SUPREME COURT No. S130659 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

HONORABLE WILLIAM R. POUNDERS , JUDGE

REPLY BRIEF FOR APPELLANT CRAIGEN LEWIS ARMSTRONG

Patricia A. Scott
Attorney at Law
1042 Willow Creek Rd., #463
Prescott, AZ 86301
Tel.: (928) 445-8380
Fax: (928) 445-1501
Email: pscottatty@cableone.net
Bar No. 165184

Counsel for Appellant
Craigen Lewis Armstrong

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The Honorable William R. Pounders, Judge

REPLY BRIEF FOR APPELLANT CRAIGEN LEWIS ARMSTRONG

ARGUMENT

GUILT PHASE ISSUES

I.

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

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant noted that it is a violation of federal due

process, resulting in a denial of a fair trial under the Fifth and Fourteenth Amendments, to fail to sever counts where the prejudice arising from the joinder of charges renders a trial fundamentally unfair. Here, consolidation of the relatively weak Christopher Florence case with the much stronger double murder and attempted murder case which took place nearly three days later on Century Boulevard violated appellant's right to due process by leading the jury to infer criminal propensity; that is, the jury was allowed to rely upon the latter crimes' evidence in order to strengthen the otherwise weak case against him for the Christopher Florence murder. As well, the joinder of the weaker non-homicide offenses committed against Tyiska Webster, which took place several months later and were unrelated to the murders, served to inflame the jury and invite it to view those offenses as propensity evidence to further assail appellant's character. The sole reason set forth by the initial trial court for denying appellant's motion to sever the offenses was the concern that Ms. Webster would be required to undergo the trauma of testifying more than once against appellant, despite the undisputed fact that she had already testified multiple times regarding the offenses before appellant's trial ever commenced. (2 RT 29-30.) When appellant renewed the motion to sever before the judge who ultimately tried the case, the court simply ruled that the charges "can and should be tried together." (2 RT 157-158.)

As set forth in his opening brief, this Court examines the trial court's ruling on a motion to sever charges based on the record upon which it was made, including the preliminary hearing transcript. (*People v. Merriman* (2014) 60 Cal.4th 1, 37-38; *People v. Scott* (2011) 52 Cal.4th 452, 468; *People v. Soper* (2009) 45 Cal.4th 759, 771-774; *People v. Mendoza* (2000) 24 Cal.4th 130, 161.) The court weighs the "'potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial. [Citation.]." (*People v.*

Merriman, supra, at p. 37, quoting *People v. Arias* (1996) 13 Cal.4th 92, 126.) Although the law favors the joinder of counts, a trial court has discretion to order that otherwise properly joined counts be tried separately, and it is not required to consolidate two or more counts even if doing so is authorized and generally appropriate. (*People v. Merriman, supra,* at p. 37.)

The relevant factors the court considers include the cross-admissibility of the evidence in separate trials, whether some charges may inflame the jury against the defendant, the joinder of a strong and a weak case or joinder of two weak cases such that the totality of the evidence might unfairly alter the outcome on some or all of the charges, and whether one of the charges comprises a capital case or the joinder of the charges converts the entire matter into a capital case. (*People v. Scott, supra,* at p. 469, citing *People v. Zambrano* (2007) 41 Cal.4th 1082, 1128-1129.) Appellant argued that analyses of these factors here demonstrated that the three sets of crimes should not have been tried together.

Appellant argued in his opening brief that the evidence underlying the incidents was not cross-admissible, and that trying him for all three sets of charges in a unitary trial prejudicially lowered the burden of proof on the prosecution since two very weak cases were connected to one very strong case, and a single trial served to collectively justify capital proceedings. He also pointed out that the combined trial of the offenses committed against Tyiska Webster was of marginal value to the prosecution and an object of confusion for the jury, points clearly made by the trial judge to the prosecutor (18 RT 2778-2779), and served only to inflame the jury by demonstrating that he was a cruel man who would hurt a woman and frighten her young daughter with gratuitous violence to satisfy his own needs. He alternatively argued that even if some of the evidence was otherwise cross-admissible, its inclusion would

have been prohibited under Evidence Code section 352.

Appellant also asserted that the record as a whole demonstrated that joinder violated due process under the federal standard, which overlaps the factors to be considered under the state law analysis. Noting that no limiting instruction was provided to the jury advising it that it could not consider the evidence of one set of offenses as proof of another, he asserted it could not be known whether the jury compartmentalized the evidence of each incident in finding guilt on the three sets of charges.

Accordingly, he established that the trial court's prejudicial joinder of the charges compels reversal of all of appellant's convictions. (Appellant's Opening Brief, 55-78.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges there was no error because the evidence underlying the crimes was cross-admissible to establish appellant's identity, intent, motive, opportunity, and plan as to each of the charged offenses, that the non-homicide charges were not inflammatory, that there was not a prejudicial imbalance of evidence as to the sets of charges, and even if there was error, a more favorable result would not have resulted from separate trials. (Respondent's Brief, 35-44.) Appellant disagrees.

ERRORS IN RESPONDENT'S ARGUMENT

Cross-Admissibility

In the opposition, respondent initially states that at the time of the trial court's ruling on the severance motion, sufficient common features of the crimes demonstrated appellant's identity as the perpetrator, as well as his motive and plan in committing them. (Respondent's Brief 38-40.) A review of respondent's citations, however, reflects reliance upon the evidence adduced at trial and not to the preliminary hearing transcript or the record from

which the trial court necessarily made its ruling. To be sure, at the time of the courts' pretrial rulings, other than the preliminary hearing, only the parties' motions addressing the severance issue were available for the courts' review. Although defense counsel raised the points which he now argues in his appeal in the defense motion, the prosecutor's only written response to the motion was to assert that all of the charges were of the same class of crimes. (See 2CT 340-349 [Defense Motion to Sever], 389-399, at pp. 396-397 [People's Opposition to Motion to Sever].)

Second, respondent engages in significant speculation and depends upon overreaching inferences in urging that identity, motive and plan were demonstrated, rather than relying upon facts established by the evidence at the time the motion was heard.

First, as to identity, respondent acknowledges that there is nothing "particularly distinctive" about the shootings or the assault and torture crimes. Still, respondent urges that common features sufficed to show that appellant was in fact the perpetrator. (Respondent's Brief, 38.) Respondent first points out that brothers from the same family were targeted on two occasions while they were seated in their cars. (Respondent's Brief, 38.) While it is true that the victims were in cars, and they were brothers, these general facts do not provide distinctive similarities sufficient to demonstrate identity. Respondent also notes the murders took place within 72 hours and in the same vicinity, the same firearm and caliber of bullet was used in both incidents, the gun was found in the car where appellant testified he left it, and appellant used torture to dissuade a witness to whom he had confessed the crimes from testifying against him. (Respondent's Brief, 38-39.)

Appellant disagrees that these purported circumstances were relevant to the trial court's decision. Moreover, he disputes that, either alone or taken

together, these factors "'virtually eliminate[d] the possibility that anyone other than defendant committed the charged offense. [Citation.]'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003, quoting *People v. Gray* (2005) 37 Cal.4th 168, 203.)

First, the shooting of Christopher Florence was charged as a gang crime. (4 CT 996-1004.) At the preliminary hearing, the prosecution gang expert testified that the shooting was for the benefit of a criminal street gang based upon a witness's [Webster] statement that the shooter [appellant] believed the occupant of the car was a member of a local rival Crip gang, possibly from the Hard Time Hustlers. (1 CT 287-288.) The expert also explained that traveling the wrong way on a one-way street was a common way for rival gangs to enter the Crenshaw Mafia gang neighborhood to shoot at its members. (1 CT 288.) The evidence showed that Christopher Florence was shot while traveling the wrong way on 10th Avenue, a one-way street in the heart of the Crenshaw Mafia gang territory. (1 CT 272-273, 288.) Any Crenshaw Mafia gang member could have committed this crime. The sole witness connecting appellant to the crime was Tyiska Webster, who reported that he later admitted to her that he shot at a car carrying a rival gang member traveling the wrong way on the street. (1CT 131-133, 287-288.)

The shootings which took place on Century Boulevard, on the other hand, bore no similarity to the purportedly common-occurrence shooting on a one-way street in a residential area centered in a gang neighborhood. The gunfire erupted at a traffic signal at a busy intersection. (1 CT 233-235.) The evidence as to appellant's identity as the shooter in this set of crimes was far more substantial. Two eyewitnesses to the crimes positively selected appellant's photograph from a computer display of potential suspects. (1 CT 265-267, 271-272.) As well, Webster told police that appellant admitted

committing the offenses and took her back to the scene shortly after the shootings took place. (1 CT 146, 149-150.) Appellant told her the driver of the car looked at him and called him "cuz." (1 CT 152-153.) Nothing pointed to appellant's knowledge that the males in the car were the brothers of the person who had been traveling the wrong way on the one-way street nearly three days earlier. Further, while it is true that the victims in both incidents were shot while seated in cars, the shooter was standing in a gang-centered residential area in the first shooting and was in the back seat of a car stopped at a signal at a busy intersection in the second shooting. The facts simply do not support joinder of the charges to demonstrate identity.

It is true that ballistics analyses reflected the shots were fired from the same gun in both instances. (1 CT 275-276.) The gun, however, was found in the car driven by appellant's brother Darrin several days later, and not in appellant's possession. (1 CT 274-276.) In this regard, respondent points out that the gun was found in the same car in which appellant admitted he left it. (Respondent's Brief, 39, citing 15 RT 2406.) This evidence, however, was not adduced until the defense case was presented at the trial and during appellant's testimony on his own behalf, long after the court had denied appellant's pretrial motion for severance. Thus, this factor was not considered by the trial court nor may it be so by this Court as to the trial court's abuse of discretion.

Finally as to identity, respondent urges that appellant used torture to dissuade a witness (Webster) from testifying against him. (Respondent's Brief, 39.) Here again, respondent cites to the testimony given in the trial and not to the record upon which the motion was decided. (Respondent's Brief, 39.)

Moreover, the record did not reflect that appellant engaged in any conduct to dissuade Webster from testifying against him. At the preliminary

hearing, Webster testified that Darrin Armstrong and three other people used a ruse to enter her hotel room. (1 CT 154-155.) The first thing that Darrin asked Webster was why she was not putting money on appellant's books in jail. (1 CT 156.) He also asked her why she was in a witness protection program and what case she was under. (1 CT 156.) According to Webster, Darrin and his companions assaulted her while he repeatedly asked about her testimony and whether she was involved in appellant's case. (1 CT 157-159, 161.) After the assault and torture, Darrin's cell phone rang. (1 CT 168.) Darrin told the caller that they had "found her," but that they had not found any money. (1 CT 169.) Darrin placed the cell phone next to Webster's ear and the caller, whom Webster recognized to be appellant, asked her why she had not put any money on his books. (1 CT 169, 210.) Webster replied that she would put money on his books if he would tell the group to leave her alone. (1 CT 169-170.) Darrin spoke again to appellant, asking him if they should "oop" or kill her, and then ended the call. (1 CT 170.) One of Darrin's companions then located Webster's wallet from which $180 was taken. (1 CT 170-171.) Darrin told Webster that if appellant was charged "for this" or for any more offenses, they would go to her grandmother's home. (1 CT 172.)

Webster's testimony did not demonstrate that appellant committed torture in order to dissuade her from testifying against him. First, appellant was not present. Second, the brief telephone exchange concerned only money. In fact, when Darrin first answered the telephone, it was clear the purpose of the call was to inquire about finding money in Webster's room, as his first substantive response to appellant's questions was to explain that he had located Webster, but had not found her money. Appellant did not tell Webster not to testify against him. In fact, he did not mention his case or the witness protection program she was under at all. From the preliminary hearing

testimony, it could be gleaned that he was unaware of her involvement in any prosecution related or unrelated to his own case.

In sum, respondent's argument that cross-admissibility to show identity supported joinder of all of the charges is without merit. The points presented by respondent do not individually nor collectively point to his identity such that the evidence of the offenses were cross-admissible for that purpose. Moreover, many of the facts cited by respondent were not part of the record at the time of the hearing on the motion. Accordingly, the argument must be rejected.

So too must respondent's argument that the offenses were properly joined to show intent, motive, and plan be rejected. (Respondent's Brief, 39-40.) Respondent urges that it was "reasonably inferable" that appellant knew the Florence brothers were investigating Christopher Florence's murder and that they were driving around the murder scene. Respondent cites to nothing in the preliminary hearing record to support this conclusion. (Respondent's Brief, 39.) Respondent further speculates that appellant concocted the plan and created an opportunity by using a ruse of a woman named Nicole. (Respondent's Brief, 39.)

First, the preliminary hearing record did not reflect that the Florence family was involved in an investigation of Christopher Florence's murder or that they were driving around the neighborhood of the murder scene. Brian Florence testified at the preliminary hearing only that he and his brothers were going to meet with a woman named "Nicole" to find out what had happened to Christopher. (1 CT 231, 256.) Michael Florence had spoken with Nicole on the telephone before leaving the family home to go to the Burger King restaurant and then meet her. (1 CT 232.) The preliminary hearing record did not reflect any evidence that the correspondence with "Nicole" was a ruse, or

that appellant utilized such a technique to get the three surviving Florence brothers "to be in a place where appellant knew he could find them." (Respondent's Brief, 39-40.)

Respondent then asserts that after appellant "accomplished his plan of shooting all the Florence brothers," he only had to order the torture of Webster to try to avoid being arrested. (Respondent's Brief, 40.) Again respondent cites to the record *at trial* as opposed to the record as it existed at the time of the preliminary hearing upon which the trial court based its ruling. Moreover, the citations do not support respondent's conclusion.

As a threshold matter, it is clear that appellant did not shoot all of the Florence brothers. Moreover, he was immediately arrested for the Century Boulevard shootings, in fact within a few days of the incident, having been identified by others at the scene including the other car passengers, Floyd Watson and Brian Florence. (1 CT 230, 247-250, 262-263, 265-267, 271-272, 274, 276-277.) Thus, respondent's inference that appellant sought to avoid arrest by torturing Webster is contrary to the record. Moreover, the record does not reflect that appellant "ordered" the torture of Webster in any event. As noted above, the preliminary hearing record reflects that appellant's sole interest in finding Webster several months after his arrest was to obtain money from her, and not to prevent her from testifying against him. He was not present when his brother and companions entered Webster's hotel room, he did not reference her potential testimony against him in their brief telephone conversation, and he apparently did not direct his brother to kill Webster, presumably since she told him she would put money on his books if the assault against her was halted. (1 CT 169-170.)

Respondent then concludes, based on the foregoing, that "the second shooting and torture, therefore, were connected to the first shooting and were

integral components to appellant's plan to avoid being apprehended." (Respondent's Brief, 40.) As noted above, this conclusion is not supported by the preliminary hearing record before the court. Moreover, it is not supported by the authority cited. Respondent refers to *People v. Valdez* (2004) 32 Cal.4th 73, 119 [*Valez*] to establish the connection between the first and second murders and the assault counts. *Valdez* does not assist respondent.

The *Valdez* court held that "[o]ffenses 'committed at separate times and places against different victims are nevertheless "connected together in their commission" when they are ... linked by a "'common element of substantial importance.'" [Citations.]'" (*People v. Valdez, supra*, 32 Cal.4th at p. 119.) There, the court held that the defendant's escape while being transported to lock-up after his arraignment on a murder charge was cross-admissible as to the murder charge itself and thus the two offenses were properly tried together. (*Id.* at pp. 119-120.) The court found that the escape occurred for the purpose of avoiding prosecution on the murder and thus demonstrated the defendant's consciousness of guilt. Further, the court found that the murder was relevant to a prosecution on the escape charge as it was the underlying felony offense pending at the time of the escape. (*Id.* at p. 120.)

Clearly, the *Valdez* reasoning was based upon the undisputed facts in that case; that is, it could readily be inferred that an escape during the jail transport was to avoid the pending prosecution and that murder was the offense the defendant was charged with at the time of the escape. The "connection" which respondent seeks to invoke here is far more tenuous. There is no "common link of substantial importance" between the Christopher Florence murder and the shootings 72 hours later. The facts that the shooting victims were brothers, and the same gun was used in both incidents, did not eliminate the possibility that the Christopher Florence killing, committed as he

traveled the wrong way on a one-way street in the Crenshaw Mafia gang territory, was committed by someone other than appellant. The offenses were not substantially similar in a way that the trier of fact could infer that the shooter entertained the same intent or acted according to a similar plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

The same is true as to the non-homicide Webster offenses. While it is true that Webster testified appellant admitted committing the two shooting offenses to her six months before she was assaulted, the evidence did not reflect that appellant ordered his brother to attack her to dissuade her from testifying against him. Indeed, the evidence only demonstrated that appellant was interested in money. No similiarities existed between the Webster offenses and the shootings several months earlier. No common plan was executed. The facts and circumstances of the offenses are unconnected in all respects but one: the *a priori* assumption that appellant was responsible.

As appellant stated in his opening brief, the Webster offenses were not committed by appellant. He was not present at the scene of the crimes. Further, the Webster crimes were not committed, or charged as committed, in association with or to benefit a criminal street gang. Third, Webster was falsely imprisoned, assaulted, robbed, and tortured. While these offenses admittedly are crimes of violence, they are not capital crimes and were not homicide-related. These offenses were not related to the capital crimes of murder, and their joinder provided no evidence of identity, modus operandi, intent, or motive as to the murders and attempted murders committed nearly nine months earlier.

Finally, appellant asserted in his opening brief that even if some of the evidence from each murder would be admissible to prove identity or common plan in separate trials, or as to the Webster offenses, the admission should have

been prohibited as more prejudicial than probative under Evidence Code section 352 and the Due Process Clause. (Appellant's Opening Brief, 65-66.) Respondent does not address this point. In sum, the evidence – and certainly, the most inflammatory and condemnatory evidence – was not cross-admissible. This factor counts strongly against consolidation of the charges.

A Strong Case Tried with Two Weak Cases

In his opening brief, appellant asserted that viewed on the record as it existed at the time the trial court denied the severance motion, the evidence against appellant on the Century Boulevard charges was much stronger than the evidence against him on the Christopher Florence shooting or the Webster counts. Respondent concedes that multiple eyewitnesses tied appellant to the Century Boulevard shootings. (Respondent's Brief, 41.) Respondent then points out that a witness and a firearm implicated him in the Christopher Florence shooting, and a witness and an item located in his cell tied him to the Webster assaults. (Respondent's Brief, 41.) Citing *People v. Soper*, *supra,* 45 Cal.4th at p. 781, respondent suggests that thus, only an "imbalance" existed as to the joined charges. (Respondent's Brief, 41.) Respondent is incorrect.

As set forth in appellant's opening brief, the evidence against appellant on the Christopher Florence shooting was far from compelling. There were no eyewitnesses. The sole evidence against appellant as to his commission of the offense was the representation by Tyiska Webster that appellant told her he shot at a car traveling in the wrong direction on a one-way street in the "Bottoms" neighborhood on a previous evening. (1 CT 130-133.) Webster, however, did not tell anyone about appellant's admission to her until after Darrin Armstrong and his companions attacked Webster in her hotel room, an incident which Webster believed was instigated by appellant. (1 CT 176-177.)

Further, as noted above, ballistics examinations of the casings found at

the scene of the Christopher Florence shooting were found to have been fired from the same gun as those recovered from the scene of the Century Boulevard shootings. (1 CT 276.) The gun, however, was recovered from the vehicle driven by appellant's brother, not in appellant's personal possession. (1 CT 276.) No evidence was before the trial court which directly connected appellant as the shooter in the Christopher Florence shooting.

The evidence against appellant on the less-serious non-capital Webster crimes was even weaker. The sole evidence connecting appellant with these offenses was Webster's representation that appellant was on the other end of a cellular telephone call made to Darrin Armstrong during the course of the incident. (1 CT 168-170.) The purpose of the phone call could only be guessed. According to Webster, when Darrin answered the phone, he stated that they had "found her" and that they were "right here." (1 CT 168.) Among a series of "yes" and "no" answers, Darrin also said to the caller that he had not found any money. (1 CT 169.) When the phone was placed next to Webster's ear, appellant only asked Webster why she was lying and why she had not put any money on his books. (1 CT 169.) There was no reference to the assault on Webster, or any discussion about torture, false imprisonment, or robbery. There was simply no preliminary evidence that appellant was behind the attack for purposes of dissuading Webster's potential testimony, or that he knew what Darrin and the others were actually doing in Webster's hotel room.

Moreover, while it is true that Webster's more permanent address for relocation under the witness protection program was found in appellant's jail cell (1 CT 277-279), the evidence did not reflect how or when appellant gained possession of the information. (1 CT 279-280.) Detectives conceded that appellant and Webster had been in both telephonic and mail contact while he was in custody. (1 CT 279-280.) It was an open question as to whether

Webster herself may have given appellant the address. It was not in dispute that Webster never moved to the apartment. (1 CT 278-279.)

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

Based on the above, respondent's characterization of the available evidence of the shooting on Crenshaw Boulevard, versus that of the Florence shooting and the Webster assault, as being merely "imbalanced" is incorrect. The prosecutor joined "a strong evidentiary case with a much weaker case in the hope that the cumulation of evidence would lead to convictions in both cases." (*Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 639, quoting *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 772.) The evidence as to the Crenshaw Boulevard shootings was far stronger than that of the first shooting and the Webster assault, and joinder of the weaker cases unfairly and cumulatively led to convictions in all of the cases. Severance was required.

Appellant Suffered Prejudice

Respondent urges that the evidence was overwhelming as to appellant's guilt for all of the charged offenses, and that severance would not have changed the ultimate outcome. (Respondent's Brief, 43-44.) Respondent is incorrect.

First, as to the shooting of Christopher Florence, respondent urges that

in a severed trial where evidence of the other offenses was not introduced, the jury would still have learned of appellant's tie to the gun, as well as Webster's testimony that he admitted the committing the killing to her. (Respondent's Brief, 43.) Respondent does not explain how this constitutes overwhelming evidence. First, the gun was not found in appellant's possession but instead was recovered from the car driven by his brother, Darrin. (12 RT 1913-1916, 1919; 13 RT 1990-1995.) Absent evidence of the Crenshaw Boulevard shootings, appellant was not connected to the gun at all. The record did not reflect that fingerprints or other solid identifying evidence connecting appellant to its use in the Christopher Florence shooting was recovered from the gun. As for the Webster testimony, the claim of appellant's admission was readily assailable in cross-examination. Significantly, Webster admitted that she did not report appellant's admission to the police until several months had passed and after she had personally been attacked by appellant's brother Darrin and his companions. (11RT 1683-1684; 12 RT 1758.) As well, two persons were located in the area of the shooting and arrested when the police arrived. (12 RT 1885, 1901-1903.) The males, Ikenna Ogauha and Darryl Johnson, were members of the Crenshaw Mafia gang. (12 RT 1886-187, 1902-1903; 14 RT 2151-2152.) Gunshot residue tests performed on the males reflected particles were present on Ogauha's hands, demonstrating the possibility that more than one person was involved in the shooting. (12 RT 1890, 1898; 13 RT 2080, 2082-2083.) Even with Webster's testimony, the lack of eyewitnesses and the absence of any direct evidence connecting appellant with the crime would have diminished the strength of the case, and certainly would weaken any prosecution under the death penalty statutes.

As for the Webster assaults, respondent asserts that the jury would have learned of appellant's participation in the cell phone call, as well as facts

giving rise to a motive on his part to use torture as an intimidation tactic to dissuade her testimony against him. The problem with this analysis is that it cannot be accomplished without introducing the facts of the shootings, which, in a separate trial, would never survive an Evidence Code section 352 challenge. Taken alone, with the sole connection being appellant's voice on the other end of the cell phone, the evidence would only have shown that he was angry she was not providing him with funds while he was in custody. It is not likely appellant would have been prosecuted for the assault offenses had they been severed from the murder counts. As pointed out in appellant's initial briefing, the assault and torture charges in this case served little purpose other than to inflame the jury and improperly demonstrate appellant's propensity for violence.

Improper joinder rises to the level of a constitutional violation when it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8.) Here, appellant has met his burden demonstrating error and prejudice under state and federal law. Reversal is required.

II.

BY IMPROPERLY DISMISSING JUROR NO. 5 FOR PURPORTED MISCONDUCT, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant noted that it is a constitutional violation to dismiss a juror without good cause where the juror's inability to deliberate is not a "demonstrable reality." After less than two days of deliberations, and

following an extensive read-back of appellant's testimony during the afternoon, the jury foreperson, Juror No. 4, reported that the jury was deadlocked on all counts. The trial court indicated its astonishment privately to counsel, as well as its suspicion that under the circumstances, it appeared one juror was likely not deliberating. The court assembled the jury and ordered it to continue deliberating, informing it that it was too soon and there was too much evidence to review for the deliberations to be declared at a permanent impasse. The court advised the jury that it could request read-back of testimony, clarification of the law, or additional argument by the lawyers if any of those would be of assistance as it proceeded.

The following court day, the court and counsel conferred out of the jury's presence regarding several jury notes which had been submitted the previous afternoon. The first note was from Juror No. 12, requesting to speak to the court out of the presence of the attorneys or other jurors. The second note was from Juror No. 5, who reported that Juror No. 12 had told Juror No. 5 and Juror No. 6 that he knew appellant's cousin, and the cousin had told him that appellant was a cold, heartless killer and an active criminal. The third note was from Juror No. 4, the foreperson, who reported that a majority of the panel believed that one juror was not fulfilling her obligation to consider all of the evidence, and that the juror may not have been truthful during voir dire in disclosing her biases concerning gang members and the police. The final note from Juror No. 12 complained about Juror No. 5, alleging that she refused to listen to the other jurors, that she read her book and did things with her cell phone instead of deliberating, that she commented about her own experiences with gang members and the police, and that ultimately she was the reason for the deadlock. The last note also indicated that other jurors were anxious to return to their work and they needed help.

After interviewing all of the jurors involved in the exchange of notes, the trial court excused Juror No. 5 for misconduct over the defense objection, and also excused Juror No. 12 at the urging of the defense and out of an abundance of caution. Juror No. 6 remained on the jury without objection. The court denied the defense motion for a mistrial as to Juror No. 12's statements based upon the likelihood they infected the entire jury, and despite the trial court's failure to inquire of the other jurors as to whether they heard Juror No. 12's statements. The court simply opined that Juror No. 5 was not credible in her comments about Juror No.12. Two alternate jurors were ordered to take the dismissed jurors' places. Unanimous verdicts were reached on the day the newly constituted jury heard additional argument from counsel.

In context, it appears that the misconduct ruling as to Juror No. 5 was merely a vehicle for dismissing a holdout juror rather than an appropriate sanction for an actual transgression. The trial court was predisposed to the dismissal upon hearing of the deadlock, surmising that it was likely a juror misconduct matter that was causing the premature impasse. The trial court's error in improperly dismissing a sitting juror for misconduct compels reversal of all of appellant's convictions. (Appellant's Opening Brief [AOB] 78-140.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent disagrees with appellant's argument. (Respondent's Brief [RB] 44-58.)

Respondent first urges that there was no error because Juror No. 5 refused to deliberate. In support of this argument, respondent briefly observes the court's receipt of two notes as well as its interviews with "several" jurors, and summarily concludes that the court had "good cause" to dismiss Juror No. 5. (Respondent's Brief [RB] 53-55.)

Respondent next urges there was no error because Juror No. 5 used both

her cell phone and a book in violation of the court's instructions. (RB 55.)

Finally, respondent urges that Juror No. 5 concealed bias from the court, justifying her dismissal. (RB 55-56.)

Respondent urges this Court to find that the trial court did not abuse its discretion it finding good cause to dismiss Juror No. 5. (RB 58.)

ERRORS IN RESPONDENT'S ARGUMENTS

Standard of Review

Recently, this court has reaffirmed that dismissing a sitting juror because of an asserted inability to perform the juror function properly is **not** reviewed under a customary abuse of discretion standard. Rather, the dismissal for inability to properly perform the juror function must meet the higher standard of a demonstrable reality. That is, a juror's inability to perform as a juror must be shown as a "demonstrable reality" which requires a "stronger evidentiary showing than mere substantial evidence." (*People v. Wilson* (2011) 44 Cal.4th 758, 821, quoting *People v. Cleveland* (2001) 25 Cal.4th 466, 474, 488; *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71; *People v.Lomax* (2010) 49 Cal.4th 530, 589 [basis for discharge involves more comprehensive and less deferential review than determination of whether substantial evidence supports the court's decision].) Indeed, in *People v. Barnwell* (2007) 41 Cal.4th 1038 this court explained that standard stating, "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Id.* at 1052.)

While respondent acknowledges this standard of review (RB 52-53), a critical review of respondent's arguments reveals that they are premised

primarily on the lesser discretionary standard concerning whether or not there was evidence to support the trial court's determinations.

Juror No. 5 did not refuse to deliberate

Respondent urges that Juror No. 5 committed misconduct by refusing to deliberate, rather than simply relying on faulty logic or disagreeing with the majority. (RB 53.) In this regard, respondent first refers to a juror note which advised the court that a majority of the jury believed Juror No. 5 was not willing to objectively consider the evidence. (RB 53-54.) Respondent then refers to an additional note which advised the court that Juror No. 5 refused to listen to the other jurors, explain how she reached her conclusions, and reverted instead to her cell phone and book. (RB 54.) Respondent thereafter states that during one interview with a juror, the court was advised that Juror No. 5 was unwilling to make "big decisions" and listen to the other jurors. (RB 54.) Respondent cites to the same interview where the juror reported that Juror No. 5 did not participate in the deliberations and instead separated herself from the other jurors with her cell phone and book. (RB 54.) Based upon these four illustrations, respondent urges the trial court had good cause to dismiss Juror No. 5 for refusing to deliberate. (RB 54-55.) Respondent is wrong.

Before examining the facts, however, it is important to examine the whole notion of what it means to deliberate.

"[F]ormal discussion is not necessarily required to reach a decision or conclusion by deliberation. In a given case to "deliberate" means "to ponder or think about with measured careful consideration and often [but not necessarily] with formal discussion before reaching a decision or conclusion.' (Webster's 3rd New Internat. Dict. (1986) p. 596.)" (*People v. Bowers* (2001) 87 Cal.App.4th 722, 733.) Moreover, as the *Bowers* case points out, "[i]t is

not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors. The record suggests that, after listening to all the evidence in court and observing the witnesses, Juror No. 4 determined they lacked credibility and were lying." (*Id.*, at 735.)

Indeed, Code of Civil Procedure section 613 states in pertinent part: "When the case is finally submitted to the jury, they may decide in Court or retire for deliberation . . . ." Clearly, this statute does not require group deliberations. Instead, each juror may conduct deliberations individually. (See *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910-911.) Similar to Code of Civil Procedure section 613, Penal Code section 1128 permits a jury to decide a case in the courtroom without retiring[1] and thus without formal group deliberations. (*People v. Bowers, supra*, 87 Cal.App.4th at p. 735.) Moreover, because "[i]ndividuals acquire different methods of processing information and decision making based on their background and experiences, it is unrealistic to expect each person or each jury to deliberate and come to a conclusion in the same fashion." (*Id.*, at p. 735.)

Turning to the instant case, it is significant to note that omitted from respondent's argument is any acknowledgment of many of the critical facts which took place prior to the court's ultimate dismissal of Juror No. 5. In his opening brief, appellant fully set forth the contents of all of the notes submitted to the court by three jurors, Jurors No. 4, No. 5, and No. 12. He also fully described the statements made by the five jurors when they were interviewed

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[1] California Penal Code section 1128 provides in pertinent part: "After hearing the charge, the jury may either decide in court or may retire for deliberation."

by the court prior to excusing both Juror No. 5 and Juror No. 12. (AOB 81-110.) It was clear from the notes and the interviews that the jury was at an impasse, as they had reported to the court before any notes or interviews took place, and the holdout juror was Juror No. 5.

The note first apparently referred to by respondent was submitted by Juror No. 4, the jury foreperson. The note read:

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

(4CT 1024; 18RT 2922.)

The second note apparently referenced by respondent was submitted by Juror No. 12. The note read:

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

> you can instruct the group to go through all of the pieces of evidence and-or have the attorneys give their arguments again would also appreciated [sic]. I wish to remain anonymous because I don't want to go over the foreman or any other juror's head. Thank you. A concerned juror."

As set forth in detail in appellant's initial briefing, based on these communications, the court interviewed Juror No. 4, Juror No. 12, Juror No. 6, Juror No. 5, and Juror No. 11. Respondent only cites to two points made by Juror No. 4 during her interview with the court, and dismisses the answers given by Juror No. 5. (RB 54.)

Juror No. 4 was the first juror to meet with counsel and the court. During the interview, Juror No. 4 explained that when the deliberations began, all of the jurors were eager and conversations and dialogue was going well. The jurors tested the evidence and looked into the possibilities. At some point, Juror No. 5 gave less input, and according to the foreman, she became less open-minded and had difficulty making decisions about the evidence due to her perception of a large number of possibilities arising from the evidence. According to the foreman, Juror No. 5 told the rest of the jurors that she had taken her notes and the jury instructions home and had gone over everything and prayed about the case. The foreman explained that as deliberations continued, however, Juror No. 5 ceased participating and sat quietly, looking at her notes, checking her text messages a few times when her phone sounded, or looking at her textbooks. According to the foreman, Juror No. 5 did not look at her phone "all that much." The foreman acknowledged, in fact, that she did not personally observe some of that activity. The foreman explained that at some point, when it became clear that the court was going to address the jurors, a first vote was taken by the jury and Juror No. 5 was apparently singled

out as a holdout juror. According to the foreman, it then became evident the jury might hang, which was frustrating to the other jurors. The foreman acknowledged that when she was engaged with the other jurors, Juror No. 5 was animated and articulate and seemed bright. Still, the foreman said that the group's discussions did not any longer "hold any water" with Juror No. 5, who had stopped engaging with the other jurors.

As Juror No. 4 described it, Juror No. 5, "has her feelings, this is the way she looks at things. We've tried to change her mind... ." The foreman noted that some of the jurors believed Juror No. 5 brought some preconceived ideas and biases into the jury room, such as knowledge of gangs and negative attitudes toward the police. Some jurors thought these beliefs caused Juror No. 5 to express openness to too many possibilities in viewing the evidence, rather than concentrating on what was probable. The foreman acknowledged, however, that Juror No, 5's comments about the police had little bearing on the case since law enforcement had little impact on the evidence. (18RT 2927-2932.)

After the court interviewed Juror No. 4, it spoke to Juror No. 12, whose earlier note had been very negative about Juror No. 5's participation in the deliberations.[2] (18RT 2937.) The record does not reflect that the court questioned Juror No. 12 **at all** about the comments in his note complaining about Juror No. 5. (18RT 2937-2944.) Thus, Juror No. 12's written comments went untested and unaddressed by the court. Respondent ignores this omission.

Subsequently, during the court's interview with Juror No. 5, she acknowledged that she had a book with her, but stated she did not read it

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[2] Points in this note were referenced by respondent. (RB 54.)

during the discussions about the evidence and the law. (18 RT 2954-2955.) The juror also acknowledged that she carried a cell phone, but other than leaving it out and checking it for the time, she did not engage in other activities, such as sending text messages or making phone calls, during the deliberations. (18RT 2955.)

The record here does not demonstrate that Juror No. 5's inability to continue deliberations was a demonstrable reality as respondent urges. Still, respondent suggests that Juror No. 5 expressed a fixed conclusion *at the start* of the deliberations and then rebuffed efforts to engage her into the discussion process. (RB 54.) Respondent is incorrect.

Juror No. 4, the jury foreman, was clear that Juror No. 5 **did** participate in the deliberations from the beginning. The foreman described how all of the jurors had a lot of energy and fully engaged with each other during the first two days of the deliberations. According to the foreman, in fact, Juror No. 5 was animated, engaging, articulate, and bright. The foreman, however, described Juror No. 5 as becoming more passive later on the second day, as having difficulty making big decisions, and as being overwhelmed by the possibilities presented by the evidence. It was then that she became quiet, looked at her notes, her book, and her cell phone. It appeared as though Juror No. 5 had come to a conclusion about the evidence. But it was clear that this had occurred *after* deliberating. Indeed, Juror No. 6 reported to the court that Juror No. 5 was participating in the discussions, but that once she had reached her conclusions, she did not engage further with the other jurors. (18RT 2951.) It was also clear that Juror No. 5 had reached conclusions contrary to those of the other jurors, which was confirmed when the foreman took a first vote and learned that Juror No. 5 was a lone holdout juror, though also suggesting that the other jurors had also reached conclusions as well.

When the court later spoke to Juror No. 5, it inquired in two brief questions at the end of the interview as to what she "[thought] about her ability to deliberate in th[e] trial," and whether she had formed opinions such that she was unwilling to discuss the evidence and the law. In responding to the court's questions with two simple yes and no answers, Juror No. 5 denied she had formed such opinions and agreed that she was freely discussing the case with the other jurors. (18RT 2957.) The court did not press further, and did not advise Juror No. 5 of the concerns the other jurors had expressed.

In subsequently ruling that Juror No. 5 should be discharged, the court agreed that Juror No. 5 was deliberating, but the problem had become her "inability to continue" in the deliberations. (18RT 2976.) The court acknowledged that under the law, a juror may reach a conclusion and indicate that further discussion will not change that conclusion, but cannot be excused so long as he or she still listens to the views of others and continues to deliberate. (18RT 2976-2977.) The court then noted that Juror No. 6, who was apparently a friend of Juror No. 5, had told the court that Juror No. 5 had arrived at a conclusion and was no longer participating. (18RT 2977-2978.)

It is settled that in situations where a juror disagrees with the majority concerning what the evidence shows or how deliberations should be conducted, such circumstances do not constitute a refusal to deliberate and are not grounds for discharge. Additionally, a juror who participates in deliberations for a reasonable period of time may not be discharged for refusing to deliberate further simply because the juror believes that additional discussion will not change his or her conclusions. (*People v. Cleveland, supra*, at p. 485.)

It is noteworthy that the jurors were instructed at the close of the evidence with CALJIC No. 17.40 as to the duty to deliberate and the

requirement and importance of the "individual opinion" in reaching a verdict. The instruction stated in relevant part:

> "The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after an open-minded discussion of the evidence and instructions with the other jurors. ¶ Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision."

(4CT 1102; 18RT 2889.)

The jury was also instructed with CALJIC No. 17.41 regarding how the jurors should approach their task, as follows:

> "'The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. ¶ Remember you are not partisans or advocates in this matter. You are the impartial judges of the facts."

(4CT 1102; 18RT 2890.)

As can be seen, Juror No. 5 complied fully with the instructions given at the close of the case. She deliberated with the others for two days and after actively engaging in the discussion, she reached a conclusion. She did not allow pressure from the other jurors to compel her to change her mind. None of the jurors indicated she was not deliberating out of a sense of pride or other personal stand, but that to the contrary, she had made up her mind and indicated it would not be changed by any further discussion. Moreover, it was clear from the jury foreman that the other jurors disagreed with Juror No. 5's

conclusion, as the vote indicated she was the reason for the impasse. None of these circumstances rose to the level of good cause to dismiss her, nor did they indicate a demonstrable reality that she was **unable** to discharge her duty.

As appellant pointed out in his opening brief, when a juror disagrees with the majority concerning what the evidence shows, or how deliberations should be conducted, this does not constitute a refusal to deliberate and is not a ground for discharge. (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) A juror who participates in deliberations for a reasonable period of time may not be discharged for refusing to deliberate further simply because the juror believes that additional discussion will not change his or her conclusions. (*Ibid., People v. Barnwell* (2007) 41 Cal.4th 1038, 1051.)

Here, the interviewed jurors admitted that Juror No. 5 fully participated in deliberations at the beginning and continued to participate in deliberations until it was clear she and the other jurors were not going to agree. Based on the comments of the interviewed jurors, it appeared that Juror No. 5 did not believe the state carried its burden of proof. Recognizing that further debate was useless in the sense that she could not persuade the majority and the majority could not persuade her, she remained silent. She reached a good faith decision about the case, and was not required to repeatedly address the disagreements of the majority after participating actively in the deliberations for one and one-half days. (See 18 RT 2897; 4 CT 1005-1006, 1013, 1018.)

Finally, respondent gives credence to the note submitted by Juror No. 12, despite the court's complete failure to address any of that juror's comments about Juror No. 5 when it interviewed Juror No. 12. (RB 54.) Moreover, as pointed out in the opening brief, it appeared there was tension between the two jurors, who submitted notes complaining about one another on the same afternoon.

In sum, Juror No. 5 participated in the deliberations for as long as was feasible. Once she reached her conclusion, after admittedly lively discussions, it became clear there would not be a consensus. The record does not reflect a "demonstrable reality" that Juror No. 5 was unable to deliberate. To the contrary, the record reflected she was a lone holdout juror who was discharged at the request of her fellow jurors because she stood in the way of what otherwise would have been a unanimous verdict of guilt. To be sure, once Juror No. 5 was eliminated, the newly constituted jury convicted appellant of all charges after barely three days of deliberations. (18RT 2995-3044; 4CT 1025-1028, 1030-1031, 1036-1037.)

Juror No. 5 did not commit misconduct with her cell phone or book

Respondent next urges that Juror No. 5 committed misconduct by failing to abide by the court's express instructions by engaging with her cell phone and her book. Respondent is wrong.

First, respondent ignores that any admonishment about the use of cell phones and/or a book were not in the formal instructions provided to the jury at the close of evidence and as jury deliberations were about to commence. In fact, the court spoke to the jury about bringing reading material, and about the use of cell phones, just after the jury was selected and sworn nearly a month earlier. (7RT 1154-1155.) As pointed out in the opening brief, at that time, the court invited the jurors to bring books to pass the time and cautioned them about cell phone use, advising them to keep their phones turned off during deliberations to lessen the possibility of outside influences affecting their decision. (7RT 1154-1155.) The court never mentioned cell phone use again.

Respondent suggests that Juror No. 5 intentionally violated the court's instruction about cell phone use. The record actually reflected that Juror No. 5 did not hear, or more likely, did not remember the court's admonishment

about phones one month earlier. (18RT 2955.) In any event, this transgression did not rise to a "demonstrable reality" that Juror No. 5 was unable to continue as a juror. A reminder of the admonishment, or even a confiscation of the phone at most, would have likely resolved the matter. Under the circumstances, it appears that the focus of Juror No. 5's cell phone use was a *post hoc* justification for the improper removal of a sitting juror who was not convinced of the strength of the prosecution's case.

Plainly, this activity was de minimis. The foreperson reported that Juror No. 5 did not use her phone "all that much." (18RT 2932.) Juror No. 6 reported that Juror No. 5 looked at her cell phone or her book "one or two times" and "for a few minutes" during deliberations. (18RT 2947.) Moreover, nothing before the court indicated that Juror No. 5 used her phone for an improper purpose. (See *People v. Fauber* (1992) 2 Cal.4th 792, 837 [juror brought cell phone into the jury room believing it was permitted and no evidence demonstrated it was used for an improper purpose or distracted other jurors].) No phone calls were made or received. A most, Juror No. 5 read or sent a text message.

Respondent cites to *People v. Williams* (2001) 25 Cal.4th 441 [*Williams*] and *People v. Daniels* (1991) 52 Cal.3d 815 [*Daniels*], to urge that Juror No. 5 was unable or unwilling to follow the court's instruction about cell phone and reading materials, and that since she had violated the instruction, she could not be counted on to follow the instruction in the future. (RB 55.) Neither *Williams* nor *Daniels* applies to the instant case.

In *Williams*, the juror in question refused to follow the trial court's instruction as to the law of rape because she believed the law was wrong. When interviewed by the trial court, the juror expressly stated she was not willing to follow her oath to abide by the law as instructed by the court.

(*People v. Williams, supra,* 25 Cal.4th at p. 446.) Following a lengthy discussion of the jury's right to exercise nullification, the *Williams* court found the juror's inability to perform her duties was a demonstrable reality since the juror affirmatively stated she disagreed with the law and was unable to abide by her oath to follow the court's instructions. (*Id.* at p. 461.)

In *Daniels*, the trial court conducted a hearing upon learning that one juror had discussed the case with outsiders and also expressed an opinion as to guilt before deliberations began. (*People v. Daniels*, *supra,* 52 Cal.3d at p. 863.) Witnesses who were acquaintances of the juror testified at the hearing that the juror had discussed the case with them and revealed to them that he had already decided the case. The witnesses also testified the juror had also read a newspaper article about the case during the course of the trial. (*Ibid.*) Although the juror denied these activities, the trial court believed the witnesses and discharged the juror. (*Ibid.*) The appellate court upheld the dismissal, finding that a court may exercise its discretion to remove a juror for "serious and wilful" misconduct, such as a repeated violation of the court's instructions. (*Id.* at 863-864.)

The instant case is nothing like these. Juror No. 5's brief engagement with her phone and her reading material were not "serious and wilful" and repeated violations of the court's instruction. It did not appear the juror believed she was doing anything wrong. A simple reminder of the instruction would have resolved the problem. Nothing in the record gave rise to a conclusion that Juror No. 5 would not follow the instruction. Respondent's suggestion that Juror No. 5's conduct was egregious enough to warrant dismissal is without merit.

Juror No. 5 did not conceal any bias as to gang members or police

Respondent argues that Juror No. 5 concealed her biases during jury

voir dire. Significantly, respondent **does not** cite to the voir dire transcript nor to Juror No. 5's answers to the preliminary juror questionnaire in support of this contention. Respondent instead relies generally on the comments of the other jurors as made to the court through notes and interviews. (RB 55-56.)

Notably, respondent singles out the note submitted by Juror No. 12, in which it informed the court that Juror No. 5 used to live near the Bottoms, that she had friends who were gangsters, and that she believed that police officers were corrupt. (RB 56, citing 18 RT 2923; see 18 RT 2922-2924; 4 CT 1022-1023.) As noted above, however, the court did not ask Juror No. 12 about any of these statements when it interviewed the juror.

Moreover, a review of the entire record demonstrates the Juror No. 5 did not commit misconduct. Initially, a review of Juror No. 5's juror questionnaire demonstrates she did not conceal biases toward either gangs or police officers. She was forthcoming on all of the relevant questions. (5 CT 1200-1219; See 3 RT 368 [Juror No. 5 ID: C4957].) In her questionnaire, Juror No. 5 revealed that she was a 19-year-old African American female who was a college student as well as being employed at the airport as a baggage screener. (5 CT 1200-1202.) When asked about her knowledge of the area around the Hollywood Park casino, she responded that she worked at a Target Store next door to the casino, and that she lived about 20 to 30 minutes away from that neighborhood. (5 CT 1207.) With regard to gangs, she indicated she had witnessed gang fights, drive-by shootings, and vandalism in her neighborhood. (5 CT 1209.) She said she believed that such activities were senseless and that state and local governments could help improve the situation in the gang communities. (5 CT 1209.) She added a concluding comment about gangs at the end of the questionnaire. She stated:

"Sometimes gangs are all these kids know and more has to be

> done to show them that there is more to life than gangs. But gang members still should be held accountable for their actions. They can't continue to use their emotions as a scapegoat."

(5 CT 1219.)

With regard to police officers, Juror No. 5 indicated she believed it was possible for any witness, including a police officer, to swear to tell the truth and yet lie under oath. (5 CT 1210.) She indicated that she had never had a negative nor a positive experience with a police officer. (5 CT 1210.)

During the voir dire, the prosecutor questioned Juror No. 5. (3RT 436-439.) The prosecutor noted that Juror No. 5 was employed as a baggage screener, and then asked her if she worked a lot with police officers. She replied "no." (3 RT 437.) The prosecutor then asked if she was interested in becoming a police officer and she again responded, "no." (3 RT 438.) The prosecutor then asked, "You don't have any bad feelings about police officers?" Juror No. 5 responded, "No. It's just too dangerous for me." (3 RT 438.) The prosecutor then asked her about her questionnaire statement regarding having once witnessed a drive-by shooting, and specifically asked whether she had called the police. Juror No. 5 responded that she was at a friend's house when the shooting took place across the street. She explained that another person at the home called the police. (3 RT 438.) When the prosecutor asked Juror No. 5 about witnessing gang fights and vandalism, she explained that she observed these activities at both at her former high school as well as in her own neighborhood, although none was directed personally at her. (3 RT 439.) She said she did not have friends in gangs, although she knew people from high school who were in the Hoover gang, the Rolling 60's gang, the Grape Street gang, and others. (3 RT 439.)

It is true that two notes submitted to the court mentioned Juror No. 5's

feelings about gangs and the police. The jury foreman wrote in the first note that "some panel members wondered" whether Juror No. 5 had honestly and accurately disclosed her experiences, associations, and biases. (4CT 1024; 18RT 2922.) The second note, as referenced by respondent and noted above, was submitted by Juror No. 12. (4CT 1022-1023; 18RT 2922-2924.)

When the court interviewed the jury foreman, Juror No. 6 and Juror No. 11 during the deliberations, the jurors responded to the court's questions about Juror No. 5's biases as to gang members and the police. According to the jury foreman, it appeared that Juror No. 5's "association with some gang members" left her open to "possibilities." She also recalled Juror No. 5 stating that when police are involved in a shooting, they seem to always have a defense. (18RT 2930-2931.) Still, the foreman told the court that Juror No. 5 never made direct comments indicating a bias for or against either group. The foreman just said, "You get more of a feeling, I suppose." (18RT 2935-2936.)

Juror No. 6 told the court that Juror No. 5 said she was "acquainted with some gang members" and that she "kind of knew how they thought," although "nothing specific." (18RT 2947-2948.) Juror No. 5 also said she once lived in the area referenced in the case, but that she did not know anyone in particular. (18RT 2948.) Juror No. 5 indicated she thought the police were not always trustworthy. (18RT 2947.)

Juror No. 11, who was not interviewed until *after* Juror No. 5, told the court that Juror No. 5 mentioned her distrust of the police and commented that with regard to the testimonies of Brian Florence and Floyd Watson, the police could coach witnesses or tamper with crimes scenes and evidence. Juror No. 5 also indicated she had friends who were gang members and that she seemed to lean toward their favor in understanding how a gang member might react to a perceived threat. (18RT 2961-2962, 2964-2965.)

When the court interviewed Juror No. 5, she was questioned briefly about her alleged biases First as to gangs, the court asked her if she had a "prior acquaintance" with the Bottoms area. Juror No. 5 responded that when she was young, she lived at 104th and Crenshaw [which was nearby], but did not go into the Bottoms neighborhood and did not associate with people there. (18RT 2955-2956.) The court then generally asked Juror No. 5 if there was anything she should tell the court and counsel about her "concerns or biases" about gangs or the police for or against either group. Juror No. 5 responded, "no." (18RT 2956.) When the court asked her about her questionnaire answers reflecting she had witnessed gang crimes, she responded as she had during voir dire that those were during her high school years and they involved the Hoover, Rolling 60's, East Coast Crip, and Grape Street gangs. Juror No. 5 said she never had any contact with the Crenshaw Mafia or the Hard Time Hustler gang although she had heard about them in conversations. (18RT 2958-2960.)

It is clear that Juror No. 5 did not conceal anything from the court or counsel. She consistently answered all of the questions asked of her by the court and counsel both before trial and during the deliberations. It was clear that Juror No. 5 knew kids in high school that were in gangs, and that she had experienced violent and non-violent gang crime both at school and in her neighborhood. At 19 years old, she was close in age to the gang community. Thus, it cannot be disputed that her understanding and feelings about gangs came from her life experiences and acquaintances with peers who belonged to gangs. That Juror No. 5 might understand how a gang member might perceive a threat, or have an understanding of how a gang member might think, does not reflect a bias, but a life experience which she was not required to leave outside the courtroom. (*People v. Fauber* (1992) 2 Cal.4th 792, 839 ["Jurors

cannot be expected to shed their backgrounds and experiences at the door of the deliberation room."].)

Respondent relies on *People v. Barnwell* (2007) 41 Cal.4th 1038 [*Barnwell*] to support the bias argument. *Barnwell* does not assist respondent.

In *Barnwell*, this court considered whether the record demonstrated that the juror in question, R.D., exhibited a general bias against police officers which prevented him from fairly weighing the police testimony in the case. (*People v. Barnwell, supra,* 41 Cal.4th at p. 1048.) There, after two days of deliberations, the court received two jury notes indicating one juror was not deliberating properly. After the court re-read CALJIC No. 17.40 to the jury regarding the duty to deliberate, juror R.D. identified himself as the subject of the notes, denied refusing to deliberate, and indicated he would follow the court's instructions. (*Ibid.*) A short while later, the court received another note which explained that the problem juror had a bias against law enforcement officers. The note indicated the juror did not believe the police officers' testimonies because they would "back up what the other cops say." The juror stated he was willing to deliberate, but would never change his opinion. (*Ibid.*)

In response to the note, the trial court conducted a hearing and took testimony from all 12 jurors. (*Id.* at 1049.) R.D. testified that he only disbelieved the officers in the case and did not harbor a bias against all officers. Nine of the other jurors, however, testified that he had generally exhibited a bias against law enforcement officers. According to one juror, R.D. had made up his mind before deliberations began and would not change his mind. Then after the court instructed the jury on the duty to deliberate, another problem surfaced. According to the juror, "[R.D.] stated that he feels *all* law enforcement will *always* back each other up regardless of [whether] it

is right or wrong. ... *All* law enforcement will back each other up. And he will not change that. He says that all witnesses that have been brought to the stand ... that are involved in law enforcement in any way have lied." When the other jurors asked R.D. to consider "all evidence, not just the fact that law enforcement is involved," R.D. responded, "I don't care. I can sit here all day, and there's nothing, nothing that anybody could say. Law enforcement lies." (*Ibid.*; emphasis in original.)

After hearing the testimony of the jurors and the arguments of counsel, the trial court excused R.D., stating, "[I]n my opinion, ... in deliberating this one juror, [R.D.], is not following the court's instructions. I feel his lack of participation is based upon his disbelief of police officers' testimony." (*People v. Barnwell, supra,* 41 Cal.4th at p. 1051.)

This court upheld the trial court's discharge of R.D. It found that on the record before it, R.D.'s disqualifying bias was established to a "demonstrable reality." (*People v. Barnwell, supra,* 41 Cal.4th at p. 1053.) The court stated: "[T]he totality of the evidence here supports the trial court's evident conclusion that, more than simply disbelieving the testimony as given by these particular witnesses, R.D. judged their testimony by a different standard because the witnesses wer police officers. Applying such different standards to the evaluation of different witnesses is, of course, contrary to the court's instructions and violative of the juror's oath of impartiality." (*Ibid.*)

This case is not like *Barnwell*. First, this case did not hinge on the testimonies of the police officers. There was no dispute about the collection or analyses of the evidence, or about the propriety of any of the actions of the police investigators. Moreover, any concern about the police coaching either of the two eyewitnesses, Brian Florence and Floyd Watson, was put to rest by appellant's testimony in his own defense that he did in fact shoot the gun that

killed Michael and Torry Florence. There was no relevant manner in which any purported bias against the police could have influenced the outcome of the case. As the jury foreman put it, the comment about coaching those to witnesses was "out of nowhere."

Moreover, the only gang member who testified in the case was appellant. It can be gleaned from the comments of the jurors that Juror No. 5 may have believed appellant's claim of self defense. This, however, did not demonstrate an unfailing allegiance on the part of Juror No. 5 to the testimony of all gang members; that is, that all gang members tell the truth no matter what. To be sure, none of the three jurors whom the court interviewed stated that Juror No. 5 said in no uncertain terms that she would always believe, or disbelieve, the testimony of a criminal street gang member.

In sum, respondent's argument that Juror No. 5 "concealed" her biases against the police and for gangsters is without support in the record. Moreover, even if Juror No. 5 tended, through life experiences, to have an understanding of how a gang member might perceive a threat, or tended, through reading the paper and hearing from others that police officers are not always trustworthy, these beliefs were not so extreme or rigid to comprise a bias which supported a finding of a demonstrable reality that she could not deliberate in this case. Thus, respondent's argument must be rejected.

Finally, respondent's efforts to distinguish *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080 [*Symington*] from the instant case is unavailing. (RB 57.)

Appellant fully set forth the facts, analysis, and applicability of *Symington* in his initial briefing. (AOB 120-121). Respondent is incorrect that the instant case was about a simple refusal to deliberate and juror bias, and not about excusing a holdout juror. Only two jurors in this case sent notes to the

court indicating that Juror No. 5 was a problem juror. Juror No. 4, the foreperson, made clear in both her note and in her discussion with the court, that Juror No. 5 actively deliberated and then retreated from the discussion upon reaching a conclusion for which the other jurors could not change her mind. A vote taken confirmed this. The note from Juror No. 12, who was not questioned by the court as to his comments about Juror No. 5, made clear that Juror No. 5 was a hold out juror and the rest of the panel needed help so they could back to their work.

Moreover, as explained above, Juror No. 5 did not conceal any bias. It can be surmised that she believed appellant, at least in part in his testimony. She likely tried to explain to the rest of the jurors why she felt he may have been telling the truth and why the prosecution did not carry its burden, but finding no support in her conclusion from the other jurors left her quiet. The clear implication from the two jurors who submitted notes was that Juror No. 5 was at the center of a frustrating impasse.

Respondent's claim that *Symington* is completely inapplicable to this case is wrong. The factual similarity is evident. As to the later disapproval on a point in *Symington,* discussed in a subsequent case and cited by respondent, the context is misplaced. As this Court stated in *People v. Cleveland*:

> "We agree with the observations in *Brown* [*United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591], *Thomas* [*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606], and *Symington* that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence. And the court in *Brown* is correct in observing that often the reasons for a request by a juror to be discharged, or the basis for an allegation that a juror refuses or is unable to deliberate, initially will be unclear. We also agree, as noted above, that a court must take care in inquiring into the circumstances that give rise to a request that a juror be

> discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined. But we do not adopt the standard promulgated in *Brown*, and refined in *Thomas* and *Symington*, that *restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'* (*U.S. v. Symington, supra*, 195 F.3d 1080, 1087, italics omitted.) Rather, we adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. [Citations]."

(People v. Cleveland, supra, 25 Cal.4th at pp. 483-484; emphasis added.) Thus, the *Cleveland* court's concern on this point was with the *restriction of inquiry* into the deliberation process. Indeed, such inquiry was the subject of *People v. Thompson* (2010) 49 Cal.4th 79, referenced by respondent in the discussion on *Symington*, and which cited *Cleveland* for the proposition set forth above. Accordingly, respondent's suggestion that this passage renders the *Symington* analysis inapplicable to the instant case is wrong.

Respondent does not address appellant's prejudice argument and it would be unfair at this point for the Court to substitute its own assessment of prejudice in the absence of briefing by the Attorney General. (AOB 138-140; See, *People v. Grimes* (2015) _ Cal.4th _ [2015 WL 47493]: Dissenting opn. Liu, J.: Petition for Rehearing pending.) The trial court erred in discharging Juror No. 5. Reversal of the judgment is required.

III.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO SUA SPONTE HOLD A HEARING AND INQUIRE OF THE ENTIRE JURY PANEL AS TO WHETHER JUROR NO. 12 TOLD THE OTHER JURORS THAT HE KNEW APPELLANT'S COUSIN, ABOUT THE COUSIN'S INFLAMMATORY COMMENTS TO HIM CONCERNING APPELLANT'S CHARACTER, AND REGARDING HIS OPINION THAT THE DEFENSE OF SELF-DEFENSE DOES NOT APPLY TO GANG MEMBERS.

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that the trial court violated his constitutional rights by failing to inquire of the full jury panel about their possible knowledge of Juror No. 12's friendship with appellant's cousin as reported to the court by Juror No. 5 during the deliberations. According to a note Juror No. 5 submitted to the court, Juror No. 12 told her and Juror No. 6 privately that the cousin spoke to Juror No. 12 about the case and described appellant as a "cold heartless killer" and as an "active criminal." As well, Juror No. 5 reported that Juror No. 12 expressed during deliberations that gang members could not claim self-defense, and that appellant must be guilty because he had "done stuff before."

Defense counsel thereafter moved the court for a mistrial on the ground that Juror No. 12 may have infected the whole jury panel with his sentiments regarding gang members not being afforded the defense of self-defense. The court stated it was concerned that information about the cousin from Juror No. 12 was passed on to the other jurors, but concluded this was not the case since Juror No. 6, who did not fully recall the private conversation, was apparently not reminded of it by any statements made by

Juror No. 12 during deliberations. (18 RT 2992.) Thus, the court determined that Juror No. 12 had not improperly discussed the information about appellant learned from the cousin with the other jurors during the jury's deliberative discussions Characterizing counsel's conclusion that the jury was influenced as "guesswork," the court denied the motion. A subsequent motion for a new trial raising the issue and urging that an evidentiary hearing should be conducted was denied. Appellant argued that the trial court's failure to inquire of all of the jurors about Juror No. 12 was prejudicial error under state and federal law. (AOB 140-152.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first urges that appellant failed to request the court to make a further inquiry as to the remaining jurors and thus has forfeited his challenge to the scope of the inquiry in his appeal. (RB 60.) Respondent then urges the trial court acted within its discretion and conducted an appropriate and sufficient inquiry into Juror No. 12's misconduct. (RB 59-61.)

ERRORS IN RESPONDENT'S ARGUMENT

Argument was not forfeited

First, appellant has not forfeited the argument on appeal. Respondent ignores that appellant filed a motion for a new trial following the verdicts raising the issue in the trial court. (13CT 3661-3665; 21RT 3476-3477.) In his motion for a new trial, appellant argued that the court had a sua sponte duty to conduct an evidentiary hearing to determine whether Juror No. 12 had repeated to the jurors that appellant's cousin called him a "cold-hearted killer" and an "active criminal." (13CT 3661-3665.) He raises the same argument in this appeal.

Court's inquiry was inadequate

Respondent argues that there was no indication that Juror No. 12 spoke to the rest of the jurors about his friendship with appellant's cousin or about his opinion of gang members. (RB 60.) Respondent further argues that a further inquiry of the remaining jurors would have constituted a "fishing expedition." (RB 60.) Appellant disagrees.

The decision whether to investigate the possibility of juror bias or misconduct, like ultimate decision to retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Castorena* (1996) 47 Cal.App.4th1051, 1065, citing *People v. Beeler* (1995) 9 Cal.4th 953, 980.) A trial court's failure to question each juror privately regarding a juror misconduct claim presents an issue of abuse of discretion. (*Ibid.*, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 927-928.) When there is a claim of misconduct, the court must conduct an inquiry sufficient to determine the facts. (*Ibid.;* See also, *Packer v. Superior Court* (2014) 60 Cal.4th 695 [Court of Appeal's decision to believe facts and inferences proffered by the prosecutor over facts and inferences proffered by the defendant in the context of a recusal motion was improper without first conducting an evidentiary hearing].)

That the trial court erred in this case is illustrated by analogy in *People v. Castorena, supra,* 47 Cal.App.4th 1051. In *Castorena*, the trial court initially interviewed seven of the 12 jurors. Based on their testimony that a holdout juror was failing to deliberate, the trial court determined to dismiss the holdout juror. Significantly, however, the trial court did not question the holdout juror. Subsequently, the judge received a 15-page note from the holdout juror which contradicted the allegations made against her by the other jurors and raised new allegations of misconduct against one of

her accusers. (*Id.* at p. 1066.) Additionally, there was evidence from at least one other juror that in fact the holdout juror was deliberating in good faith. (*Id.* at p. 1066.) Despite those matters, the trial court dismissed the holdout juror. (*Ibid.*) Upon review, the appellate court concluded that reversal was required.

The court concluded that the trial court erred significantly in failing to conduct a proper inquiry. (*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.) Based on the 15-page note, the court possessed information which, if true, would preclude "good cause" for removing the holdout juror, and constitute "good cause" to justify removal of one or more of the other jurors from the case. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313, 343.) Absent an inquiry into the facts raised in the juror's 15-page note, however, "the court did not have the requisite facts upon which to decide whether [the holdout juror herself] in fact failed to carry out her duty as a juror..." (*Id.*, at p. 1066.) Although a sufficient inquiry might have refuted the holdout juror's claims in the note, nevertheless, "we cannot speculate about what facts might have been adduced if the [proper] inquiry had been conducted."(*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.)

A similar result is required here. At the outset, the trial court had sufficient information that appellant's cousin may have communicated to Juror No. 12 about his opinion of appellant's character as a killer and a criminal. Other than Juror No. 12, and Juror No. 5 who submitted the note, the court only inquired of Juror No. 6 who was present at the time of Juror No. 12's admission about the friendship with the cousin. Based solely upon Juror No. 6's failure to recollect the full conversation, and the court's opinion that Juror No. 6 would have recalled such information, the court failed to inquire of the rest of the jurors as to whether Juror No. 12

discussed his friendship with the cousin with them and further, whether he told them of the cousin's personal opinion about appellant. Here, as in *Castorena*, a further inquiry might well have refuted Juror No. 5's claim in her note to the court, but it cannot be known what facts may have been discovered upon a proper inquiry.

The Supreme Court has stressed that the remedy for allegations of jury bias is a hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial. (*United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 847, citing *Remmer v. United States* (1954) 347 U.S. 227, 229-30; *Smith v. Phillips* (1982) 455 U.S. 209, 216.) Although an evidentiary hearing is not required on every allegation of jury misconduct or bias, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. (*Ibid.*)

In this case, the content of the allegation - that Juror No. 12 had inappropriate contact with appellant's cousin and may have communicated about it to more of the jurors - and the seriousness of the allegation if true, cannot be reasonably disputed. It is true that the court found the source of the allegation, Juror No. 5, to not be credible. (See 18RT 2992-2993.) The court, however, had to concede that Juror No. 5 gave the court other information that was accurate, including the information about Juror No. 12's relationship with appellant's cousin, which Juror No. 12 otherwise kept hidden from the court and counsel. (18RT 2992-2993.)

As appellant pointed out in his initial briefing, it cannot be determined what effect the trial court's failure to sua sponte conduct an adequate inquiry into the juror misconduct had on the ultimate outcome of

appellant's trial. The trial court's omission was erroneous and foreclosed any evaluation of the extent of the prejudice which occurred. The allegation of jury misconduct raised a presumption of prejudice, and the reliance by the trial court upon Juror No. 6's failure to recall the conversation that took place between her and Juror No. 12 and Juror No. 5 was insufficient to rebut that presumption. In fact, Juror No. 6's expressed lack of memory about the conversation gives rise to a question as to her credibility and possible lack of candor with the court.

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

IV.

SUBSTITUTION OF ALTERNATE JURORS FOR ORIGINAL JURORS NO. 5 AND NO. 12 COERCED A VERDICT

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that when a new juror is substituted, the jury is required to start deliberations anew in order to prevent existing jurors from imposing their views on the new juror, thus coercing a verdict. Here, the dates on the verdict forms and the speed at which the jurors arrived at verdicts despite the vast quality of evidence demonstrates that there was no meaningful deliberation. Instead, as with past juror misconduct substitutions, the existing jurors simply pressured the new jurors into accepting their view of the evidence. (AOB 152-158.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argues that because the newly constituted jury deliberated for two days and requested further argument from counsel shows the jurors

were deliberating properly. It also shows the jury followed the judge's instructions to begin deliberations anew. Finally respondent points out that the court did not constrain the reconstituted jury in any way. For these reasons, respondent asserts that appellant's claim is necessarily based upon speculation. (RB 61-62.)

ERRORS IN RESPONDENT'S ARGUMENT

Nothing in respondent's argument addresses the problem of substituting jurors after the majority has already reached conclusion regarding guilt. As appellant pointed out in his opening brief, even though a jury has been instructed to start its deliberations anew, there are some circumstances where following such an instruction is simply unrealistic because it is impossible to incorporate into those deliberations the perception, memory and viewpoints of the new juror.

As appellant explained in his opening brief as well, there is a substantial "inherent coercive effect upon an alternate juror who joins a jury that has ... already agreed that the accused is guilty...." (*United States v. Lamb* (9th Cir. 1973) 529 F.2d 1153, 1156.) The coercive effect is particularly strong where the sole dissenter is removed by the court (here, Juror No. 5), which can only telegraph to the majority that its guilty position was approved by the court. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231, 239-241 [recognizing court's conduct more likely to be interpreted as coercive where jury is aware that the court knows the numerical breakdown of the division among the jurors.])

Here, the alternate juror who replaced Juror No. 5 was under pressure to go along with the group, particularly where the one recalcitrant member the court had removed from its body after substantial deliberations. (See, e.g., *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981 [trial court coerced a verdict by its actions that "sent a clear message that the jurors in the majority

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

This court has emphasized that the propriety of substitution of a juror during deliberations rests on the presumption that the new juror will participate fully in the jury's deliberation. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) The deliberations here, however, were skewed when the court effectively gave its approval to the majority by discharging the one juror who took issue with the majority's view during those deliberations.

The length of deliberations are a critical factor in determining whether the judgment was rendered in undue haste. Indeed, in *People v. Thomas* (1990) 218 Cal.App.3d 1477, the court specifically noted, "...this is not a case where the jury rushed to judgment after the alternate jurors were seated. In point of fact, the newly constituted jury deliberated for *almost three weeks* before reaching a verdict on some but not all of the remaining counts. The length of deliberations and the discriminating verdicts reached by the jury establish beyond doubt that defendant suffered no prejudice because of the court's action." (*Id.*, at p. 1488 (emphasis added).) Obviously, the same cannot be said for the deliberations here.

As the trial court noted, the guilt phase of the trial lasted nine days, consisted of the testimonies of 38 witnesses, and 130 items of evidence. (18 RT 2909-2910.) The total length of deliberations from the final reconstituted jury lasted barely two days, excluding the additional arguments of counsel. (4 CT 1025-1026, 1030-1031, 1036-1037.) By comparison, the original jury deliberated for almost the same period of time before the court received notice from Juror No. 4 that the jury was at an impasse. At that time, the trial court expressed its astonishment that deliberations could be at an end after such a

brief period of time, given the length of the trial and the significant amount of evidence that was available to consider. (18RT 2909-2913.) While the circumstances with the earlier jury reflected a deadlock, the likelihood that the reconstituted jury carefully reviewed and discussed all of the evidence and reached a verdict without any influence from the prior deliberations is equally astonishing.

The very short time frame in which the final reconstituted jury reached verdicts constituted nothing less than a rush to judgment. Under the totality of the circumstances presented in this case, particularly the coercive conduct of the majority jurors and their successful campaign to replace the lone holdout, "[a] replacement juror, no matter how novel or persuasive her argument for [] acquittal may have been, would have been hard pressed to overcome the trial court's implied admonition to the original jurors to hold their ground and convict." (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (dis. opn. of Nelson, J.).)

For these reasons, the verdicts here were improper. There is simply no evidence that will support respondent's invocation of the presumption of regularity. Instead the opposite is true. What evidence there is demonstrates that the jury verdicts here were coerced.

Accordingly, the trial court deprived appellant of his state and federal constitutional rights to a fair trial by an impartial jury, requiring reversal. Moreover, because the coercion of the guilt verdicts rendered them unreliable, it also deprived appellant of his right to due process under the Fifth Amendment, his right to a jury trial under the Sixth Amendment, and his right to a reliable death judgment under the Eighth and Fourteenth Amendments to the United States Constitution. For all these reasons and those set forth in his opening brief, the judgment must be reversed.

V.

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

In his opening brief, appellant established that the abstract of judgment must be amended to reflect the appropriate prison terms of life with the possibility of parole for counts 3, 4 and 6. (AOB 158-160.)

Respondent agrees and concedes this issue. (RB 62.) The abstract should be amended accordingly.

PENALTY PHASE ISSUES

VI.

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

SUMMARY OF APPELLANT'S ARGUMENT

CALJIC 8.85 was given in this case. The instruction is Constitutionally flawed because it fails to tell the jury which factors are mitigating and which are aggravating. This failure to designate allows jurors to make disparate judgments on similar factors and introduces an unacceptable level of arbitrariness in the capital sentencing process. (AOB 161-165.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent cites several cases where arguments similar to the ones appellant makes here have been rejected by this court. On that basis, respondent asserts that appellant's claim has no merit. (RB 62-63.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant conceded that this court has ruled adversely on claims somewhat similar to the one appellant presents here. Nevertheless, also in his opening brief, appellant explained why that reasoning does not apply to appellant's case and why appellant was prejudiced by the standard CALJIC 8.85 instruction given in this case.

Since respondent has chosen not to address the substance of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

VII.

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

SUMMARY OF APPELLANT'S ARGUMENT

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

Finally, the critical "so substantial;" language in the instruction that describes the effect of the aggravating factors is unconstitutionally broad. That language would allow a death judgment if the jury found death was

authorized under the statutes instead of whether it was appropriate under the circumstances. All of these problems effectively lower the prosecution's burden of proof below that is required by the Constitution. (AOB 165-176.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that all of appellant's arguments have at one time or another been rejected by this court. On that basis, respondent asserts that appellant's claim has no merit. (RB 63.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant conceded that this court has ruled adversely on claims somewhat similar to the one appellant presents here. Nevertheless, in his opening brief, appellant explained at length why that reasoning does not apply to appellant's case and why appellant was prejudiced by the standard CALJIC 8.88 instruction given in this case.

Since respondent has chosen not to address the substance of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

VIII.

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

SUMMARY OF APPELLANT'S ARGUMENT

In his opening brief, appellant argued that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of

these features have been rejected by this Court, appellant presented these arguments 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 virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants for the ultimate sanction. 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. (AOB 176-210.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that all of appellant's arguments have previously been rejected by this court and appellant does not present any compelling reasons for a new review of those issues. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument. (RB 63-65.)

ERRORS IN RESPONDENT'S ARGUMENT

In his opening brief, appellant acknowledged that this court has approved these statutes generally but explained in detail why the application of these statutes was not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

IX.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

SUMMARY OF APPELLANT'S ARGUMENT

Even if the errors in appellant's case standing alone do not warrant reversal, the court should 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.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to severance of charges where joinder is prejudicial and renders the trial fundamentally unfair, 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, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors. (AOB 210-212.)

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent urges that there were no errors in this case, thus there could be no cumulative error or prejudice flowing therefrom. (RB 65-66.)

ERROR IN RESPONDENT'S ARGUMENT

Respondent does not address the situation where this court might disagree and find one or more errors in the guilt or penalty phases of appellant's trial. Implicitly, therefore, respondent appears to concede that such errors may be cumulatively prejudicial.

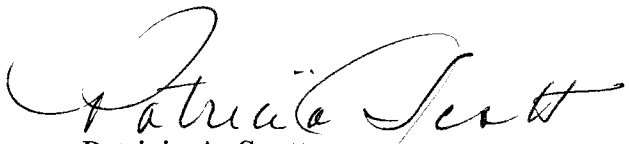
Regardless of any such concession, however, there is a more fundamental problem with respondent's argument. Heightened reliability is required in capital litigation. Reliability, however, is not the primary focus of respondent's answer. Nowhere in respondent's answer does it explain how the challenged procedures in this case contributed to the overall reliability of the guilt or penalty phase fact finding process or verdicts. Instead, respondent's partial insistence on forfeiture and harmless error provide little assistance to this court in its duty to ensure fundamental fairness.

The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. More important, individually and cumulatively, these errors undermined the reliability of the death verdict. Our system of justice relies on process. If the trial process is just and fair, then the result will be reliable. (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) If the process is fundamentally flawed, however, it cannot be redeemed by resort to waiver or harmless error analysis. As appellant explained in both his opening and reply briefs, the death penalty process in California is fatally flawed in statute and it was flawed in its application to this case. Therefore, appellant's conviction and his death judgment must be set aside.

CONCLUSION

For the foregoing reasons, and the reasons set forth in his opening brief, appellant respectfully requests this Court to reverse his convictions in full. Alternatively, appellant requests the judgement of death be reversed. If this Court should affirm, the abstract of judgment must be amended.

Respectfully submitted,



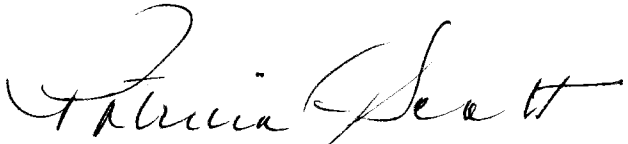
Patricia A. Scott
Attorney for Appellant
CRAIGEN LEWIS ARMSTRONG

CERTIFICATE OF WORD COUNT

I am the attorney for appellant Craigen Lewis Armstrong. Based upon the word-count of the Word Perfect X6 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 17,339 words. (California Rules of Court, rule 8.630 (b)(1)(A).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true.

Date: January 24, 2015



Patricia A. Scott
Attorney at Law
1042 Willow Creek Rd., #463
Prescott, AZ 86301
CA State Bar # 165184

S130659

PROOF OF SERVICE BY MAIL

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Patricia A. Scott, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 1042 Willow Creek Road, #463, Prescott, AZ 86301. On January 24, 2015 I served the within:

REPLY BRIEF FOR APPELLANT CRAIGEN LEWIS ARMSTRONG

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the US mail at Prescott, AZ addressed as follows:

Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-3600

Clerk of the Court
Criminal Division
210 W. Temple Street
Los Angeles, CA 90012
Attn. Hon. William R. Pounders

Office of the Attorney General
Attn: Eric J. Kohm
300 S. Spring Street
Los Angeles, CA 90013

California Appellate Project
Attn: Scott Kauffman
101 Second St., Ste 600
San Francisco, CA 94105

Office of the District Attorney
Attn. Lowell Anger,
210 W. Temple St
Los Angeles, CA 90012

Mr. Craigen Lewis Armstrong
V65496
San Quentin State Prison
San Quentin CA 94974

Franklin Peters
Attorney at Law
880 West First Street, Suite 302
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on January 24, 2015, at Prescott, Arizona.

Patricia A. Scott