his homeboys fired additional shots and two other innocent party-goers were seriously wounded. Johnson was later heard to be bragging about the shootings.

The jury also listened to two tape-recorded telephone calls a) between Johnson (at Ironwood State Prison) and Keith Williams, who was to be a witness against Johnson in the Mosley murder, and b) between Johnson and an unknown individual named "Sticks." In the first recording, Johnson can be heard instructing Williams to commit perjury when he testifies against Johnson before the grand jury. [People's Exhibit #80 (tape) and #80A (transcript of #80), located at CT SUPP IV, 2:448-465)] The prosecution thereafter played for the jury another tape-recorded telephone call between Johnson (at Ironwood State Prison) and "Sticks." Johnson can be heard complaining that he had "schooled" Williams as to what to testify to before the grand jury, but Williams had "put it on thicker than what he did before [Johnson] was [unintelligible] the state"; that Williams had testified

before the grand jury for four (4) hours; and that "Assassin" was supposed to be handling some "business" for Johnson; that is, "Assassin" was supposed to telephone Williams and have a talk with him (Williams). [People's Exhibit #82 (tape) and #82A (transcript of #82), located at CT Supp IV, 2:469-474)]

The prejudice to Appellant is patent. The testimony at the guilt phase was voluminous as witness after witness spoke of their fear of "retaliation"; Barling testified over and over that their fears were "legitimate"; that gang members made concerted efforts to "school" and intimidate, if not kill, potential witnesses. That was the gang lifestyle, and the prosecution presented Appellant to the jury as a very active participant of the gang and its lifestyle. Now the jury was presented with actual proof that the members of the gang did intimidate and would retaliate in extremely violent fashion.

The jury would quite naturally assume that Appellant was in complete agreement with that lifestyle, that he would do whatever was necessary to support and to protect his gang homeboys, including acts of intimidation and murder. Hence, Appellant would, in the eyes of the jury, have been guilty by association. Simply be being a member of the gang, the jury would assume that Appellant was just as willing, and just as capable, of committing each of the violent criminal acts that were being presented to them in the penalty phase of the trial, despite the fact they were told to not consider them against Appellant. And, because of his gang membership, he was just as willing, and just as capable of violent retaliation and intimidation towards those who sought to cooperate with law enforcement. For the jury to disregard this thought process, even when told to do so was, Appellant asserts, a superhuman task that was impossible to comply with.

b. <u>Johnson's 1994 Solicitation to Murder Nece Jones:</u>

The prosecution called Detective Barling to set the stage for the jury to hear the contents of two telephone calls made by Johnson while in prison. Barling testified that he participated in a special task force that included local police as

well as F.B.I agents. One case they investigated was the murder of Willie Bogan. Charles Lafayette, a homeboy of Johnson's, was charged with, and later convicted of, the murder of Willie Bogan. [RT, 30:6013-6015]

Barling continued to explain that a young woman named Nece Jones lived in the neighborhood and was considered an associate of the 89 Family Bloods gang.[347] The prosecution against Lafayette, Johnson's homeboy, for the murder of Willie Bogan began in December of 1994. Nece Jones was a prosecution witness in that case.

The jury listened to two tape recordings of Johnson that were made while Johnson was incarcerated at Ironwood State Prison. In the first tape Johnson could be heard soliciting Reco Wilson, an 89 Family Bloods gang member, to murder Nece Jones who was a witness in the murder trial involving Johnson's homeboy Charles LaFayette. [RT, 30:5993-5994; People's Exhibits #51 (tape) and #51A (transcript of #51), located at CT SUPP IV, 2:437-442]. In the second tape recording, Johnson can be overheard confirming to another individual that he had spoken to Reco Wilson. [People's Exhibits #81 (tape) and #81A (transcript of #81), located at CT SUPP IV, 2:466-468]

Barling testified that Reco Wilson was a member of Johnson's 89 Family Bloods gang. His moniker was "Little K Mike." [RT, 30:6017-6018] In the tape recordings, Johnson was overheard telling Reco Wilson

> Them three smokers out there, ... put a leash around their ass, by any means necessary. You know what I'm saying? It's either, it's either your way or no way. [RT, 30:6021]

Barling was allowed to render his opinion, over Johnson's objection, about the phrase: "Put a leash around someone is to control them like you would a dog.

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[347] Jones was referred to as a "smoker" or "basehead" because of her addition to cocaine. She benefited the gang because she purchased her drugs from members of the gang.

You put a leash around a dog, you control it. That's what put a leash around someone means, is to control them." [RT, 30:6023-6024]

The prosecutor then compared the relationship between Johnson and Reco Wilson, just as she previously had done regarding the relationship between Johnson and Appellant[348]. [RT,]

> DDA: You've earlier testified that Mr. Johnson had a lot of respect in the gang. What was Mr. Johnson's relative respect level in comparison to Reco Wilson at the time of these phone calls?
> BAR: In respect to Reco Wilson, Cleamon Johnson would tell Reco Wilson, or ask Reco Wilson to do certain tasks. Cleamon Johnson called the shots in the gang.
> DDA: And would Reco Wilson's status in the gang be improved by following those instructions?
> BAR: Most certainly if Cleamon Johnson asked him to do something his status would increase, or he would maintain respect among other people. [RT, 30:6024][349]

Barling testified that he investigated the murder of Nece Jones and that the person charged with her murder, and subsequently convicted, was none other than Reco Wilson. According to Barling, Nece Jones was murdered three days after Johnson solicited Wilson to "control her" and "by any means necessary." The

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[348] This illustrates why the motion to sever should have been granted. Since Wilson did whatever the shotcaller told him to do, including killing people, and since Appellant also did whatever the shotcaller told him to do, it was only natural for the jury to assume that Appellant would have willing to kill Nece Jones just as Wilson did; that is, if Appelant had not been in custody at this time, Johnson would have asked him to kill Nece Jones and Appellant would have willingly done so.

[349] As with the testimony of Barling during the guilt phase, Barling was *not* qualified to testify as an expert on the customs, habits, behavioral characteristics and psychology of members of the 89 Family Bloods gang, of Cleamon Johnson, or of Reco Wilson. He also had no personal knowledge of these relations. Hence, his testimony was simply his own personal belief regarding what he thought. That was speculation and simply not relevant. Appellant could not object because it was offered only against Johnson, and Johnson's attorney assumedly did not object because his previous objection on the same issue during the guilt phase had been overruled.

prosecution produced additional evidence that three days later, Reco Wilson was observed chasing and shooting at Nece Jones. When she fell to the ground, Wilson walked up to her and shot her execution-style in the back of the head at "contact" range. She was murdered because she was to testify against Johnson's homeboy, Charles LaFayette! [RT: 15:3383, 3389][350]

The undue prejudice of this testimony is obvious. Members of the 89 Family Bloods gang were so zealous in their desire to gain and maintain their gang's reputation for violence, and they were so completely willing to do whatever the gang's shotcaller bid them to do, that as far as the jury was concerned, Appellant would have been willing to do exactly what Wilson had done, and he would continue to do anything the gang leaders bid him to do, regardless of where he lived, and regardless of whether he was in custody or not. There was only one penalty that would protect society from someone like him ... death.

c. Johnson's 1994 Solicitation to Murder Los Angeles Police Detective Tom Matthew:

If the murder of rival gang members were not sufficiently evil, and if murdering witnesses were also not evil enough, the jury that was to determine Appellant's punishment was now told that the lives of investigating police officers were also not safe from the retaliatory desires of the gang. In this case, it was the shotcaller Johnson who spoke of killing the detective. However, since Johnson was the shotcaller, he had the ability to call upon Appellant, Wilson or any number of other members to do his lethal bidding, and they would do it, according to the theory urged by the prosecution throughout the trial.

Detective Barling testified during the guilt phase of the trial that he knew Detective Matthew and worked with him as Los Angeles Police officers. The were together in the C.R.A.S.H. unit of LAPD since 1989. The area in which

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[350] Carl Connor was the star witness in that case, the only eye-witness who identified Wilson, and thereafter received a $25,000 reward for his efforts.

Johnson lived was in Barling's assigned district, while Mathew's assigned district was the adjacent one to the north. [RT: 30:6007-6008] Mathew was assigned to work with the Swans gangs, of which the 89 Family Bloods gang was a subset. [RT, 30:6008-6009] From 1989 to about 1993, Barling estimated he met and conversed with Johnson about 20 times. Barling said Johnson constantly asked him, "Who is that Indian officer? Who is Mathew? Why is he always messing with us? Johnson asked Barling why Mathew was giving him a hard time when Johnson went into Swan territory. [RT, 30:6010] Barling testified that Detective Mathew was an aggressive gang detective, particularly as it concerned making daily contacts with members of the gangs. [RT, 30:6011] In Barling's opinion, Johnson's attitude toward Detective Mathew was not a friendly one; rather "upset, but upset in the fact that who is this guy, and why is he always messing with me?" [RT, 30:6012] According to Johnson, Mathew was always "jacking up and jamming" him; that is, stopping Johnson perhaps for a cursory search or an extensive search. Mathew was always stopping to talk to Johnson, finding out who he was, stopping his car all the time, etc. [RT, 30:6012].

Thereafter, the jury listened to two tape recordings of telephone calls between Johnson (who was incarcerated at Ironwood State Prison) and another individual. In the first recorded call, Johnson was overheard telling the individual that when he (Johnson) gets out of prison, "I'm gonna be able to have a scope [i.e., a telephoto lens or scope on a rifle] for old Matthews . . . and after, that motherfucker would be able to kick back, you know what I am saying?" [RT, 30:5997-5998; People's Exhibits #52 (tape) and #52A (transcript of #52), located at CT SUPP IV, 2:443] In the second recorded call, Johnson was overheard talking about obtaining a ".30-.30" rifle so he can kill Det. Mathew. In rather chilling language, Johnson was overheard saying: "I don't want him to see me 'til its too late. (laughter) Yeah, he be talking about 'Why me?' (laughter), 'Why me?', you know what I'm saying?" [RT, 30:5999-6000; People's Exhibits #53 (tape) and #53A (transcript of #53), located at CT Supp IV, 2:444-447]

It was the prosecution's theory of the case that made this evidence so prejudicial to Appellant. The prosecution insisted from the beginning of the trial that Johnson was the gang's shotcaller, and that members of the gang were highly desirous of supporting Johnson and the gang. Hence, anything Johnson wanted done, each of the gang members would be only too willing to perform for him. Consistent with the theory urged upon them by the prosecution, the jury would have looked at Appellant as one who would, if given the opportunity, have been more than willing to murder Detective Mathew. Hence, in the jury's mind, the only way to eradicate this horrifying mentality among these gang members would be to prescribe a punishment that would not allow them to commit these crimes ... even from prison. The only choice of punishment the jury would have seriously considered for Appellant was death. Because he was a gang member, allowing him to live was much too risky.

d. Johnson's 1995 Possession of a Deadly Weapon while in Custody at the Los Angeles County Jail:

Robert Mayberry testified that he was a jailer at the men's central jail in Los Angeles County. On Nov. 19, 1995 he and other sheriff's deputies did a random unannounced search of the cell in which Johnson was housed. They located a shank, or what Mayberry referred to as a "jail mate-stabbing device." The weapon was about 4 to 4 ½ inches long, ¾ inch wide, with a sharpened point at one end, and made of metal. It was found in Johnson's pants that were located in the cell. In the deputy's opinion, the shank could cause death. A photograph of it was taken, and the photo was introduced as People's Exhibit #50. [RT, 29:5935-5941]

Even though the jury was told to consider this evidence solely as to Johnson, in the back of their minds each juror knew that if Johnson could accomplish this, so could Appellant if they returned a "life without possibility of parole" verdict against him. If Appellant were allowed to live, he would take this incredibly lethal and violent lifestyle with him to prison. Others would then

become his next victims as he continued to do all in his power to have his gang, and himself, earn the greatest of "respect."

2. An Incident During the Penalty Phase Demonstrated in Graphic Terms that the Jurors Were Simply Not Capable of Ignoring the Evidence Introduced Against Johnson as They Considered Appellant's Fate.

In the instant case, one incident during the trial dramatically illustrated that at least one juror was literally *unable* to follow the court's various limiting instructions when highly frightening and inflammatory evidence was admitted solely as to co-defendant Johnson. In a most unique and unusual occurrence during the penalty phase of the trial, "alternate juror #2" sent a handwritten note to the judge at a time when the prosecution was presenting evidence in aggravation against co-defendant Johnson. [CT, 5:975, 977; RT, 32:6553] In the note the juror expressed fear for her safety because Attorney Joe Orr and Appellant were "looking" at her! Not only was this juror unable to abide by the limiting instruction (the jury was instructed *not* to consider the evidence as to Appellant), but she was unable to abide by the limiting instruction as to Appellant's attorney Joe Orr! Her deep seated fear of simply being in that courtroom had completely taken over her ability to be rationale. Other jurors undoubtedly had similar misgivings about serving as jurors because of the fear that permeated the courtroom. Other jurors were also aware of Alternate Juror #2's fear. They were aware she passed the note to the judge. They were aware of the contents of the note. [RT, 32:6571-6572] In these circumstances, and realizing the effect the evidence had on that particular juror – evidence that the jury had been expressly instructed was not to be considered as to Appellant -- it is hard to imagine Appellant was not unduly prejudiced by being tried jointly with co-defendant Johnson. This juror was part of the jury that unanimously found Appellant guilty of both murders. This juror was part of the jury that voted unanimously that Appellant should be executed.

Certainly there must exist doubt in everyone's mind as to whether these decisions by the jury were made rationally or whether these most-important-of-all decisions were unduly influenced by their fear that if they didn't convict Appellant and impose death, the very safety of the jurors themselves could be in jeopardy.

As stated previously, the Supreme Court in *Zafrio v. United States* (1993) 506 U.S. 534 explained that the risk of compromising a specific trial right of a jointly tried defendant (i.e., Appellant) could occur

> ... when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. ... Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. [citation] (*Id.*, at p. 542.)

3. The Requirement of Not "Lightening" the Prosecution's Burden of Proof.

This evidence showcased the precise problem .of highly inflammatory and voluminous gang evidence offered against a co-defendant who, the prosecutor argued throughout the trial, was the shotcaller. As far as the jury was concerned, if Appellant had been acquitted or if they did not vote for death as to Appellant, all co-defendant Johnson would have to do would be to tell Appellant "to serve a mission", to kill Det. Matthew, Connor, Jelks or James and, according to the prosecutor, Appellant had to do it or his life itself would be in jeopardy through internal discipline imposed on him at the gang's direction, or through a "hit" issued from jail by the co-defendant. After all, the co-defendant had issued just such an order from prison to Reco Wilson and his order to "serve" Nece Jones was carried out most effectively. As soon as the jury recalled this evidence, it "lightened" the prosecution's burden of proof because they were not about to

release Appellant or vote against death. After all, the jurors knew of the power co-defendant Johnson wielded ... the prosecutor never let them forget.

This situation violated Appellant's due process right to a fundamentally fair trial and lessened the prosecution's burden of proof. (*Zafrio v. United States, supra,* 506 U.S. at p. 539, see also p. 544, Stevens J. concurring); *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.)

4. The Requirement of Heightened Reliability of Findings and Verdicts in Capital Cases.

Appellant asserts the trial court not only did not insist on heightened reliability of the verdicts and findings by the jury; rather, the trial court by its various evidentiary rulings clearly *lessened* the reliability of the jury's verdicts and findings.

The trial court's *obvious* errors in allowing the prosecution to bolster the credibility of Connor and Jelks lessened the reliability of the jury's verdicts and findings. (See Issues III and IX, *supra.*) Likewise, the trial court's limiting of Appellant's ability to confront and cross-examine two of his three principle accusers, Jelks and James, as well as Detectives McCartin and Sanchez -- because it might prejudice co-defendant Johnson unduly -- also lessened the reliability of the jury's verdicts and findings. The astounding amount of inflammatory and unnecessary gang evidence, and the highly emotional impact it had on the jurors, undoubtedly lessened the reliability of the jury's verdicts and findings. The introduction of co-defendant Johnson's out of court statement that clearly referred to Appellant and improperly corroborated the testimony (and credibility) of Freddie Jelks also lessened the reliability of the jury's verdicts and findings. It seemed like every ruling made by the court lessened the reliability of the jury's verdicts and findings.

The prejudicial impact of the improperly joined guilt phase trial, which prevented the jury from reliably evaluating the conduct and culpability of the individual defendants, continued into the penalty phase, where the added

prejudicial impact further deprived Appellant of the benefit of any lingering doubt jurors would have likely otherwise harbored even had they convicted him at a separate guilt phase trial.

Where codefendants are facing the death penalty in a joint penalty phase trial and the prosecution admits a large amount of extremely revolting and emotionally disturbing acts in aggravation against the co-defendant, it becomes increasingly difficult for Appellant to receive a fair penalty phase trial.

5. The Requirement of a Truely Individualized Consideration of the Accused Prior to Imposition of a Death Sentence.

This court noted in *People v. Ochoa* (1998) 19 Cal.4th 353, the law governing capital sentencing determinations "requires an individualized assessment of the defendant's background, record, and character, and the nature of the crimes committed, both as a matter of state law and as a federal constitutional requirement." (*Id.* at p. 455, citing Penal Code section 190.3; *People v. Beeler* (1995) 9 Cal.4th 953, 991-992; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.) Relying on the Eighth and Fourteenth Amendments, the U.S. Supreme Court in *Woodson, supra* noted:

> The penalty of death is qualitatively different from a sentence of imprisonment, however long .... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Id.*, 428 U.S. at p. 305.) (See also *Zant v. Stephens, supra,* 462 U.S. at p. 879 ["What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."].)

Additionally, as Appellant pointed out in his argument on severance at the guilt phase, "[p]rejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual basis." (*United States v. Tootick, supra,* 952 F.2d at 1082.) Indeed, "the ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's

admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct." (*United States v. Brady, supra,* 579 F.2d at p. 1128; *see also United States v. Marshall, supra,* 532 F.2d at p. 1282; *United States v. Donaway, supra,* 447 F. 2d at p. 943.)

D. Conclusion.

All of these problems were present in the penalty phase of this case.

Under the well-established tenets of Eighth and Fourteenth Amendment law and under California law, Appellant was entitled to have evidence of the co-defendant's bad acts excluded from consideration by the jury deciding whether Appellant would be sentenced to death. (*People v. Boyd* (1985) 38 Cal.3d 762, 773; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [the jury must focus on the defendant as a "uniquely individual human being"].) In a joint penalty phase trial, the judge must be careful to assure that evidence in mitigation or aggravation relevant to one defendant does not unduly prejudice the other defendant. The Eighth and Fourteenth Amendments to the federal Constitution require no less.

Further, as the U.S. Supreme Court noted in *Satterwhite v. Texas* (1988) 486 U.S. 249, "[t]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the sentencer." (*Id.* at p. 258.)

Given the highly damaging and inflammatory nature of the evidence introduced against the co-defendant, plus the prosecution's continued exhortation that Johnson was the shotcaller and others, including Appellant, would do his bidding, the brief instruction by the trial court to consider the evidence separately as to each defendant was insufficient to overcome the prejudice resulting from the joinder of the penalty phase trials.

For all the above reasons, Appellant respectfully urges this Court overturn his sentence of death.

XXII.

Appellant was denied his constitutional due process right to a fair trial in the penalty phase when the prosecution was allowed to introduce a voluminous amount of extremely prejudicial, frightening, and highly inflammatory gang evidence during the penalty phase in violation of Evid. Code, §352.

A. Introduction.

Appellant contends that the prosecutor, consistent with her *modus operandi* in the guilt phase, began right where she left of in the penalty phase as far as seeking to introduce as much inflammatory gang evidence as possible, even though there was no direct evidence that Appellant's Prior Murder Special Circumstance was related to any type of gang activity or gang motive.

B. The Applicable Law.

Penal Code, § 190.3 states that in the penalty phase of the trial, jurors are told to consider "the nature and circumstances of the present offense" as part of the evidence they evaluate regarding the aggravating circumstances and the mitigating circumstances that may exist. Because of the broad and open-ended language of this statute, the jury was entitled to consider *anything* admitted during the *guilt* phase that reflected upon the issue of penalty, including gang evidence introduced during the guilt phase.

C. Discussion of penalty phase testimony.

1. Gang Evidence Introduced During the Guilt Phase.

Because of Penal Code, 190.3, Appellant respectfully incorporates herein by reference as though fully set forth herein, his arguments XI, XII, XIII, XIV, and XV, all of which pertain to the erroneous admission of highly inflammatory and prejudicial gang evidence.

2. The prosecution's improper and speculative attempts to get Roderick Lacy to admit he had been threatened by Appellant (or one of his homeboys) while Lacy was in custody;. [RT, 32:6394-6425]

On direct-examination of Roderick Lacy, the prosecutor immediately sought to introduce gang evidence by asking Lacy if he was fearful of testifying[351]: "How do you feel about being here in court?" [RT:32:6395] When Lacy responded in a way that indicated he was *not* fearful of retaliation, the prosecutor immediately brought out the fact that Lacy and the deceased victim, Chester White, were long time Avalon Gardens Crips gang members. [RT, 32:6395-6396] This evidence, however, was not relevant unless there was evidence that the killings were somehow gang motivated.

The prosecutor continued to try and create a gang motive for the killing. She asked Lacy what the relationship was between his and White's gang (the Avalon Crips) and Appellant's gang, the 89 Family Bloods. [RT, 32:6396] When Lacy said there was animosity between the two gangs [RT, 32:6396], the prosecutor had a tentative possible motive, albeit a highly speculative motive. That is, a member of the 89 Family Bloods gang *might* have had a motive to kill Chester White because there was "animosity" between the two gangs

Thereafter, Lacy described the shootings in which White was killed and Lacy was wounded. Lacy said he saw four men he thought were involved in the shootings, but he could not identify any of them. [RT, 32:6399-6406] He was asked if he testified at Allen's trial for the murder of Chester White. He said he did, but he added that he told that jury he could not identify Allen as the shooter. He said that when he was at the hospital, *the police told him that Allen was the suspect*, and they asked if he could pick out a photo of Allen, an individual he already knew by the name of Fat Rat. Lacy said he identified Allen's/Fat Rat's photo as the picture of the individual he knew as Fat Rat, but not that he was the shooter. [RT, 32:6406]

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[351] This trial tactic was also used by the prosecutor on direct examination of Carl Connor, Freddie Jelks, and Marcellus James. It allowed the prosecutor to then introduce inflammatory gang evidence as a reason why the witness' testimony was inconsistent, belated, etc. The resultant explanation was the witness was fearful of retaliation by the gang.

At this point, the prosecutor confronted Lacy with a "problem" he had allegedly experienced while in custody. It was an effort by the prosecutor to prove to the jury that Lacy's testimony at the original trial, as well as his testimony in the penalty phase, was influenced by his fear of gang retaliation.. However, rather then simply ask him what happened while he was in custody, the prosecutor asked a leading question that suggested to Lacy *and the jury* that he had been *directly* threatened by Appellant:

> DDA: Was there an incident at county jail between yourself and Mr. Allen?
> RL[352]: I guess. I don't know who they were, though, but they tell me I'm snitching and stuff like that, tell me they going to take me out, and stuff like that.
> DDA: Were you labeled a snitch because you might testify against Mr. Allen?[353]
> RL: Basically, yeah.
> DDA: In county jail – how do people in county jail view snitches?

At this point, Appellant objected. He stated the defense had received no discovery of any threat made to Lacy by Appellant. Counsel for Appellant then told the court:

> DM[354]: I think what counsel (the prosecutor) is doing, from what I'm hearing is – this witness was afraid to testify at the trial in '93, he seems to be afraid to testify now, and I think counsel is trying to make it look like, with no basis for asking the questions, that some kind of specific threat was made in the county jail. There's still no offer of proof of a threat. [RT, 32:6409]

The trial court overruled counsel's objection and did *not* request an offer of proof from the prosecutor as to where this line of questioning would go. The court

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[352] "RL" is Roderick Lacy.

[353] This question was objectionable because it called for speculation on Lacy's part. It was also irrelevant unless it went to Lacy's state of mind that he was fearful of testifying against Appellant. Up until this point, there was no evidence of that.

[354] "DM" is Dan Murphy, co-counsel for Appellant at the trial.

indicated that for evidence of threats to be relevant to Lacy's state of mind, the threats need not be tied to Appellant. Counsel for Appellant acknowledged this, but asked the court to provide the jury with an instruction that would limit their consideration of this testimony. The court's response was "Let's hear the balance of the testimony, direct and cross, then if you want to renew your request, I'll do so. [RT, 326409-6410]

Lacy testified that he had *not* been directly threatened while in the jail. He said he overheard two other inmates talking, and one referred to Lacy by name and said he (Lacy) "snitch on one of my homeboy. We going to have his head, and stuff like that." [RT, 32:6411-6412] Lacy stated he did *not* know who was talking, but *thought* the speaker was a "Blood." [RT, 32:6412]

Thereafter, the prosecutor did what she had done while questioning Connor, Jelks, and James. She asked a series of questions that went to the violent character traits of Crips and Bloods gang members for fighting with each other, again creating by innuendo the suggestion that Appellant had a motive for the killing of White. [RT, 32:6413] That is, since Chester White was a Crip and Appellant was a Blood, that by itself became the motive for the murder of White.

Through her questions, the prosecutor began suggesting answers to Lacy regarding his state of mind. She asked if he was familiar with the phrase "watching your back." She then asked in leading fashion whether Lacy, after overhearing that conversation in jail, began "watching his back?" [RT, 32:6413] She then prodded Lacy, as she had done with Connor, Jelks and James[355], to talk about all of the various things that could happen to someone who testified against a gang member, including retaliation by "bad stuff" and "getting dealt with" especially if in jail, beat up, stabbed, and "everything in the book." The prosecutor reminded Lacy to testify that this concern for safety remained with the individual even after he was released from jail.

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[355] See Argument XI in Appellant's Opening Brief.

It was here, however, that the prejudicial and baseless nature of prosecutor's questioning became apparent. Suggesting the answer to Lacy in her question, she asked him if the threatening conversation he overheard between the two individuals in the jail occurred *before* he testified in the original trial:

> DDA: Those comments by the two Bloods, was that before you got called to testify against Mr. Allen in his trial?
> RL After that.
> DDA: If was after you testified?
> RL: (nods head in the affirmative.)
> DDA: Is that a "yes"?
> RL Yes.
> DDA: How do you feel about that today?
> RL: I just – I just look over my shoulders every day. I just keep on look out. [RT, 32:6414-6415. Emphasis added.]

Clearly the prosecutor sought to use the "jailhouse threat" in the jail as a basis for arguing to the jury why Lacy was unwilling to identify Appellant as the individual who shot him. Since the "jailhouse threat" occurred after Lacy testified at Appellant's trial for the murder of Chester White, it could not have been the reason for Lacy refusing to identify Appellant as the shooter of himself and White. Yet, because the court refused to require an offer of proof from the prosecutor in an area fraught with potential prejudice and for which no discovery had been made available, highly prejudicial evidence was presented to the jury. A defense request for a "limiting instruction" at that time would have done nothing more than highlight the "jailhouse threat." On cross-examination, Lacy confirmed that no one had threatened him prior to his testimony in Appellant's original trial, and that he testified truthfully at that time when he said that Appellant was *not* the shooter. [RT, 32:6419] Further, his original trial testimony occurred in October, 1993. His penalty phase testimony occurred in September, 1997. Four years had elapsed. Lacy testified that during the ensuing four years, he had received *no threats* about testifying and in effect he thought any concern of retaliation was a thing of the past (i.e., "I thought it was over with."). [RT, 32:6420-6423] The trial court erred

when it allowed the prosecution to pursue this area of inquiry without so much as an offer of proof.

However, the error became even more prejudicial. Even though Lacy testified that the conversation between the two individuals at the jail occurred *after* he testified at Appellant's original trial [RT, 32:6414-6415], and even though the prosecution had absolutely no evidence to rebut that testimony, the prosecution still was allowed to subsequently have Detective Tizano [RT, 32:6473-6494] testify that Lacy's "cooperation level" changed from cooperative to uncooperative at a time when Lacy and Appellant were both in jail. [RT, 32:6482-6483] The obvious inference from Detective Tizano's testimony, unsupported by any evidence, was that Appellant had either threatened Lacy or he had arranged to have him threatened. Yet, that inference was completely speculative. If Lacy's cooperation level changed at a time while he was in jail, there was no evidence that it was related to Appellant or any "jailhouse threat" in any way whatsoever. For some unknown reason, Lacy's cooperation level changed while he was incarcerated, yet the court allowed the prosecution to improperly present evidence from which it could be inferred that the change in cooperation had something to do with Appellant and/or members of his gang. In effect, the trial court allowed the prosecution to suggest an *improper, groundless, and highly prejudicial* motive for why Lacy became uncooperative.

Appellant asserts the trial judge had a *duty* to ensure that what the prosecution presented to the jury, particularly in the penalty phase of a capital prosecution, was relevant and admissible evidence. The defense requested the court require an offer of proof. The court refused that request. Had the court done so, most of the above testimony regarding threats would have been excluded because as Lacy's testimony illustrated, he was *never* threatened! Not by Appellant nor by anyone else! Lacy overhead a conversation between two unknown men in the jail, a conversation that was not directed toward him. At a minimum, the court should have instructed the jury to limit the conversation Lacy

overheard to his state of mind, and not that someone was out to harm Lacy. The defense made this request also, but the court "put it off" as though it was too much bother.

3. Witness Earl Woods. [RT, 32:6426-6439]

Earl Woods testified that he and his son were walking to the store when he heard gun shots. Moments later, he said he saw "Stupid" laying the ground with bloods around him, and his friend was "limping" away. He said he did not see the shootings, and denied that he told the police he saw the shootings, and he denied identifying any of the shooters. The prosecutor confronted him with a photo-lineup form and had him read it to refresh him memory. The prosecutor asked a series of "Did you tell the police ....", in effect laying a foundation for introducing prior inconsistent statements through a subsequent witness. Woods either denied saying many of the statements, and he also stated he "could not remember" if he said some of the others. [RT, 32:6426-6438] He finally concluded by saying he lied to the police when he spoke with them on the day of the murder of Chester White. [RT, 32:6438]

The prosecutor then sought to establish, inferentially, that Woods was fearful of retaliation if he testified to the truth. However, as she frequently did with her questioning of Connor, Jelks, and James, she carelessly phrased her questions in such a way that they did *not* address the witness' state of mind; rather the questions called for evidence that members of the 89 Family Bloods gang were extremely violent and would, in fact, retaliate against Woods, his son, and his mother.

DDA: Mr. Woods, do you still live in the neighborhood over there?
EW: Yes.
DDA; Do you still have a son?
EW: Yes.
DDA: If you hadn't been subpoenaed to court would you have ever volunteered any information in this case.
EW: No.
DDA: How do you feel about testifying here?

EW: I didn't want to be here.
DDA: You know what the word snitch is?
EW: Yes.
DDA: By being here today, are you making yourself a snitch?
EW: Yes.
DDA: Did you feel the same way at Mr. Allen's previous trial?
EW: Yes.
DDA: And how come you don't want to be here?
EW: For once, I didn't actually see the shooting. I was going by hearsay. And I have a son and a mother to think about.
DDA: Whey you say you have a son and a mother to think about, are you concerned about your son and your mother's safety/
EW: Yes.
DDA: What happens to people who help the police, or help the prosecution in cases like this?
EW: They become a snitch and have to be under protective custody, something I don't want to be under.
DDA; And if they are not under protective custody, what?
EW: You just out there on the street waiting for just to be a target.
DDA: By being a snitch, are you making yourself a target?
EW: Yes. [RT:32:6438-6439. Emphasis added.]

Much of what Woods was asked about did *not* pertain to his state of mind[356]. At least many of the questions were not phrased in a manner that clearly demonstrated that. Although it could be inferred that the prosecutor's questions dealt with the Woods' state of mind, gang evidence is so highly prejudicial and inflammatory that it is *not too much to expect* that prosecutors be required to carefully articulate questions so there is simply no misunderstanding as to the purpose of the question. As the questions were phrased, Woods told the jury that by testifying, he had made himself, his son and his mother "targets" for gang retaliation unless they entered into the witness protection program. That was the inference the jury was allowed to draw from the testimony of Connor, Jelks and James, and that was the inference the jury was allowed to draw from Woods'

[356] The underlined portions of the previous quotation from his testimony indicate which questions and answers did *not* pertain to his state of mind.

testimony. Woods testimony simply added to the undue prejudice that the prosecution had previously heaped upon Appellant during the guilt phase.[357]

4. Admissibility of Gang Evidence Generally.

Gang evidence has been deemed relevant and admissible, subject to Evidence Code, § 352, when offered to support or attack the credibility of witnesses. (*People v. Ayala* (2000) 23 Cal.4th 225; *People v. Malone* (1988) 47 Cal.3d 1, 30 [It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.]; *People v. Warren* (1988) 45 Cal.3d 471, 481 [Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible.]; *People v. Avalos* (1984) 37 Cal.3d 216 [Witness' fear, regardless of cause, is relevant to assess her credibility.]) *People v. Green* (1980) 27 Cal.3d 1, 19-20 [testimony witness was afraid to go to jail because defendant had friends there relevant to witness's credibility.]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588; Evid. Code, § 780, generally.)

This Court, however, has consistently expressed its concern that gang evidence a) may have a "highly inflammatory impact" on a jury, and b) may create the risk the jury will infer guilt and criminal disposition merely from an accused's gang membership. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Cox* (1991) 53 Cal.3d 618, 660.) This Court and numerous intermediate appellate courts have repeatedly held that gang evidence uniquely tends to evoke an emotional bias against the defendant as an individual, may often have very little relevance to the issue of guilt of the underlying charge, and can deprive the accused of a fair trial. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.)

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[357] See Argument XI in Appellant's Opening Brief.

The admission of gang evidence, particularly when the defendant claims membership in the gang, 1) creates a risk that jurors will improperly infer guilt from the defendant's criminal disposition or propensity [Evid. Code, § 1101, subd. a.], and 2) may have a highly inflammatory and prejudicial impact on the defendant. Hence, before gang evidence is admitted, the trial court must carefully evaluate its probative value and its potential undue prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

The direct examination of Lacy and Woods encompassed much more than simply establishing inferentially their subjective state of mind of fear. They also were allowed to testify, over defense objection, that 89 Family Bloods gang members possessed a *propensity* for violence. When the prosecution introduced gang evidence to prove Appellant and his fellow gang members had a propensity to commit acts of savagery and to retaliate violently, California law is clear and unambiguous: Gang evidence is not admissible for that purpose. (Evid. Code §§ 1101(a), 1102)

Appellant further asserts the trial court abused its discretion pursuant to Evid. Code, §352 when it allowed the prosecution to introduce prejudicial gang evidence for violence, witness intimidation and retaliation to circumstantially establish the state of mind of witnesses Lacy and Woods.

The jury was provided such a voluminous and malevolent amount of gang evidence during the guilt phase of this trial that when the penalty phase gang evidence was introduced, Appellant contends no reasonable juror could have put aside his/her emotional feelings of abhorrence and revulsion of the members of the 89 Family Bloods gang. Since the prosecution emphasized again and again that Appellant was an active member of that vile gang, thereby taking on the characteristics and propensities of that gang, to suggest the jury was not unduly influenced by that evidence would be nonsense. This is particularly true when limiting instructions given by the trial court, already of questionable validity, pertain to emotional, inflammatory, and frightening evidence.

If the trial court had required the prosecution to properly phrase her questions relating to state of mind evidence, *if* the trial court had promptly instructed the jury to limit its consideration of the gang evidence to the witness' state of mind, and *if* the trial court had limited the amount and provocative nature of the gang evidence presented, Appellant vigorously maintains it is "reasonably probable" that he "would have obtained a more favorable outcome." (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) When the penalty phase evidence of gang violence and intimidation is considered together with other inadmissible gang evidence (See Arguments XI, XII, XIII, XIV and XV in Appellant's Opening Brief.), as well as other errors raised in this appeal, Appellant asserts the impact on the jury of the combined errors clearly exceed that which this Court would deem "harmless."

Appellant respectfully urges this Court overturn his sentence of death on these grounds.

D. The Trial Court's Errors in Admitting this Evidence Also Involved Violations of Appellant's Federal Constitutional Rights that Are Applicable to California's State Courts by the Due Process Clause of the Fourteenth Amendment.

This Court has recognized, however, that when the erroneous admission of irrelevant and prejudicial evidence "lightens" the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. *People v. Garceau* (1993) 6 Cal.4th 140, 186. In this situation, Appellant's sentence of death must be overturned unless the state can establish that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24.

1. The gang evidence "lightened" the prosecution's burden of proof.

Appellant respectfully asserts the admission of gang evidence, as illustrated above, violated his Fourteenth Amendment right to due process. Due process

requires that a criminal defendant receive a fundamentally fair trial. (*Lisenba v. California* (1941) 314 U.S. 219, 236 [86 L.Ed.2d 166, 62 S.Ct. 208]; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237 [84 L.Ed.2d 716, 60 S.Ct. 472].) Fundamental fairness is not provided when a California State court conviction is based upon improperly admitted evidence or unfairness on the part of the State in the use of the evidence. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [4 L.Ed.2d 242, 80 S.Ct. 274]; *Spencer v. Texas* (1967) 385 U.S. 554, 564 [17 L.Ed. 2d 606, 87 S.Ct. 648].) When a State court's evidentiary rulings are "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [115 L.Ed.2d 720, 111 S.Ct. 2597].)

When gang evidence is erroneously introduced to prove members of a particular gang possess a violent *propensity* to threaten and intimidate potential witnesses and to viciously retaliate against anyone who speaks to the police or who testifies to their criminal acts, it has the natural and inescapable effect of causing any individual juror to despise and hate the gang and its members.

When gang evidence that circumstantially proves a witness' state of mind becomes so cumulative and so inflammatory that the probative value is substantially outweighed by the danger of undue prejudice and limiting instructions become superfluous, it has the natural and inescapable effect of causing any individual juror to despise and hate the gang and its members.

In both situations, the jurors hate the gang because of the violent propensities of its members. The jurors then hate anyone who is a member of this gang. Once the jury transfers these "reasons to hate" to the accused, the prosecution's burden of proof is "lightened" and conviction becomes much easier. The jury *wants* to convict the accused, not necessarily because of any criminal act he may have committed, but because he is a member of this gang that the jury has been given so many "reasons to hate."

The prosecution's burden of proof is "lightened" and convictions become easier because the jury, in its desire to punish the accused for being a member of that gang, is then willing:

a) To believe a questionable prosecution witness without thoroughly evaluating his credibility;

b) To overlook or simply reject any legitimate defense evidence simply because it is just that ... defense evidence; and

c) To look past the evidence and determine the outcome of the trial based on their hatred of the accused, his gang, and what that gang and its members represent.

The prosecution presented this jury with numerous reasons to hate the 89 Family Bloods gang, as well as its members, because of the gang's willingness to use compulsion, terror and brutality to obtain their desires, all at the expense of the decent, peaceful, law abiding residents of the same community. These feelings of injustice and unfairness would have resonated deeply within each juror. Throughout the trial, these feelings undoubtedly simmered just beneath each juror's conscious surface where, probably unbeknownst to each juror, it affected the juror's *subconscious* thought patterns. This subconscious emotional revulsion would have resulted in the juror's desire to *punish* Appellant because of his gang associations, and not just because of what he may have done. Each juror, trying his/her best to follow the court's instructions and to be just and fair, would not have been consciously aware of the intensity of the impact this hatred would have had on the juror as he/she deliberated, in good faith, the fate of the accused.

Finally, the continuous and repetitive introduction of gang evidence, particularly the specific illustrations murder, drive-by shootings, and savage gang retaliation committed by members of the 89 Family Bloods gang reinforced, deepened and intensified each individual jurors' "reasons to hate." throughout the entire trial.

When these "reasons to hate" the gang and its members were transferred to Appellant (he was, after all, a member of the gang), it would have undeniably "lightened" the prosecution's burden of proof. and deprived Appellant of his Fourteenth Amendment right to due process in a California State court. (*People v. Garceau* (1993) 6 Cal.4th 140, 186. See also, *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed 302, 111 S.Ct. 1246]; *Delaware v. Van Arsdall,* (1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674) Whatever evidentiary weaknesses existed in the prosecution's case that linked Appellant to the killings would have been more-than-made-up-for by the jury's emotional insistence on punishing Appellant because he was an active member of this murderous, brutal gang.

2. The Trial Court Failed to Ensure that the Evidence Possessed Even Greater Reliability than Normal Because This Was a Capital Case.

In addition, both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama (1980)* 447 U.S. 625, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens (1983)* 462 U.S. 862, 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256]).

If Appellant's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of the Fifth, Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

The admission of unduly inflammatory evidence is "an irrelevant consideration" and often leads to "an unguided emotional response" by the jury. It undermines the reliability required by the Eighth and Fourteenth Amendments for

a conviction of a capital offense (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and it deprives Appellant of the reliable individualized capital sentencing determination guaranteed by the Eight Amendment. *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.

In this regard, Appellant asserts that the trial court's admission of the above described irrelevant and inadmissible gang evidence, combined with the above described gang evidence that was cumulative of the witnesses' state of mind and highly inflammatory in violation of § 352, amounted to "an irrelevant consideration" by the jury that undoubtedly led to "an unguided emotional response" by the jury. This undermined the reliability of Appellant's conviction for this capital offense and deprived Appellant of the individualized capital sentencing determinations guaranteed by the Eight Amendment, as applied to California by the Fourteenth Amendment.

Appellant asserts the trial judge had a *duty* to ensure that what the prosecution presented to the jury, particularly in the penalty phase of a capital prosecution, was relevant and admissible evidence. The defense did not object, because they had learned during the testimony of Connor, Jelks and James that it did no good to object. Hence, the failure to object should not be deemed a waiver of this issue on appeal.

For all the above reasons, Appellant respectfully urges this Court overturn his sentence of death.

XXIII.

The Cumulative Effect of the Errors in This Case Require That the Convictions and Death Sentence Be Reversed.

A. Introduction.

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and more clearly when

considered cumulatively, deprived Appellant of due process, of a fair trial, of his right to confront and cross-examine his accusers, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, Appellant asserts that each error described above, by itself, was sufficiently prejudicial to warrant reversal of Appellant's convictions and death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

B. The applicable law.

Even if the above described errors in Appellant's case standing alone do not warrant reversal, Appellant respectfully requests this Court assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

C. Discussion.

1. Cumulative errors.

The prosecution's case against Appellant was based entirely on the testimony of three witnesses. Appellant asserts that Carl Connor committed perjury when he testified, and that the prosecutor committed prejudicial misconduct when she knowingly presented Connor's false testimony without even attempting to reconcile the obvious contradictions in his testimony with the known facts of the case.

Subsequently, the prosecutor was successful in persuading the trial court to limit the scope of cross-examination of Freddie Jelks. However, the prosecutor committed further prejudicial misconduct when she refused to disclose to the trial judge information specifically requested by the judge that would have impacted the court's decision to limit cross-examination of Jelks. Because of the trial

court's ruling, the prosecution was able to present Freddie Jelks in a totally false light. The defense was unable to further demonstrate Jelks' testimony was the inadmissible product of continuing police coercion. Additionally, Appellant was unable to adequately impeach the credibility of Detectives McCartin and Sanchez, as well as witness Marcellus James, because of the ruling regarding Jelks. The trial court also allowed the prosecution to improperly bolster the credibility of Connor and Jelks when detectives rendered their "opinions" that those two witnesses testified truthfully.

Although there was very little actual evidence that the motive for the shootings was gang related, the prosecution was erroneously allowed to introduce an incredible array of highly prejudicial and irrelevant gang evidence that became so overwhelming and frightening that one of the jurors literally feared for her life because defense counsel appeared to be looking at her! Further, additional evidence of a terrifying nature was introduced against the co-defendant; evidence that was so terrifying in nature that it was impossible for any juror to ignore when deliberating Appellant's fate and punishment. Appellant's inability to be tried separately from the co-defendant doomed Appellant to be cast into the same dark and evil pit that the co-defendant was placed in. In effect, the jury was given so many reasons to hate the 89 Family Bloods gang and its "shotcaller", Cleamon Johnson, there can be little doubt that the jury transferred those reasons to hate to the Appellant because of his choice of associating with members of that gang. Any doubts the jury had would have been filled in by their antipathy for Appellant because of his gang affiliation, and not because he committed these murders.

Additionally, the trial judge improperly removed a juror who was deliberating but simply could not be persuaded to vote guilty. The trial judge exacerbated the problem by not removing two other jurors who clearly violated the trial court's instructions, then gave the jury a coercive instruction by telling them he would not allow them to cease deliberating until they had reached a unanimous verdict.

The errors committed in the penalty phase of appellant's trial were equally grave. The failure of the trial judge to sever appellant's trial from that of his codefendant was error which denied appellant a fair trial in both the guilt and penalty phases of the trial.

2. Prejudicial Federal Constitutional Errors

The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require heightened reliability in a capital case. (*Johnson v. Mississippi. supra,* 486 U.S. at pp. 584-585; *Zant v. Stephens, supra,* 462 U.S. at p. 885.) The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) In a death penalty case, the state-created liberty interest described in *Hicks* means the right to due process in accordance with state law.

In a capital case, the principles of the *Hicks* rule also implicate the Eighth Amendment. Just as Hicks guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.)

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (See, e.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) Appellant asserts it certainly cannot be said that the errors in this case had "no effect" on at least one juror. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.)

3 Prejudicial State Law Errors.

The combined errors in this case also compel reversal of Appellant's death sentence under state law. In *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this

court held that the standard for penalty phase error in a capital case is the "reasonable possibility" harmless error standard. It is "the same in substance and effect" as the *Chapman*[358] "reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) It is a more exacting standard than that used for assessing prejudice for guilt phase error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (*People v. (Albert) Brown (Brown I), supra,* 40 Cal.3d 512, 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' " (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the guilt and penalty phases of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

D. Conclusion.

Given the interrelationship and the severity of the trial court errors in this case, their cumulative effect was to deny Appellant fair and reliable guilt and penalty determinations. Appellant's convictions and death sentence must be reversed.

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[358] *Chapman v. California, supra,* 386 U.S. p. 24, held that the test for prejudice for federal constitutional error is that reversal is required unless the prosecution can demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained."

XXIV.

California's death penalty statute, as interpreted by this Court and applied at Appellant's trial, violated the Due Process Clause of the 14th Amendment to the United States Constitution.

A. Introduction:

Many features of this state'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. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps practically every murderer into its net, and then allows almost every 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 the home) - to justify the imposition of the death penalty.

Penal Code § 190.2, the "special circumstances' section of California's death penalty statutes, is the section that narrows the class of first degree murderers to those most deserving of death, but as discussed below, that section was specifically passed for the purpose of making every murderer eligible for the

death penalty. The statute does very little to "narrow" down those 1st degree murderers who may be deserving of death.

Further, California has inadequate safeguards during the penalty phase that 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" means 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 lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

B. Appellant's Judgment of Death Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this court has recognized:

> 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].) (*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:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite statutory narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This court has explained that

> "[U]nder our death penalty law,... the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

California's 1978 death penalty law was created, however, not to narrow those murderers eligible for the death penalty but to make practically *all* murderers eligible for the death penalty. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated:

> "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

When Donald Loggins and Payton Beroit were murdered in August of 1991, § 190.2 contained eighteen special circumstances[359] that "narrow" the category of first degree murders to those murders most deserving of the death

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[359] 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 twenty-two.

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.

Section 190.2's special circumstances were created with an intent directly contrary to the constitutionally necessary function at the legislative stage; the circumscription of the class of persons eligible for the death penalty. For example, 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, acts committed during a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Further, § 190.2's reach has been extended by this court's interpretation of the lying-in-wait special circumstance, which the court has construed to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that § 190.2 comes very close to achieving the goal of its authors of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?,* 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[360] It is quite clear that these theoretically possible non-capital first degree

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[360] The potentially largest of these theoretically possible categories of non-capital first degree murder is what the authors refer to as " 'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra,* 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of

murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will *not* be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This court has in the past rejected challenges to § 190.2's lack of any meaningful narrowing and has done so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. However, it would appear that was not the case. In *Harris,* the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris, supra,* 465 U.S. at p. 52, fn. 14.)

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 created a Constitutional issue for this Court to resolve when it made practically every

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another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill - a distinctly improbable form of premeditated murder. (*Ibid.*)

murdered eligible for the death penalty. Appellant respectfully requests this court review California's 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.

C. 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.

Appellant submits that California's Penal Code § 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 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." Having previously found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never defined the meaning of this factor other than to state that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[361] Indeed, this Court has arguably expanded the scope of factor (a) by approving use of the "circumstance of the crime" aggravating factor to three weeks after the crime when the defendant sought to conceal evidence[362],

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[361] . *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[362] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.,* 494 U.S. 1038 (1990).

or had a "hatred of religion,"[363] or threatened witnesses after his arrest,[364] or disposed of the victim's body in a manner that precluded its recovery.[365]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, 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, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

1. The manner in which the murder occurred as an aggravating factor.

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. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[366] or because the defendant killed with a single execution-style wound[367].

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[368] or because the defendant killed the victim without any motive at all.[369]

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[363] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.,* 112 S. Ct. 3040 (1992).

[364] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.,* 113 S. Ct. 498.

[365] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

[366] See, e.g., *People v. Morales,* Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien,* No. S004762, RT 36-38 (same); *People v. Lucas,* No. S004788, RT 2997-98 (same); *People v. Carrera,* No. S004569, RT 160-61 (same).

[367] See, e.g., *People v. Freeman,* No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson,* No. S004761, RT 3026-27 (same).

c. Because the defendant killed the victim in cold blood[370] or because the defendant killed the victim during a savage frenzy.[371]

d. Because the defendant engaged in a cover-up to conceal his crime[372] or because the defendant did not engage in a cover-up and so must have been proud of it.[373]

e. Because the defendant made the victim endure the terror of anticipating a violent death[374] or because the defendant killed instantly without any warning.[375]

f. Because the victim had children[376] or because the victim had not yet had a chance to have children.[377]

g. Because the victim struggled prior to death[378] or because the victim did not struggle.[379]

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[368] See, e.g., *People v. Howard,* No. S004452, RT 6772 (money); *People v. Allison,* No. S004649, RT 968-69 (same); *People v. Belmontes,* No. S004467, RT 2466 (eliminate a witness); *People v. Coddington,* No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent,* No. S004309, RT 2553-55 (same); *People v. Brown,* No. S004451, RT 3543-44 (avoid arrest); *People v. McLain,* No. S004370, RT 31 (revenge).

[369] See, e.g., *People v. Edwards,* No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband,* No. S005233, RT 3650 (same); *People v. Hawkins,* No. S014199, RT 6801 (same).

[370] See, e.g., *People v. Visciotti,* No. S004597, RT 3296-97 (defendant killed in cold blood).

[371] See, e.g., *People v. Jennings,* No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[372] See, e.g., *People v. Stewart,* No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson,* No. S004763, RT 1141 (defendant lied to police); *People v. Miranda,* No. S004464, RT 4192 (defendant did not seek aid for victim).

[373] See, e.g., *People v. Adcox,* No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams,* No. S004365, RT 3030-31 (same); *People v. Morales,* No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[374] See, e.g., *People v. Webb,* No. S006938, RT 5302; *People v. Davis,* No. S014636, RT 11,125; *People v. Hamilton,* No. S004363, RT 4623.

[375] See, e.g., *People v. Freeman,* No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis,* No. S004767, RT 2959 (same).

[376] See, e.g., *People v. Zapien,* No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[377] See, e.g., *People v. Carpenter,* No. S004654, RT 16,752 (victim had not yet had children).

h. Because the defendant had a prior relationship with the victim[380] or because the victim was a complete stranger to the defendant[381].

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

2. Factors that occur with *every* murder that are used as aggravating factors.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" as an aggravating factor that embraces facts which cover the entire spectrum of facets inevitably present in every homicide. For example:

a. *The age of the victim.* Prosecutors have argued, and juries were free to find, that this factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[382]

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[378] See, e.g., *People v. Dunkle,* No. S014200, RT 3812 (victim struggled); *People v. Webb,* No. S006938, RT 5302 (same); *People v. Lucas,* No. S004788, RT 2998 (same).

[379] See, e.g., *People v. Fauber,* No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera,* No. S004569, RT 160 (same).

[380] See, e.g., *People v. Padilla,* No. S014496, RT 4604 (prior relationship); *People v. Waidla,* No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[381] See, e.g., *People v. Anderson,* No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters,* No. S004712, RT 4264 (same).

[382] See, e.g., *People v. Deere,* No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin,* No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp,* No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter,* No. S004654, RT 16,752 (victim was 20), *People v. Phillips,* (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa,* No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble,* No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton,* No. S004518, RT 4376 (victim was 77); *People v. Bean,* No. S004387, RT 4715-16 (victim was "elderly").

b. *The method of killing.* Prosecutors have argued, and juries were free to find, that this factor (a) was an aggravating circumstance regardless of whether the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[383] [FN158]

c. *The motive for the killing.* Prosecutors have argued, and juries were free to find, that this factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[384]

d. *The time of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[385] [FN160]

e. *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[386] [FN161]

The foregoing examples of how the factor (a) aggravating circumstance is being used in actual practice makes it clear that it is being relied upon as an aggravating factor in *every* case, by every prosecutor, without any limitation whatever. As a consequence,

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[383] See, e.g., *People v. Clair,* No. S004789, RT 2474-75 (strangulation); *People v. Kipp,* No. S004784, RT 2246 (same); *People v. Fauber,* No. S005868, RT 5546 (use of an ax); *People v. Benson,* No. S004763, RT 1149 (use of a hammer); *People v. Cain,* No. S006544, RT 6786-87 (use of a club); *People v. Jackson,* No. S010723, RT 8075-76 (use of a gun); *People v. Reilly,* No. S004607, RT 14,040 (stabbing); *People v. Scott,* No. SO 10334, RT 847 (fire).

[384] See, e.g., *People v. Howard,* No. S004452, RT 6772 (money); *People v. Allison,* No. S004649, RT 969-70 (same); *People v. Belnontes,* No. S004467, RT 2466 (eliminate a witness); *People v. Coddington,* No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent,* No. S004309, RT 2553-55 (same); *People v. Brown,* No. S004451, RT 3544 (avoid arrest); *People v. McLain,* No. S004370, RT 31 (revenge);
People v. Edwards, No. S004755, RT 10,544 (no motive at all).

[385] See, e.g., *People v. Fauber,* No. S005868, RT 5777 (early morning); *People v. Bean,* No. S004387, RT 4715 (middle of the night); *People v. Avena,* No. S004422, RT 2603-04 (late at night); *People v. Lucero,* No. S012568, RT 4125-26 (middle of the day).

[386] See, e.g., *People v. Anderson,* No. S004385, RT 3167-68 (victim's home); *People v. Cain,* No. S006544, RT 6787 (same); *People v. Freeman,* No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus,* No. S004723, RT 7340-41 (city park); *People v. Carpenter,* No. S004654, RT 16,749-50 (forested area); *People v. Comtois,* No. SO 17116, RT 2970 (remote, isolated location).

from case to case prosecutors have been permitted to turn entirely opposite facts - or facts that are inevitable factors in every homicide - into aggravating factors which the jury is urged to weigh on death's side of the scale.[387]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor 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].)

D. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentenceing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute effectively does little 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 practically 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 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 believe beyond a reasonable doubt that a) aggravating

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[387] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating.

circumstances are proved, b) that they outweigh the mitigating circumstances, or c) 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 removed from the entire process of making the most consequential decision a juror can make - whether or not to impose death.

First. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ..." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi,* the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring,* 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 were at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona*) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at p. 598) The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that they must be found by a jury beyond a reasonable doubt.

This year, 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." In *Blakely v. Washington* (2004) 124 S.Ct. 2531, 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. The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. 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 of the 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 finds." (*Id.*)

Accordingly, Appellant submits that California's death penalty scheme as interpreted by this court violates the federal Constitution.

a. Pursuant to *Ring*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[388] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify

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[388] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710- 30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); 111. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2- 9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand, however, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be found by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

California law as interpreted by this court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance - and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra;* see also *People v. Hawthorne* (1992) 4 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, § 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[389] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt 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

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[389] This court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its 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.)

by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[390] 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 punishment notwithstanding these factual findings.[391]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, 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. After *Ring*, this court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "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 at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[392] indicates, the maximum penalty for any first degree murder conviction is death.

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[390] 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 not merely discretionary weighing, 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.,* 59 P.3d at p. 460)

[391] 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.)

[392] 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

Arizona advanced precisely the same argument in *Ring* to no avail: In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi,* Arizona first restated the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001). Ring was therefore sentenced within the range of punishment authorized by the jury verdict. 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.)

In this regard, California's statute is no different than Arizona's. 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,* 122 S.Ct. at p. 2440.) 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 §§ 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither a sentence of Life Without Possibility of Parole (LWOP) nor death can actually be imposed unless the jury finds a special circumstance to be true. (§ 190.2). Even then, death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (§ 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an

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life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance (§ 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].) In essence, therefore, a true finding on a special circumstance is a necessary, but *not* a sufficient prerequisite to the imposition of a death judgment.

Additionally, Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[393] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[394]

There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment

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[393] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[394] California Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

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,* 124 S.Ct. at pp. 2439-2440.) In *Blakely*, the high court made it clear that , as Justice Breyer pointed out, "Thus, 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., at p. __. Emphasis in original.) The issue of the 6th Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional fact-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."

This court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow, supra,* 30 Cal.4th at 126, fn. 32; citing *Anderson, supra,* 25 Cal.4th at 589-590, fn. 14.) This Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto,* 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence - in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death - no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a

death sentence. .The finding of an aggravating factor is an essential step before the weighing process begins. And *Blakely* makes it very clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant, no longer comports with the federal constitution.

In *Prieto,* the court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty - death or life without the possibility of parole - is appropriate." (*Prieto,* 30 Cal.4th at 263; emphasis added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present - otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

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. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. As noted above, the Arizona Supreme Court has found that this weighing process if the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, supra, 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for lenience."] In this regard, the court, along with several others, correctly anticipated the ruling in *Blakely*. Accord, *State v. Whitfield*, (Mo. 2003) 107 S.W.3d 253; *State v. Ring*

(Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[395]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto,* 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections... extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital

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[395] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Calital 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 mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death.].

> sentence ... is without precedent in our constitutional jurisprudence. (*Ring, supra,* 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

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"].)[396] 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 final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination 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 any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity.

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[396] In *Monge,* the U.S. Supreme Court foreshadowed *Ring,* and expressly found the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable doubt burden of proof requirement applicable 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).)

This court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore - including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[397] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that

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[397] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure ... [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[398] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v.*

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[398] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.,* at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in
part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.)

Michigan (1991) 501 U.S. 957, 994), and certainly no less (*Ring,* 122 S.Ct. at p. 2443).[399]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[400] To apply the requirement to findings carrying a maximum punishment of one year in the county jail - but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) - would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California, supra,* 524 U.S. at p. 726; *Strickland v. Washington,* 466 U.S. at pp. 686- 687; *Bullington v. Missouri* (1981)451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining

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[399] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[400] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

whether death is imposed particularly in a case like appellant's, where the chief reasons presented to the jury for imposing a death sentence were numerous instances of purported misconduct that were not part of the commitment offense.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the " 'continuing series of violations' " necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. (*Richardson, supra,* 526 U.S. at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that

basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra; People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) _____' *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of

> certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment. (*State v. Rizzo* (2003) 261 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn 37].)

Moreover, Blakely mandates that the right to a jury finding beyond a reasonable doubt applies to all finding, not just to findings that a state may label as moral or normative. (Blakely v. Washington (2004) _____[The right to a jury finding beyond a reasonable doubt applies to any finding necessary to the imposition of the sentence.] The central concern in Blakely was not the nature of the finding that is necessary to impost a sentence, but rather who makesw the finding. Under Blakely, where a sentence depends on a predicate finding, that finding must be made by the jury beyond a reasonable doubt and cannot be made by the court alone and cannot be made by a standard other than proof beyond a reasonable doubt.

California law already recognizes that the jury must make the finding required for a judgment of death that the aggravating circumstances are so substantial in comparison to the mitigating circumstances as to warrant death instead of life without parole. Under *Apprendi*, *Ring*, and *Blakely*, the Supreme Court has mandated that the requisite finding, whatever it is called and however it is labeled, be made by a jury beyond a reasonable doubt. Although California law accords with this mandate by having the finding made by a jury, it violates this mandate by holding that the finding need not be made beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitutions 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 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* (1970) 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.

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 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship, supra,* 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing

"three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Stantosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser, supra,* 375 U.S. at 525, how much more transcendent is human life itself! 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 Cal.3d 306 (same); *People v. Thomas*(1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate

As to the "risk of error created by the State's chosen procedure" *Stantosky, supra,* 455 U.S. at 755, the United States 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 756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Stantosky.* They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Stantosky, supra,* 455 U.S. at 763. Nevertheless, 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 363.

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that 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 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.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra* 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) In *Monge,* the U.S. Supreme Court expressly applied the *Stantosky* 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 are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% - even 20%, or 10%, or 1% - is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co., supra,* 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."

There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Accordingly, Appellant respectfully suggests that *People v. Hayes* - in which this court did not consider the applicability of § 520 - is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, Appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing Appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

. This court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors - and the juries on which they sit - respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be

imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) It is unacceptable - "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) - the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) - that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra.*) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana, supra.*)

6. 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.

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, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) And 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 at least 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.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings. 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. (*In re Sturm* (1974) 11 Cal.3d 258.) 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.,* 11 Cal.3d at p. 267.)[401] The same analysis applies to the far graver decision

[401] 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

to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.;* section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. 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 in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra,* 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors

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crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[402]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence - including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. 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.

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[402] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99- 19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2- 102(e) (1988).

7. 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. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is " 'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.' " (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

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, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note 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 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.)

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.* (See section A of this Argument, *ante.*) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate - even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2242, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether "... the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "... further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] ..." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially "... adopted the type of proportionality review mandated by

the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[403]

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, supra,* 1 Cal.4th 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.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 - a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* - and the absence of any other procedural safeguards to ensure a reliable

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[403] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29- 2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988). Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

and proportionate sentence, this court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently *540 disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. 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 during the sentencing phase, as outlined in section 190.3(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, 108 S.Ct. 1981, 100 L.Ed.2d 575; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *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, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be

found beyond a reasonable doubt by a unanimous jury. 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 a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. 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* (1988) 486 U.S. 367; 542*Lockett v. Ohio* (1978) 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised 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. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (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* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of

nonexistent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584- 585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made 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.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and

constitutionally unacceptable. Capital sentencing procedures must protect against *544 " 'arbitrary and capricious action' " (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra,* 455 U.S. at 112.)

E. 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. In 1975, Chief Justice Wright wrote for a unanimous court that "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 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights.... It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles,* 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)0

If the interest identified 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,*judg. vacated on other grounds,* (1971) 403 U.S. 915.) 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. In this case, the equal protection guarantees of the state and federal Constitutions 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. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[404] as in *Snow*[405], 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. If that were so, then 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.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons

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[404] "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." (*Prieto,* 30 Cal.4th at 275.)

[405] 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." (*Snow,* 30 Cal.4th at 126, fn. 32.)

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." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1 -C.5, *ante.*) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante.*) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen, supra,* this court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The court offered three justifications for its holding.

First. The court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra,* 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia* (1977) 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp, supra,* 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review

cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

Second. The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra,* 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra,* 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia, supra,* 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio, supra,* 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan, supra,* 501 U.S. at p.

994; *Monge v. California, supra,* 524 U.S. at p. 732.)[406] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

Third. Finally, this court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to noncapital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra,* at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their

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[406] The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.,* at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.)

fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia, supra.*)

Nor can this fact justify the refusal to require written findings by the jury (considered by this court to be the sentencer in death penalty cases [*Allen, supra,* 42 Cal.3d at p. 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[407] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital

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[407] 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,* 122 S.Ct. at pp. 2432, 2443.)

cases. 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* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this court when a fundamental interest is affected.

F. 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... The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons.... Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*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; see also *People v. Bull* (1998) 185 I11.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

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 AD109 S.Ct. 2969, 106 L.Ed.2d 306] [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" (Dec. 18, 1999), on Amnesty International website [*www.amnesty.org*].)[408]

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 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, supra,* 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *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. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of

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[408] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

decency that mark the progress of a maturing society." (*Trop v. Dulles, supra* 356 U.S. at pg., 100; *Atkins v. Virginia, supra,* 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. 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,* 122 S.Ct. at 2249, 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,* 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 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."[409] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION

JOINDER IN ARGUMENTS OF APPELLANT JOHNSON

Pursuant to Rule 13 of the California Rules of Court, Appellant hereby joins in those arguments that will be raised on behalf of co-appellant Johnson in his opening brief on appeal, to the extent they may inure to his benefit. See Cal. Rules of Court, Rule 13(a)(5).

For all of the foregoing reasons, Appellant respectfully requests this Court reverse his convictions and sentence of death, and pursuant to his Argument II, *supra*, reverse his case *with prejudice*.

DATED: Dec. 31, 2004 Respectfully submitted,

Brent F. Romney

Brent F. Romney

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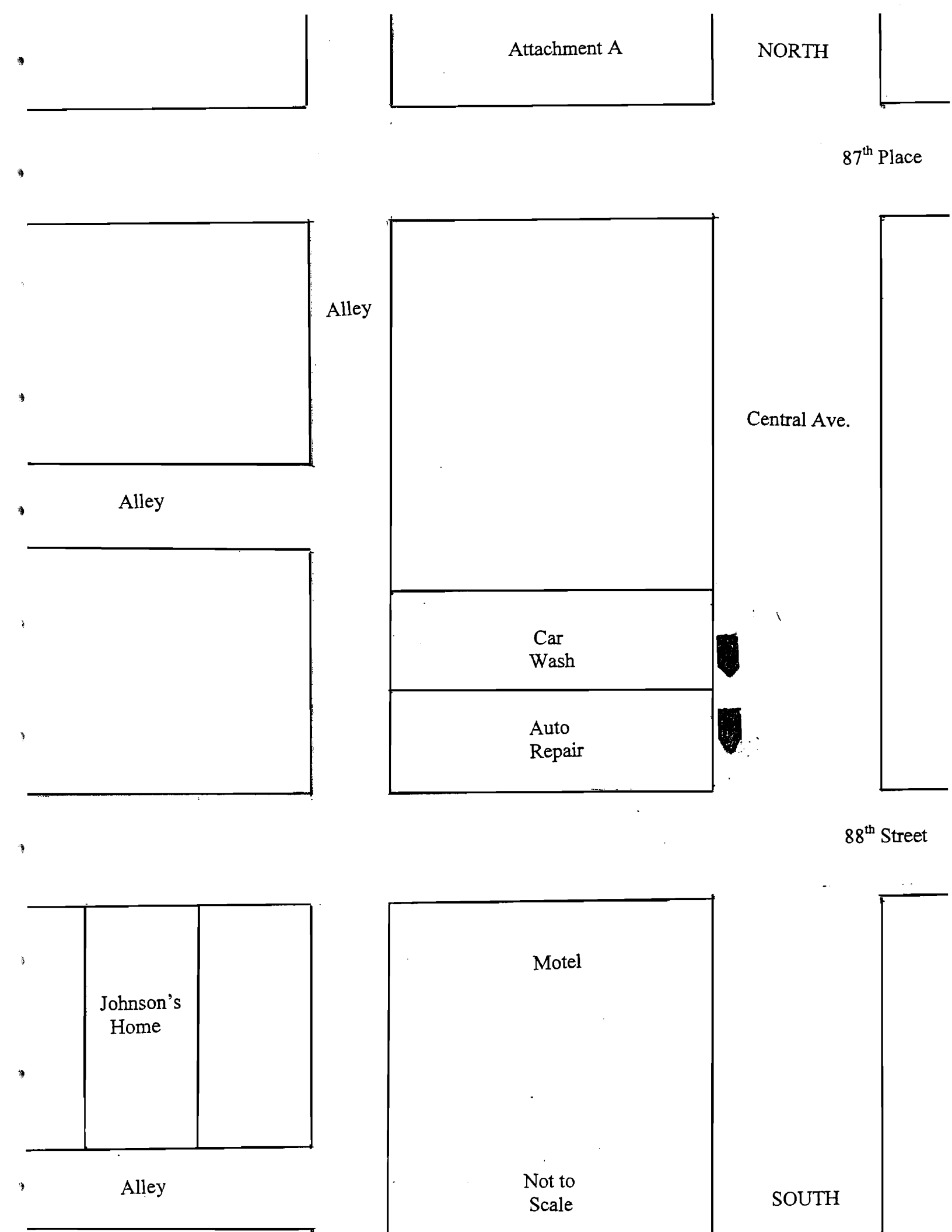
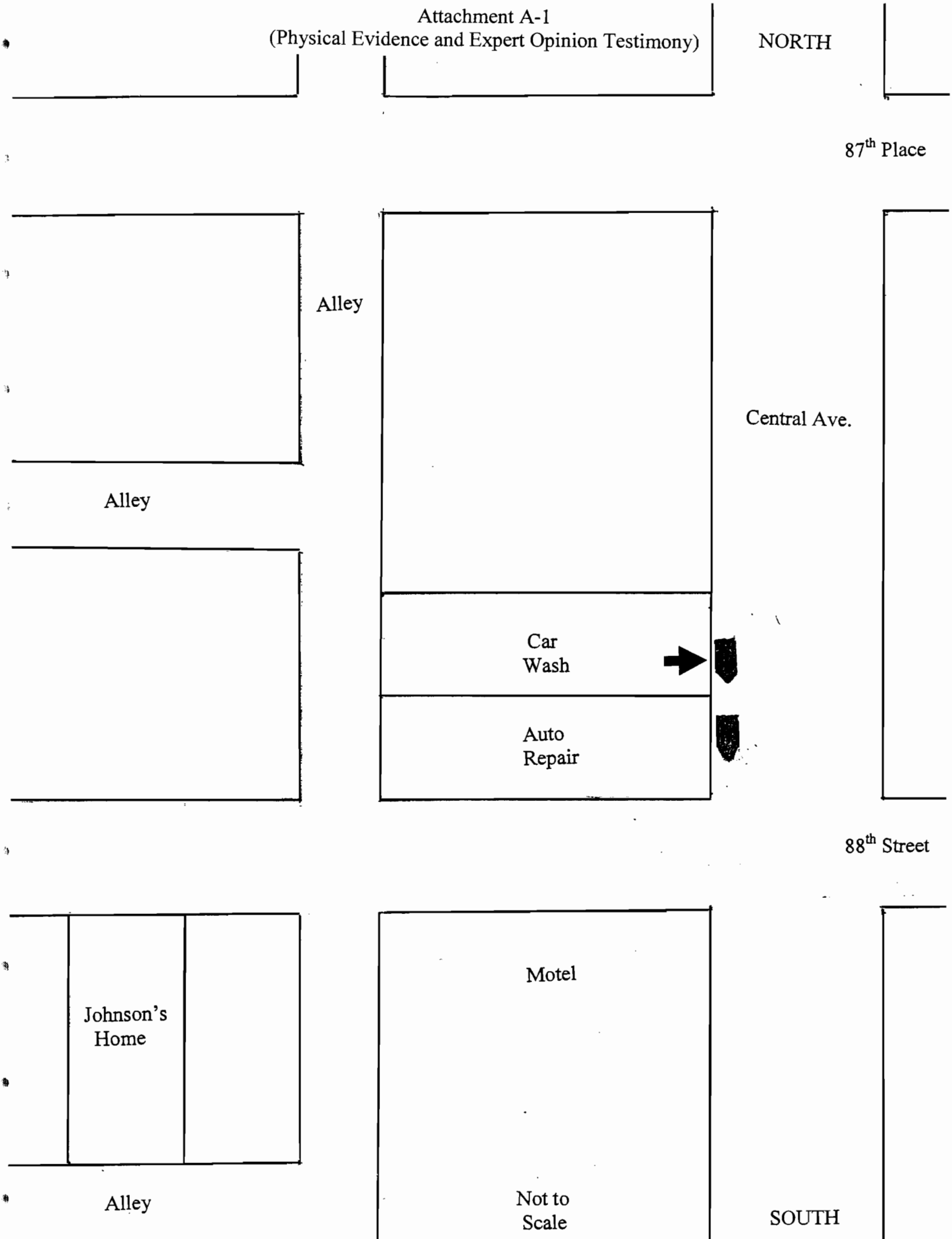
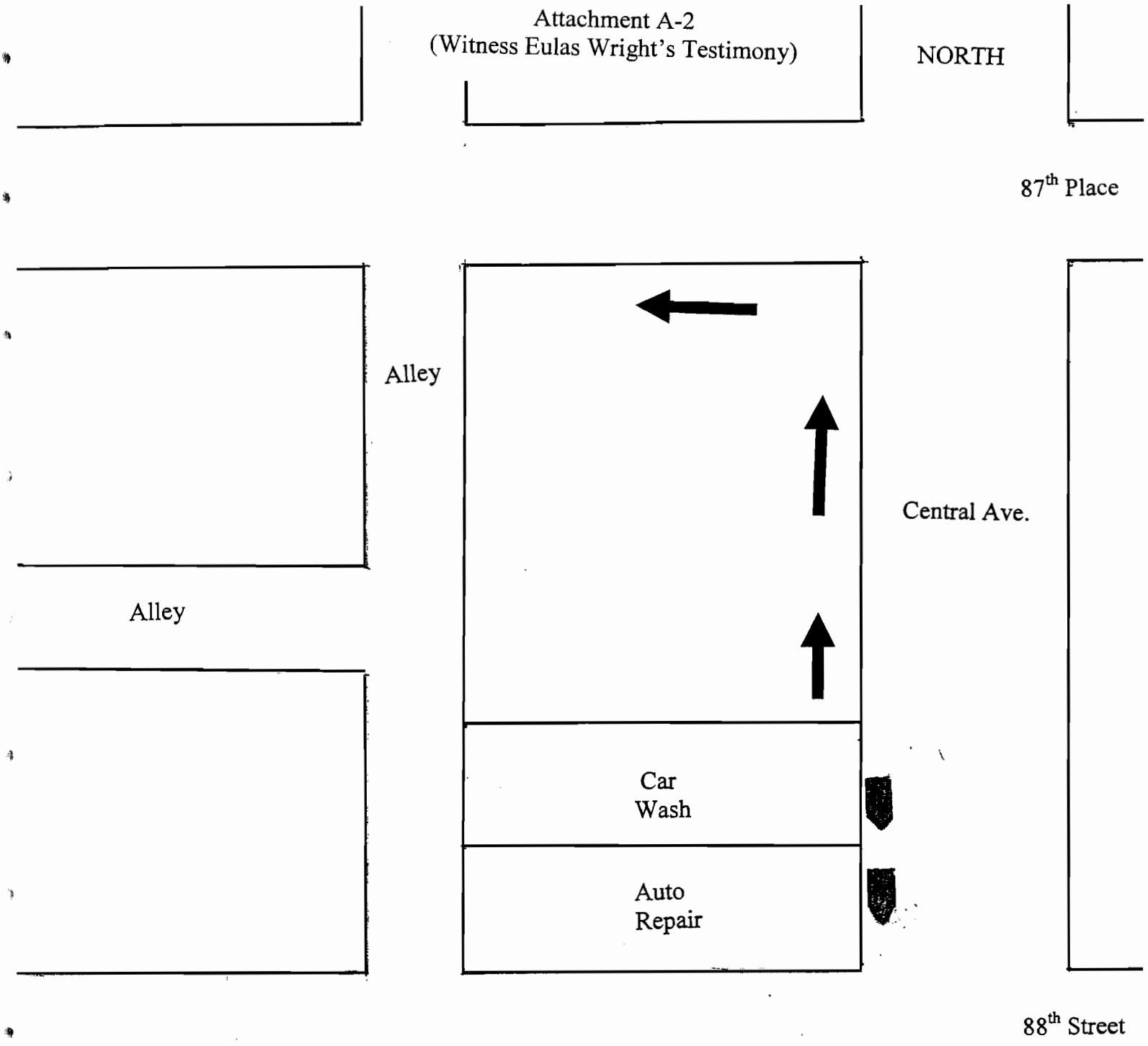
[409] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad - mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence,* 46 Case W. Res. L.Rev. 1, 30 (1995).)


Attachment A
NORTH
87th Place
Alley
Central Ave.
Alley
Car
Wash
Auto
Repair
88th Street
Johnson's
Home
Motel
Alley
Not to
Scale
SOUTH

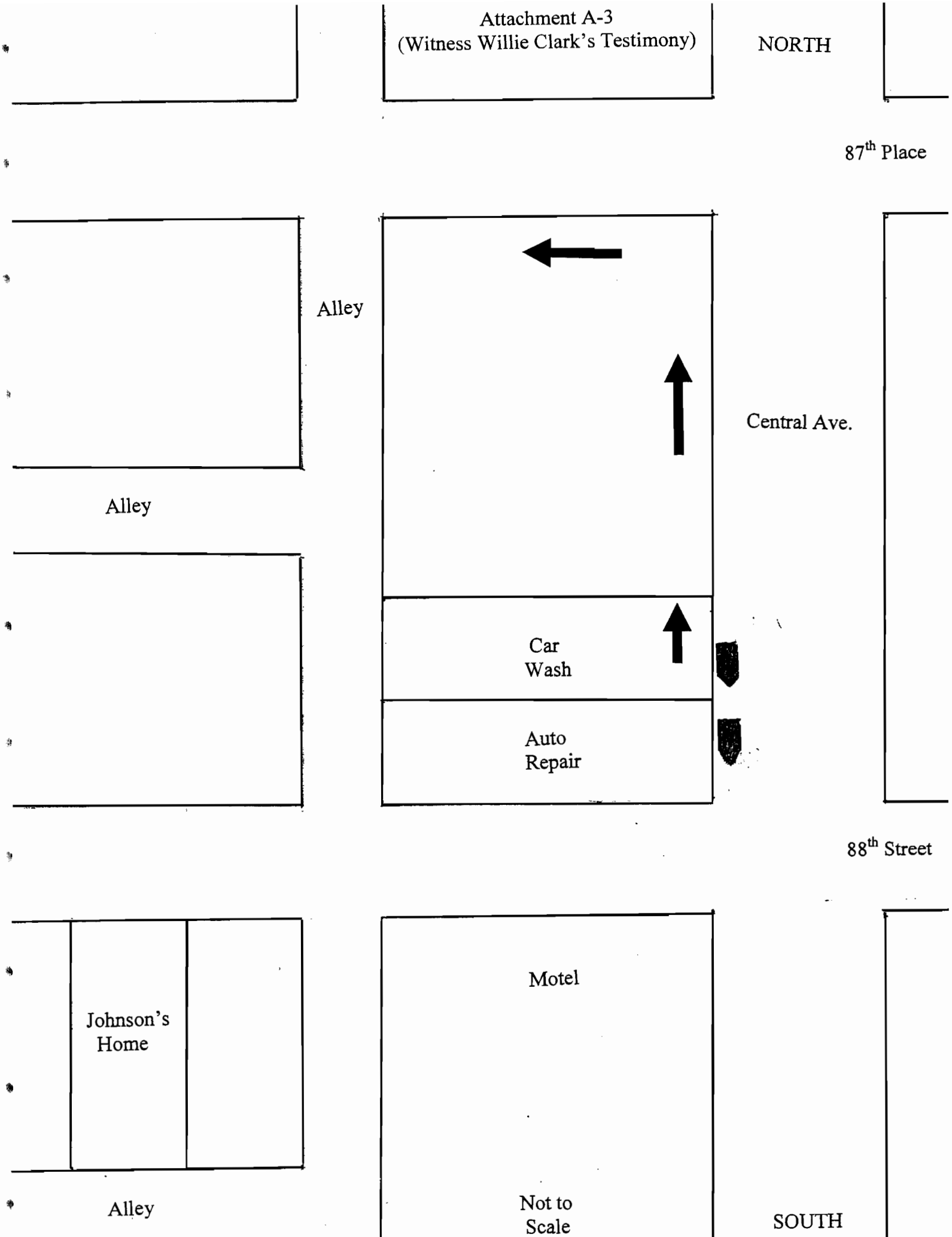
Attachment A-1
(Physical Evidence and Expert Opinion Testimony)

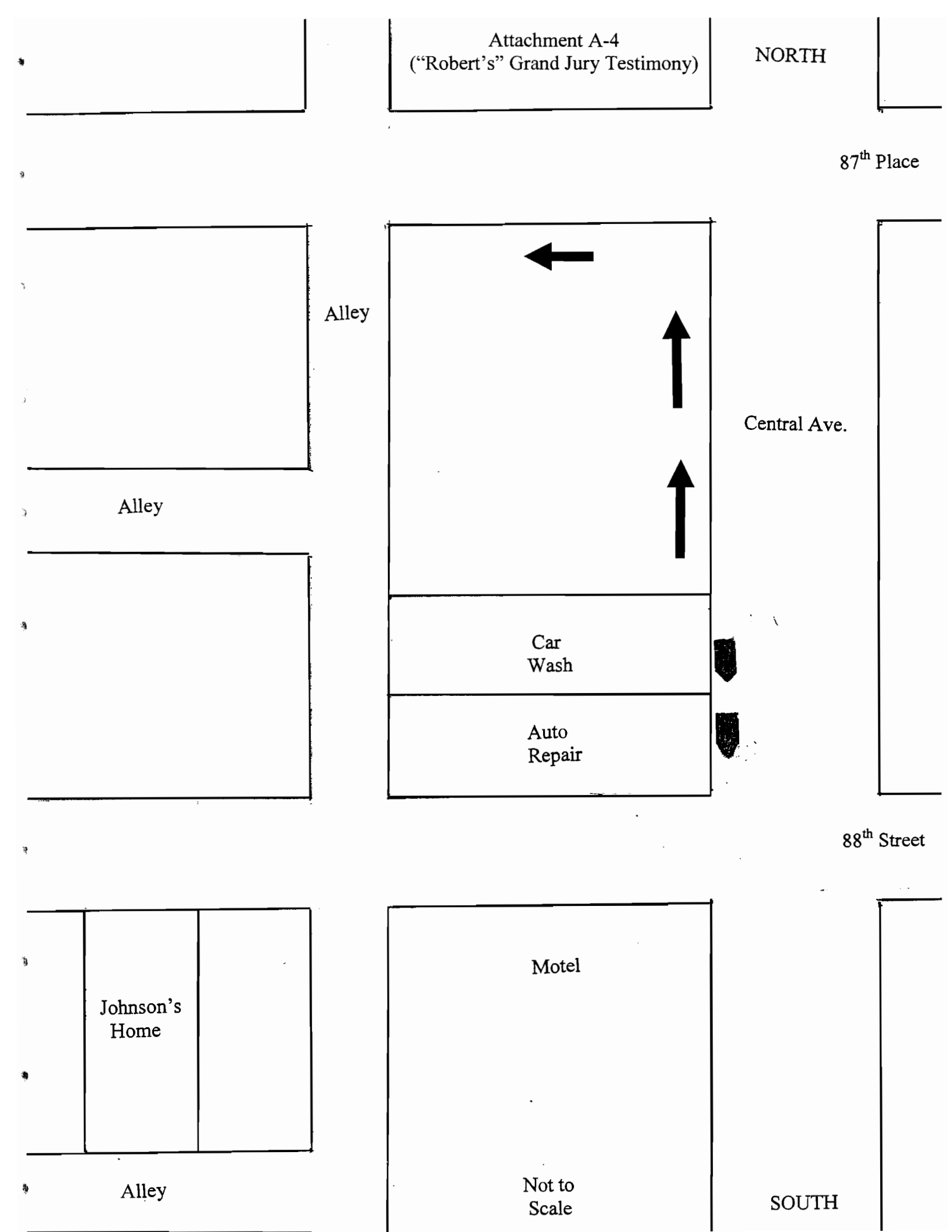


Attachment A-2
(Witness Eulas Wright's Testimony)

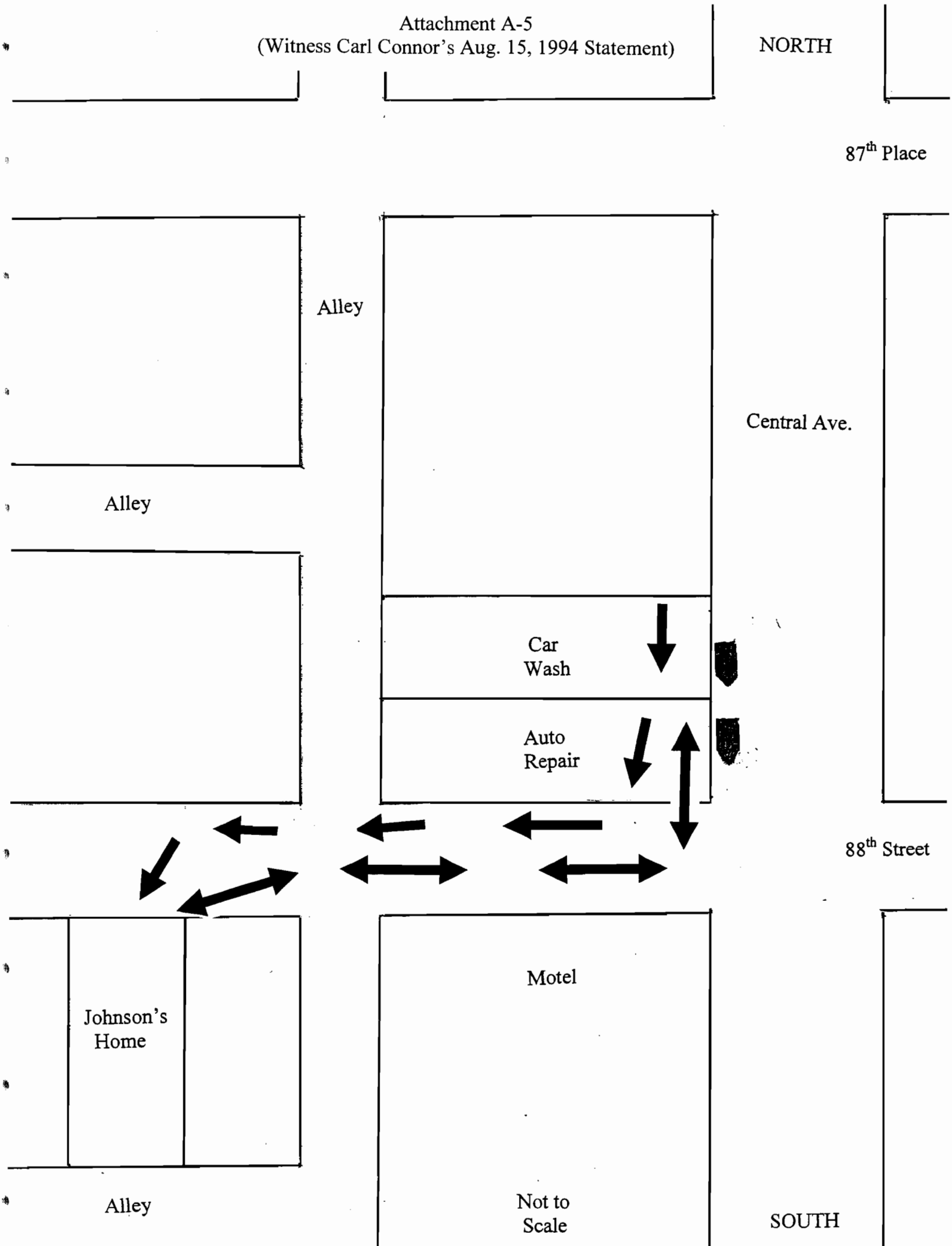


Attachment A-3
(Witness Willie Clark's Testimony)

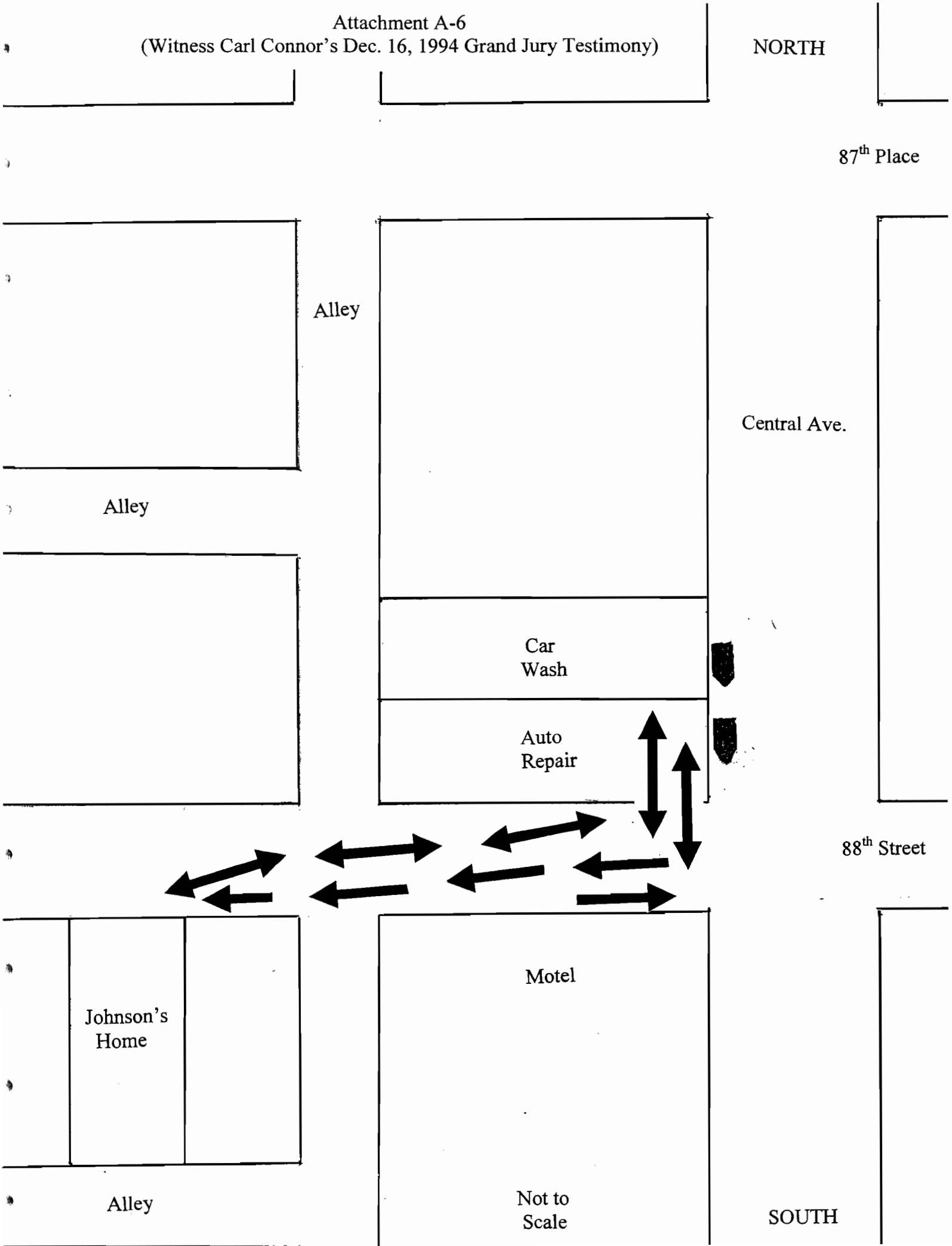



Attachment A-4
("Robert's" Grand Jury Testimony)
NORTH
87th Place
Alley
Alley
Central Ave.
Car
Wash
Auto
Repair
88th Street
Johnson's
Home
Alley
Motel
Not to
Scale
SOUTH

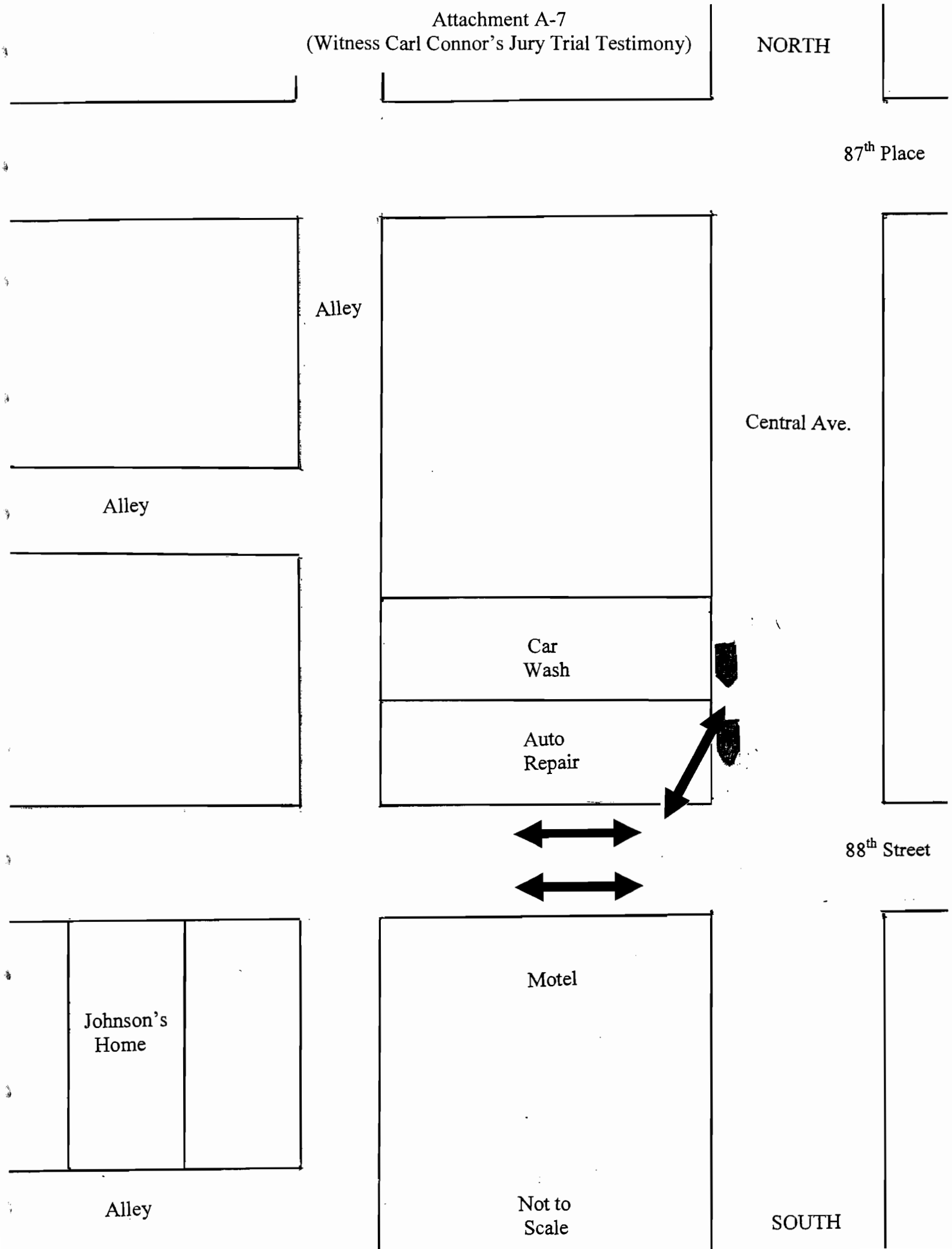
Attachment A-5
(Witness Carl Connor's Aug. 15, 1994 Statement)

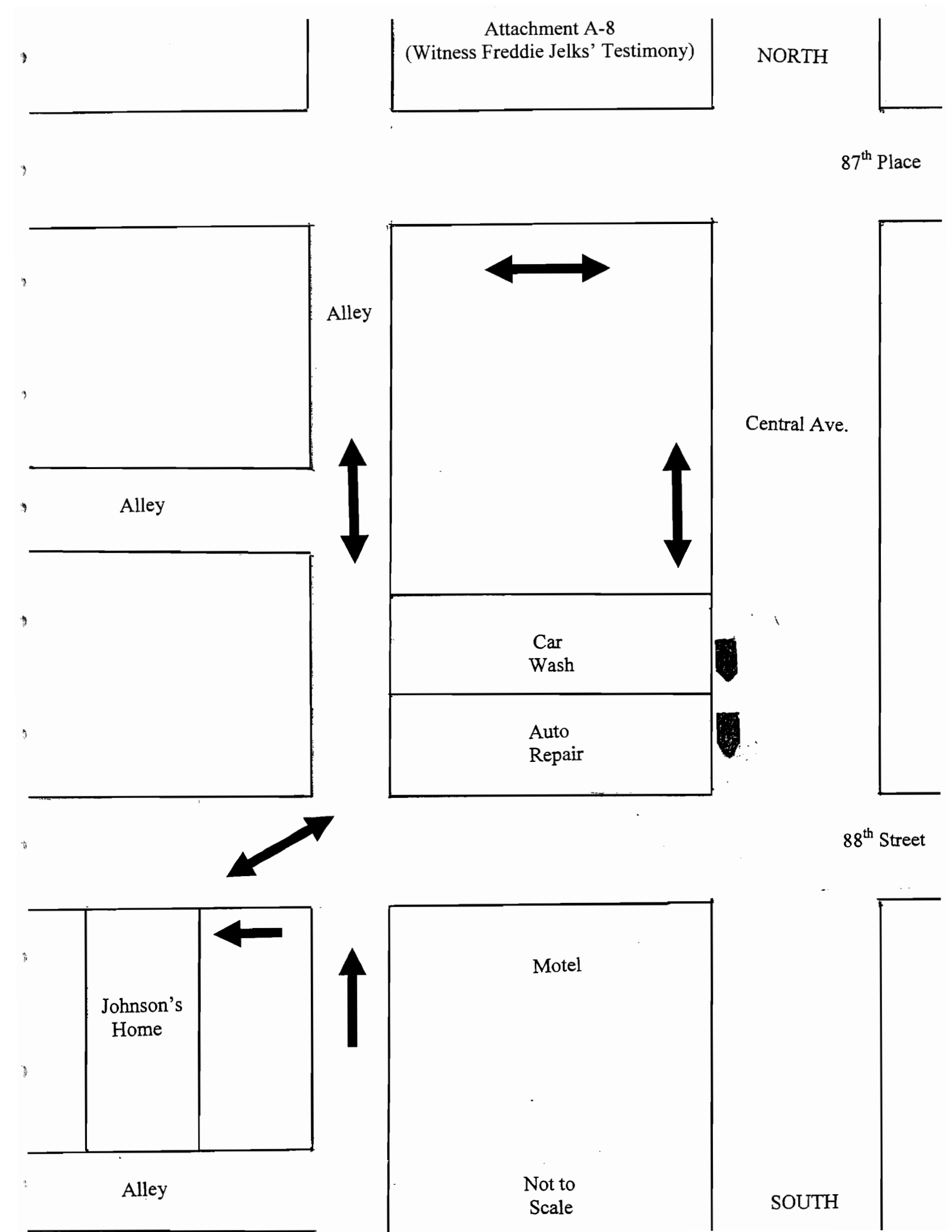


Attachment A-6
(Witness Carl Connor's Dec. 16, 1994 Grand Jury Testimony)



Attachment A-7
(Witness Carl Connor's Jury Trial Testimony)

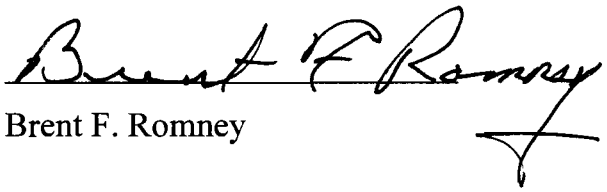



Attachment A-8
(Witness Freddie Jelks' Testimony)
NORTH
87th Place
Alley
Central Ave.
Alley
Car
Wash
Auto
Repair
88th Street
Motel
Johnson's
Home
Alley
Not to
Scale
SOUTH

CERTIFICATE OF COUNSEL
[CAL. RULES OF COURT, RULE 36(B)(2)]

I, Brent F. Romney, am appointed by this Court to represent Appellant, Michael Allen, in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 238,425 words in length excluding tables, attachments and certificates.

Dated, January 3, 2005.



Brent F. Romney

DECLARATION OF SERVICE BY MAIL

Re: People v. Allen and Johnson — No. BA105846-01 (Cal. Supreme Ct. No. S066939)

I, Brent F. Romney, declare that I am over 18 years of age, and not a party to the within cause; by business address is 4070 View Park Drive, Yorba Linda, California, 92886. A true copy of the attached

APPELLANT'S OPENING BRIEF ON APPEAL

was provided to each of the following, by placing same in an envelope addressed, respectively, as follows:

Mr. Michael Allen (Appellant)
P.O. Box J-03047
San Quentin State Prison
San Quentin, CA 94974

Mr. Gary Lieberman, Esq.
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

Luke Hiken, Esq.
California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

Andrew S. Love, Esq.
Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105

Ms. Addie Lovelace
Death Penalty Appeals
L.A. County Clerk's Office
210 West Temple Street
Los Angeles, CA 90012

Each respective envelope was then, on December 31, 2004, sealed and deposited in the United States mail in Orange County, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on January 3, 2005, at Yorba Linda, California.

Brent F. Romney
DECLARANT