2nd petition

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Case No. S__________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 31 2012

Frederick K. Ohlrich Clerk

Deputy

PEOPLE OF THE STATE OF CALIFORNIA	)
	)
Plaintiff and Respondent,	) DCA No. F057736
	)
vs.	) Kern County
	) No. BF122135A-C
COREY RAY JOHNSON, et. al.	)
	)
Defendants and Appellants	)
	)

APPELLANT JOHNSON'S PETITION FOR REVIEW

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State Bar #115294
By Appointment of Court of Appeal

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Defendants and Appellants	)	
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APPELLANT JOHNSON'S PETITION FOR REVIEW

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal erred in upholding the trial court's denial of appellant's motion to quash the jury venire after the prosecution exercised peremptory challenges to discriminate against potential jurors with physical disabilities.

2. Whether the Court of Appeal erred in upholding the trial court's denial of

appellant's motion to quash the jury venire after the prosecution exercised a peremptory challenge to discriminate against an African-American potential juror.

3. Whether the Court of Appeal erred in upholding the trial court's denial of the defense motion to excuse two carpooling jurors for misconduct when they admitted talking about the case together prior to deliberations.

4. Whether the Court of Appeal erred in upholding the trial court's admission of a videotape purporting to show the degree of darkness at the time of the shootings at McNew Court one year earlier.

5. Whether the Court of Appeal erred in upholding the trial court's decision to allow the prosecution to present expert testimony on appellant's mental state and intent at the time of the crimes.

ARGUMENT IN FAVOR OF GRANTING REVIEW

A decision on these issues is necessary to settle an important issue of law regarding the rights of people with physical disaabilities. (California Rules of Court, rule 8.500 (b)(1).) This Court may transfer the case back to the Court of Appeal to correct the errors made below. (California Rules of Court, rule 8.500 (b)(4).) This is the last chance for the state courts to grant appellant relief on his federal constitutional claims. *(Rose v. Lundy* (1982) 455 U.S. 509, 518; *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844.)

STATEMENT OF THE CASE

This is a petition for review of a partially published decision by the California Court of Appeal, Fifth Appellate District, reversing in part and affirming in part the judgment of the Superior Court of Kern County, Judge Gary Friedman.

Due to this Court's word-count limitation, appellant incorporates by reference the detailed Statement of the Case in Appellant's Opening Brief. (Johnson AOB at 2-6.) Appellant was convicted by a jury of three counts of attempted murder, three counts of special circumstances murder, shooting at an occupied vehicle, conspiracy, and active gang participation, with enhancements for firearm discharge and gang benefit. (I-CT at 1-27; IX-CT

at 2521, 2529-2602.) Appellant was sentenced to three terms of life without parole plus 196 years to life in prison. (X-CT at 2811-2818, 2837-2840; LXII-RT 11640-11653.)

On April 26, 2012, the Court of Appeal reversed the judgment on count nine: conspiracy to commit and to participate actively in a criminal street gang. The Court of Appeal modified the sentence on the three attempted murder counts to a determinate term of seven years in prison on each count, exclusive of any enhancements. The Court of Appeal directed the trial court to amend the sentencing minutes and abstract of judgment to include the notation that liability for victim restitution imposed pursuant to section 1202.4, subdivision (f) is joint and several. The remainder of the judgment was affirmed. Appellants' petition for rehearing was denied May 24, 2012. Copies of the 329-page opinion have already been lodged with the Attorney General's Petition for Review and so, with the permission of this Court's clerk, the opinion has not been duplicated for this petition.

STATEMENT OF FACTS

Due to this Court's word-count limitation, appellant incorporates by reference the detailed Statement of Facts in Appellant's Opening Brief. (Johnson AOB at 8-41.) This case is based upon charges arising from a series of shootings in Bakersfield from March through August 2007 in separate incidents. Edwin McGowan was injured in a "walk-up" shooting on Inyo and Monterey Streets in the Canal area. (XIV-RT 2079, 2083, 2115; XVI-RT 2356, 2370.) Multiple shots were fired at a blue and white van on Deborah Street. (XIII-RT 1907-1911.) James Wallace, Vanessa Acala and her fetus were killed in a walk-up shooting on McNew Court. (XVI-RT 2535-2537, 2800-2804, 2816, 2819, 2889; XXIII-RT 4009.) Adrian Bonner was injured in a shooting as he sat in his car at a red light on South Real Road. (XXVII-RT 4684-4687.) Police officers testified that all the defendants were active members in the Country Boy Crips. (LV-RT 9961-10029.)

DISCUSSION

I.
THE PROSECUTION VIOLATED THE FEDERAL AND STATE CONSTITUTIONS BY USING PEREMPTORY CHALLENGES TO EXCUSE TWO PROSPECTIVE JURORS WITH PHYSICAL DISABILITIES

A. PETITIONER'S CONTENTION[1]

The prosecution exercised two peremptory challenges against prospective jurors with physical disabilities. These prospective jurors were able and willing to serve in this case, but were dismissed because of their disabilities. Neither of them demonstrated any bias relating to the issues or the participants in this trial. The defendants and people with physical disabilities who are able to serve as jurors are protected from such invidious discrimination by the Equal Protection Clause of the United States Constitution under *Batson v. Kentucky* (1986) 476 U.S. 78, the Sixth Amendment/ Article I section 16 right to a jury drawn from a representative cross-section of society under *People v. Wheeler* (1978) 22 Cal.3d 258 and the California Constitution's Equal Protection Clause.

With regard to the potential juror who required use of the court's

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[1]To comply with this Court's word-count limitations, the complete description of facts and argument in appellant's appellate briefs are incorporated herein by reference. (Johnson AOB at 42-83; Johnson RB at 1-11.)

listening device and a magnifying glass, Ms. Desperado-Rodriguez, the court stated:

> I listened to her. I watched her body language. And sure, she has some challenges, but she's been able to overcome those handicaps. I don't know if I could have done as well as she's done. I think to the extent that one of the judicial branch's goal is fairness and diversity and access....I think that she is qualified to serve as a juror,....
> (VIAugRT 1110-1111.)

No challenge for cause was made. (VIAugRT 1111.) Upon returning to open court, the prosecution immediately used a peremptory challenge to excuse Ms. Desperado-Rodriguez. (VIAugRT 1112.)

Johnson's attorney, in turn, immediately made a motion under *Batson* and *Wheeler*, stating that Desperado-Rodriguez was able to serve as a juror if she used the hearing device and magnifier and as such could not be dismissed by the prosecution based upon her disabilities. (VIAugRT 1113-1114.)

The court agreed with Johnson's attorney's description of these facts but questioned whether the disabled are a "cognizable group." (VIAugRT 1114.) The prosecutor argued that even if the disabled were a cognizable group, Johnson had failed to prove a *prima facie* case of discrimination. (VIAugRT 1117.) The prosecutor added that even if a *prima facie* case were to be shown, she wanted the record to reflect:

> that after we called a sidebar Miss Holly Desperado-Rodriguez was wandering around the courtroom and she tried to go in the back with us and she tried to go back behind the defendants, and then I saw her go back toward this exit door and another juror had to catch her and stop her and bring her back in. So I just need -- that was not on the record. I'd like the record to reflect that.

(VIAugRT 1118.)

Both the court and Dixon's counsel pointed out that Desperado-Rodriguez did not have her hearing device on at that time. (VIAugRT 1118.) The prosecutor responded: "I think her confusion was obvious. If you don't know what's happening, you don't try to go back into the judge's chambers." (VIAugRT 1118.) Johnson's attorney explained the prospective juror's confusion was due to the fact that she had taken off the hearing device and probably had not heard the instructions about where to go during the recess. (VIAugRT 1118-1119.)

The court denied Johnson's *Batson* motion as follows:

> I don't feel that she's part of a cognizable group, but I can see good arguments for why she should be in a cognizable group. But based on what I've seen here, I don't feel that a prima facie case of group bias has been established in this case or evidence sufficient to permit me to draw an inference that discrimination has occurred in this case.
> (VIAugRT 1119-1120.)

Under the United States' and California's Equal Protection guarantee, persons with disabilities are protected from being peremptorily excused on the basis of disability when those persons are able and willing to

serve on a jury. (*Johnson v. California* (2005) 545 U.S. 162, 168.) Our state constitution provides, in Article I, section 7 (a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;...."

Equal protection permeates all rights conferred by the state constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 831 [the constitutional right to marry incorporates a requirement of "equal dignity and respect"]; *People v. Ramirez* (1979) 25 Cal.3d 260, 267 [the right to due process incorporates a requirement that every person must be treated "as an equal, fully participating and responsible member of society"].)

Primarily, equal protection is available to groups that have a history of discrimination and are vulnerable to oppression by a political majority. (*In re Marriage Cases, supra*, 43 Cal.4th at p. 843, fn. 63; *see also Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 19.) Underlying all such suspect classifications is "the stigma of inferiority and second class citizenship associated with them." (*Sail 'er Inn, supra*, at 19.) Suspect classifications, "irrespective of the nature of the interest implicated," "in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment." (*Molar v. Gates* (1979) 98 Cal.App.3d 1,16 [invalidating gender discrimination in prison rules].) "Such classifications

... violate 'the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member.'" (*Ibid.*)

Because Ms. Desperado-Rodriguez was excused by the prosecution on the basis that the physically disabled juror was not mentally fit to serve, this invidious discrimination violated the federal and state constitutional rights of both appellant and the excused juror, mandating a reversal of the judgment.

B. THE COURT OF APPEAL OPINION

The Court of Appeal declined to address the challenge as raised under the California Equal Protection guarantee, finding it subsumed under the federal constitution. (Typed opinion at 99, fn 77.) The Court of Appeal acknowledged that the trial court ruled that the physically disabled are not a cognizable group and also that there was insufficient evidence of discrimination during jury selection. (Typed opinion at 103-104, VI-Aug-RT at 1118.) Relegating the caselaw discussion to a footnote, the Court of Appeal assumed the physically disabled are a cognizable class. (Typed opinion at 105-106, fn 81.) The Court of Appeal concluded that the relevant facts did not support an inference of discrimination because prospective juror Desperado-Rodriguez was "a less-than-desirable juror for a complex case like this." (Typed opinion at 107.) The Court of Appeal found the

prosecutor's comments questioning Desperado-Rodriguez' mental abilities were not evidence of bias. (Typed opinion at 107.) The Court of Appeal found the following to be "ample disability-neutral" reasons for excusing Ms. Desperado-Rodriguez: her lack of education, her brothers were gang members and had been in prison, she had a misdemeanor conviction, her answers were inappropriate and she "was confused for reasons beyond her hearing impairment." (Typed opinion at 107.) The Court of Appeal refused to consider evidence of the excusal of a second juror with disabilities on the issue of the prosecutor's discriminatory intent. (Typed opinion at 108.) Quoting the same ruling set forth above, the Court of Appeal interpreted the trial court's language as an express finding that people with disabilities were a cognizable group. (Typed opinion at 107, 108.)

C. REASONS FOR GRANTING REVIEW

This is an issue of first impression in California. The trial court did not make an express finding that people with disabilities are a cognizable group, but at one point merely assumed so at the prosecutor's request. (VI-Aug-RT at 1117.) The lower court did make the express factual finding that Ms. Desperado-Rodriguez was capable of serving as a juror in this case, so the Court of Appeal's reliance on inferences inconsistent with this express finding of fact was a failure to apply the correct standard for a fair

and reasoned decision on appeal.

The Court of Appeal's refusal to address the infringement of rights under the state constitution was a failure to accord due process and a full and fair review on appeal. People with disabilities cannot be denied the constitutional rights to privacy and liberty enjoyed by those without disability. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 162.) "[T]he right in issue, one which we have no doubt is entitled to constitutional protection, is the right of **every** citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level. That all persons may not seek to exercise this right in no way diminishes its importance. It lies at the core of the liberty interest protected by the Fourteenth Amendment to the United States Constitution, and article I, section 1 of the California Constitution." (*Id.* at 163, emphasis added.) To be free from invidious discrimination during jury selection is a right to public participation that must be made available to people with disabilities, who may wish to enrich and develop their lives by participating in this fundamental part of our society. Appellant requests that this court grant review of this important issue.

II.
THE LOWER COURT VIOLATED EQUAL PROTECTION BY DENYING DEFENDANTS' MOTION UNDER *BATSON* TO QUASH THE VENIRE BECAUSE THE PROSECUTION USED A PEREMPTORY CHALLENGE TO EXCUSE AN AFRICAN-AMERICAN ON THE BASIS OF HIS RACE

A. PETITIONER'S CONTENTION[2]

The prosecution used half of its total peremptory challenges to remove three African-American prospective jurors and eight Hispanic or Hispanic-surnamed prospective jurors. The defense moved to quash the venire after the prosecution excused a young male African-American prospective juror, Mr. Boykin.

The court found the defense had succeeded in making a *prima facie* showing of discrimination against minorities, both Hispanic and African-American. (IX Aug. RT 1775-1776.) The *Batson* motion was only made with regard to Boykins and the court asked the prosecutor to state her reasons for excusing him. (IX Aug. RT 1776.)

The prosecutor's reasons were: Boykins was young, single and childless. He had no post-high school education and did not follow the news. Boykins was fidgeting in chair while being questioned. He mumbled.

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[2]To comply with this Court's word-count limitations, the complete description of facts and argument in appellant's appellate briefs are incorporated herein by reference. (Johnson AOB at 84-105; Johnson RB at 12-14.)

(IXAugRT 1776.) Because he did not know how much pay he might be losing by serving on the jury, he was immature. He solved his workplace disputes in a "criminal" manner by cussing at the employees and "whooping" them. Boykins was "cavalier" in his answer about considering Dixon's prior conviction. He dressed inappropriately in a skull T-shirt and sagging pants. (IXAugRT 1777.) Boykins only read at work. He only watched sports on television. His conduct at work showed he was a "mean" person. (IXAugRT 1779.)

The court denied the *Batson* motion:

> Find that the reasons given for the challenge exercised on Mr. Boykins are group neutral. I find specifically that the prosecution was sincere in offering their challenges based on demeanor of Mr. Boykins based upon his young age, his immaturity, and indication of the type of way in which he settles disputes or exercises control by the exercise of self-help mechanisms in regards to co-employees on the drilling rig, his body language, his movement in his seat in shifting of position. All I think are indicative, especially the way in which he indicates he would discipline or handle employees in the workplace. Maybe if this was in a restaurant or a bar setting or in a party setting or in some social gathering, but the way in which he would handle employees who were either under the influence or not performing to his expectation indicate to me how a sincere person such as the prosecution -- sincere party such as the prosecution could conclude that he is immature in the way in which he would exercise discipline and control over co-employees. So the challenge is denied.

(IX Aug. RT 1793-1794.)

Applying the pertinent *Miller-El* factors to the record of voir dire, it

appears the race-neutral reasons proffered by the prosecutor were a pretext for exercising a peremptory challenge against Boykins because of his race. Seventy percent of the prosecution's first ten challenges were used against minorities, three of those African-Americans. (IXAugRT 1770, 1772.) Three out of four African-Americans in the jury box were excused on prosecution peremptory challenges. (VIIAugRT 1358; IXAugRT 1642, 1768.) Therefore, a great percentage of African-Americans in particular – all but one – were removed by the prosecution, supporting a strong inference of purposeful discrimination on the basis of race. (*Miller-El v. Dretke, supra*, 545 U.S. at 240.)

The prosecution used a different "script" for questioning Mr. Boykins than for other prospective jurors. (*Miller-El v. Dretke, supra*, 545 U.S. at 255-260.) The prosecutor began by asking Boykins if he had ever evaluated someone's credibility at work. (IX Aug. RT 1723.) Boykins stated that sometimes people lie about getting their work done and he would have to go check it. (IX Aug. RT 1724.) Rather than question Boykins about the sort of process he might use to determine if an employee had lied, the prosecutor asked a "trick question": how Boykins would handle a situation where an employee showed up at work after drinking. (IX Aug. RT 1724.) (*Miller-El v. Dretke, supra*, 545 U.S. at 262.) Lee's counsel's

objection to this question was sustained. (IX Aug. RT 1725.) The prosecutor then took a more indirect approach to the same "trick" question, asking what Boykins' responsibilities would be in terms of disciplining other employees. (IX Aug. RT 1725.) When Boykins said he would tell a employee who acted "crazy" to meet him after work, the prosecutor pressed on, asking how the supervisor had instructed Boykins to correct employees. (IX Aug. RT 1726.) This was a "trick" question because the prosecution was only trying to elicit cause to strike this young African-American male, not discover how he would function as a juror. (*Miller-El v. Dretke, supra*, 545 U.S. at 262.)

In stark contrast, the prosecution did not ask similar questions of similarly situated non-black jurors, such as sworn juror 1314332, who also worked out in the oil fields. (*Miller-El v. Dretke, supra*, 545 U.S. at 255-260.) Instead of asking an open-ended question about how he resolved conflicts with others, the prosecutor merely asked 1314332 the leading and pregnant question if he advocated violence at work. (X Aug. RT 1908.) This occurred after the public questioning of Boykins and was clearly a reference to him and not a sincere question going to 1314332's suitability as a juror. The prosecution did ask a former oil company supervisor, Bobby Rouse, how he handled conflict among his employees in the oil fields and

he said: "Get rid of them" and added "Well, I think that we are only accountable to each other for ourselves." (IX RT 2272.) This answer puts the response of Mr. Boykins into perspective, insofar as the oil fields are just not the preferred workplace environment for highly sensitive people. Boykins' "tough" response must be viewed in that context. The prosecution had no grounds for labeling him "mean" and so doing mischaracterized Boykins' responses. (*Miller-El v. Dretke, supra*, 545 U.S. at 252.)

The prosecution did not ask similar questions about workplace conflict or discipline of non-black prospective jurors with similar jobs: Guy Hairfield, an oil field operator (IVAugRT 742-743); Juror 1222064, who had previously worked in the oil fields (VAugRT 913-929); Brian May, former manager of oil plant (XAugRT 2074-2078); Juror 1355968 who worked in the oil fields in a prior jobs (XIAugRT 2416-2158); Matthew Boyles, 26-year-old oil field worker (XIAugRT 2173, 2193-2197); and Greg Fuhrman, oil field worker (XIAugRT 2299, 2306-2314). This is a strong indication of racial bias in questioning. (*Miller-El v. Dretke, supra*, 545 U.S. at 255-260.)

The prosecution did not ask questions about employee conflict resolution or discipline during voir dire of other similarly situated non-black prospective jurors: Sara Freeman who was a "relatively young" manager

overseeing employees (IVAugRT 629-630; VAugRT 836-837); Keith Morovich who supervised employees in construction jobs (VIAugRT 1179-1180); Lena Dodgen who interviewed and supervised employees (VIIIAugRT 1584, 1587-1588); or Tammy Cates, former supervisor of six office supply company workers who was responsible for their discipline (XIAugRT 2188-2193).This is a strong indication of racial bias in questioning. (*Miller-El v. Dretke, supra*, 545 U.S. at 255-260.)

The record reflects that some sworn jurors shared characteristics with Mr. Boykins that the prosecution had listed as reasons for dismissal. This is a strong indication of racial bias in questioning. (*Miller-El v. Dretke, supra*, 545 U.S. at 241-248.) The sworn jurors included several who were single and had/or had no children like Mr. Boykins: 1181469 (VIIIAugRT 1463), 1227832 (XIAugRT 2106), 1228043 (XIIAugRT 2480) , and 1355968 (XIAugRT 2141). Like Mr. Boykins, 1181469 only read materials at work. (VIIIAugRT 1471.) Sworn jurors 1286800 (VAugRT 865), 1343211 (VAugRT 862), 1477749 (VAugRT 864) and 1336880 (VAugRT 864) agreed with Boykins' position that a prior conviction was not important to them in deciding guilt in this case.

Thus, the record demonstrates a extremely strong inference that the prosecution's proffered reasons were pretext for excusing Mr. Boykins

because of his race in violation of the federal constitution.

The trial court accepted as a valid non-racial reason for excusing Mr. Boykins that his conduct in resolving workplace disputes showed he was immature. (IXAugRT 1793-1794.) However, the United States Supreme Court requires the reason given by the prosecution must be one that "substantially furthers the State's legitimate interest in achieving a fair and impartial trial" and "provide[s] substantial aid to a litigant's effort to secure a fair and impartial jury." (*J.E.B. v. Alabamà ex rel. T.B., supra,* 511 U.S. at 136-137.)

Mr. Boykins' roughneck manner of dealing with a hypothetical "crazy" employee out in the oil fields had no connection to his conduct in the courtroom as a juror. As put on the record by defense counsel, Mr. Boykins' conduct during voir dire was polite and completely appropriate. (IXAugRT 1770.) Boykins was unbiased and stated he could speak up and listen to others during jury deliberations. (IXAugRT 1715, 1723, 1731, 1735, 1770.)

The federal court standard is clear: it is not enough that the prosecution came up with a race-neutral reason and supported that reason with its own provocative line of questions. The reason must have some connection to the juror's ability to serve. "[T]he prosecutor must . . .

articulate a neutral explanation related to the case to be tried." (*Batson, supra*, 476 U.S. at 98; *United States v. Harris, supra*, 197 F.3d at 874 [must be a rational basis for excuse connected to the juror's ability to serve].) A legally sustainable explanation was not presented by the prosecution and trial court committed federal constitutional in denying the *Batson* motion.

The erroneous denial of the *Batson* motion is *per se* reversible error. (*Batson, supra*, 476 U.S. at 100.) Appellant respectfully requests the judgment be reversed.

B. THE COURT OF APPEAL OPINION

The Court of Appeal ruled that because there was no inherent discriminatory intent in any of the prosecution's proffered reasons, the reasons were race-neutral and satisfied the prosecution burden. (Typed opinion at 116.) The Court of Appeal held the trial court made a sincere and reasoned effort to evaluate the prosecutor's reasons and accepted the trial court's conclusions as supported by substantial evidence. (Typed opinion at 117-118.) The Court of Appeal stated that even though Mr. Boykins conducted himself appropriately in the courtroom, his "apparent inability to use reasoning and persuasion to resolve disputes" at work reasonably showed he was too immature to serve as a juror. (Typed opinion

at 118, fn. 86.)

The Court of Appeal found the statistics showing a significant percentage of African-Americans excused from the jury pool was not persuasive and were "misleading" given the non-racial reasons for excusal apparent on the record. (Typed opinion at 120-121.) The Court of Appeal found there was no inference of discrimination shown by the use of a different script for non-African-American potential jurors because the questions were merely tailored to people with different characteristics from Mr. Boykins. (Typed opinion at 122-124.) Expressing the perspective that comparative juror analysis serves little purpose on appeal, the Court of Appeal went on to dismiss the points raised by appellant because the jurors compared were not identical in every aspect of their lives and so were not similarly situated. (Typed opinion at 125-126.)

The Court of Appeal concluded that the record as a whole demonstrated that the excusal of Mr. Boykins was not motivated by discriminatory intent and affirmed the denial of the *Batson/Wheeler* motion, emphasizing that the reason given by the prosecution was supported by the record. (Typed opinion at 126 and fn. 87.)

C. REASONS FOR GRANTING REVIEW

The Court of Appeal employed erroneous standards in reviewing this

claim and denied appellant his due process right to a full and fair appeal.

Appellant challenges the denial of his *Batson v. Kentucky, supra* 476 U.S. 79, motion following the prosecutor's excusal of Ernest Boykins because the record as a whole indicates the reasons proffered were a pretext for racial discrimination (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238) or because the reason for the excusal did not have a rational basis related to the jury's function at trial. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 140-142.)

The Court of Appeal's reliance on the prosecutor's race-neutral reasons was erroneous because it is well established that even one inadvertent act of racial discrimination violates the constitution. (*Batson, supra*, 476 U.S. at 95; *accord, e.g., People v. Silva* (2001) 25 Cal.4th 345, 386 [reversing death judgment after penalty retrial on finding *Batson* error as to only one prospective juror].) The Court of Appeal simplified and generalized the *Batson* analysis so that any "race-neutral" reason supported by any inference from the record could suffice to insulate invidious discrimination from appellate review. This denied appellant due process and a full and fair review on appeal.

III.
THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENSE MOTION TO EXCUSE TWO CARPOOLING JURORS FOR MISCONDUCT WHEN THEY ADMITTED TALKING ABOUT THE CASE TOGETHER PRIOR TO DELIBERATIONS

A. PETITIONER'S CONTENTION[3]

It was brought to the trial court's attention that three carpooling jurors had been discussing the case outside of deliberations. Such juror misconduct is a denial of the constitutional right to due process and a fair trial by jury. The trial court applied an erroneous standard in making its ruling. In addition, under the finding of fact made by the trial court, the jurors' misconduct caused actual prejudice to the defense. In refusing the defense motion to dismiss all three jurors for cause, the court committed reversible federal constitutional error.

The record of misconduct in this case is clear. Both Juror 1244336 and Juror 1267086 admitted they had discussed witnesses and evidence in this case while carpooling:

Juror 1244336 stated: "Yes, and we try really hard when we're riding in the car together not to deliberate, but there have -- I mean, and we absolutely have not done that, but there have been a couple of times -- there

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[3]To comply with this Court's word-count limitations, the complete description of facts and argument in appellant's appellate briefs are incorporated herein by reference. (Johnson AOB at 106-115; Johnson RB at 15-18.)

have been times when we tried to get something straight...." (XLIII-RT 7842-7843.) Juror 1244336 said the carpooling jurors discussed a question of a specific date shown on a timeline chart in court and a freeway exit for the area discussed in testimony. (XLIII-RT 7843-7844.) She could not remember what else they talked about and also denied blogging about the case, until the court confronted her with specific facts she had recorded publically, leading to her eventual admission of wrongdoing. (XLIII-RT 7845-7849.

Juror 1267086 stated she had not talked about the facts of the case with anyone "other than the people I ride with." (XLIII-RT 7857.) She admitted: "Yeah, we've discussed a little bit about some of the witnesses," sympathizing about the unfortunate circumstances of their lives. (XLIII-RT 7859-7860, 7898.)

In light of these admissions, Juror 1355968's blanket denial of any conversation about the case while carpooling lacked any credibility. After being confronted, Juror 1355968 did admit they talked about the timeline and the freeway off-ramp. (XLIII-RT 7903-7904.) The hearing was set up so that the blogging juror went before the judge first and did not return normally to the jury room, but left court another way with the secretary. The second juror went before the judge and did return to the rest of the jury, so

it was obvious to Juror 1355968 that one of the carpoolers had been dismissed before she came in. (XLIII-RT 7851.) Viewed in this light, any "passionate" response of the remaining carpoolers was just as likely to have indicated their consciousness of guilt and fear of dismissal as it was an awareness of juror responsibilities.

The record reflects that, at a minimum, at end of every court day the court instructed the jury members not to speak with anyone about the case. In the context of the record as a whole, the carpooling jurors knew very well that they were violating the court's orders every time they discussed the case together. These jurors' self-serving denials are not sufficient substantial credible evidence to rebut the presumption of prejudice and prove no actual harm occurred.

In addition, the trial court used an erroneous standard of law in making its decision. The court stated there was no misconduct committed by the two carpooling jurors. (XLIII-RT 7928.) The court went on to rule that if the jurors had committed misconduct raising the rebuttable presumption of prejudice:

> I feel that that has certainly been rebutted by the testimony on their part, by what they've indicated, and find that there is **no substantial likelihood of a prejudice** on their part and I don't find that any of their statements have indicated that there is prejudice on their part or anything that would in any way undermine the integrity of the trial or result in any unfairness.

(XLIII-RT 7929, emphasis added.)

The court characterized the jurors as being only being sympathetic about the plight of other humans. (XLIII-RT 7929-7930.)

The California "substantial likelihood" test is in conflict with clearly established United States Supreme Court authority requiring a showing of no actual prejudice. (*Remmer v. United States* (1954) 347 U.S. 227, 229.) The prosecution had a heavy burden to rebut the legally presumed prejudice by showing the misconduct was actually harmless to the defendants. The prosecution did not meet that standard in this case and the judgment must be reversed.

B. THE COURT OF APPEAL OPINION

The Court of Appeal found, in a footnote, that there is no conflict between California's "substantial likelihood of prejudice" standard and the United States Supreme Court's standard of "presumed prejudice" established in *Remmer v. United States* (1954) 347 U.S. 227, 229. (Typed opinion at 264-265, fn 140.) The Court of Appeal characterized the conversations among the carpooling jurors as only "technical violations" of the court's admonitions and Penal Code section 1122 because the communications did not rise to the level of deliberations. (Typed opinion at

266.) The Court of Appeal held that it was permissible for the jurors to think about the case and feel sympathy for the prosecution witnesses outside of deliberations, so long as the ultimate decision was fairly made. (Typed opinion at 267.) The Court of Appeal found no substantial likelihood of prejudice and concluded that any presumption of prejudice had been rebutted. (Typed opinion at 267.)

C. REASONS FOR GRANTING REVIEW

The Court of Appeal found it would have been possible for Juror 1267086 to view her photograph on Juror 1244336's blog without having read the discussion of the trial (typed opinion at 266-267), but because the blog itself is not available and the highly repetitive printouts do not accurately represent the functioning website, this finding of fact by the appellate court is not supported by the record on appeal. (Court exhibit 5.) The court merged the lesser standard of "substantial likelihood" of prejudice with that of "presumed prejudice" and inappropriately failed to cite to any actual showing by the government attorney rebutting that presumption. The Court of Appeal ignored the fact that the people the jurors expressed sympathy for were prosecution witnesses, which establishes prejudice to the defense case on the face of the record. For these reasons, appellant requests that his case be remanded to correct the errors.

IV.
THE COURT ABUSED ITS DISCRETION IN ADMITTING THE MCNEW COURT ANNIVERSARY TAPE TO SHOW FADING DAYLIGHT AT THE SCENE WHILE INSTRUCTING THE JURY THAT THE TAPE COULD NOT BE USED TO DETERMINE THE AVAILABLE LIGHT AT THE TIME OF THE SHOOTINGS

A. PETITIONER'S CONTENTION[4]

Throughout the trial, the court overruled defense evidentiary objections and relied heavily on limiting instructions to avoid the strictures of the Evidence Code. A patently erroneous, ineffective and prejudicial use of a limiting instruction occurred when the defense objected to admission of a videotape made of the area around 1313 McNew Court one year after the shootings. The night-time portion of the video was proffered by the prosecution to prove that defendants had premeditated and deliberated the shootings because they had been lying in wait until darkness fell. However, there was no foundation laid that the video accurately reflected the amount of light that was actually available at the time of the shooting or that the video camera was able to replicate those conditions as they had existed.

The court admitted this tape over defense objection with a limiting instruction that it was not to be used by the jury to determine the lighting

[4]To comply with this Court's word-count limitations, the complete description of facts and argument in appellant's appellate briefs are incorporated herein by reference. (Johnson AOB at 116-123; Johnson RB at 19-21.)

conditions at the time of the shooting. The limiting instruction thereby completely eliminated any relevance the tape might have had, leaving only the prejudicial effect of the inaccurate tape. It would have been impossible for the jury to consider that tape for any purpose other than to determine the lighting conditions at the time of the shooting. The trial court abused its discretion in admitting the tape and crafting the oxymoronic limiting instruction, resulting in reversible error.

People's Exhibit 98 was lodged with the Court of Appeal, a video 19 minutes, 22 seconds long. It depicted daylight scenes filmed in the afternoon around 1313 McNew Court. At 17 minutes, 22 seconds, there was an abrupt change in the video and a dim photograph of a clipboard appeared. From 17 minutes, 53 seconds to 18 minutes, 15 seconds, the video showed a darkened street lit by a full moon and streetlights; the cars passing in the distance had their headlights on. The next shot panned across buildings with lit doorways and windows, the trees were silhouetted and the shot ended with a view of the waning sunset at 18 minutes, 56 seconds. The video concluded with the camera panning away from the sunset, back to the darker area by the buildings.

Counsel for Johnson and Lee objected to admission of the videotape on relevance grounds and because the camera lens interpreted light

differently from the human eye. (XXI-RT 3686; V-CT at 1238.) The tape was prepared for the prosecution on April 18, 2008 by Evidence Technician Mark Riehle, who researched the time of civil twilight one year earlier, on April 19, 2007. (XXI-RT 3686.)

Riehle testified that the DVD image was darker than what the naked eye would have been able to perceive at the scene. (XXI-RT 3662-3663.) In addition, the 2008 video depicts a full moon, which was not the condition of the moon on April 19, 2007.[5] (XXII-RT 3802.) Riehle did not use a light meter; he did not know how much moonlight might effect the level of luminosity as compared to sunlight. (XXII-RT 3835.) The video showed the street lights across the street from the crime scene. (XXII-RT 3832.) Riehle testified he had not tried to achieve a particular light value or to duplicate any conditions. (XXII-RT 3836.)

Riehle testified he had adjusted the camera to record what his eye could see. (XXII-RT 3837.) Riehle used a professional grade digital video camera; it interpreted light differently from the way the human eye would. (XXII-RT 3842.) Riehle felt the camera provided a fairly accurate

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[5]According to U.S. Naval Observatory records, the moon was "waxing crescent with 8% of the Moon's visible disk illuminated."
(http://aa.usno.navy.mil/cgi-bin/aa_pap.pl)
This means only a sliver of the moon's surface was illuminated on April 19, 2007 in Bakersfield. (http://aa.usno.navy.mil/faq/docs/moon_phases)

representation, but it could not capture an image in low light as well as the human eye could see it. (XXII-RT 3843.) The camera's exposure could be changed automatically if the light changed. (XXII-RT 3844.) The resulting video was darker than what his eye could see at the scene. (XXII-RT 3845.) There was no cloud cover or fog on the night he made the video. (XXII-RT 3846.)

Appellant Johnson objected to admission of the nighttime video as cumulative because the evidence had already been presented by eyewitnesses, including Albert Darrett, who testified it was still light at the time of the shooting and that he saw the shooters approach from a distance down the street. (XXII-RT 3849.) Johnson objected to a lack of foundation because Darrett had not been shown the video to determine its accuracy. (XXII-RT 3849.) Counsel for Lee correctly pointed out that production of the video actually was an attempt by the prosecution to show lighting conditions at the scene, as shown by the research done by the technician on the time of civil twilight one year earlier. (XXII-RT 3838.)

The prosecution claimed the video was not being used to show the jury lighting conditions under which witnesses were able to view the events of the crime, but only the speed at which twilight occurred between 7:45 PM and 7:55 PM to prove the defendants' premeditation and deliberation.

(XXII-RT 3833.) The prosecutor averred they were making no attempt to show the exact conditions of light, only that it did get dark at that time and that twilight was over when the shooting was done, proving the defendants had been lying wait for darkness. (XXII RT 3839-3840.)

The court ruled that the video was admissible to show the change in darkness between 7:45 and 7:55 PM with the following limiting instruction:

> Ladies and gentlemen, you're about to review a DVD taken in the evening of April 18th, 2008. This video was not taken under the identical lighting conditions as of the night of the crime of April 19th, 2007. The purpose of the film is not to demonstrate the exact lighting conditions under which the witnesses were able to view the events of the crime and may not be viewed as such. The film is being admitted for the limited purpose of **showing the level and degree when darkness fell** between the times of 7:45 P.M. and 7:55 P.M. You are not to consider it for any other purpose.

(XXII-RT 3851, 3859, emphasis added.)

During closing argument to the jury, the prosecutor stated the anniversary videotape could not show the specific level of darkness but showed that it became dark quickly at 7:57, which proved lying in wait, premeditation and deliberation because the shooters were watching and waiting for darkness to fall. (LX-RT 11012.)

There is no reasonable distinction to be drawn between the "level and degree of darkness" and the "lighting conditions" at the scene. Admission of the irrelevant and misleading tape under these circumstances

was a clear abuse of discretion. (Evidence Code §§350, 352; *People v. Pedroza* (2007) 147 Cal.App.4th 784, 795.)

B. THE COURT OF APPEAL OPINION

The Court of Appeal found that all defendants had forfeited any challenge to the trial court's limiting instruction because all counsel had agreed that it could be read to the jury. (Typed opinion at 151.) Because the Court of Appeal concluded the claim was meritless, there was no ineffective assistance of counsel in allowing the forfeiture. (Typed opinion at 151, fn 93.) Relying on *People v. Rodriguez* (1994) 8 Cal.4th 1060, the Court of Appeal found the video was not admitted to show the actual lighting conditions of the scene and the fact that no witness confirmed the accuracy of the video did not render it inadmissible. (Typed opinion at 155.) Whether the trial court had admitted or excluded the video, the Court of Appeal would have upheld the ruling. (Typed opinion at 156-157.) The video had some probative value and little prejudicial effect. (Typed opinion at 157.)

C. REASONS FOR GRANTING REVIEW

The trial court abused its discretion when it admitted the prosecution's crime scene videotape to show the speed that darkness fell on

the night of the McNew Court shootings, then told the jury not to consider the tape for the lighting conditions that existed at the time of the crime. The limiting instruction did not obviate the prejudice inherent in the tape which did not accurately depict the lighting one year earlier. This was central evidence used by the prosecution to prove premeditation and lying in wait, resulting in far harsher penalties to the defendants. The Court of Appeal opinion was overly deferential and failed to provide appellant due process through a full and fair review of his claim on direct appeal. Appellant requests that his case be remanded for correction of these errors.

V.
THE TRIAL COURT DENIED APPELLANT FEDERAL DUE PROCESS OF LAW AND COMMITTED REVERSIBLE ERROR IN PERMITTING THE GANG EXPERT TO TESTIFY AS TO HIS OPINION OF APPELLANT'S MENTAL STATE AND OTHER ULTIMATE ISSUES OF FACT AND LAW

A. PETITIONER'S CONTENTION[6]

The trial court allowed the prosecution expert witness to testify over and over as to the defendants' intent and motive, which are issues of fact and law that must ultimately be decided by the jury. The court initially admitted the evidence to prove the defendants' identity, motive and intent, then ruled during presentation of the testimony that the evidence was not admitted to prove defendants' intent or motive. This was an abuse of discretion as the jury could use this opinion testimony only to determine the defendants' mental states. In so doing the trial court denied appellant his federal constitutional right to due process of law and committed reversible error on the gang-related counts, enhancements and special circumstances. (*Jackson v. Virginia* (1979) 443 U.S. 307.)

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[6]To comply with this Court's word-count limitations, the complete description of facts and argument in appellant's appellate briefs are incorporated herein by reference. (Johnson AOB at 124-131; Johnson RB at 22-25.)

B. THE COURT OF APPEAL OPINION

The Court of Appeal held that the gang expert should not have been allowed to testify that gang members find killing exciting but ruled that the error was harmless. (Typed opinion at 215.) The Court of Appeal interpreted this Court's opinion in *People v. Vang* (2011) 52 Cal.4th 1038, 1047 as disapproving "*any* interpretation of *Killebrew* barring or limiting the use of hypothetical questions." (Typed opinion at 221, fn 122, emphasis added.) The Court of Appeal ruled there was nothing objectionable about the trial court allowing the officer to testify whether each defendant was an active member of the Country Boy Crips. (Typed opinion at 221.) The Court of Appeal concluded that while an expert cannot testify as to a defendant's guilt, such an expert may testify that an element of a crime has been proven. (Typed opinion at 226.) As such, the expert's opinion that a person identical to defendant under the identical circumstances would have acted with the intent to benefit a gang was properly admitted. (Typed opinion at 227.) The Court of Appeal concluded that the evidentiary bar contained in Penal Code section 29 did not apply because there was no psychological expert testimony about mental illness, disorder or defect. (Typed opinion at 228.) Officer Sherman's testimony that gang members

often brag about crimes was within the scope of his extensive expertise. (Typed opinion at 229.) The court held summarily that substantial evidence supported the gang crimes, enhancements and special circumstances, even if the expert's opinion on intent had been excluded. (Typed opinion at 229-230.)

C. REASONS FOR GRANTING REVIEW

If the prosecution's gang expert is allowed to offer an opinion about the defendant's mental state, feelings, beliefs, knowledge or intent, there is a danger that some jurors would assume the law enforcement expert has some special knowledge or insight about the defendant's subjective thoughts and defer to the expert's judgment. (*United States v. Boyd* (D.C. Cir. 1995) 55 F.3d 667, 672; *cf. People v. Housley* (1992) 6 Cal.App.4th 947, 957 [noting the danger that jurors may give "undue weight" to an expert's opinion].) The prosecution here relied on police officers' opinions to prove appellant's mental state and thereby supplanted the jurors' fact-finding function, which infringed appellant's constitutional rights to have a jury decide the facts of the case. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477; *In re Winship* (1970) 397 U.S. 358, 362-364; U.S. Const., 5th, 6th, & 14th Amends.)

Appellant recognizes that this Court has rejected a similar argument

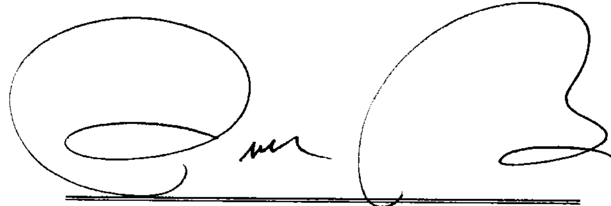
in *People v. Vang* (2011) 52 Cal.4th 1038, 1041, 1053. However, in *Vang* this Court did not forthrightly address the precise issue presented here: when a prosecutor's hypothetical question contains so many extraneous details that it was the same as asking for an expert opinion on the specific defendant's state of mind and the gang expert answers by parroting those same facts in response, the expert's testimony is inadmissible under Evidence Code section 801. (*See, People v. Vang, supra, concurring opinion* of Werdegar, J. at 1052-1055.)

This Court recognized in *Vang* that a gang expert may not testify to a defendant's subjective mental state or his guilt of the charges. Although an expert is not barred from giving an opinion simply because it embraces an ultimate issue in the case, an expert may not render an opinion unless the "subject . . . is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code §801, subd. (a); §805.) An expert is in no better position than a juror to determine, based on the evidence, whether the defendant had a particular mental state at the time of the incident. Such an opinion does not assist the jurors and is not relevant. The police expert merely agreed with the prosecutor that the facts of this case supported both the gang enhancement and the gang participation crime. Appellant requests that review be granted to clarify this provision.

NOTICE OF JOINDER AND CONCLUSION

Johnson joins any relevant argument raised by his co-appellants in their briefs, including cumulative prejudice. For the reasons expressed herein and in the briefs filed by all defendants on appeal, petitioner urges this court to grant review of his case and order additional briefing on the merits or grant the relief prayed for above on the basis of the briefs on file.

Respectfully submitted,



Susan D. Shors
Attorney for Petitioner Johnson

Date: May 29, 2012

RULE 8.504 CERTIFICATION OF NUMBER OF WORDS

I certify that this Petition for Review contains 8223 words, as counted by WordPerfect version X5.

Susan D. Shors

PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco. I am over the age of 18 years and am not a party to the within action. My business address is 466 Green Street, Suite 300 , San Francisco, California. On the date specified below, I served the following:

APPELLANT'S PETITION FOR REVIEW

on the interested parties by placing a true and correct copy thereof in a sealed envelope with postage prepaid thereon and placing the same in an United States Postal Service Mail Box addressed as follows:

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I declare under the penalty of perjury that the foregoing is true and correct. Executed this 30 day of May 2012.