In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KARL HOLMES, HERBERT McCLAIN, and LORENZO NEWBORN, Defendants and Appellants.	CAPITAL CASE Case No. S058734

Los Angeles County Superior Court Case No. BA092268
The Honorable J. D. Smith, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an indictment filed by the Los Angeles County Grand Jury, appellant Karl Holmes, appellant Herbert McClain, appellant Lorenzo Newborn, and codefendants Aurelius Bailey and Solomon Bowen[1] were charged as follows: in counts 1 through 3 with murder (Pen. Code,[2] § 187, subd. (a)); in counts 4 through 8 with attempted, willful, deliberate, premeditated murder (§§ 187, 664); and in count 10 with conspiracy to commit murder (§ 182, subd. (a)). Appellant McClain was charged in count 9 with attempted, willful, deliberate, premeditated murder. As to counts 1 through 8, it was alleged that appellant Newborn, appellant Holmes, and Bailey personally used a firearm. (§ 12022.5, subd. (a).) As to count 9, it was alleged as that appellant McClain personally used a firearm. (§ 12022.5, subd. (a).) As to counts 1 through 10, it was alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) As to counts 1 through 3, the following special circumstance was alleged: that appellants, Bowen, and Bailey intentionally killed the victims while lying in wait. (§ 190.2, subd. (a)(15).) As to counts 1 through 3, it was further alleged that the offenses constituted another special circumstance, multiple murder. (§ 190.2, subd. (a)(3).) (3CT 631-644.) Appellants pled not guilty and denied the special allegations. (3CT 760-762.)

The trial court granted the prosecution's motion to sever Bailey and Bowen, and trailed the trial for codefendants Bailey and Bowen to be heard upon the conclusion of appellants' trial. (4CT 1124.) Trial was by jury. (5CT 1202-1203.)

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[1] Aurelius Bailey and Solomon Bowen are not parties to this appeal.

[2] All future statutory references are to the Penal Code, unless otherwise noted.

The jury found appellants guilty in counts 1 through 3 of first degree murder, in counts 4 though 8 of attempted murder with premeditation, and in count 10 of conspiracy to commit murder. The jury also found that overt act #3 ("That at Pasadena Avenue and Blake Street, on October 31, 1993 at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip") was committed. The jury found that the murders were committed by appellants and that they intentionally killed the victims while lying in wait. The jury found that the convictions in counts 1 through 3 constituted multiple murder. The jury found appellant McClain guilty of attempted murder with premeditation in count 9, and found that he personally used a firearm in that count. The jury found that appellant Holmes personally used a firearm in counts 1 through 8; the jury found the remaining firearm allegations not true. (6CT 1590-1621, 1683-1702.)

The jury was unable to reach a penalty verdict. The trial court declared a mistrial. (7CT 1863, 1888.) Following the penalty phase retrial, the jury fixed the penalty for appellants at death. (8CT 2228-2230, 2234-2236, 2240-2242, 2290-2291.)

Appellants were each sentenced to: death on counts 1 through 3, life in prison on counts 4 through 8, and 25 years to life on count 10. Appellant McClain was additionally sentenced to life on count 9, plus a consecutive term of five years for the firearm enhancement. All the counts were ordered to run consecutively, except that count 10 was stayed as to appellant McClain. As to appellant Holmes, the firearm enhancements were stayed. Appellants Newborn and Holmes were each given presentence custody credit of 1,687 days, consisting of 1,125 actual days and 562 good time/work time days. Appellant McClain was given presentence custody credit of 1,650 days, consisting of 1,100 actual days

and 550 good time/work time days. (9CT 2348-2405; 1Supp. CT III 165-268.)

This appeal from the judgments of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

1. McClain's attempted murder of Crip Robert Price (Count 10)

During the early morning hours of October 28, 1993, appellant McClain asked Robert Price for a cigarette as Price was leaving his grandmother's house at the Community Arms Apartments, located near Orange Grove and Marengo in Pasadena. (14RT 1154; 31RT 3161-3162.) Appellant McClain, a Parke Street ("P-9") gang member, had previously been with another P-9 gang member (Majhdi Parrish), but at that time was alone. (31RT 3162-3163, 3194, 3201; see 17RT 1539; 19RT 1843-1844.) After Price handed appellant McClain a cigarette, appellant McClain said, "Thank you Blood." (31RT 3163.) Price was not a Blood gang member; he belonged to the Raymond Crips. (14RT 1161; 31RT 3163.) Appellant McClain pulled a .380 caliber gun out from his waistband and then shot Price in the face. As Price ran, he was shot twice in the "butt." (31RT 3161-3162, 3164, 3172.) Appellant McClain fired more than three times. (31RT 3166.) Price had previously seen appellant McClain at the Community Arms. They had not spoken and Price had not threatened appellant McClain in the past. (31RT 3167.)

After Price was shot, he learned of appellant McClain's name "from the street." (31RT 3168.) As Walter Carson drove Price to the hospital, Price described the person who shot him as a P-9 and said, "It was that punk motherfucker with the long jericurl and big lips." (31RT 3193-3194.) That night, the police contacted Price at Huntington Memorial Hospital. Price did not tell them who shot him and said that he did not know who shot him because he wanted to shoot appellant McClain. (31RT 3169.)

At a later time, Price told Detective Carter what truly happened and selected appellant McClain's photograph from a six-pack photographic lineup. (31RT 3169-3170, 3193, 3208-3211.) Price testified before a grand jury that he was shot by appellant McClain on October 28, 1993. (31RT 3171.) At trial, Price had no doubt that appellant McClain shot him. (31RT 3168.)[3]

2. The shooting of Fernando Hodges on the evening of October 31, 1993

At approximately 7:20 p.m., on October 31, 1993, Pasadena paramedics Aleta Bergstrom and Chuck Legg responded to a call and arrived at the Community Arms. Police and persons were running around inside the complex. The paramedics were instructed to stay outside the iron gates until it was safe to enter. (14RT 1138-1139.) Four or five minutes later, they were allowed to enter near the basketball courts. (14RT 1140.) Fernando Hodges was on the basketball court. He was near death, dying from multiple gunshot wounds. (14RT 1141; see RT 1143; Peo. Exh. 2 [board containing two photographs].) His head was bleeding. (14RT 1142.)

3. The gathering at Huntington Memorial Hospital after Hodges's shooting

Hodges was taken to Huntington Memorial Hospital at approximately 7:45 p.m. Some young women and young men dressed in baggy attire

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[3] Price received $200 for his medical injuries from the Pasadena Police Department after he testified in front of the grand jury. (31RT 3171.) Price had been convicted of: an assault with a firearm in 1983, second degree burglary in 1986, sales of narcotics in 1986, receiving stolen property in 1992, and corporal injury to a cohabitant in 1993. Prior to testifying at the trial, he had been in jail for a misdemeanor. While he was in jail, he saw appellant McClain, who told Price not to take the stand against him. (31RT 3172-3174.) The prosecution promised to relocate Price's family if he testified. (31RT 3175.)

arrived at the hospital. They appeared to be friends or family of Hodges and were upset. (14RT 1143-1145.) Bowen, a close friend of Hodges, went to the hospital. (18RT 1812-1813.) The paramedics notified hospital security because they believed that the shooting was gang-related and because of the crowd arriving. (14RT 1146.)

Between 7:41 and 7:45 p.m., Huntington Memorial Hospital security officer Robert Taylor went to the emergency room after receiving information that there was an incoming trauma involving a gunshot wound, that it was gang-related, and additional visitors were arriving with the gunshot victim. (15RT 1189, 1191, 1193, 1246, 1249; see Peo. Exh. 8 [Officers' Daily Log].) Ten to fifteen minutes later, persons arrived at the emergency room waiting area. They said they were related to the patient and attempted to gain access past the triage desk and into the emergency room. (15RT 1193, 1251.) Only patients and those persons authorized by the medical staff were allowed in the emergency room. Persons who were not allowed in the emergency room were primarily in the reception area or outside smoking. (15RT 1247-1248.) According to the Huntington Memorial Hospital Officer's Daily Log, at 8:45 p.m., there was the following notation: "Crowd control due to GSW in room 6. Friends and family in the waiting area. Code 4." (15RT 1250-1251.)

A second group of 20 to 30 persons gathered outside the emergency room. They did not go into the emergency room and did not ask about the patient. Persons from the first group went outside to talk with the second group. A person in the second group appeared to be in charge. Persons in the second group wore hooded sweatshirts with the hoods up and baggy attire. (15RT 1194-1195, 1253-1254.) They appeared to be gang members. (15RT 1229.) Taylor thought it was unusual for the second group not to enter the hospital. It appeared that they were at their location for another purpose. (15RT 1196.) They were unusually quiet. (15RT 1254.) The

second group remained outside the hospital for at least an hour. (15RT 1226, 1255.)

4. Appellant Newborn's and Bowen's visit to Willie McFee's residence at Pasadena and Blake on October 31, 1993, in search of Dion Nelson

During the early evening hours of October 31, 1993, appellant Newborn went to Willie McFee's[4] home, located at 825 North Pasadena Avenue on the corner with Blake Street. (17RT 1542; 23RT 2373-2374, 2390.) Appellant Newborn said that he went to McFee's house because he saw his brother Wendell Jefferson's car outside McFee's home. (23RT 2375.) Jefferson spoke with appellant Newborn outside. (23RT 2376,) Jefferson entered the home and told McFee that appellant Newborn wanted to speak with him. McFee went outside. Appellant Newborn and Bowen were outside. McFee spoke with appellant Newborn. Appellant Newborn was looking for a person named Dion Nelson, also known as Crazy D, who lived near McFee. (20RT 2111-2112; 23RT 2378-2380.) Appellant Newborn wanted to know if McFee knew where Crazy D lived. (23RT 2381.) Appellant Newborn, who was upset and crying, said that his friend Hodges had been killed. Crazy D was a Raymond Crips gang member. (23RT 2382-2384.) Appellant Newborn and Bowen appeared to be armed because they had bulges under their clothes. McFee said he was sorry to hear about appellant Newborn's friend. (23RT 2384.) McFee made clear that he was not a gang member. (23RT 2385.) Appellant Newborn and Bowen did not appear to believe that McFee did not know where Dion lived. Bowen "mad-dogged" McFee. (23RT 2386.) Appellant Newborn and Bowen walked away toward the railroad tracks. (23RT 2412-2413.)

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[4] McFee had two felony convictions for drug possession. During the trial, he was awaiting sentencing for a case in which his sentence could be six to nine years. (23RT 2410.)

Jefferson and James Riley left McFee's home. McFee saw four males running down the street toward the railroad tracks. (23RT 2386, 2389.) The four men wore sweatshirts with hoods. (23RT 2397.) The four men were approximately three car lengths away from appellant Newborn and Bowen. (23RT 2414.)

McFee asked Jefferson and Riley what was going on. Jefferson's grey BMW was behind Riley's prime grey Cutlass. They responded that they did not know. (23RT 2398-2399.) McFee then said, "They're on a mission," meaning that they were after someone. (23RT 2399, 2410.) McFee went into his house and then called his friend Michael Ray and told him to advise Dion to look out. (23RT 1400, 2402.) They spoke on a three-way conversation. (24RT 2486.)

Dion said, "thank you for calling me," and then McFee heard several gunshots. The shots sounded as if they were coming from the railroad tracks. (23RT 2402-2404.) McFee heard a second set of shots from different weapons and from a different location -- Crazy D's home. (23RT 2403, 2406; 29RT 3041-3042.) The gunshots sounded like "crossfire" as if people were shooting at each other. A shot was then fired at McFee's house. (23RT 2405-2406.) Jefferson and Riley were still outside when the shots were fired. (23RT 2415, 2418.) They "hit the pavement." (23RT 2400.)

Approximately five minutes had passed from the time McFee saw appellant Newborn and Bowen in front of his house and the time he heard gunshots. (23RT 2411.) McFee's cousin and roommate, Charles Baker, found a casing almost directly in front of the house by the curb and another casing in the yard across the street. (29RT 3043, 3045.)

5. The shooting on Wilson Street on October 31, 1993

On October 31, 1993, Stephanie Robinson had a birthday party to celebrate her thirteenth birthday. She had invited about 20 persons, but 40 people arrived at the party. She lived on Allen Street, near Walnut and Colorado. (15RT 1236-1237; 16RT 1461.) Brothers Stephen and Kenny Coats, Edgar Evans, Reggie Crawford, Derieus Halliburton, brothers Lawrence and Antwaun Ayers, Mickey Polk, Antone Prince, Robert Nolden, and Lloyd Summerville attended the party. Nothing unusual occurred at the party.[5] Robinson asked guests to leave her home around 9:15 p.m. (15RT 1240-1241, 1243, 1288-1290; 16RT 1461-1462; 18RT 1754-1755; 19RT 1976; 20RT 2008, 2021; 31RT 3224-3225, 3227.) At approximately 10 p.m., Kenny, Stephen, Eddie, Reggie, Derieus, Antwaun, Lawrence, Mickey, Antone, Robert, and Lloyd left Robinson's home. They walked as a group toward the Coatses' home on Wilson Street. (15RT 1242, 1290-1291; 16RT 1462-1463; 18RT 1754; 19RT 1977; 20RT 2010.)

Some of the boys went trick or treating. (15RT 1309; 18RT 1754-1755; 19RT 1990; 31RT 3229; see 16RT 1493.) The boys stopped outside George's Market at the corner of Villa and Wilson streets. Some of the boys called their mothers on the pay phones. Kenny, Eddie, and Antone played with the pay phones. Reggie was walking in the street when he was almost hit by a Chevrolet Celebrity automobile. He jumped back on the curb, raised his arms, and said, "What's up?" He did not yell anything at

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[5] Stephen Coats, Kenny Coats, Edgar ("Eddie") Evans, Reggie Crawford, Derieus Halliburton, Lawrence Ayers, Antwaun Ayers, Mickey Polk, Antone Prince, Robert Nolden, and Lloyd Summerville are referred to by their first names throughout this brief for clarity because there are at least two sets of brothers and witnesses referred to the boys by their first names throughout the trial.

the car. (15RT 1291-1294; 16RT 1463-1464; 18RT 1755-1756; 19RT 1978; 20RT 2010; 31RT 3228-3229.)

Four or five other cars (including a Maxima, a Tempo, a Cadillac, and a white Camaro), that did not appear to be connected with the Celebrity, passed the boys. They were "packed full" of Black males. These four or five cars and their occupants appeared to be together. (15RT 1296, 1310-1311, 1334; 19RT 1979, 1996-1997; 20RT 2001-2002, 2012-2013; 31RT 3235.) The occupants "threw up" P-9 signs. (31RT 3231.)[6] The people in a "tan" car and a red car were "staring awfully hard" at the boys.[7] (19RT 1980; 20RT 2012.) The third car was new and a gray color. (31RT 3237.) Robert and Kenny felt uncomfortable about the staring. One of the passengers in the tan car was dark-skinned, had hair trimmed on the sides and curly on top, and gave a mean look toward Robert. (19RT 1980; 31RT 3236.) One of the passengers in the back seat had "sort of" long hair. (31RT 3235.) The cars traveled not very fast in the same direction as the boys. (15RT 1297; 19RT 1981; 20RT 2013; 31RT 3232.) The cars

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[6] Kenny testified that the second of these cars, a burgundy four door car, swerved close to the curb, causing Reggie to jump back and throw his hands up. (31RT 3231, 3233.)

[7] Robert described the gray car in People's Exhibit 21 as "tan." The car in People's Exhibit 21 (a gray Tempo) looked familiar to him because it was compact and tan. (19RT 1996.) Appellants and Fernando Hodges attended a party given by DeSean Holmes on October 15, 1993. (17RT 1537-1538.) A gray Ford Tempo was also at the party. Darryl Johnson and Felton Leagon gave the Tempo to DeSean Holmes in November 1993. (17RT 1538; see 17RT 1571; 18RT 1711; Peo. Exh. 21 [board containing two pictures of a car].) The police later conducted tests on the gray Tempo (see Peo. Exh. 21 [photograph]). They fingerprinted the car and papers collected from the car. Fingerprints were lifted from the passenger visor mirror and the rear-view mirror. (28RT 2935-2936.) A fingerprint from the rear-view mirror was matched to DeSean Holmes's right thumb print. (31RT 3154-3155.) A fingerprint from the registration form from the car matched a fingerprint of Lionel Edward Evans. (31RT 3158.)

continued to go straight, and then two of the cars turned on Mentor or the street after Catalina and headed toward Orange Grove. (31RT 3239.)

Three minutes later, the boys left George's Market and continued to walk as a group. (15 RT 1297.) Mickey, Robert, and Derieus left the group to go to Mickey's aunt's house. The other boys talked to one of Reggie's friends and her boyfriend who were in a car parked on the street. At approximately 10:30 p.m., Deborah Bush, Kenny and Stephen's mother, drove by and stopped to talk with Stephen and Kenny. (15RT 1298-1299; 16RT 1467-1468, 1489-1490; 18RT 1757-1758; 19RT 1982; 20RT 2014, 2024; 31RT 3241, 3243.) Bush offered the boys a ride home. Stephen laughed and said, "No, your car is so slow I can probably beat you home." (16RT 1491; see 31RT 3245.) Bush drove away. Their home was approximately 30 to 45 seconds away by car. (16RT 1492.)

Reggie, Stephen, and Lawrence sang a song called, "Gangster Lean." When they stopped singing, Kenny heard someone with a deep voice say, "Now, Blood." (31RT 3243, 3258.) Reggie was wearing a black bandanna tied around his head. Antwaun had a blue bandanna in his pocket. The group was fired upon on Wilson Street. (15RT 1300; 16RT 1466-1467, 1471, 1474-1475; 18RT 1757, 1759; 31RT 3237.) There was a single boom and then approximately 20 shots. (15RT 1301, 1304; 16RT 1471; 18RT 1771; 20RT 2014; 31RT 3250.)

Roger Boon heard rapid fire from one gun and then slow, timed shots from a second gun. The first round of shots sounded like they were from a nine-millimeter semiautomatic weapon. He also saw muzzle flashes. The second gun sounded like a .38 caliber revolver. (18RT 1772-1773, 1795; see 19RT 1986; 23RT 2403; 31RT 3257.) Kenny saw the outline of about two persons from where he heard the gunfire, near a fence. The taller person had braids and was more muscular than the shorter person. The two ran toward Orange Grove. (31RT 3249, 3255-3256.) The area where the

fence was located was eight to twelve inches higher than the level of the sidewalk. (31RT 3270.) Eddie grabbed his stomach and said, "Mama." (31RT 3251.) He went low to the ground and crawled away. (31RT 3251.) Little blue sparks that looked like firecrackers passed Lloyd's foot. The sparks were coming from bushes on the same side of the street as the boys. Stephen and Reggie fell. Lawrence ran to a hiding place and heard more gunshots. When the shots stopped, he emerged from his hiding place and called out to everyone. He saw someone in a light-colored top on the sidewalk. He heard more shots and ran back to his hiding place. He was shot as he was returning to his hiding place. Lloyd ran away from the sparks to a house that had a gate. Antwaun hopped a gate and joined Lloyd. Antwaun had been shot in his hand. (15RT 1302-1304, 1321; 16RT 1472-1474, 1477; 18RT 1760-1764; 19RT 1984, 1993; 20RT 2015; see Peo. Exh. 14 (photograph).)

Robert, Mickey, and Derieus heard the shots, ran away from the shots, and then returned to their friends after the shooting stopped. Lloyd and Antwaun returned after the shooting to where they had been and saw Reggie's friend and her boyfriend, who were screaming. Stephen and Reggie were on the ground. (15RT 1302-1304, 1321; 16RT 1472-1474, 1477; 18RT 1760-1764, 18RT 1787-1789; 19RT 1988; 20RT 2016-2017, 2024-2025; see Peo. Exh. 14 (photograph).) Kenny screamed, "They shot my brother. Stephen. Let me to him." (15RT 1308-1309.) Eddie was on some stairs, had been shot, and was bleeding. (15RT 1309; 16RT 1477; 18RT 1765; 19RT 1989.) He tried to talk and called his mother's name. (19RT 1992.) Lawrence had been shot in the leg. (15RT 1321; 18RT 1765; 19RT 1987.) Antone had been shot in the right thigh. (15RT 1322; 16RT 1477; 22RT 2215-2216.)

When Antwaun went to Reggie, he removed the bandanna from Reggie's head. Antwaun took the bandanna that had been inside his pocket

and Reggie's bandanna and threw them in a bush. (16RT 1475-1476; see Peo. Exh. 13-C & J [photographs].) Lloyd ran to a house and asked the occupant to call the police. He then called his mother. He and his mother went to the police station. (15RT 1310.)

Brenda Bush, Kenny and Stephen's aunt, had been at Deborah Bush's home for three minutes when she heard the gunfire. Brenda Bush ran down the driveway and looked southbound on Wilson, the direction from where she heard the gunshots. She saw two cars turn from Emerson onto Wilson. One of the cars was red, and the second was light-colored (white, silver, or beige). The cars did not have their headlights on and were traveling rapidly. (25RT 2628-2632.) Both cars had more than one person in them. (25RT 2634.)

Deborah Bush heard the gunshots and ran toward the boys, yelling Kenny's and Stephen's names. She worked for the Pasadena Police Department and had been trained in crime scene investigation and first aid. (16RT 1493-1495.) When she arrived at the crime scene, she noticed two persons "down." (16RT 1495.) The first person, Reggie, was dead. She realized that the second person was her son Stephen, who had a bullet in his head and "was already gone." (16RT 1496.) Bush's daughter covered Stephen with a jacket. (16RT 1497; 31RT 3253; see Peo. Exh. 16-A & 16-B.)

The police arrived at the scene. (18RT 1794; 31RT 3254.) After the ambulances arrived at approximately 10:42 p.m., Boon described the cars that he saw to the police. (18RT 1794; 20RT 2043-2044; 22RT 2212.) Eddie had a gunshot wound to the chest. (20RT 2045.) He did not have a pulse, was not breathing, and was very near death. (20RT 2047, 2051.) Antone was taken to Huntington Memorial Hospital. (22RT 2216.) The police collected Eddie's clothing from Huntington Memorial Hospital. (24RT 2498, 2501.)

Eddie was 13 years old. (28RT 2900.) He was approximately five feet eight inches tall and weighed 128 pounds. He had a gunshot wound on his left chest, which was determined to be the cause of death. (20RT 2118-2119, 2121.) Based upon the organs that the bullet had gone through, his body was bent when he was shot. (20RT 2122.)

Reggie was 14 years old. (28RT 2900.) He had five gunshot wounds, one of which was fatal. His blood did not have any alcohol or common drugs of abuse. (27RT 2882, 2886, 2891.) A bullet jacket was laying in the folds of his T-shirt and underneath trousers at his left hip. There was a small hole in the trouser at that point. (28RT 2905-2906.) There appeared to be a bullet strike impact point in the cement underneath Reggie's hip, where the slug was located. (28RT 2907.) All of his wounds appeared to have come from his left, except for one, which Reggie appeared to have received when he was on the ground. (27RT 2891-2892.) He could have been struck by as few as three rounds and as many as five rounds. (27RT 2895.)

Stephen was 13 years old. (28RT 2900.) On November 3, 1993, the Los Angeles County Coroner's Department conducted an autopsy on Stephen. He had a gunshot wound to the head. (23RT 2361-2362.) In his upper thigh region, Stephen had another gunshot wound, which was not fatal. (23RT 2363, 2366.) Portions of bullets were removed from behind his jawbone and from his leg. (23RT 2364-2365.) There were no drugs detected in Stephen's blood. (23RT 2368.) The cause of death was multiple gunshot wounds. (23RT 2366.)

6. Other eyewitness accounts of events surrounding the shooting on Wilson Street

Around 10 p.m., Lillian Gonzales and her boyfriend Gabriel Pina were walking his dog. As they walked on Mentor near Emerson, they noticed two sets of two cars drive quickly on Mentor. The first two cars

turned right on Orange Grove. The occupants of the four cars were Black. (22RT 2221-2222; 25RT 2636-2640.) Pina commented, "Gee, you know, they're going pretty fast." (22RT 2223.) The cars were going at least 45 mph in a 25 mph zone. (25RT 2639.) As Pina and Gonzales walked on Catalina, the lead car of the four cars previously seen on Mentor drove in the middle of the road and headed toward them. It was a newer two-door import with tinted windows. (25RT 2646.) The car pulled up to Pina and Gonzales, reversed back toward Emerson, and then approached them again. The driver, appellant McClain, leaned forward toward the windshield. (25RT 2647-2648; see 25RT 2666; 26RT 2782.)[8] Two cars of the original four cars stopped along the curb and honked their horns.[9] The driver said to five or more Black males who were walking out of the driveway of the house at the corner of Catalina and Emerson, "Come on. Let's go. Hurry up." (22RT 2224-2227; 23RT 2288; 25RT 2655.) Ten to fifteen people were standing outside of the cars. (25RT 2654.) Some of the persons appeared to be wearing costumes. One costume was half black and half white, like a joker. (25RT 2676.)

Jessica Ramirez, who lived near the corner of Emerson and Catalina, also saw the two stopped cars and black males. The green car had its motor running. (23RT 2286-2288.) The persons who had been on the driveway entered the two cars. (22RT 2228.) One of the persons was dressed in all

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[8] Later, Pina saw on television that persons had been apprehended for the Halloween murders. He recognized one of the pictures as that of the driver of the lead car. He contacted the police and told them he had heard that some of the suspects had been caught, and that he wanted to see if he could select the right person. Pina was unable to describe the driver of the lead car, but said that if he saw him again, he would recognize him. In December 1993, at a police station, he then selected photographs of appellants Holmes and McClain as the persons he saw. (25RT 2650, 2653-2654, 2663-2664; 26RT 2777-2778 .)

[9] Pina saw approximately four cars parked. (25RT 2645.)

white. (22RT 2229.) Two cars drove away.[10] (22RT 2230; 25RT 2657-2658.)

Gonzales heard the gunshots 15 to 20 seconds after seeing the two cars drive away from the corner house at Emerson and Catalina. (22RT 2231.) Four to five seconds after the gunfire stopped, Gonzales looked down Wilson Street and saw an African-American male wearing a trench coat run from Wilson and enter a Nissan Sentra. (22RT 2233-2234.) Pina also saw the man wearing a trench coat, whom he later identified as appellant Holmes, enter the second car, a white four-door car that looked like the one in People's Exhibit 21. (25RT 2660-2661, 2665, 2679-2680; 26RT 2782, 2789.) The Sentra left. (22RT 2234.) Pina saw two or three persons, including the driver of the lead car, running around the corner house gate at Wilson and Emerson and into the two cars that had backed onto Emerson. (25RT 2659-2660.)

Janet Takacs, who lived at 555 North Wilson Street, heard the chain fence for her driveway rattle after hearing the gunshots. (29RT 3074.) She looked out the front side of her house and saw a young Black male leave her front yard. He headed in a northeasterly direction. (29RT 3075.) She called 911. From the opposite side of the house from where she heard the chain link fence rattle, she heard someone say, "I've been shot. I've been shot." (29RT 3076.)

Joe Colletti lived at 1023 Emerson Street. (19RT 1902.) After he heard the gunshots and screams, he looked out his window and saw a group of four to six persons walking on his side of Emerson. The group turned at the corner of Catalina and got into a small, dark car parked there. Colletti

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[10] Ramirez saw the green car leave and three persons who were near the black car walk around the corner on Emerson. (23RT 2289.) Of the four cars that Pina saw, he saw two proceed in reverse onto Emerson. One car had already left, and one car remained parked. (25RT 2658.)

continued to observe the group from a window that faced Catalina. (19RT 1901, 1904-1905, 1913.) Colletti believed that the group was all male. (19RT 1906.) He believed that they were Black based on their vocal tones. (19RT 1913.) One of the persons wore something that appeared to be white or very light-colored. (3RT 1911.) The next morning between 6:30 and 6:45 a.m., Colletti described his observations to Pasadena Police Sergeant Michael Korpal. (19RT 1909, 1912.)

Approximately 24 to 60 seconds after the gunshots ended, Roger Boon, Kim Rea, Kristen Davis, Richard Gazely, and another, who were handing out Halloween candy at Bill Voorhes's home that was six or seven houses down the street from the shooting, saw two cars approaching. (18RT 1774, 1776, 1778, 1786; 22RT 2177-2179, 2181.) Rea noticed the cars because they turned on their headlights at Wilson Street after they were already moving and were moving slowly. (22RT 2184.) Boon noticed the cars because their high beams were on. (18RT 1777.) They appeared to be traveling together. The first car looked like a maroon or dark red Nissan 240ZX. The other car looked like a Nissan or Toyota four-door model. It was gray or two-toned and could have been a gray Ford Tempo.[11] The driver's side window of the second car was open. (18RT 1778-1779; 22RT 2188.) (18RT 1780-1781; 22RT 2188-2189; see Peo. Exh. 21 [photograph].) Boon believed that the cars were linked with the shootings. (17RT 1781.) They traveled from the direction where the shooting had occurred. (22RT 2181-2182.) The first car had a driver, a front passenger, and three passengers in the back seat. Boon thought the second car had two persons in it. (18RT 1782.) Rea thought that the second car had approximately four Black males between around 20 or 21 years old. (22RT

[11] Rea was unfamiliar with what kind of car the Tempo was. She guessed that it was a foreign car. (22RT 2200.)

2188, 2201.) As the first car passed by Boon and Rea, the driver, who was a Black male, gave a thumbs up. (18RT 1783; 22RT 2186-2187.) The driver's side window was open. (22RT 2186.)

7. Forensic evidence

Shell casings were fairly scattered within a radius under a tree at the crime scene on Wilson Street. (20RT 2079, 2086; see Peo. Exh. 32 [diagram].) On November 1, 1993, the police department collected from the crime scene: a Styrofoam cup from next to the curb at 612 North Catalina, clear candy wrappers in the parkway area, chewing gum wrappers, a live-round of .38 special wad cutter ammunition, 19 nine-millimeter shell casings, and a rubber Halloween mask. (20RT 2081-2084, 2086, 2502; 24RT 2502-2503; see Peo. Exhs. 33, 34 [boards containing photographs].) Except for a projectile collected from an air-conditioning unit on September 20, 1995, the remaining evidence items were collected on November 1, 1993. (20RT 2086, 2502.) Six expended shell casings were found in front of 569 North Wilson Street. (24RT 2509-2510.) Live bullet rounds were in the front yard of 569 North Wilson. There were candy wrappers and suckers along the driveway of 569 North Wilson. There were shell fragments along the sidewalk in front of 569 North Wilson. (24RT 2515.)

Two of the deceased victims were in front of 569 North Wilson. (24RT 2516, 2525.) The police collected 69 items from the area of Wilson and Emerson Streets in Pasadena. (24RT 2519; Peo. Exh. 49 [property log].) A bullet hole went through a window at 574 Wilson Street. (24RT 2523.)

The police unsuccessfully attempted to lift latent fingerprints from the shell casings, the live rounds, the candy wrappers, the fence post, and the candy boxes. The police successfully lifted a latent print from a gum wrapper located near 569 North Wilson. (20RT 2100; 24RT 2527-2529)

Usable prints are not usually found on expended casings. (27RT 2852, 2861.) The police selected three spots to remove fence railing because it was determined that the suspects stood in the front yard of 569 North Wilson. (28RT 2931-2932.) There were no latent prints on three long pieces of pipe from a chain link fence. (27RT 2859-2860.) It is unusual to be able to obtain a fingerprint from a surface like that of the pipes from the chain link fence. (27RT 2861.) The police also removed sections of the fence north of the location where the casings were found at 577 North Wilson. (28RT 2932.)

Fingerprints were lifted from a gum wrapper (item 53). (28RT 2929-2930; 31RT 3145.) Fingerprints were also obtained from one Big Red gum wrapper (Item 81). (28RT 2930.) The police collected four trick or treat bags that were found near Reggie. (28RT 2934.) The police compared the fingerprints with those of appellants, Bowen, Ishmael Offutt, Bailey, Darryl Johnson, DeSean Holmes, and Ernest Holly. The fingerprints did not match any of their fingerprints. (31RT 3146, 3148-3150.) The fingerprints from the two gum wrappers did not match. (31RT 3151.) One latent fingerprint was submitted for identification, but no matches were found. (31RT 3150-3151.)

Seven plaster shoe casts were obtained from Emerson Street. (24RT 2500, 2504.) FBI Agent Bill Bodziak, an expert in shoe print analysis, examined the shoe casts. Item 19 was an L.A. Gear Street Hiker Low shoe imprint in a children or youth size. He was unable to determine the shoe design or size for items 20, 47-A, and 49. Items 40, 41-A and B could not be associated with any footwear design, but were neither Buffalino nor Ellesse shoes, and were well below the adult-size range. Item 47-B is a cast of a partial heel impression. Agent Bodziak was unable to determine the brand name or manufacturer of the shoe that made the impression, but the

relatively large size of the heel impression indicated an adult size. (29RT 3078-3079.)

Sergeant Korpal was assigned to investigate the murders. (16RT 1432-1433.) After receiving information, Sergeant Korpal and Investigator Uribe inspected the damage to an air-conditioning unit at Willie McFee's and Charles Baker's home. (20RT 2097-2099.) On September 20, 1995, the Pasadena Police Department collected a projectile from an air-conditioning unit on a house on the other side of the road, located at 825 North Pasadena Avenue. (20RT 2080; 23RT 2404; see 20RT 2411.)

Los Angeles County Sheriff's Deputy Dwight Van Horn testified as a firearms examiner. (26RT 2795.) A semiautomatic pistol ejects both the bullet and the cartridge case when fired. (26RT 2796.) In contrast, a cartridge case remains in a revolver. So, a revolver can be fired six times, and then the spent cartridge cases must be pushed out of the ejected rod. A firearms examiner can determine whether bullet fragments and expended portions of bullets were fired from the same gun. (26RT 2800.) When a nine-millimeter is fired, the casing is ejected to the right and the rear in a majority of semiautomatic firearms. (27RT 2839.) Deputy Van Horn examined the evidence in the case. He grouped the evidence into types of ammunition. (26RT 2801-2802.) People's Exhibit 60 contained 35 individual envelopes of casings, bullets, and bullet fragments that were all found at the crime scene on Wilson. (27RT 2823.) People's Exhibit 61 contained 21 individual envelopes of casings, bullets, and bullet fragments that were found at Pasadena and Blake. People's Exhibit 62 contained two coroner's envelopes containing ballistic evidence retrieved from Reggie's autopsy. People's Exhibit 63 contained three coroner's envelopes containing ballistic evidence retrieved from Stephen's autopsy. (27RT 2824-2825.)

Three live .38 caliber rounds and 15 expended nine-millimeter shell casings were found at Wilson Avenue. (27RT 2830, 2846.) An additional expended nine-millimeter shell casing (Item 37) was found in the roadway three feet east of the curb at 561 North Wilson Avenue. (27RT 2832; see 26 RT 2806-2807.)

Three expended .38 or .357 caliber bullet fragments were individually found: (1) on the sidewalk west of 561 North Wilson (Item 25); (2) in the southbound lane south of 555 North Wilson (Item 35); and (3) in the corner of the living room at 574 North Wilson (Item 46). (27RT 2831-2833, 2848.) Four expended nine-millimeter bullet fragments were individually found: (1) in the northbound lane south of 554 North Wilson (Item 36); (2) on the driveway at 561 North Wilson (Item 29-A); (3) in the middle of the roadway in front of 554 North Wilson (Item 34); and (4) at the base of the steps at 574 North Wilson (Item 32). (27RT 2831, 2833, 2846.) Ten other bullet fragments were found in the area. (27RT 2834-2835 [Items 28, 31, 33, 54, 55, 57].)

A live .38 caliber round was found in the driveway entrance at 830 North Pasadena Avenue. Also at that location, an expended nine-millimeter shell casing was found in the driveway entrance and 18 expended nine-millimeter casings were found in the front yard. (27RT 2830.) A nine-millimeter bullet jacket fragment was recovered from the air-conditioning unit at 825 North Pasadena Avenue (Item 130). (27RT 2834.)

The live round found on Pasadena Avenue (Peo. Exh. 61 [item 78]), as well as the three live rounds collected from Wilson Avenue (Peo. Exh. 60 [items 2-4]) were all .38-special wad cutter made by PMC Company. (26RT 2802-2803.) That ammunition was made for use in a revolver. (27RT 2846.)

With two exceptions, all the nine-millimeter casings found at both Wilson Avenue and Pasadena Avenue were fired from the same nine-millimeter firearm. One casing found on Wilson Avenue (Item 37) was fired from a different gun, and testing on one casing found at Pasadena Avenue (Item 89) was inconclusive. (26RT 2803-2804, 2814-2815; 27RT 2836-2837, 2843.) The nine-millimeter bullet fragment (Item 130) found in the air conditioner on Pasadena Avenue was fired from a different gun from the ones at Wilson Avenue (Items 32, 36, 58). (26RT 2817; 27RT 2838.)

An expended bullet recovered from Reggie's body during the autopsy was fired from the same firearm as an expended bullet found under the right shirt collar and above the right shoulder of Reggie (Item 59). (26RT 2806-2807; 27RT 2831.) A bullet recovered during Stephen's autopsy was fired from the same firearm that fired the bullet found in the living room at 574 North Wilson (Item 46) and the expended bullet found on the sidewalk west of 561 North Wilson (Item 25). (26RT 2806-2807, 2815; 27RT 2848.)

The bullets recovered from Reggie's and Stephen's bodies were both .38 or .357 caliber, but they were fired from different guns. (26RT 2808-2809; 27RT 2849.) Similarly, the expended bullet found under Reggie's collar (Item 59) and the one found at the corner of the living room of 574 North Wilson (Item 46) were fired from two different guns. (27RT 2847-2848.) However, both guns were revolvers. (27RT 2848.)

An expended nine-millimeter bullet fragment (Item 58) was found in the T-shirt above the left buttocks of Stephen. (27RT 2833.) It was fired from the same gun as the nine-millimeter bullet fragments found at the steps of 554 North Wilson (Item 32) and the one found in a traffic lane at 554 North Wilson (Item 36). (26RT 2812; 27RT 2846-2847.)

Based on all of the evidence that Deputy Van Horn examined, he determined that one nine-millimeter gun was used to fire all of the casings, except for one. There were two .38 or .357 firearms used. (26RT 2816-

2817.) Deputy Van Horn was unable to make any positive determination as to the caliber of some bullet fragments because they were too small. (27RT 2827.)

8. Police investigation

Approximately three days after the shootings, the police gave to the media descriptions of the suspects, including that one suspect had a ponytail. (31RT 3269.) The police did not include the information that the bandannas were found at the scene. In Pasadena, the colors of the bandannas signified certain gangs. (32RT 3299.)

A $40,000 reward fund was established. During the police investigation, persons came forward merely to get the reward. The information was recorded either during a taped interview or an officer would take notes. Sergeant Korpal assessed the information given and determined whether the information was credible. (31RT 3271.) If there was a viable threat to a witness, the Pasadena Police Department prepared paperwork for relocation and the paperwork would be evaluated. (31RT 3272-3273.)

On December 22, 1993, Pasadena police interviewed Bowen's girlfriend, Lachandra Carr. The interview was tape-recorded. (18RT 1809, 1818.) At trial, Carr said she felt pressured to give a statement and made things up when she talked with the police. At the time of the interview, she was in love with Bowen and wanted to be with him. Bowen was not in custody at the time. She did not want to do anything to harm Bowen. (18RT 1819-1820.) She told the police that Bowen was present during the shootings, but he did not shoot the children, was not the driver, and did not know that the shootings were going to occur. (18RT 1822; 19RT 1834, 1870-1871, 1878.) Carr told the police that she guessed that Bowen knew who shot the children and that "they kept talking about 'Let's go riding, let's go riding, let's go riding.'" (19RT 1870; see 19RT 1878.) "Let's go

riding" means retaliation. (19RT 1871.) She also told the police that her mother had told her about the shootings on October 31, 1993, because her mother had heard it on her police scanner. (19RT 1831.) She did not call the police and did not want to get involved because, "My momma's house is not getting blown up and my brothers and sisters are not dying for nobody." (19RT 1841.) She was afraid of Bailey, Bowen, and appellants Holmes and Newborn. (19RT 1851.) When talking about Hodge's death, Bowen told Carr, "It's triggeration." (19RT 1895, 1897.) During her grand jury testimony, Carr explained that "triggeration" meant, in part, "when like a Blood and a Crip fight against each other, you know, shoot at each other. That's triggeration." (19RT 1895.) It was also used to mean retaliation. (19RT 1896.) Bowen did not return home on the night of the murders. (18RT 1815-1816.)

On March 2, 1994, Carr testified before the grand jury as follows. (18RT 1823-1824.) She was afraid of Bailey, Bowen, and appellants Holmes and Newborn at the grand jury. (19RT 1849.) She was at Huntington Memorial Hospital on October 31, 1993. (19RT 1837.) Bowen, Bailey, appellant Newborn, and appellant Holmes were also present at the hospital. (19RT 1838-1839.) At trial, Carr initially disavowed her statements to the police and disavowed her grand jury testimony. (18RT 1823; 19RT 1839.)

The focus of the investigation of the Hodges shooting was on the Raymond Avenue Crips. (14RT 1160.) Hodges was associated with the Parke Street Nine Lives (P-9) gang. (14RT 1161; see 14RT 1172.) P-9 was not a Crip gang. The Raymond Avenue Crips attempted to get along with the P-9's, but still considered the P-9's to be a Blood gang. (14RT 1170-1171.) Appellants, Bailey, and Bowen were members of P-9. (19RT 1843-1844; 25RT 2550-2553.) The Squiggly Lane Bloods (S-9) combined with the P-9's. (14RT 1170-1171; 18RT 1714.) Other P-9 or S-9 members

or associates included Alonzo Hamilton, Ivan Warren, Carlos Clayton, Laward Looney, Tyrone Anderson ("T Crazy"), Cornell Daniels, Ivan Warren, DeSean Holmes, and Danny Cook ("Two Punch"). (14RT 1163-1171; 17RT 1539-1540; Peo. Exh. 4 [photograph of five persons "throwing" a gang sign, including Hodges and appellant Newborn]; Peo. Exh. 5 [photograph of 12 persons, including appellant Newborn, Hamilton, Warren, Clayton, and Hodges]; Peo. Exh. 6 [photograph of a bandanna with gang writing "P-9 L-I-V" and "Ishmael, Mike D Laward, T Crazy, Little Carlos, Mando, Royce, Cornell, Trey Kay, Solomon, Herb Dog, Alonzo, Red, Gil, Hate, and T Crazy"].) Appellant Newborn and Bowen were friends. (19RT 1889.) Hamilton was appellant Newborn's brother. (14RT 1169.)

According to gang expert Detective Derrick Carter, "Let's ride on someone" or "Let's ride," meant to basically attack someone. "Putting in some work" meant to go out, represent the gang, and attack rival gangs. (14RT 1174.) When given a hypothetical—a P-9 gang member is gunned down, Raymond Avenue Crips are suspected to be responsible, and the P-9's are going to ride on someone—Detective Carter opined that the P-9's would be going to ride on the Raymond Avenue Crips. (14RT 1174.)

9. Appellant McClain's admissions, earlier crimes, and post-offense conduct

a. Appellant McClain's post-offense admission to Mario Stevens

On November 1, 1993, Mario Stevens[12] spoke with appellant McClain at King Manor in Pasadena. (25RT 2542-2544.) Appellant McClain talked

[12] At the time of trial, Stevens was serving time in state prison for a probation violation. He had been convicted of drug sales. (25RT 2541-

(continued...)

about the Halloween shootings. He said that he and his "homeys" went to Wilson and shot some Crips. (25RT 2545.) He said that he "put in some work" on some Crips. (25RT 2554.) "Put in some work" meant to shoot. (25RT 2554.)

b. Appellant McClain's admissions to Troy Welcome

David Morris was James Carpenter's roommate. (28RT 2947, 2949.) On November 2, 1993, Troy Welcome[13] and Morris drove in a Lincoln towncar to Morris and Carpenter's home. Appellant McClain was also at the house. (28RT 2947-2948.) Later that day, Welcome, Morris, and Carpenter were in the Lincoln and smoking marijuana. Appellant McClain entered the Lincoln. Appellant McClain and Welcome were in rival Pasadena gangs. (28RT 2950.) When appellant McClain sat in the Lincoln, he removed a nine-millimeter or a .380 caliber firearm from his waist area and placed it in his lap. (28RT 2951.) Appellant McClain referred to his gun and said the lyrics of an Ice Cube song, "1, 2, 3, I'm a killer, as in G, I'm a gorilla. This is my nigger. I put in work with this. I put it down," as it played in the Lincoln. (28RT 2952.) Welcome understood appellant McClain's statements to mean either that somebody had been killed with the gun, or that he shot somebody with the gun. (28RT 2952-2953.) Appellant McClain asked Morris, "Did you hear anything on the radio about Halloween?" (28RT 2958.) Appellant

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(...continued)
2542.) Stevens was an associate of Pasadena Devil Lanes ("PDL"), a Blood gang. There were problems between PDL and P-9. Stevens knew that appellant McClain associated with P-9. Stevens was not testifying against appellant McClain because he associated with P-9. Stevens received benefits in exchange for his testimony. (25RT 2547-2548.)

[13] At the time of trial, Welcome was in custody for a narcotics case. (28RT 2945.)

McClain later sang the song, repeating the same words, at a park. (28RT 2954.) He asked Laward Looney what "was happening down the way." (28RT 2960.) As they got ready to leave the park, appellant McClain asked Hamilton about what was on the radio. He seemed serious, "uptight," and impatient. (28RT 2960-2961.) Two days later, Welcome saw that appellant McClain had cut his hair. (28RT 2962.) Welcome also later saw Carpenter in possession of what appeared to be appellant McClain's gun. (29RT 3030.)

Welcome also saw appellant McClain in a little burgundy rental car outside of one of Carpenter's relatives' home. (28RT 2955-2956.) Welcome also saw Looney and Hamilton at this home. (28RT 2957.) Appellant McClain entered the home and told Welcome that he was "on the run," but did not say why. (28RT 2958.) On November 29, 1993, Welcome was interviewed by the Pasadena police while he was in custody. The interview was tape-recorded. He was released that same day. He did not tell the police everything that he knew and stated at trial. While Welcome was in custody, someone purporting to be appellant McClain's investigator visited Welcome. The investigator showed Welcome paperwork of the tape-recorded conversation and said that appellant McClain had a copy of the paperwork. Welcome said that he did not know anything about the case and asked if he could make a statement that could be made available for appellant McClain to read. (27RT 2965-2967; 29RT 3065-3066.) Welcome told the investigator that he did not know anything because it was dangerous to testify against someone while incarcerated. (28RT 2969.) The investigator wrote something on a piece of paper and asked Welcome to sign it. (28RT 2968.)

c. Appellant McClain's failure to report to James Thomas

McClain was obligated to report to James Thomas once every 30 days. (20RT 2062-2063.) Thomas spoke with appellant McClain by telephone on September 14, 1993, and told him to report to Thomas's office on September 16, 1993. They met on September 16, 1993, and Thomas told appellant McClain of his reporting obligations. (20RT 2062-2063.) Thomas tried to visit appellant McClain on September 17, 1993 at his residence. (20RT 2063.) On October 21, 1993, Thomas tried to call appellant McClain on the telephone and tried to visit him at his home. Thomas saw appellant McClain on October 25, 1993. Thomas spoke with appellant McClain on the telephone on November 4, 1993, and arranged for him to report to Thomas's office on November 5, 1993. (20RT 2064-2065.) Thomas did not see appellant McClain, but spoke with him on the telephone on November 5, 1993. Appellant McClain indicated that he was at a park located at Fair Oaks and Washington. (20RT 2066.) He was instructed to report to the office to which he agreed. He, however, did not appear. (20RT 2067.) On November 16, 1993, he was again instructed to report to Thomas's office on November 17, 1993. He said that he would be there, but did not appear. (20RT 2068.) After November 17, 1993, Thomas did not again see appellant McClain. (20RT 2070.)

d. Appellant McClain's flight to Memphis on November 7, 1993

On November 7, 1993, appellant McClain flew from Ontario to Dallas. During the flight, he ordered a Courvoisier, which was unusual because people usually did not order that type of drink. He shuffled through a large wad of money to pay for the drink. He showed Tonja Richardson Underwood, who was seated next to him, his ticket. He said

that he did not fly frequently and was fearful. The first name on the ticket was Robert and the last name was Martin, McClain, or McCain. (23RT 2268-2270.) When Underwood asked him if people called him "Bobby," he laughed and said, "No. That's not my real name." (23RT 2271.) He told Underwood that he had just gotten his hair cut. She noticed that his hair was longer on his identification card. (23RT 2271.) Appellant McClain said that he was going to be in Memphis for business for about 30 days and that he did not plan to return to Pasadena. He wrote on a piece of paper his pager number and "Herb" and gave it to Underwood. (23RT 2272.) Underwood accompanied him to his gate for his flight to Memphis because he did not know where to go in the Dallas airport terminal. (23RT 2273.) Appellant McClain said that after he stayed in Memphis for 30 days, he would rent a car and drive to Kansas. (23RT 2273-2274.) He told her that he did not fly out of Los Angeles because there were too many police there and he met a gang member's profile. He said he was a gang member. (23RT 2274.)

Underwood did not hear about the murders until December 1993. While watching the news, she heard a report that they were looking for the persons they believed had committed the murders and were going to show the pictures. The news showed appellant McClain's photograph (Peo. Exh. 20). (23RT 2274-2275.) Underwood immediately recognized appellant McClain as the same person she saw on the November 7, 1993 flight. (23RT 2276.) On the day of her trial testimony, Underwood selected photograph number two (appellant McClain) from a six-pack photographic lineup. (23RT 2276-2278; Peo. Exh. 41; see 55RT 5497.)

e. The seizure of guns and ammunition from appellant McClain and Bowen on September 12, 1992

On September 12, 1992, at approximately 3:15 a.m., Pasadena police officers found .38 caliber live rounds in appellant McClain's pants pocket while he was at a gas station. The police also found a .357 caliber revolver and a TEC-9 weapon on the south end of the gas station property. McClain was accompanied by Bowen. Bowen said that the TEC-9 was his. (23RT 2296-2299.)

f. Appellant McClain's admission to James Carpenter

On December 18, 1993, Pasadena Police Detective Uribe and Sergeant Korpal interviewed James Carpenter at the Tulare Police Department. (23RT 2333; 31RT 3277.) Carpenter told the police the following. Three or four days after Halloween in 1993, appellant McClain, Laward Looney, and Alonzo Hamilton visited their cousin James Carpenter in Tulare. Appellant Newborn was also Carpenter's cousin. (23RT 2303-2305; see 23RT 2335.) They arrived in a burgundy car and stayed for a few days. (23RT 2306.) Laward Looney and Alonzo Hamilton were laughing about some type of massacre in Pasadena. (23RT 2334-2335; 31RT 3278.) Appellant McClain said, "Boom boom pow pow pow, I can still hear the noise." (23RT 2335; 31RT 3278.) Carpenter asked them what they were talking about. Appellant McClain said that he and others had been looking for "Steve" when they shot three Crips in Pasadena in retaliation for the Hodges shooting. When they later heard that the victims were children, not Crips, appellant McClain became nervous and cut his hair short. He said that he needed to get away because it was "too hot" to stay around. Carpenter "put two and two together" and realized that appellant McClain

was possibly responsible for shooting the three children. (23RT 2335-2336; 31RT 3279-3280.) Carpenter told police detectives that appellant McClain sold a .38 caliber gun to his cousin Michael Thompson. (23RT 2311, 2323, 2327, 2339; 31RT 3281.) At trial, Carpenter recanted what he had told the police. (23RT 2306-2313; 31RT 3279.)

g. Appellant McClain's change in appearance after his arrest

Shortly after his arrest, appellant McClain's hair length and the facial hair changed. (16RT 1444-1445.)

10. Appellant's Holmes's admission to Derrick Tate

In December 1993, Derrick Tate[14] visited Terranius Pitts who lived in Pasadena. Pitts's nickname was "T." Tate, Pitts, appellant Holmes, and four or five others spoke on Claremont in Pasadena. Appellant Holmes's nickname was "Boom." He was wearing a P-9 hat. (15RT 1352-1353.) He indicated that he was a gangster and called himself a "rider." (15RT 1347-1350.) Appellant Holmes bragged about getting a hat that said "trick or treat" and described how the shooting occurred. He said that they were in some bushes, jumped out, and said "trick or treat." He said that they blasted when they jumped out. He said that he was a killer. There were others with him, but he did not say how many others. He mentioned two additional persons. He explained that the reason for the trick or treat killing was that one of his friends, Fernando (Hodges), had been killed by Crips. (15RT 1351-1354, 1362.)

Tate first shared this information with a police officer while Tate was in the Pasadena jail, having been arrested for joyriding. He provided the

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[14] Tate had four out-of-state felony convictions: two aggravated batteries, forgery, and unlawful restraint. (15RT 1359-1360.)

information because he was trying to get out of his case. But he did not get out of the case. (15RT 1354-1355; 16RT 1401, 1448.)

While in the Pasadena jail, Tate also provided the information to Pasadena Detective Robert Uribe and Sergeant Mike Korpal. (15RT 1356, 16RT 1448.) The interview was tape-recorded. (16RT 1433.) Tate asked Sergeant Korpal to do Tate the favor of getting him out of his unlawful restraint case, but Sergeant Korpal was unable to do so. (15RT 1360.) Tate went to prison for that case. (16RT 1401.) On January 5, 1994, Tate identified appellant Holmes from two six-pack photographic lineups without hesitation. (15RT 1359; 16RT 1435, 1448-1449; Peo. Exh. 17-A, 17-B.)

Tate testified at trial "because of the kids." (15RT 1360.) He had seen a poster on reward money, but he never mentioned reward money to Sergeant Korpal. (15RT 1360.) Tate was brought to California to testify, and did not need to pay for his transportation, lodging, or food. He was given approximately $300 during the course of the week before testifying at trial. (15RT 1361.) Two or three weeks prior to trial, his mother and girlfriend received phone calls stating that he "had better not show up in court." (16RT 1396-1397.) He had heard that someone who may have been involved in the case had been killed. (16RT 1399.)

11. Appellant Newborn's post-offense statements and admissions

a. Appellant Newborn's admission to DeSean Holmes

In 1995, DeSean Holmes was taken into the custody.[15] He was charged with residential burglary and pled guilty to that charge. He had

[15] DeSean Holmes's life had been threatened. He did not go to the police. They went to him. (17RT 1545.)

been accused of burglarizing Willie McFee's house. Before he pled, he was housed at Wayside county jail. Appellant Newborn was also housed at Wayside at that time. They talked about events that occurred at McFee's house on Halloween 1993. McFee's house was located at the corner of Pasadena Avenue and Blake Street. (17RT 1540-1542; 28RT 2923, 2926.) Appellant Newborn told DeSean Holmes the following: Appellant Newborn and others went to look for appellant Newborn's brother Wendell at McFee's house and "got into it" with some other persons with whom appellant Newborn socialized. Appellant Newborn ended up shooting at the people who had accompanied him to McFee's house. (17RT 1543-1544.) He used a nine-millimeter Glock. (17RT 1553.)

DeSean Holmes told the police about this conversation. (17RT 1545.) DeSean Holmes ended up at the sheriff's station in Altadena on September 9, 1995. He spoke with Deputy Johnny Brown and asked for help and protection because he was afraid that Danny Cook and Ernest Holly were trying to kill him. DeSean Holmes said that he had information on some cases. (17RT 1546-1547; 30RT 3093-3094; see 17RT 1681.)

DeSean Holmes provided information about the Halloween case. (17RT 1548.) Sergeant Korpal interviewed DeSean Holmes twice - once at the Temple City Sheriff's substation and a second time in the detective interview room at the Pasadena Police Department. (31RT 3273-3274.) DeSean Holmes had seen Bailey and appellant Newborn with a .38 caliber gun. (17RT 1559.) Appellant Newborn told DeSean Holmes the following. Appellant Newborn used a Glock nine-millimeter on Blake Street. (17RT 1560; see 31RT 3275.) He was a shooter and was across the street from McFee's house when he shot. There were others with him. (17RT 1565.) They went around the block one time before the shooting. Appellant Newborn hoped to use a girl who lived in Azusa as an alibi, but was unable to contact her. (17RT 1572-1573.) A gray Ford Tempo was

used in the murders. He said, "Solomon, dumb ass, he gone and do something with us and he keeps driving the same car around town." (31RT 3276.) Appellant Newborn had heard from his attorney that Torrance Brumfield was a witness on the case and had testified before a grand jury that appellant Newborn took a gun from Brumfield. While in custody, appellant Newborn spoke with Darryl Johnson's sister Nicole about a list of persons who were "going against him." The list included Charles Blake, Willie McFee, and Torrance Brumfield. (17RT 1566-1567.) Once he got out of custody, appellant Newborn was going to "smash" everyone that was on his list.[16] (17RT 1573.)

Appellant Newborn said that the shooting of the children was Ernest Holly's fault. He had been riding in a car and he blamed two other people in the car because they said the children were Crips. He was depressed that he was in custody because of his homeboys. He said that Hodges was stupid for hanging out at Community Arms. Appellant Newborn had told Hodges not to hang out in the Community Arms. (17RT 1569-1570; 30RT 3099, 3102-3103.) At the time of the shooting, Bailey ran, bumped into somebody, and bullets fell out of the gun. (17RT 1571.) Appellant Newborn said that Bowen was "down in the county talking too much." (17RT 1570.) They had taken a gun to Terranius's house and disassembled it there. (30RT 3099; see Peo. Exh. 76 [audiotape].) Other people had gone to McFee's house to shoot at McFee. (30RT 3100, 3134-3137.) A gray Ford Tempo was involved in the shooting. (17RT 1572; see Peo. Exh. 21.) DeSean Holmes knew Reggie from school. (17RT 1550.)

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[16] At the time of his trial testimony, DeSean Holmes believed that he was on appellant Newborn's list. (17RT 1573.)

b. Appellant Newborn's statement to Deputy Keeling

While at Wayside, appellant Newborn told Los Angeles County Sheriff's Deputy Christopher Keeling that he belonged to P-9. (19RT 1923.) Appellant Newborn was first placed in the Adjustment Center for possessing a shank, a jail-made weapon. (19RT 1960.) He was then moved from the Adjustment Center to Administrative Segregation. (19RT 1961.) When appellant Newborn was placed into administrative segregation on March 23, 1994, for making threats against an inmate, he told Deputy Keeling, "I'm not saying I'm not guilty for what I'm here for, but while I'm here I don't want to be caged up like I'm some animal." (19RT 1927, 1930, 1962.) Three to five days later, appellant Newborn was agitated because he believed that Deputy Keeling lied. Appellant Newborn said that he didn't mean his statement "that way." (19RT 1932-1933.)

B. Defense Evidence

1. Appellant Newborn's defense

In October 1993, Shawntia Blaylock was dating Hodges. At that time, Blaylock and Hodges had a three-month-old daughter. Their daughter's godfather was appellant Newborn. Hodges and appellant Newborn were together almost every day. They were best friends. Between 8:15 and 8:30 p.m. on October 31, 1993, Blaylock went to Huntington Memorial Hospital after Hodges was shot. (32RT 3362-3364.) She was in the emergency, ICU, lobby, and outside. Blaylock did not see appellant Newborn or Lachandra Carr at the hospital. At the hospital, Blaylock saw Bowen, Darryl Johnson, Ishmael, Felton Leagon, Dawon, Frank, appellant Holmes, Efrem Hodges, Orlando Hodges, Anedra Keaton, Alisha Thomas, Ramona Hodges, Chris Hodges, Antoinette Black, Patricia Williams, Vanessa Holly, Trina Woods, Dory McGee, and Tasha Bonner.

(32RT 3365-3371.) Appellant Holmes had pulled up in a car that he was driving while Blaylock was outside. (32RT 3374-3375.) Blaylock left the hospital between 9 and 10 p.m. to get her baby. When she returned to the hospital, she remained there for the rest of the evening. (32RT 3371-3372.) At the hospital, Leagon, Ishmael, Dawon, and Darryl Johnson discussed that the Raymond Crips were responsible for the shooting. (32RT 3410.)

During that evening, Blaylock tried to page appellant Newborn to tell him that Hodges had been shot. Appellant Newborn did not respond to the page. (32RT 3372-3373.) She also tried to call Anedra Keaton because she was one of appellant Newborn's girlfriends. (32RT 3374.)

In 1993, Felicia Goodall was dating appellant Newborn. On October 31, 1993, she saw him at approximately 5 p.m. on Washington Boulevard in Pasadena. (32RT 3417.) She asked him to go to her apartment in Azusa "a little bit later." (32RT 3418.) She was living with her aunt and uncle, Kim Reed and Wendell Jefferson. (32RT 3419; 33RT 3529.) Jefferson was appellant Newborn's "play brother" as they were childhood friends. (33RT 3528.) James Otis, who was appellant Newborn's close friend, gave him a ride to Goodall's apartment. (33RT 3455-3458.) At approximately 7 p.m., appellant Newborn went to Azusa and spent the night with Goodall. (32RT 3419-3420; 33RT 3458.)

On October 31, 1993, Jefferson heard that there had been a shooting. In the afternoon of Halloween, he was at his mother's house in Pasadena. Around 1:30 or 2 p.m. that day, he and his friend James Riley were at McFee's house on Pasadena Avenue near Blake Street. Jefferson and Riley left at approximately 3 p.m. Jefferson returned to his mother's house at approximately 7:30 p.m. Riley went there, too, in his own car - a gold with white top Cutlass Supreme. Jefferson denied that appellant Newborn went to McFee's house while Jefferson was there. (33RT 3530-3531, 3533-3534.) He denied that any shooting occurred near McFee's house while he

was there. At that time, Jefferson had a 1979 Cadillac Coupe de Ville that was gray with a white top. (33RT 3532.) At approximately 8:30, he returned to his home in Azusa. Appellant Newborn was already at Jefferson's home. (33RT 3534-3535.)

Appellant Newborn left the next day at approximately 9 a.m. He had made arrangements with Otis to be picked up at 10 a.m. There was no working phone at Goodall's home. (32RT 3419-3420; 33RT 3536-3537.)

Otis drove appellant Newborn home. During the drive home, Otis informed appellant Newborn that Hodges had been shot and killed. (33RT 3459-3460.) Appellant Newborn appeared surprised and told Otis to "quit lying." (33RT 3461.) Otis dropped off appellant Newborn at Hodges's mother's home at Marengo and Hammond in Pasadena. (33RT 3461-3462.)

On October 31, 1993, between 7 and 7:30 p.m., Latoya Carr, no relation to Lachandra Carr, received a phone call from Lachandra. Lachandra was at Bowen's mother's house at the time. Over a series of phone calls, they talked to each other over the course of the evening until 12:30 or 1 a.m. The longest time period that they were off the phone was 10 to 15 minutes. (33RT 3582-3583.) Lachandra never told Latoya that she had gone to Huntington Memorial hospital. Lachandra said that Bowen was not at his mother's house. She thought that he was at the hospital. During the evening, Lachandra said that she spoke with Bowen by telephone. She never told Latoya anything about what Bowen said about who was at the hospital. (33RT 3584.) Marie Bonner was at Huntington Memorial Hospital on October 31, 1993. She did not recall seeing Lachandra there that night. (33RT 3624.)

Sergeant Korpal checked the Pasadena police station's reports of shots fired at Pasadena and Blake Streets near the McFee home. The report was made from 600 Blake at 1:52 a.m. on November 1, 1993. There was

nothing to indicate whether the shots occurred at the time of the call or earlier. (35RT 3764-3767.) At 1:47 a.m. on November 1, 1993, a report was made from 860 Winon Avenue, which is a block from the intersection of Pasadena and Blake. At 1:50 a.m. on November 1, 1993, a report was made from Seco Street, a few blocks from Pasadena and Blake. (35RT 3768.) There were no reports made on October 31, 1993. (35RT 3769.)

Sergeant Korpal had not released the bandanna information to the press because he wanted to authenticate whether information later provided was valid. There were about 40 to 50 people at Robinson's birthday party. Anyone at the party could have seen what the victims had been wearing. (35RT 3769-3770.) By the time Sergeant Korpal arrived at the crime scene at 12:10 a.m., the crowd had been pushed back and had dwindled to approximately 12 persons. (35RT 3770.) There were in excess of 20 or 30 911 calls. The maximum number of police personnel on the scene was 40. As it became daytime, the number of persons from the media grew to approximately a dozen. (35RT 3771.) There were several crews of emergency personnel. (35RT 3772.) Sergeant Korpal conceded that he had no control over what the people at the party, the young men, the crowds, the emergency people, the press, and the people in the caravan or four cars said or passed on after October 31, 1993. (35RT 3773.)

On November 3, 1993, Pasadena Police Officer Carlos Lopez stopped a silver Ford Tempo (Peo. Exh. 21). There were two occupants in the car - Edward Lyonel Evans and Charnell Blaylock. (36RT 3874-3876.)

On November 9, 1993, the Sergeant Tim Sweetman received information from an informant that appellant Newborn had been involved in the case. (35RT 3773.) Appellant Newborn was charged on December 23, 1993. (35RT 3774.)

During a November 10, 1993 interview at Pasadena and Blake, Sergeant Korpal interviewed a man who said his name was Charles

(Baker), but Sergeant Korpal believed that the man was actually Willie McFee because the house was registered to McFee and because of the man's standoff nature. (35RT 3777-3780.) When Sergeant Korpal returned to the station, he obtained information on the location and McFee, including a photograph. Sergeant Korpal concluded that the person with whom he spoke was actually McFee, not Charles Baker. Later, Sergeant Korpal realized that Baker and McFee were two separate persons. Sergeant Korpal spoke with Baker on September 18, 1995, and September 25, 1995. (35RT 3782.) Up until March 1995, McFee had been labeled confidential informant D. (35RT 3783.) The fingerprints of Lionel Evans and DeSean Holmes were found in the rental car. (35RT 3778, 3784.) As of March 9, 1995, McFee had not provided any information on the case. (35RT 3786.)

2. Appellant Holmes's defense

On October 31, 1993, appellant Holmes picked up Wanda Martin from work. They went to the babysitter's. (38RT 4092.) They picked up their two-month-old son and went to their home, located at 601 Foothill in Azusa, between 6 and 6:30 p.m. Their home was 30 to 35 minutes from Huntington Memorial Hospital. (38RT 4093, 4096.) They ate dinner and began watching a movie. Appellant Holmes received a page, and he went to the 7-Eleven to make a phone call. They did not have phone service at their home. Five minutes later, appellant Holmes returned to the house. (38RT 4094.) He told Martin that Hodges had been shot, and he (Holmes) was going to the hospital. Appellant Holmes then left and Martin fell asleep. (38RT 4095.) A little before 10 p.m., Martin woke up to feed the baby. Appellant Holmes had returned to their home. (38RT 4096.) He told her that he went to the hospital and "came right back." (38RT 4097.) Martin tried to tell law enforcement what she had testified to at trial, but the officer told her that she was lying and that they knew appellant Holmes did it. The officer also told her, "You see that baby [referring to her son], he

will be grown before you see him again." (38RT 4122.) She viewed the statement as a threat. (38RT 4122.)

According to appellant Holmes's aunt, Donna McCallum, he got his nickname, "Boom," when he was a toddler because he was very active and was always bumping into things. (35RT 3853.) As soon as his picture was flashed in the newspaper, appellant Holmes turned himself in. (35RT 3855.)

Pasadena Police Officer Ruben Chavira was one of the first officers at the scene at Emerson and Wilson. (36RT 3882.) He determined which persons at the scene were witnesses, so that they could be interviewed by other police officers. (36RT 3883.) Officer Chavira spoke with Pina. He saw four cars. The first car was a dark blue 1983 or 1984 Toyota Corolla. He could not describe the rest, other than saying that the other cars were all small. The cars turned eastbound onto Emerson and parked west of Wilson. He saw persons get out of the cars and run southbound. He did not say how many persons. He saw them return to the cars. Officer Chavira did not ask Pina for a description of the persons. Pina did not describe a person with a trench coat. Officer Chavira never asked Pina if he could recognize any of the persons. (36RT 3884-3886.)

During the early morning hours of November 1, 1993, Pasadena Detective W.R. Ireland, who was involved with investigating the Halloween shooting, spoke with Pina at his home and then at the police station. The interview at the police station was taped. Pina described seeing four cars. (35RT 3741-3742.) They were traveling together in a caravan. The first car was a newer car "maybe from 1984," possibly a Toyota Celica, that was either dark blue or dark green. The second car was a white older car, between 1980 and 1989. (35RT 3743-3744.) He did not give any particular descriptions of the third and fourth car. He first saw the cars on Mentor. He then saw all four cars on Catalina near Emerson. He

later saw two of the cars approximately five to six car-lengths from the corner of Wilson and Emerson, west of Wilson on the south side of the street, facing eastbound. He walked down Catalina and then made a right on Emerson. He saw three persons run to the cars when they were parked near the intersection of Emerson and Wilson. (35RT 3744-3745.) Two of the persons went to the first car, while the third got into the second car. He observed the cars that were parked near the corner of Wilson and Emerson, while he was two houses down on Emerson. He did not cross Catalina. When asked to describe the individuals that he had seen, he described a Black male, approximately 20 or under, wearing a tan-brown trench coat, a brown plaid shirt, and ivory pants. When asked if he would recognize them if he saw them again, he said that he was not paying attention. (35RT 3746-3747.)

Pasadena Detective De Wayne D. Moe interviewed Kenny during the early morning hours on November 1, 1993. Kenny indicated that he had seen two suspects jump out of the bushes. He described the first suspect as a Black male, between 18 and 24 years old, five feet ten inches to six feet tall, 175 pounds, and muscular. The first suspect had slicked-back hair, tied in a ponytail that went down to the shoulders. This person wore a red bandanna around his head and dark clothing. (35RT 3794-3795.) Kenny described the second suspect as a Black male, between 18 and 24 years old, five feet ten inches tall, 175 to 185 pounds, and "flabby." (35RT 3795.) The second suspect wore a red bandanna around his head and dark clothing. (35RT 3795.) Kenny never said that the suspects wore a trench coat. (35RT 3796.)

On November 4, 1993, Detectives Uribe and Korpal showed car brochures to Pina, so that he could identify the cars that he saw on the evening of the shooting. (36RT 3901.) He did not identify any of the cars that were in the brochures. (36RT 3902.) He did not give the make or

model of the first car. He said that he believed it was a small import car. The second car was possibly a four-door white Sentra with lowered, tinted windows all around. (36RT 3903-3904.) There were possibly two black males in the second car. He gave no further description. He did not give a description of the driver of the second car. (36RT 3905.)

On December 27, 1993, Pina called Detective Uribe on the telephone. He said that he could identify two of the five persons whom he saw in a newspaper. (36RT 3907.) He went to the police station. (36RT 3908.) He identified appellant McClain from photo six-pack B-5. He identified appellant Holmes in photo six-pack A-2, saying that it was "possibly him." (36RT 3910.) Sergeant Korpal showed Pina a newspaper that had pictures of the suspects. (36RT 3910-3911.)

On May 11, 1995, appellant Holmes's investigator, Bob Zink, spoke with Derrick Tate at Macon County Jail in Decatur, Illinois. Zink asked Tate about his interview by the police, what information he had given to the police, what information he had, and who he knew was involved in the incident. Tate indicated that he was arrested in a stolen car on January 3, 1994. On January 5, 1995, he had one of many interviews with law enforcement. He did not know the names of the officers or the dates and times of the interviews. When Zink read names of persons involved in this case, Tate indicated that he knew appellant Holmes as "Boom," whom he met in 1992. Tate had known Terranius Pitts all of his life. (36RT 3858-3859.) Tate said that he made up his statements to law enforcement. He told the officers what they wanted to hear. He had a warrant from McClean County, Illinois. The officers told him that if he helped them with this case, they would help him with his case and he might be eligible for part of the reward in this case. During Zink's conversation with Tate, Zink never offered Tate any money to talk with the defense. Zink never threatened

Tate. Zink never gave Tate any information where he thought all he would have to say is "yes" or "no." (36RT 3860-3861.)

Dr. Kathy Pezdek testified as an eyewitness identification expert. She had reviewed transcripts of the interviews with Gonzales and Pina, the transcripts of the grand jury proceedings, the daily transcripts of the trial of Pina's testimony, and police and investigators' reports. (34RT 3654-3655.)

Memory does not work like a videotape. Rather, there are three stages of memory. The first stage is the input stage, which has to do with the initial perception of the individual. The second stage is the storage stage which has to do with how well a witness can hold onto the information in memory over time. The third stage is the identification stage, in which the witness is asked to make an identification. (34RT 3655-3656.)

There are different factors that relate to the accuracy of eyewitness identification as to each of the stages. (34RT 3657.) The factors that affect perception are exposure time, lighting conditions, physical distance, distractions, and cross-racial identification. There is little correlation between the confidence of the witness regarding the identification and the accuracy. (34RT 3657-3661.) Memory does not improve over time, but gets worse. If a witness sees a photograph of a certain individual in the newspaper or television, the memory could be impacted based on suggestibility. (34RT 3662.) If a witness misidentifies a person, it is not because he or she is not trying his or her best or is lying. Memory is an imperfect process. (34RT 3666.)

If an individual initially described a person as male Black and then later gives specific facial features, then the later information must be evaluated as to whether that information came from the individual's memory or from seeing the person's face on television or in the newspapers. (35RT 3835.) If an individual saw a person's photograph in

the newspaper or on television, the individual's memory could have been influenced by that photograph. (35RT 3836.)

In Dr. Pezdek's opinion, if Pina initially said that he did not pay much attention, then he did not get a good look at the individuals. Regardless of when he was asked to make an identification, he was less likely able to identify the right person. His initial description of what he saw was a more reliable indicator of what he actually saw. (35RT 3834.)

A few weeks before the trial began, Thomas Nishi, appellant Holmes's attorney, received a voice mail from DeSean Holmes who stated in part that he did not want to testify. Nishi had never contacted DeSean Holmes before the voicemail. To preserve the evidence that DeSean had already decided not to testify, the voice mail was not erased and provided to the prosecution as part of discovery. Shortly after receiving the voice mail, Nishi attempted to interview DeSean Holmes at the Pasadena Police Station. DeSean Holmes did not want to speak with Nishi, but stated that he would call Nishi the following day. The next day, DeSean Holmes called Nishi and was put on a three-way call with defense attorney Carl Jones (appellant Newborn's attorney). Most of the conversation dealt with DeSean Holmes's incarceration at the Pasadena Police Station and whether DeSean Holmes wanted legal representation. Based upon what DeSean Holmes stated, Nishi contacted DeSean Holmes's attorney Daniel Nardoni, and told Nardoni of DeSean Holmes's desires. These experiences were the only encounters Nishi had with DeSean Holmes. At no time did Nishi say or do anything to encourage DeSean Holmes not to testify. (42RT 4318-4319.)

3. Appellant McClain's defense

Detective Carter interviewed Robert Price. The interview was taped. During the interview, Detective Carter questioned Price about the shooting on October 28, 1993. Price said that appellant McClain said to him,

"Thanks for the cigarette." He did not say, "Thank you, Blood." He did not make any statement referring to Blood. (35RT 3763.) Rather, he said, "Thank you, chief." (35RT 3764.)

On October 28, 1993, at 1 a.m., while at Huntington Memorial Hospital, Price's blood alcohol content was .11 percent. In California, it is illegal for a person to drive a car if his or her alcohol level is .08 or greater. (38RT 4130.)

Appellant McClain[17] testified on his own behalf. (36RT 3962.) He was a friend of Hodges and his death "would have" upset appellant McClain. (36RT 3973.) He denied committing the homicides and attempted homicides, being the driver of a car that was present when the crimes were committed, and being involved in any way. He had no information about the shooting prior to it happening. He was in Tulare sometime after Halloween and saw Carpenter while he was there. Appellant McClain denied making the statements to which Carpenter testified. He was there to sell his "dope" and to see his two or three girlfriends. He had been there "a million times." (36RT 3963-3964, 3973-3974.)

Appellant McClain had worn his hair long since 1986. Darrell Johnson and Ishmael Offutt also wore their hair long and were Hodges's friends. (36RT 3970.) Appellant McClain had worn his hair shoulder length with some sort of processed chemical around September 12, 1992. (36RT 3964-3965.) He normally did not wear it in a ponytail, but rather "let it hang." (36RT 3965.) He saw Underwood on the airplane in early November. At that time, he had cut his hair. He had given her his phone number. She gave him her phone number or beeper. He was going to

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[17] Appellant McClain had three felony convictions for ex-felon in possession of guns and one conviction for grand theft auto. (36RT 3971.)

Kansas City to sell drugs. He probably returned back to California. He went back and forth to Kansas City many times. (36RT 3964-3966.)

At some point, appellant McClain turned himself in for this case. (36RT 3966.) He told the police that he was not involved in the shootings. When the police asked him where he was that evening, he said some true and some false statements. He said that he had stayed at Kathy Brown's house until midnight and passed out candy. This statement was true, although the time was not exact. (36RT 3967-3969, 3973.)

Appellant McClain denied telling Mario Stevens in early November that he and his homeboys had put in some work. (36RT 3966.) He would not have talked to Mario Stevens. King's Manor was not a place where he would "hang out" because it was frequented by his enemies, the PDL. (36RT 3967.)

On October 28, 1993, appellant McClain was present when Price was shot, but did not shoot him. (36RT 3970.) Appellant McClain knew the shooter. Price was shot because he owed "homeboy" some money. (36RT 3971.) When Price was shot, appellant McClain was near the exit sign at the Community Arms. There was one other person present. Appellant McClain denied having a conversation with Troy Welcome. (36RT 3972.)

Appellant McClain's father testified that James Carpenter was not related to appellant McClain. Appellant McClain's father did not have a twin sister. (38RT 4090.)

C. Prosecution's Rebuttal

On October 31, 1993, Martin clocked in at Sears at 10:54 a.m., clocked out for lunch at 2:38 p.m., clocked back in from lunch at 3:05 p.m., and clocked out at 7:20 p.m. The normal store hours for that particular day, Sunday, were 10 a.m. to 7 p.m. (40RT 4245; Peo. Exh. 101 [time sheet for Martin].)

On October 31, 1993, Lakesha English lived in the Casa Del Longo Apartments in Covina. She attended a Halloween party at the apartment's recreation room, thrown by Jacqueline Neal. (40RT 4226.) Neal was appellant Holmes's and Martin's babysitter. (40RT 4240.) Around 3 or 4 p.m., English helped Neal set up for the party. Around 7:30 or 8 p.m., Martin arrived at the party. (40RT 4227.) She had arrived in a car with appellant Holmes and her baby. (40RT 4228.) Martin told English to get the baby. Martin and appellant Holmes argued and then he left. (40RT 4229.) Martin was at the party for a couple of hours. (40RT 4230.)

During Sergeant Korpal and Detective Uribe's conversation with Carpenter in Tulare, Carpenter said that appellant McClain said that he, appellant Holmes, and Cornell Daniels were involved in the shooting. (39RT 4140-4141.) Sergeant Korpal did not obtain a handwritten or signed statement from Carpenter because he was not considered to be a cooperative witness based on his background and family ties. (39RT 4196.) While in Tulare on December 18, 1993, Sergeant Korpal saw Alonzo Hamilton and Laward Looney. (39RT 4194.)

Officer Luna had told Sergeant Korpal that Tate was in their custody and wanted to speak to them. Prior to that, Sergeant Korpal did not even know who Tate was. Sergeant Korpal had two conversations with Tate. The first conversation occurred at the Pasadena Police Department on January 5, 1994. Sergeant Korpal did not recognize Tate from any previous contacts. The first interview was audiotaped. Sergeant Korpal made no threats or promises to Tate prior to the beginning of the audiotape. The two conversations with Tate occurred within weeks of each other. (39RT 4141-4143.) During the first interview, Tate implicated appellant Holmes. (39RT 4144.) The second conversation occurred in the East Facility at Wayside in Castaic, California on January 20, 1994. (39RT 4144.) Tate's statement included details of the crimes that were not released by the

Pasadena Police Department. He said that appellant Holmes said that one of the victims had a blue rag. (39RT 4186-4187.)

At some point, appellant McClain became a suspect. The Pasadena Police Department held a press conference on December 23, 1993, where some photos were distributed concerning the suspected perpetrators of the Halloween case. There was one photograph of each of the persons suspected to be involved. Five photographs were pinned onto a poster board. (39RT 4144-4146.) The police received information that appellant McClain had shaved his head. On January 5, 1994, a sketch of appellant McClain with his head shaved was given to the media because he was not in custody. (39RT 4188.) He was arrested on January 17, 1994. (39RT 4189.)

During the officers' conversation with appellant McClain after he was arrested, appellant McClain said that he heard about the Halloween shooting the next day. (39RT 4146-4147.) He heard people talking about it, but that it was on the television at the same time. He had already left the Posada when he heard people talking about it. He heard about Hodges's killing two minutes after it happened. Appellant McClain could not go there because he did not have a ride. (39RT 4148-4149.) He denied shooting Price. (39RT 4150-4151.)

The distance between Villa and Wilson and the location where appellant McClain claimed to be with Lacey was less than 1.1 miles. It took about two and a half minutes to drive that distance. (39RT 4152-4153.)

Pina called the Pasadena Police Department and said that he had seen two of the persons and could identify them. (39RT 4161-4162.) Pina viewed the photo lineup in the second floor detective interview room in the Pasadena Police Department. (39RT 4153.) Sergeant Korpal gave Pina the police department issued admonition about the photographs. Six or seven

six-pack photographic lineups were shown to Pina. (39RT 4154.) As he thumbed through the six-packs, he looked at appellant McClain's photograph and said, "This looks like one of the guys." (39RT 4159.) Pina said something about seeing appellant McClain's photograph at a different angle. When he saw appellant Holmes's photograph, he said, "This guy resembles one of the guys." (39RT 4160.) Sergeant Korpal stepped out of the interview room and retrieved a newspaper with only appellant McClain's photograph visible.[18] Sergeant Korpal asked Korpal, "Does this change your idea" or "change your image?" (39RT 4160.) Pina said, "That's him." (39RT 4160.) As he looked at the pictures, he mentioned some blemishes on appellant Holmes's face that he noticed in the photographs. (39RT 4160-4161.) The photographic lineups included pictures of all five suspects, but Pina did not pick Bailey, Bowen, or appellant Newborn. (39RT 4192-4193.)

Sergeant Korpal had made efforts to try to locate Darryl Johnson, but was unsuccessful. (39RT 4158-4159.) John Doe 5 or J.D. 5, referred to in some of the documents, was Mario Stevens. (41RT 4285.)

Officer John Luna was the Pasadena Police Department's Latino gang officer. His partner, Carlos Lopez, focused on African-American gangs. Officer Luna had been in Otis's residence, near 2080 North Raymond. 2080 North Raymond was where P-9 gang members would congregate. Otis's house had a picture of P-9 gang members hanging on the wall. (40RT 4215-4216.)

On October 31, 1993, Eddie was five feet eight inches and weighed 127 pounds. Reggie was five feet ten inches and weighed 170 pounds. Stephen was five feet nine inches and weighed 161 pounds. (40RT 4244.) Ishmael Offutt died in late spring 1994. (40RT 4242.)

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[18] There were five photographs in the newspaper. (39RT 4192.)

On July 25, 1994, licensed private investigator Steven Thorton, who was working for appellant Newborn, interviewed Shawntia Blaylock. She said that on the day of her boyfriend Hodges's shooting, she was at home watching the "Martin" television show at 8 p.m. and Trina Woods came to her door asking for Blaylock's mother. Woods was a cousin of Blaylock's stepmother. Woods knew the friends of Hodges and Blaylock. Woods told Blaylock that she was in the area of the shooting, heard the shots, got out of her car, walked up to the scene, saw Hodges, got back into her car, and drove straight to Blaylock's home. Blaylock went to the hospital shortly thereafter with Woods giving her a ride. Blaylock left the hospital at about midnight. (40RT 4242-4243.)

On September 26, 1993, Thorton interviewed Marie Bonner. She said she was returning from trick or treating on the night of the incident, passed by the Community Arms, and noticed ambulances present. She was bringing her nieces and nephews home. After dropping them off, she went back to the apartments and was told that Hodges had been shot. She was with Dory McGee, who was driving the car. She did not remember if Daneisha was present, but later recalled she probably was with them. Bonner arrived at the hospital shortly after Hodges did, sometime before 10 p.m. She did not get out of the car and observed things from the parking lot. She did not see Lachandra Carr at the hospital. She saw Alish Thomas and Anedra Keaton together during the evening. She and her friends "tripped off" the fact that appellant Newborn and others in his group were not at the hospital because she always thought that appellant Newborn and Hodges were best friends. (40RT 4242-4243.)

Thorton interviewed Wendell Jefferson on July 8, 1994. Jefferson was Kim Reed's boyfriend and resided at an Azusa address. He was not present when appellant Newborn arrived that night, but Jefferson arrived home at about 8:30 p.m. He had been at his mother's house in Pasadena.

He had rushed home in an attempt to see the "Martin" television show which aired between 8 and 8:30 p.m. The show was off when he got home. The show that followed "Martin," "Living Single," was on. (40RT 4244.) On October 31, 1993, "Martin" and "Living Single" were not on at their regularly scheduled times of 8 and 8:30 p.m., respectively. (40RT 4246.)

On November 2, 1993, the following information was published in the Los Angeles Times, the Pasadena Star News, or broadcast on local radio and television news programs: (1) three non-gang member teenagers were murdered in Pasadena while trick or treating Halloween night; (2) two shooters were described, one as muscular, with slicked-back hair, long, braided ponytail, and the second as chubby wearing flashy clothes; and (3) in a news broadcast on a local television station, a sobbing teenage girl blamed the shooting on "bloods and crabs [*sic*]." (40RT 4248.)

On November 13, 1994, there was a visitor's pass for Martin for the Los Angeles County Sheriff's Department. (40RT 4247.)

D. Appellant Holmes's Surrebuttal

On Halloween 1993, Jacqueline Neal, who lived in Covina, babysat Martin's baby. Neal also had a Halloween party, which began when the sun went down. It began as a children's party and then became an adult party. That day, Martin had gone to Neal's residence to pick up her child. Neal first saw Martin at the recreation room of the apartment complex. Martin had worked at Sears on Halloween 1993. Martin worked about ten minutes from Neal's residence. Martin obtained from Neal the keys for Neal's residence to get Martin's son's things. Martin then disappeared. Neal did not see Martin again. (42RT 4320-4323.)

II. PENALTY PHASE (RETRIAL)

A. Prosecution's Evidence

1. Circumstances of the crimes[19]

On October 29, 1993, Pasadena Police Detective Derrick Carter interviewed Robert Lee Price at Huntington Memorial Hospital. Price was affiliated with the Raymond Avenue Crips. He had a bullet wound to the face and had also been shot twice in the right thigh. (71RT 7029-7031.) Appellant McClain had been found guilty of attempted murder of Price, with findings that: the attempted murder was willful, deliberate, and premeditated; appellant McClain personally used a firearm in the commission and attempted commission of the attempted murder; and in the commission and attempted commission of the attempted murder, a principal was armed with a firearm. (71RT 7032-7033.)

On October 31, 1993, at 7:20 p.m., Pasadena firefighters and paramedics went to the Community Arms, located on Orange Grove between Marengo and Raymond streets in Pasadena. They waited for two to three minutes before the police had deemed it safe for them to enter the scene. Fernando Hodges was lying near the basketball court. (66RT 6415-6418, 6442.) He had two gunshot wounds to the head and multiple gunshot wounds to the body. The paramedics performed cardiopulmonary resuscitation, covered all of Hodges's wounds with dressings, ventilated with a bag valve mask, established IV lines, and transported him to Huntington Memorial Hospital. As the paramedics headed to the hospital, they asked their dispatch to notify Huntington Memorial Hospital's security

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[19] Because the first jury had hung at the penalty phase, the circumstances of the crimes were presented during the second penalty phase trial.

to take extra precautions because of possible fellow gang members who may have wanted to retaliate. (66RT 6420-6421.)

Huntington Memorial Hospital's security log indicated that at approximately 7:42 p.m., the security received information that a possible gang-related gunshot wound victim would be arriving at the hospital. In response, the hospital placed security officers at the emergency doors, in the reception area that would control the entry into the treatment area, in the back by the radiology doors, and outside. (66RT 6433-6434.) At some point, there were additional security officers in the emergency room area. (66RT 6435.) There were two distinct groups of persons who arrived at the hospital. One group consisted of family and friends who were concerned about the patient and numbered between 50 to 100. The second group consisted of persons who went to the emergency room area of the hospital, but did not actually enter the emergency room. They were dressed in dark hooded sweatshirts. They were between the ages of 20 and 40. (66RT 6437-6438.) They appeared to an organized group. That group dispersed after 9 p.m. (66RT 6439.)

The Pasadena police investigated Hodges's murder. In conducting the investigation on the night of Hodges's murder, the police attempted to establish leads as to possible perpetrators. Based on what was said in the immediate vicinity surrounding the murder scene, there was a consensus that the Crips were responsible for Hodges's murder. Hodges belonged to the P-9 gang. (66RT 6442-6444.)

Stephanie Robinson had a birthday party on October 31, 1993, at her house near the intersection of North Allen and Walnut. (66RT 6429; 67RT 6517-6518; 68RT 6745.) The party started around 7 p.m. There were approximately 40 guests. Lawrence and Antwaun Ayers, Lloyd Summerville, Robert Nolden, Mickey Polk, Derieus Halliburton, Edgar Evans, Stephen and Kenny Coats, Antone Prince, and Reggie Crawford

attended. That group of boys left between 9:30 and 10 p.m. (66RT 6430-6431, 6480; 67RT 6518-6519, 6525, 6542; 68RT 6746.)

The boys went trick or treating on the way to the Coats's home. They also stopped at George's Market. (66RT 6481; 67RT 6518, 6525, 6527, 6543; 68RT 6747.) They played on the phones at the market. Four or five cars drove by and one almost hit Reggie. The people in the cars threw P-9 gang signs. Reggie threw up his hands like, "What's up?" (66RT 6482; 67RT 6519-6520, 6543; 68RT 6748-6749.) The cars proceeded down Villa. There were a lot of Black males in the cars. (66RT 6483; 67RT 6520-6521, 6543.) Two cars turned on Mentor, and two went straight. (68RT 6750.) Mickey, Derieus, and Robert left the group. (67RT 6544; 68RT 6753.)

Meanwhile, Gabriel Pina and Lillian Gonzales were out for a walk with his dog near the intersection of Mentor and Emerson. As they walked toward Orange Grove, Pina heard a car speeding up the street, at approximately 45 or 50 miles per hour in the residential area. (67RT 6605-6607.) Pina realized that there were four cars altogether speeding. He tried to look inside to see if there were people he recognized from the neighborhood to tell them to slow down. He focused on the drivers. (67RT 6608.) The cars turned onto Orange Grove, heading toward Mar Vista. When Pina reached Mentor and Orange Grove, he no longer saw the cars. (67RT 6609.) At some point, Pina, Gonzales, and the dog headed southbound on Catalina. Pina again saw the cars. Three cars were then parked on Catalina, near Mar Vista. The fourth car was parked in the middle of the street with its parking lights on. (67RT 6610-6611.) As Pina, Gonzales, and the dog walked on Catalina, the first car drove to them, stopped for a minute, and then reversed back to the group. Pina, Gonzales, and the dog continued to walk. The car then drove to them again. The driver looked at them through the front windshield. He was approximately

15 feet away. The car then returned to the other three cars. (67RT 6612-6613.) The car's action made Pina nervous. (67RT 6616.) There were about 15 to 20 persons standing on the corner of Emerson and Orange Grove. Some persons approached the car. They talked. That car backed up southbound on Catalina, then proceeded briefly westbound on Emerson and then eastbound on Emerson. (67RT 6614.) Another car joined that car, after having made the same maneuver. (67RT 6617.)

Jessica Ramirez lived at the corner of Emerson and Catalina. She woke to the sound of two cars pulling up and people talking. She looked out the window. (67RT 6581.) She heard male voices and saw that the persons were Black. She heard, "Hurry up." (67RT 6582.) Pina heard someone pounding on a gate, a horn honking, and someone saying, 'Hurry up." (67RT 6617-6618.) One car left eastbound on Emerson and then turned northbound on Catalina. At the same time, three persons walked around the corner on Emerson. (67RT 6582-6583.) Pina saw other persons get into the cars and the two cars proceed northbound on Catalina. (67RT 6619.)

In the meantime, after playing on the phones, the boys walked up Wilson, talked to someone that Reggie knew, and then saw the Coats brothers' mother in a car. She stopped and talked to her sons. The boys then continued to walk on Wilson. Reggie and Stephen were singing a song that was popular at that time, called "Gangster Lean." (66RT 6484-6485; 67RT 6521, 6528-6530, 6544-6546; 68RT 6751-6753.) Someone said, "Now Blood." (68RT 6754.) The boys then heard loud sounds like firecrackers from the same area as the voice. The sounds were not from firecrackers, but were from gunshots. Reggie turned and held his chest. Stephen said, "They're shooting" and "I'm hit," and fell. He was less than a foot from the bushes. Muzzle flashes came from the bushes. Eddie grabbed his stomach and chest and said, "Momma." Lawrence told

everyone that someone was shooting. Antwaun was hit in his right hand and yelled that he had been hit. (66RT 6484-6485; 67RT 6521, 6528-6530, 6544-6546; 68RT 6751-6755, 6757; see 67RT 6620.) There were at least two persons running from the shooting and bush area. (68RT 6765.)

Pina ran behind a tree on Emerson. He saw two persons run around the corner and get into the two cars that he had previously seen. Both cars left. (67RT 6621-6622.)

Roger Boon, who was at a party on Wilson Street, heard the gunshots. He believed that the shots were from two guns. He was on the sidewalk with five other persons when he heard the gunshots. (67RT 6592-6593.) He saw muzzle flashes. Approximately five minutes after the gunshots, he saw two cars driving up Wilson from where the gunshots came from. (67RT 6593.) As the first car passed in front of him, a man in the car extended his right arm and gave a thumbs-up signal. (67RT 6595.) There were two persons in the first car and five persons in the second car. (67RT 6596.)

A minute after the cars passed, Boon and his friends heard people screaming and shouting. Boon and his friends then went to the crime scene. (67RT 6596; see 67RT 6622.) Boon saw two persons on the grass. He went to the first boy and began talking to him. The boy was not alert, but was still breathing. A few seconds later, he died. Boon could tell that the other boy was already dead. Boon then noticed more boys walking around, one lying down, and another with blood coming from the shin. Boon went to help the one lying down. (67RT 6597-6598.)

Pina went to Eddie, who was gasping for breath. (67RT 6626-6627.) He then heard noises and saw two boys hiding behind some bushes. They were frightened. They had been shot, one in the leg and the other in the hand. Pina helped one of them sit on the grass. When the police arrived, Eddie had passed away. (67RT 6628.)

Kenny went to his brother and saw his mother, sister, and aunt. His mother was screaming. His aunt was trying to calm his mother and kept saying, "That's not him." (68RT 6759.) Kenny pushed his mom out of the way and said, "That is him." (68RT 6759.) He recognized Stephen's shoes. (68RT 6760.) His sister took off her jacket and put it on Stephen. She kept saying, "Momma, he's cold." (68RT 6759.) Kenny tried to pick up Stephen to take him home. His mother told Kenny to leave Stephen there because of the police needed to investigate. Stephen's body was around a tree. (68RT 6760.)

Reggie's body was half on the curb and half in the street. (68RT 6760.) Kenny said to Reggie, "Get up, Reggie." (68RT 6760.) Mickey and Derieus grabbed Kenny and moved him back. (68RT 6760.) Everyone was crying. (68RT 6761.)

At 10:37 p.m., the Pasadena firefighters and paramedics were dispatched to the area of 512 Wilson Street, the scene of the Halloween murders. (66RT 6421; 67RT 6511.) Three victims, two of whom were on the ground, were deceased. (67RT 6513, 6625.) Eddie was lying face up on the steps of a house, as if he may have been going up the steps and then collapsed. (66RT 6424.) He had a gunshot wound over his heart. He was without a pulse and not breathing. He was "basically dead." (66RT 6425.) The paramedics administered CPR, inserted IV's, and transported him to Huntington Hospital. (66RT 6425.)

Antone had a gunshot wound to the right leg. After being treated by paramedics, he was transported to Huntington Hospital. According to Yvette McDowell, who was a paramedic at the Wilson Street crime scene, had been a paramedic for fourteen years, and had responded to hundreds of shooting scenes, she could not remember any incident that was comparable to what she saw at Wilson Street. (67RT 6515-6516.)

On October 31, 1993, Charles Baker[20], Willie McFee, McFee's son, Sheree Holloway, Roscoe, and Wendell were at Baker's residence on Pasadena Avenue. Around 9:30 or 10 p.m., there was a man at Baker's door who asked if Wendell was there. (71RT 7034, 7036.) McFee went to the door. Forty minutes later, Baker heard gunshots -- one loud boom and then rapid fire. Baker heard something hit the house. The next morning, he noticed that the air conditioning unit in a window had a hole in it. (71RT 7034, 7037-7038.) There were bullet casings directly across the street from the air conditioner. (71RT 7039.)

On November 1, there was a firebombing at the home of Stephen Riles, an active Crips gang member. (66RT 6445.)

On November 3, 1993, an autopsy was performed on Eddie. (67RT 6552.) The cause of death was a gunshot wound to his chest. At the time of death, Eddie weighed 127 pounds and was five feet eight inches tall. (67RT 6553.) The bullet went through his heart, diaphragm, liver, stomach, spleen, and the lower part of his chest. (67RT 6554-6555.) Eddie died within minutes after being shot. (67RT 6556.) After receiving the gunshot, he would have been conscious and realized that he had been shot. (67RT 6557.) He would have been in agony, gasping for breath as blood gushed into the chest cavity. (67RT 6558.)

On November 3, 1993, an autopsy was performed on Reggie. (68RT 6734.) He died as a result of multiple gunshot wounds. (68RT 6735.) He had gunshot wounds to his neck, upper chest, abdomen, right forearm, and right index finger. The gunshot wound to his upper chest was fatal. (68RT 6737-6738.) Reggie died within a few minutes of receiving the fatal

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[20] At the time of trial, Baker was on drug diversion, but had not completed the courses. He was expecting that his case would be dismissed in exchange for his testimony at trial, so that he would not have to complete diversion. (71RT 7040.)

gunshot wound. (68RT 6742.) That gunshot wound perforated the top of his right lung, causing a five-inch contusion of the lung and a tremendous amount of bleeding into the chest cavity and collapsed the lung. (68RT 6742.) Reggie would have probably felt an inability to breathe and would know that he was dying. (68RT 6743.) The gunshot wound to his abdomen indicated that Reggie was most likely lying on his back on the ground when he received that gunshot, and that the shooter was some distance beyond his head and firing down toward Reggie's feet. (68RT 6740-6741.) There was no evidence of soot or stippling. (68RT 6741-6742.)

On November 3, 1993, an autopsy was performed on Stephen. (69RT 6911.) At the time of death, Stephen was five feet nine inches tall and weighed 161 pounds. He had a fatal gunshot wound to his head and a gunshot wound to his left hip area. The gunshot wound to the hip was actually two individual wound paths caused by bullet fragments. The bullet fragments were consistent with a bullet striking something, becoming fragmented, and lighter portions of the bullet becoming caught in Stephen's clothing and heavier portions entering him. (69RT 6912-6914.) Because an impact area was observed to be next to the body, it was likely that Stephen was on the ground when the bullet struck the ground and then entered his body. (69RT 6915.) Stephen's death would have been instantaneous. (69RT 6918.)

The prosecution introduced a chart that reflected the physical items of evidence examined by Deputy Dwight Van Horn, the ballistics expert. (69RT 6860; Peo. Exh. 128 [chart].) Three live .38 caliber rounds were found in the front yard of 569 North Wilson. (69RT 6861.) Two .38 or

.357 caliber[21] expended bullets were individually found on Wilson Avenue. (69RT 6862-6863.) An expended .38 or .357-caliber casing was found at the corner of the living room at 574 North Wilson. (69RT 6863.)

Fifteen expended nine-millimeter casings were found on the sidewalk on the front yard of 569 North Wilson. (69RT 6861.) Five expended nine-millimeter bullets or bullet fragments were individually found on Wilson Avenue. (69RT 6862-6863.) Several additional bullet fragments were found on Wilson Avenue, including five expended bullet fragments in the sidewalk and flowerbed area of 569 North Wilson. (69RT 6863.)

A live PMC .38 special wad cutter was found in the driveway at the entrance of 830 North Pasadena. (69RT 6863; see Peo. Exh. 49 [item 78].) Eighteen expended nine-millimeter casings were found in the front yard of 830 North Pasadena, and one additional casing was found in the driveway entrance. (69RT 6864.)

After examining the items, Deputy Van Horn concluded that 15 casings found on Wilson Avenue and 18 casings found on Pasadena Avenue were fired from the same nine-millimeter. (69RT 6878.) An expended nine-millimeter shell casing found at the base of the steps at 554 North Wilson (item 37) was fired from a different nine-millimeter firearm. (69RT 6885.)

A .38 or .357 caliber bullet was taken from Reggie's body during the autopsy. (69RT 6864.) An expended .38 or .357 caliber bullet was found under the right shirt collar and above the right shoulder of Reggie; it had

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[21] A .38 special revolver and a .357 magnum revolver are capable of firing the same bullet. The difference would be the length of the cartridge case. A .357 magnum caliber cartridge case is one-tenth of an inch longer than a .38 special caliber cartridge. The live round of a .38 special caliber ammunition could be placed into the cylinder of a .357 magnum revolver, but a .357 magnum round of ammunition could not be placed into the chamber of a .38 special revolver. (69RT 6869.)

been fired from the same gun as the bullet found during the autopsy. (69RT 6864, 6883-6884.) Six expended bullet fragments were inside the back of the jacket of Reggie. (69RT 6864.)

Two bullet fragments and two expended .38 or .357 bullets were collected during Stephen Coats's autopsy; the bullets had both been fired from the same gun. (69RT 6864, 6883-6884.) An expended nine-millimeter bullet was in the T-shirt above the buttocks of Stephen. (69RT 6864.) That nine-millimeter bullet was fired from the same gun as two of the expended nine-millimeter bullets found on Wilson Avenue. (69RT 6884.) The bullets retrieved from Stephen were fired from a different gun than the bullet retrieved from Reggie. (69RT 6884.)

In October 1993, Pasadena Police Officer Carlos Lopez was assigned to the gang unit and primarily worked with Black gangs. (66RT 6450-6451.) As a gang officer in Pasadena, Officer Lopez was familiar with the P-9's. (66RT 6452.) P-9 stands for Parke Street Nine Lives. (66RT 6456.) P-9's were originally all Blood gang members. Parke Street was derived from the street where appellant Newborn lived. (66RT 6456.)

Appellant Newborn was a member of the P-9's. (66RT 6456.) He lived approximately a quarter of a mile from the Community Arms. (66RT 6463.) His gang moniker was "Sunday Shoes." (66RT 6464.) Appellants McClain and Holmes were active members of P-9. (66RT 6456-6457.) "Boom" was appellant Holmes's nickname. (66RT 6463.)

At trial, Officer Lopez was shown a picture of the P-9 gang taken at a P-9 gang funeral. In the photograph were Solomon Bowen, Alonzo Hamilton, appellant Newborn, Carlos Clayton, Robert Leagons, Cornell Daniels, Royce Kemp, Laward Looney, Ishmael Offutt, Michael Williams, and Fernando Hodges. (66RT 6458.) Officer Lopez was shown another photograph in which Carlos Clayton and another person were holding a large red bandanna with different P-9 names, like Herb, Solomon, T. Crazy,

Royce Kemp, Carlos Cornell, Tray K, and Mike D. Laward Looney was holding a nine-millimeter gun with shells coming out of it. (66RT 6460.) Officer Lopez took a photograph of the wall at Orange Grove and Lincoln. It showed S-9/SL, which stood for Squiggly Lane, a Blood gang in Pasadena. It had S-9 and P-9 together, signifying an alliance. In October 1993, there were problems between the P-9's and the Crips. (66RT 6461.)

At trial, Officer Lopez was also shown a photograph of graffiti. The graffiti had P-9, Boom, Sunday Shoes, and Monsta Herb 1. There were the words "Anybody Killa," and beneath it, "sheriff" was crossed out, "police" was crossed out, and "killa." (66RT 6464-6465.) Crossing out sheriff and police signified murder. (66RT 6465.) The graffiti was on the wall of a holding cell in the courtroom. Officer Lopez believed that because the graffiti had appellants' names on it, they were more than likely to have been possible individuals to have put up the graffiti. (66RT 6475.)

Appellant McClain testified in a prior proceeding that the P-9's that he knew by name were himself, Alonzo, Lorenzo (appellant Newborn), Howard, Royce, Rob Leagons, Solomon Bowen, Carlos, Clayton, and "[his] homeboy Fernando [Hodges]." He denied that he knew appellant Holmes and Aurelius Bailey by name. (70RT 7018.) When appellant McClain heard that Hodges had been killed, he went to Navarro and Howard because P-9's could have been there, even though it was not a P-9 "hangout." He had tried to page his "homeys," but no one called him back. (70RT 7019.) He was paged by Kim Smith, who had called from her home at the Community Arms. She was crying and told him that Hodges had been shot by Crips. (70RT 7020-7021.) Appellant McClain was angry at the Crips for shooting Hodges and wanted to retaliate. Appellant McClain paged appellant Newborn, Alonzo, and Bowen. (70RT 7022.) Appellant McClain was armed with a .44 caliber gun that night, which he took with

him. (70RT 7023.) He had "never killed nobody as yet." (70RT 7024.) He looked for both Crips and his "homeys." (70RT 7025.)

2. Victim impact testimony

The incident affected Lloyd's life "a whole lot" and had a lasting impact in a "lot of ways. Hurt." (67RT 6522.) He was 12 years old at the time of the shooting. (67RT 6519.) He was unable to go to school and did home study. He had to go to a different state. He had received threats. He was frightened by the incident. He saw that Antone and Lawrence were shot. Lloyd saw Eddie and Stephen lying down. (67RT 6522.)

Lawrence was 14 years old at the time of the shooting. (67RT 6526.) After hearing the gunshots, he ran and hid in bushes. When the shots stopped, he left his hiding place. Because he did not see anyone, he called for his friends. He then heard a lot more gunshots and was hit by a bullet. He had been shot in his left calf. (67RT 6532-6533.) Lawrence then went to his brother Antwaun and his cousin, Antone, because they were both injured. Antone was lying on the ground, bleeding from his leg. He was in pain and screaming. Antwaun had an injury to his wrist. Lawrence saw Stephen and Reggie lying on the ground, checked to see if they were alright, and realized that they were not. A lot of blood was dripping from their heads. Lawrence went into shock. Lawrence saw Eddie and heard him moaning. Lawrence was taken to St. Luke Hospital. (67RT 6534-6536.) At trial, Lawrence still had a bullet in his leg. (67RT 6536.) After what had happened, he thought that "being on the streets is not no joke." (67RT 6536.) He and his friends were not "gangbanging." (67RT 6537.) They were not armed. They had bags of candy. (67RT 6537.)

Antwaun was 13 years old at the time of the incident. (67RT 6541.) When he emerged from the bushes, he saw a woman screaming and saw Stephen's, Reggie's, and Eddie's bodies on the ground. (67RT 6548.) At

trial, half of a bullet was still in his hand and he had some problems as a result. His hand "lock[ed] up every now and then." (67RT 6547-6548.)

From where he was, Robert could not see who was shooting. (66RT 6487-6488.) After hearing the gunshots, Robert ran to Wilson and saw Stephen and Reggie lying on the ground. (66RT 6485-6486.) They were dead. He also saw Antwaun, Lawrence, Antone, and his cousin Eddie wounded. Robert went to Eddie, who was on a stairway. Eddie said, "Mama. Mama." (66RT 6486-6487.) The shootings and the murders that Robert saw caused lasting hurt. The persons that he used to see every day were gone. (66RT 6490.)

Katrina Evans was Eddie's mother. He was 13 years old when he was murdered. He asked his mother for permission to go to the Halloween party. Katrina saw him leave to go to the party. (66RT 6491-6492.) He wore a blue T-shirt and jeans. She asked him to be home on time and not to stay out late. She did not speak to him ever again. At 10 p.m., she became concerned about his whereabouts because he normally called if he was going to be late and she had not received a phone call. (66RT 6493.) She asked her husband if they should call the police because it was late and "crazy things happen on Halloween." Her husband said that it was only 11 p.m. and to not panic. Katrina received a call from a woman who lived down the street and whose daughter was good friends with Eddie. The woman told her that there had been a shooting on Wilson, that Eddie may have been there, and that Katrina needed to go to the hospital. Katrina told her 11-year-old daughter that she was going to the hospital to "do some checking" and that she would call with information. (66RT 6494-6495.) When Katrina and her husband went to the hospital, her friend who worked at the hospital asked that they pray before Katrina saw Eddie. As soon as she saw Eddie's feet, she knew it was him. (66RT 6499.) She could not believe that he was lying on a stretcher when she had seen him healthy,

happy, and outgoing earlier. While she was in the waiting room, a nurse gave her Bible verses that were found in Eddie's pocket. (66RT 6500.) Katrina called her daughter and told her that Eddie was dead and had been shot. (66RT 6501.) Her daughter "lost it," and screamed and said, "Oh, no, God." (66RT 6501.) Eddie and his sister were only 22 months apart in age and were always together. (66RT 6502.)

For the two weeks after the murder, Katrina did not want to eat, could not sleep, and cried most of the time. (71RT 7058.) Arranging Eddie's funeral was the hardest thing for Katrina. For the past three years, Katrina had been working to get her daughter "back on track" because she was "really incoherent." (66RT 6502.) She did not want to go anywhere and stayed at home. Her husband did not take Eddie's death well. He left the family and lost his business. Eddie's younger brother was angry and frustrated, and drew pictures of Eddie, a gun and a bullet going straight into Eddie's heart. (66RT 6503.) Eddie was a good brother and a good boy. He was a "real go-getter." (66RT 6496.) He helped around the neighborhood. (66RT 6497.) He won a citywide essay contest for the Martin Luther King "I Have a Dream" theme. (66RT 6498; 71RT 7058-7062; Peo. Exh. 134.) He had high grades in school. (66RT 6504.) Whenever he went somewhere, he gave to his mother the phone number where he could be reached. He studied the Bible with his mother and went to church. He had a strong faith. He was talented, good at writing, and could write songs. (66RT 6504.)

Kenny was 13 years old at the time of the shooting. (68RT 6745.) When he saw his brother, he had a "feeling in his heart" that Stephen was dead, but did not want to believe it. Stephen was 14 years old when he was murdered. They were 17 months apart in age. Kenny and Stephen did a lot of things together - basketball, football, playing Nintendo. Stephen drew well. He did a mural at Washington Middle School. (68RT 6761-6762;

69RT 6984.) He did not make a big deal out of it, and said, "It's just a picture." (69RT 6982.) Kenny felt that part of his life for 13 years was no longer there. (68RT 6763.)

Deborah Bush was Kenny and Stephen's mother. She had two other children. (69RT 6966.) On October 31, 1993, they lived in the 600 block of North Wilson. (69RT 6968.) At 10:30 p.m., Bush picked up her daughter and grandson in Altadena and saw Stephen and Kenny with their friends. She was happy that the boys had listened to their older sister's instruction to be home at 10:30. (69RT 6970.) She tooted her horn and Stephen and Kenny approached Bush's car. She asked, "How come you're not home?" (69RT 6971.) Stephen responded that they were almost there. Bush asked if they wanted a ride, and Stephen said, "No, I don't need a ride home. In fact, your car's too slow. I'll race you home. I'll probably beat you." (69RT 6971.) Bush drove home. It was the last time she spoke with Stephen. (69RT 6971.)

Their home was approximately seven houses north of the intersection of Emerson and Wilson. As Bush pulled into her driveway, she heard gunshots. In her neighborhood, they were not accustomed to hearing gunfire. (69RT 6972.) Bush was horrified. Her sister had just arrived at the home and tried to stop her, but Bush ran down the street. She ran to the area where the boys had been and did not see anything. She screamed their names, but nobody answered. She saw a body, but did not distinguish who it was. Bush, who was a crime scene investigator for the Pasadena Police Department, was trained in first aid and felt the neck for a pulse. She realized that the person was dead. She walked a few feet and saw another body on the ground. She saw that the person had a bullet in his head and realized it was Stephen and that he was dead. (69RT 6973-6974.) Bush's daughter Stephanie and Bush's sister arrived at the scene. Bush screamed for someone to call the police and the paramedics. Stephanie put her coat

over Stephen and said, "It's going to be all right. Help is on the way." (69RT 6975.)

At that point, Bush realized that she did not see Kenny. She then saw him running up the street. He tried to pick up Stephen. The police tried to restrain him and he said, "They killed my brother." (69RT 6975.) Bush's 12-year-old daughter arrived at the scene. Bush told her that Stephen was dead. Bush's daughters said, "They're [referring to the paramedics] not helping him, mama. Please make them help him. Take him to the hospital so he is better." (69RT 6976.) Bush had to tell them there was nothing else that the paramedics could do because Stephen was "already gone." (69RT 6976.) Bush saw her co-workers and fellow crime scene investigators and realized that they could not do their job if Bush was there. Bush and her three children went home. For the first time in her life, she only had three children to bring home and she had to leave one behind. It was the most difficult thing she had to do. (69RT 6976.)

Stephen's father, Stephen Coats, was notified by Bush that Stephen had been killed. Coats went to the crime scene. It was painful for him to see his son lying on the ground, lifeless, with ants crawling on his face, and a bullet hole in his head. (70RT 6989-6990.)

Later that night, the police arrived at their home to talk with Kenny. There were approximately 20 or 30 people at Bush's home by that time. Bush's children were devastated. (69RT 6977.) Bush and Kenny went to the police station so that the detectives could interview Kenny. She saw that Kenny's white dress shirt had blood on the front. (69RT 6978.) Stephen's funeral occurred eight days later. (69RT 6979.) Their lives were "turned upside down." (69RT 6980.) Media was at their doorstep. People whom Bush did not know, offered their support because they were horrified by what had happened. (69RT 6980.)

Of all of Bush's children, Stephen was the quiet one. (69RT 6980.) His favorite pastime was drawing. He loved to play Nintendo and talk on the phone. He rooted for the underdog. He loved little children. (69RT 6981; 70RT 6990.)

The impact of the crimes had been "hitting and hard." (69RT 6985.) It was devastating. Their family had always made jokes and laughed, with Stephen pulling the most pranks. Their laughter was taken on October 31, 1993. (69RT 6984.) Kenny had never slept in his room without his brother. It took a year after Stephen's death before Kenny could sleep in their room. Bush's youngest daughter could not even talk about the incident. She could not watch or read anything to do with the murders because it made her upset. Stephen had been Bush's other daughter's best friend. (69RT 6985; 70RT 6990.) Stephen's father felt hate, anger, sadness, and remorse. He repeatedly said that had he taken Stephen to Los Angeles on that night, Stephen would have been alive. (70RT 6990.)

Reggie was 14 years old when he was murdered. (70RT 7004.) Florence Crawford, Reggie's mother, allowed her son to go to a Halloween party because she did not want him to go trick or treating. Around 10 p.m., she drove past the boys. She was going to make him get into the car, but since they were just down the street, she allowed him to go to the Coats's house. Five minutes later, the boys had not returned. She then heard shooting. She was worried. She eventually got in her car and drove toward Wilson. She saw Robert Nolden, who was upset and hysterical. He said that Reggie had been shot. (70RT 6993-6994.) Wilson was blocked off, so Crawford went to Huntington Memorial Hospital to look for Reggie. An officer told them to go to the hospital. She thought that he was wounded. She did not know that three boys had been killed. Reggie was not at the hospital. Crawford's sister called other hospitals, trying to locate Reggie.

They left the hospital and went to Wilson and Villa, but were told to go home. Crawford and her sisters waited at her home. (70RT 6995-6996.)

Thirty minutes later, Reggie's grandfather arrived at the house and told them that Reggie was dead. Reggie's grandfather had identified the body. Crawford went into a state of shock. (70RT 6997.) She was a good parent. She had kept him from becoming involved with gangs. Reggie was against gangs, and he got killed not for something he did. (70RT 6998.)

For Crawford, "reality had set in that [Reggie] was really gone" at the funeral. She had not seen Reggie after he had been shot until the day before the funeral. (70RT 7002.) His murder made her miss his teenage years and his future that they had planned. She missed him going into her room and giving her a kiss. (70RT 7006.) Reggie's sister did not handle her brother's death well. She was 13 years old. She needed counseling. Crawford missed work. (70RT 6998-6999.) Reggie's younger brother took Reggie's death hard. (70RT 7004.)

3. Appellant Newborn's prior criminal activity involving force or violence or threat to use force or violence

a. 1986 altercation at CYA

On May 5, 1986, appellant Newborn and another ward at the California Youth Authority O.H. Close school facility were in a verbal altercation. It was gang-related. Appellant Newborn then struck the other ward. Appellant Newborn was "clearly the aggressor" because he struck first. (69RT 6894-6895, 6897.)

In August 1986, Gary Driggs was a senior youth counselor with the California Youth Authority. Appellant Newborn was under Driggs's supervision at that time at O.H. Close School in Stockton. On August 4, 1986, appellant Newborn was breaking a rule by talking when the wards were not permitted to talk. Driggs escorted appellant Newborn to a

temporary lockup room, but appellant Newborn continued to talk with another ward. He then broke away from Driggs and jumped over a four-foot railing to the bed area below. (69RT 6856-6857.) Appellant Newborn initiated a fight with another ward. The words exchanged between appellant Newborn and the other ward were "gang-related disrespect." (69RT 6858.) Appellant Newborn struck the other ward. (69RT 6858.)

b. Batteries of Detrick Bright

In 1991, Detrick Bright began dating appellant Newborn. (68RT 6695.) On August 30, 1992, the driver's side window was kicked in as Bright was driving her car in reverse on Parke Street in Pasadena. She did not see who kicked in the window. The broken glass hit her face, legs, and thighs. Later that evening, she told the police that: she had had an argument with appellant Newborn; she saw him run toward the car immediately before the window broke; appellant Newborn kicked in her window and struck her with his foot; and she wanted to prosecute appellant Newborn for the injuries she sustained in the matter. A couple days later, she told the police that she did not want to prosecute appellant Newborn and signed a release form stating that she no longer wanted to prosecute him. (68RT 6696-6697; Peo. Exh. 126 [four photographs].)

On April 9, 1993, appellant Newborn took Bright's pager. He hit her and pushed her into rose bushes several times.[22] When Pasadena Police Officer John Perez arrived, he observed that Bright's right cheek was red. (68RT 6699-6701, 6793-6794; see Peo. Exh. 127 [photographs].) She was very upset, agitated, and crying. (68RT 6801.) She said that she had been attacked by appellant Newborn. When officers began to talk about the

[22] At trial, Bright's recanted what she told the police and stated that she had first hit appellant Newborn, that when he stood, she fell into rose bushes, and that the thorns had scratched her. (68RT 6699-6700.)

circumstances with appellant Newborn, he became agitated and pushed himself away from the officers. He was taken to the ground, and after a brief struggle, was handcuffed and taken into custody. (68RT 6802-6805.) He resisted getting into the police car, so the officers used mace to subdue him. (68RT 6806.)

On December 7, 1993, Bright and appellant Newborn were in the apartment that they shared. Late that night, they argued and she struck him. She then went into the bedroom. He entered the bedroom with a can of Lysol and tried to spray her in the face with it. She turned her head and was sprayed on the side of the head. Appellant Newborn left the bedroom and returned with a bottle of Windex. He sprayed her in the face with Windex. (68RT 6702-6703, 6719-6720.) He then said, "Oh fuck it. I know what -- I know what to use." (68RT 6720.) Bright tried to leave the bedroom, but appellant Newborn pinned her against the wall and sprayed her with Raid Ant and Roach Spray. She was pregnant at the time. The Raid got into her eyes and mouth and caused her to lose her breath and to fall down. Appellant Newborn called the paramedics, who came and treated her. She was unable to call the paramedics because her tongue was swollen and she could not talk. She thought the paramedics were going to call the police. (68RT 6702-6703, 6720-6721.) Appellant Newborn had said that even though it was December, he had a New Year's resolution that he was not going to put his hands on anyone anymore, but he would spray Bright instead of putting his hands on her. (68RT 6714.) The next morning, appellant Newborn abruptly woke Bright by pulling her off the sofa and onto the floor.[23] (68RT 6721.)

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[23] Bright testified that appellant Newborn abruptly woke her by sitting on her. (68RT 6705.)

c. Battery of Tanchell Anderson

Around October 1991, 16 or 17-year-old Tanchell Anderson broke up with appellant Newborn, whom she had been dating for approximately three or four months. It was her mother's idea for Anderson to break up with appellant Newborn. On October 15, 1991, two weeks after breaking up with him, Anderson saw him as she was leaving a liquor store on Los Robles near Orange Grove. (67RT 6560-6562.) They argued. He was unhappy that they had broken up and wanted to continue the relationship. He called her a bitch, causing her to slap him. (67RT 6564-6565.) Anderson told police that she tried to walk away, but appellant Newborn grabbed her by the arm. (67RT 6587-6588.) He became more angry, punched her in the face several times, knocked her to the ground, and then hit her in the face with both fists in excess of 30 times. (67RT 6566-6567, 6588.)[24]

d. Battery of Aneadra Keaton

On May 7, 1992, Aneadra Keaton was involved in a dispute with appellant Newborn, who was her boyfriend. (69RT 6934, 6952.) They argued because Keaton had not gone to school. (69RT 6935.) Appellant Newborn pulled her out of the apartment and pushed her down the stairs outside the apartment. They walked up the street and continued to argue

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[24] Anderson went home immediately after her contact with appellant Newborn. Her mother, who was home, became upset when she saw Anderson. (67RT 6577.) Anderson was hurt and her face was swollen. (67RT 6578.) Her cheeks were swollen and she had a bump on her forehead. (67RT 6588.) After Anderson told her mother what happened, her mother reported the incident to the police. (67RT 6566.) Anderson went to the Pasadena police station to report the assault. (67RT 6587.) She appeared frightened, was upset and mad, and was crying. (67RT 6590.) At trial, Anderson said that she and appellant Newborn exchanged blows, totaling 15. (67RT 6566.)

when a police car arrived. She had a swollen lip. (69RT 6936-6937, 6952.) Keaton told the officer that she had a two-week old infant in her arms when appellant Newborn entered the bedroom and pushed her onto the bed. He pried open a sliding door and forced his way in. He pushed her into the living room, causing her to fall to the floor. Outside the apartment, he slapped her across both cheeks with an open palm. He pushed her out the front door and down the stairs. (69RT 6939-6940, 6953.) He said, "Listen, you fucking bitch, you'll do what the fuck I want you to do." (69RT 6940, 6954.)

On August 20, 1992, Keaton was with Shawntia Blaylock at Keaton's house. Appellant Newborn arrived in a car at her house. Fernando Hodges was with appellant Newborn. Keaton and Blaylock left with appellant Newborn and Hodges. Keaton and appellant Newborn began arguing. When they arrived at a park, appellant Newborn hit Keaton. Hodges and Blaylock were arguing in the back seat. Hodges struck Blaylock. (69RT 6945-6946.) Keaton exited the car and left. Appellant Newborn grabbed Keaton's arm, but she got away. (69RT 6947.) Later, Keaton and Blaylock told police officers what had happened. She told them that appellant Newborn hit her numerous times with an open hand on her head and her leg and called her a bitch and other names. He pulled her by the hair as she tried to exit the car. (69RT 6948, 6962-6964.) As she ran from the car, appellant Newborn said that he was going to kill her. (69RT 6964.) She complained that her head hurt from the injuries that she received. (69RT 6949.)

e. Battery of Rochelle Douglas

On November 3, 1992, 21-year-old Rochelle Douglas, who had been dating appellant Newborn for about three years, was eight and half months pregnant with his baby. (68RT 6663.) At 11:15 a.m., a six-year-old child and Douglas were at her home on Summit Avenue in Pasadena when

appellant Newborn entered the home. They were still dating and argued. (68RT 6663-6665.) Appellant Newborn said he heard that Douglas had been "messing around" and that the baby was not his. He told her not to put the baby in his name. (68RT 6666; see 69RT 6892-6893.) If she did, he would hurt her every time he saw her.[25] She hit him with a phone.[26] He slapped her hard four to five times in the cheek. He ripped the phone out off the wall and threw it outside. Her face was swollen. Her earring scratched her face and drew blood. She chose not to prosecute the case. (68RT 6667-6671; 69RT 6891-6892; see Peo. Exh. 125 [photographs].)

f. Altercation with Louise Jernigan

On December 11, 1992, Louise Jernigan was at a beauty supply store on Fair Oaks and Orange Grove in Pasadena. (68RT 6768.) Appellant Newborn entered the store, and placed a gun to Jernigan's right side. She pushed him away. (68RT 6770.) She asked him why he put a gun to her side and why he would want to shoot her. He said, "Come to the car." (68RT 6771.) Jernigan responded, "No, I don't have to come to no car." (68RT 6771-6772.) At some point, she went outside to argue with him more. She told him, "You going to shoot me, shoot me, punk." (68RT 6772.) She asked him why he was going around killing everybody. He told her to come to the car. (68RT 6772.) She refused. He got into his car and drove away. She called the police. (68RT 6773.)

g. Resisting Arrest

On May 12, 1993, the Pasadena police received a call about a male with a gun. (69RT 6822.) Approximately seven police officers responded

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[25] Although at trial Douglas denied that appellant Newborn made the statement, she testified that she may have told the police that he made it. (68RT 6667.)

[26] Douglas told Pasadena Police Officer Mary Hooker that she tried to hit appellant Newborn, but could not reach him. (69RT 6893.)

to an area in Pasadena. There were over 20 civilians present. Officer Monica Cuellar was directed to search appellant Newborn. When she asked him to place his hands on his head, he refused to comply. (69RT 6823-6824.) He said, "Don't touch me, bitch" and "fuck you." (69RT 6824.) Officer Cuellar again asked appellant Newborn to place his hands on his head, he again refused. (69RT 6824.) Investigator Peterson then stepped in. Appellant Newborn responded, "Fuck you, man. I can talk any way I want to." (69RT 6825.) Two more officers then stepped in. Appellant Newborn yelled obscenities at the officers, apparently trying to incite the crowd. The officers detained appellant Newborn for officer safety. (69RT 6825-6826.) Appellant Newborn resisted being handcuffed by keeping his arms stiff. He continued to yell obscenities, even when he was placed in the patrol car. (69RT 6927.)

4. Appellant McClain's prior criminal activity involving force or violence or threat to use force or violence

a. 1989 conviction for grand theft of an automobile

On April 24, 1989, appellant McClain was convicted in case number A578735 of grand theft auto, committed on January 19, 1989. (69RT 6850.)

b. Robbery of Raquel Flores

At 9:30 p.m. on July 27, 1989, Raquel Flores arrived home in Pasadena, located near Marengo and Villa, and was getting out of her car. There were three dark-skinned males, whom she allowed to cross the street before she parked. One person had a bicycle with a baby seat. Appellant McClain, one of the three males, asked Flores about someone. Flores said that person did not live there. Appellant McClain asked if Flores was sure that the person did not live there, and she said no. Appellant McClain then

pushed her with one hand and used the other hand to take four or five chains from Flores's neck. Flores had never before seen appellant McClain. The attack left marks on her neck. Appellant McClain then ran. Flores called the police. (69RT 6833-6837, 6839.) She gave the police a description of the incident. The police then transported her to another location, where she identified appellant McClain as her assailant who took the chains. She identified him by his clothes. She also identified a person who was standing next to appellant McClain as being involved with the attack. (69RT 6838-6839, 6841.) The field identification was made within 30 minutes of the crime. (69RT 6842.)

c. Possession of a firearm by a felon

At approximately 1 a.m. on November 8, 1989, Los Angeles County Sheriff's Deputy Ron Blankenbaker and his partner were in a marked patrol car in Charles White Park in Altadena. The deputies saw two males standing near the bathroom area of the park. When the males saw the patrol car approaching, they ran into the bathroom area. The deputies heard a gunshot from the inside of the bathroom. (69RT 6815-6816.) The deputies ordered the persons out of the bathroom. Four persons exited the bathroom, including one who said, "I shot myself." (69RT 6817.) Deputy Blankenbaker saw wounds to the person's left small finger. The deputies found a .25 caliber Raven Arms, Model P-25 in the toilet area of the bathroom. They found no weapons on the persons who exited the bathroom. Live .25 caliber rounds were found on appellant McClain. (69RT 6818-6819.) On January 8, 1990, appellant McClain was convicted in case number GA001659 of possession of a firearm by a felon, committed on November 8, 1989. (69RT 6850.)

d. Robbery of Bernard Rowe and Bryant Cook

At approximately noon on August 9, 1990, Bernard Rowe and Bryant Cook were in the front yard of Rowe's house at 702 West Harriet Street in Altadena. Two Black men approached them and pulled out handguns. Cook ran toward the rear of Rowe's house. One of the men ordered Rowe to stand against the garage door, and he complied. The other man went to Cook's convertible Mustang that was parked in the driveway and said, "Hey, the keys are in the car." (68RT 6730; see 69RT 6829-6830, 6845.) The assailants then got into the Mustang and drove away. (68RT 6730.) Ten minutes later, the Mustang was stopped. Appellant McClain was driving the car. Thirty minutes after the robbery, Rowe identified the Mustang and said that it belonged to Cook. Rowe identified appellant McClain as the armed assailant who ordered him to stand against the garage. Cook also identified appellant McClain. (68RT 6731-6732; 69RT 6847.)[27]

e. 1990 conviction of possession of a firearm by a felon

On November 8, 1990, appellant McClain was convicted in case number GA004643 of possession of a firearm by a felon, committed on August 9, 1990. (69RT 6850.)

f. Possession of firearm and ammunition

At 3:15 a.m. on September 12, 1992, Pasadena Police Officer Luis Banuelos and his partner were in a patrol car traveling eastbound on Orange Grove near Raymond Avenue. Officer Banuelos saw appellant McClain and Solomon Bowen running out of a housing project. (68RT 6685-6686.)

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[27] At trial, Rowe recanted what he told the police. (See 68RT 6722-6727.)

The officers followed appellant McClain and Bowen to the parking lot of a gas station at the corner of Marengo and Orange Grove. Appellant McClain and Bowen went behind the gas station and were briefly out of Officer Banuelos's sight. Appellant McClain and Bowen tried to conceal themselves - appellant McClain was lying on the ground while Bowen was nearby in a crouched position. (68RT 6687-6688.) The officers detained them. Officer Banuelos found .38 caliber bullets in appellant McClain's pocket. The police found a TEC-9, a nine-millimeter firearm, and a .357 revolver in the area. The ammunition found in appellant McClain's pocket was identical to six bullets found in the cylinder of the .357 revolver. (68RT 6688-6689.) The firearms were found approximately 45 to 65 feet south of appellant McClain on the other side of a wall. (68RT 6690.) They were in the general area where appellant McClain and Bowen had been when they were out of Officer Banuelos's sight. (68RT 6691.) On September 28, 1992, appellant McClain was convicted in case number GA012718 of possession of a firearm by a felon. (69RT 6850.)

g. Attack of inmate in Los Angeles County Jail

On June 19, 1995, Sheriff's Deputy Gregory Boghosian worked at Central Jail. The "High Power inmates" were those inmates who were segregated from the rest of the inmate population. Deputy Boghosian's duties included escorting the High Power inmates to the roof for their exercise time. (68RT 6648-6649.) For exercise time, the inmates were strip-searched in their cells, handcuffed from behind, and then escorted to the roof after the gates to their cells opened. On June 19, 1995, appellant McClain and seven other inmates were going to the roof for exercise time. When the gates opened, appellant McClain's arms were to his front, which meant that he had slipped his handcuffs. He then ran toward another inmate and tried to attack him. (68RT 6649, 6651-6653.) He raised his hands above his head. (68RT 6654.) He swung his arms down. (68RT

6655.) The sheriff's deputies removed the other seven inmates for their own safety and then slowly lifted appellant McClain. Under where appellant McClain's hands had been, the deputies found a jail-made stabbing device. (68RT 6655-6656, 6658-6659; Peo. Exh. 124.)

h. Threat to Joseph Petelle

At trial, Joseph Petelle testified as to an incident involving appellant Newborn at California Youth Authority. (See 69RT 6893-6898.) As Petelle left the courtroom at trial, appellant McClain leaned back and said, "I'll kill you." (69RT 6923.)

i. Threats to courtroom bailiffs

On October 16, 1996, Los Angeles County Sheriff's Deputy Robert Browning was assigned the security of the court personnel and transportation of inmates to and from the holding cell to the courtroom of the trial court. (73RT 7331.) Every morning when the defendants arrived, the deputies placed electronic devices on the defendants. (73RT 7332.) Deputy Browning ordered appellant Holmes out of the cell and placed the device on him. He walked to the court and was seated next to his counsel. Appellant McClain was then ordered out of the holding cell. (73RT 7333.) Two deputies, Deputy David Admire and Deputy Les Tranberg, placed the belt on him. He said, "Why is my belt warm?" (73RT 7334.) Deputy Browning responded, "Why do you think? We just tested it." (73RT 7334.) Appellant McClain asked why the belts were tested. Deputy Browning said, "Well, it's because of the Sheriff's Department policy. Every morning before court we test them to make sure that they work." (73RT 7335.) Appellant McClain then stepped back into the cell to retrieve a shirt that he was going to wear for court. (73RT 7335.) Deputy Browning then ordered appellant Newborn out of the cell. Appellant Newborn said that his belt was cold. Appellant McClain said, "If you do

one of us, you'll have to do us all." (73RT 7336.) Deputy Browning asked, "What?" Appellant Newborn, who was directly in front of Deputy Browning, repeated appellant McClain's statement and added, "If you push one button, then you better push all three, because you know what I'm going to do." (73RT 7336.) Appellant McClain then said, "Don't get within two feet of me or I'll kill you, and I'll have weapons this time." (73RT 7336.)

5. Appellant Holmes's outburst in the courtroom

When the verdict in this trial was announced, appellant Holmes said, "Fuck you, you motherfuckers. P-9 rules."[28] (65RT 6412; Peo. Exh. 117 [videotape].)

6. Appellant Holmes's prior criminal activity involving force or violence

On August 3, 1990, at approximately 8 p.m., Pasadena Police Officers Tory Riley and Derrick Carter were working at a carnival at Jackie Robinson Park. (68RT 6796.) The officers were notified that a man was seen with a gun. The officers saw the handle of a gun protruding from appellant Holmes's right pants pocket and arrested him. They recovered a loaded blue steel revolver. (68RT 6797-6798.)

B. Defense Evidence in Mitigation

1. Appellant Holmes's evidence in mitigation

Officer Lopez did not personally know whether there were any P-9 members at Huntington Hospital on October 31, 1993. (66RT 6469-6470.)

On October 31, 1993, Pina and his girlfriend were walking a dog. He saw four cars on the street traveling at the same speed at approximately 45 to 50 miles per hour. Because it had been so long, Pina could not

[28] A videotape of the verdict being read was played at trial. (65RT 6411.)

remember at trial the exact details of the first car. It was an import and compact. (71RT 7064-7065.) He mainly paid attention to the driver to see if he was a neighborhood resident. The driver was a Black male, around 20 or 25 years old, with a haircut close to the head. (71RT 7066.) The second car was a black, lowered Honda Civic S model. (71RT 7067.) The driver for that car was a Black male, around 20 to 25, who had a thinner build than the previous driver. The third car was possibly a white Nissan Sentra with tinted windows. He could not see the driver for that car. (71RT 7068-7069.) Pina could not recall the fourth car. It may have had tinted windows. (71RT 7070.)

After the shots were fired, Pina went home, but then returned and talked with law enforcement officers. He gave them a vague description of one or two cars. (71RT 7070.) He said that he saw several persons running back to a car shortly after the shooting. (71RT 7158.) He was unable to give a description of these individuals to Pasadena Police Officer Chavira. (71RT 7159.) The only description he had for the shooters was that they were Black males. He said that one car was a dark blue 1983 or 1984 Toyota Corolla, possibly an MR2. He said that the cars were small. (71RT 7071, 7073; 71RT 7158.) At trial, Pina explained that he meant a 1994 Corolla, not 1983. (71RT 7073.) The other cars were all kinds and new models, except for one that was an older model. (71RT 7074.) As he reviewed the case, he remembered more key details. (71RT 7076.)

On November 1, 1993, Pasadena Detective Ireland interviewed Pina. The interview was recorded. Pina said he saw four cars. Two of them he was unsure of and two he gave descriptions of a brand new, dark blue or dark green, possibly Toyota Celica and an older 1980 to 1989 white car. (71RT 7162-7163.) That was the extent of his descriptions of the cars. He indicated that he was not paying particular attention to the individuals inside the cars. He saw three persons running to a car after the shots were

fired. (71RT 7164.) When Detective Ireland asked Pina if he crossed Catalina at the time of the shooting, he first said, "no," and then he said, "yes." (71RT 7165.) When asked where he was standing when he observed the persons running back to the cars, he said he was two houses west of Catalina on Emerson. The persons ran from Wilson, around the corner, and back west on Emerson. The cars were between three to five car lengths west of Wilson. He never indicated that he ran around trees while trying to make the observations. He said he could not identify the persons running back to the cars because he was not paying attention. (71RT 7165-7167.)

During a taped interview with Detective Uribe on November 4, 1993, Pina indicated that he did not a good look because he was not paying attention. (71RT 7084.) He indicated that there were four cars. All cars were lowered. The first car had tinted windows all around. He did not give a make and model for the first car. He had looked through some brochures, but was unable to make any identification from the brochures. The second car was possibly a four-door white Sentra, with chrome rims. The person in the first car was a Black male about 22 or 23, with a shoulder-length jheri curl. In the second car, there were possibly two male Blacks. (71RT 7076, 7139-7140.) He did not indicate that the second car was driven by a male Black who had short hair, was clean-cut, and was in his 20's. (71RT 7141.)

On December 27, 1993, Pina called Detective Uribe and indicated that he could identify two persons from the newspaper. (71RT 7093; 71RT 7137.) Pina had seen photographs in a newspaper. (71RT 7094.) He saw something on television, and he recognized a person. (71RT 7095-7096.) When he called Detective Uribe, Pina did not know that there was a reward being offered. He received $4,500. He went to the station and was shown six-pack photographic lineups. (71RT 7097.) At first, he was unable to

identify anyone. He said that he had a possible person and that the other person stuck out in his mind. He said, "This person that's in the six-pack is familiar. I mean this is the guy I remember." (71RT 7098.) Someone then showed him a folded-up newspaper that contained the photographs of the defendants in the case. He then looked at the six-packs. (71RT 7098.) Pina stated that a picture of appellant McClain resembled the individual who he saw the night of the shooting. Pina said that he needed to see it from a different angle. (71RT 7118-7120, 7154.) Pina also identified appellant Holmes from a photographic lineup. (71RT 7120-7121.)

On March 3, 1994, approximately five months after the incident, Pina testified before a grand jury. He stated that the first car was a new model, small import car, a Toyota, an MR2 or Corolla, 1993 or 1994, and dark green or dark blue. (71RT 7079.) The second car was a white Nissan Sentra with an advertisement on the front plate. The third car was a Honda DX, hatchback, maroon or brown in color without tinted windows. He did not provide a description for the fourth car. (71RT 7080-7081.) He picked out appellant Holmes because of blemishes on his face. (71RT 7114.) At night in 1993, Pina saw the person running to the car and saw blemishes while the shooting occurred. He had very good eyesight. (71RT 7115-7116.) He testified that the first car was occupied by a male Black, probably in his 20's or 25's, with long straight hair that was down to his shoulders and appeared wet. (71RT 7086.) The driver of the second car was clean-cut and had short, curly or nappy hair, cut close to his head, and was in his twenties. (71RT 7088.) The driver of the third car was young and clean-cut with nappy hair. (71RT 7090.)

At the trial, Pina said that the lead car on Mentor was a small two-door sports car with tinted windows, lowered, and rims, and could have been a Geo. (71RT 7081.) The second car was a white four-door import.

The third car was a black Honda CRX S model. The fourth car was a white two-door Sentra. (71RT 7082.)

Detective Uribe heard Kenny's description of the two individuals whom he saw running away. (71RT 7151.) Detective Uribe saw photographs of appellant Holmes. In none of the photographs did appellant Holmes have a ponytail. He was not fat or flabby - Kenny's description of the second suspect. (71RT 7152.)

Willie Wimberly, appellant Holmes's father, testified on appellant Holmes's behalf. Wimberly had four children. Wimberly raised appellant Holmes. His early childhood was fine until his mother suddenly died in 1990. Appellant Holmes was 14 or 15 years old at the time of her death. Her death changed all of Wimberly's children's lives. (71RT 7175-7176.) The death of appellant Holmes would impact Wimberly's family because the family was close. (71RT 7177.)

Donna McCallum, appellant Holmes's aunt, testified on appellant Holmes's behalf. He sometimes went by the nickname of Boom because when he was little, he always bumped into things and bumped his head. (71RT 7183.) McCallum knew him during his entire life. He lived with her for one point in time. Appellant Holmes's mother's sudden death had an impact on the family and appellant Holmes. Appellant Holmes's death would impact McCallum's life, his grandparents' lives, and his great-grandmother's life. (71RT 7184-7185.)

2. Appellant McClain's evidence in mitigation

As a gang expert Officer Lopez had known drugs to be part of a gang. Carlos Clayton was a "baller" from P-9 gang. (66RT 6476.) A "baller" is a person who sells narcotics and makes a lot of money. (See 66RT 6477.)

According to Richard Leonard, who was seated at counsel table next to appellant McClain as Petelle passed him, appellant McClain said as Petelle passed by, "You're a dick head." (69RT 6960.)

Clarence Jones remembered an incident involving a shank or some type of assault on the tier in 3100. He did not see any weapons in any person's hands. During an altercation between persons of different races, it would be unusual for someone to throw a weapon as an aid to a person. (73RT 7273.)

If appellant McClain were put to death, it would hurt Earlene Shamburger, their daughter, and Shamburger's children. (73RT 7286, 7289.) Doris Russell, appellant McClain's mother, said his death would greatly affect her and the entire family. (73RT 7293.)

Deputy Admire did not hear the words "I'll kill you." (73RT 7342.) He heard, "If you get within two feet," and "I'll have weapons." (73RT 7343.) Deputy Tranberg was three feet away from Deputy Browning and was positioned behind appellant Newborn, next to the opening of the lockup cell. He did not hear the words, "I'll kill you." (73RT 7345.)

3. Appellant Newborn's evidence in mitigation

a. Incident involving Louise Jernigan

On December 11, 1992, Pasadena Police Officer Tracey Ibarra responded to a beauty supply store located near the intersection of Fair Oaks and Orange Grove. (72RT 7194.) Officer Ibarra spoke with Jernigan in the parking lot, her daughter, and a sales clerk (Helen Edwards) who was working at the beauty supply store. Jernigan told Officer Ibarra that she was inside the store when appellant Newborn entered and hugged the sales clerk. (72RT 7195, 7241.) Jernigan then left the store. She never told Officer Ibarra that appellant Newborn approached her with an apparent gun in his pocket and stuck it to her side. She said that before she and appellant Newborn left the store, there had been no conversation between them. As she and her daughter walked across the parking lot, she asked appellant Newborn, "How you doing?" (72RT 7196.) Appellant Newborn

responded, "Fuck you. You accused me of killing your son, and we're going to get you, too." (72RT 7198.) Then, Jernigan and appellant Newborn exchanged profanity. (72RT 7106.) Appellant Newborn's hand was in his pocket and she saw a shape, but saw no weapon. On that occasion she had not seen a gun with appellant Newborn. Appellant Newborn then drove away. (72RT 7197.)

Edwards considered appellant Newborn like a nephew because she had been a family friend for approximately 20 years. Prior to the incident with Jernigan, she had worked at the beauty supply store for a short time. (72RT 7241-7242.)

Jernigan had been in the store first. Appellant Newborn entered the store and walked directly to Edwards and hugged her. (72RT 7243-7244.) Jernigan said, "You killed my son." Appellant Newborn told Edwards, "She thinks I killed her son." Edwards told him, "You didn't, so don't worry about it." (72RT 7244.) Edwards told appellant Newborn to leave. Jernigan and appellant Newborn both yelled at each other. Before they left the store, appellant Newborn never approached Jernigan, who was five or six feet away, because he remained with Edwards. (72RT 7244.) Appellant Newborn left before Jernigan, who left right behind him. As he left, Jernigan continued to say, "You killed my son," and appellant Newborn kept saying, "I didn't kill your son." (72RT 7245.) After they left the store, Edwards went to the door because she was concerned. From the door, she saw that appellant Newborn was at his car. Jernigan was at the end of the walkway, approximately 37 feet away. Jernigan continued to say, "You killed my son," while appellant Newborn said, "I didn't kill your son." There was profanity from both. Edwards was later interviewed by the police. (72RT 7245-7246.)

b. Absence of reports of shooting near Blake and Pasadena on October 31, 1993

Police Sergeant Michael Korpal searched the Pasadena records for reports of shootings on October 31, 1993, in the vicinity of Blake Street. Sergeant Korpal searched the computer system of all calls that were registered and logged on a digital tape. (73RT 7263.) He found no reports. However, he found calls regarding shots fired on the early morning hours of November 1, 1993, at approximately 1 a.m.[29] (72RT 7264.) Two calls were made at 2 a.m. (73RT 7268.)

c. Appellant Newborn's difficult upbringing

Gracie Newborn, appellant Newborn's mother, testified on his behalf. Appellant Newborn was born in 1970. At that time, his mother was 16 or 17 years old and in high school. At that time, she also had another child, Alonzo Hamilton. She was 15 years old when Hamilton was born. She then returned to high school. She married appellant Newborn's father, Buford Newborn, before appellant Newborn was born. She stayed with Buford for five years before getting divorced. While they were married, Buford abused Gracie. He beat her and raped her in front of the children. With respect to physical abuse, the police were called on more than one occasion and Buford was arrested more than one. Around the time of the divorce, Gracie obtained a restraining order against Buford, but he did not comply with it and physically abused her. He was arrested again. (72RT 7200-7202, 7238.) When appellant Newborn was young he constantly ate Tide detergent if Gracie did not keep it off the floor. (72RT 7216.)

After the divorce, Gracie left the home and took appellant Newborn with her. Appellant Newborn did not have much contact with his father

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[29] The teletype indicated 2 a.m.; however, the computer's time was an hour off. (73RT 7264.)

after the divorce. Their relationship was hostile. After the divorce, appellant Newborn had a close relationship with his half brother Buford, Jr., but Buford Jr. was killed. Appellant Newborn also had a close relationship with Hamilton. As a practical matter, their relationship ended when Hamilton went to prison. (72RT 7202-7204.)

Appellant Newborn became close friends with Fernando Hodges. (72RT 7204.) Appellant Newborn was godfather to Hodges's child. (72RT 7215.)

Around Halloween 1993, Gracie did not know that Hamilton, Hodges, and appellant Newborn were involved in gangs. At that time, Gracie had moved to Palmdale to better her living conditions. She asked appellant Newborn to move with her, and initially he did. But then he moved back to Pasadena. Gracie tried her best in teaching him right from wrong, and took him to church. But when appellant Newborn was 13 years old, he was sent to juvenile camp. (72RT 7204-7206.) When he was 15 years old, he was sent to youth authority. He was sent to juvenile camp and youth authority because of lying, stealing, and other misconduct. Gracie visited him while he was at juvenile camp and at youth authority. She loved him then and still loved him. (72RT 7206-7207.) He had a very low class ranking while at youth authority and juvenile camp. (72RT 7211.)

During the early years, appellant Newborn had a physical disability that caused him to walk with a noticeable limp. He was always teased by his peers and older children because of the way he walked. He had learning disabilities, resulting in problems with reading and writing. He stuttered, which caused more teasing. At some point, he was labeled retarded. He was placed in a special school designed exclusively for physical disabilities, but was not designed for the learning disabilities. (72RT 7207-7208.) He was transferred to a school designed for learning disabilities. He was given medication for his stuttering and hyperactivity. He

developed a tolerance for the medication, so his medication was increased. During his early teen years, he had a problem with bed wetting. He had the problem when he went to youth authority and juvenile camp, causing him to be ridiculed by his classmates and inmates. (72RT 7208-7210.) When he wet his bed, Gracie punished him by making him stay in his room, hanging his sheets out on the window, or making him sleep in it until she was ready to change it. She did not seek any medication or treatment for him. (72RT 7211.) In spite of appellant Newborn's disabilities, he received two awards. In 1981, he received a certificate from Pasadena for excellence as a ball monitor. In 1988, he received a basketball trophy. (72RT 7213-7214.)

Gracie sought treatment for appellant Newborn for head injuries that he received during his childhood. (72RT 7211.) His sister threw a rock that hit him, causing him to be taken to the hospital. On another occasion, he was taken to USC Medical Center because he had been hit in the head with a bat. The treatment he received for both injuries was that he was given aspirin. On a third incident, he fell off his bike, knocked out a tooth, and injured his head. He was given aspirin for treatment. (72RT 7212-7213.)

When appellant Newborn was 17 or 18 years old, he had developed a problem with alcohol and marijuana. Gracie unsuccessfully talked with him about it. (72RT 7215.)

Appellant Newborn had attempted once to work with the City of Pasadena, which involved picking up trash at the Rose Bowl. (72RT 7216.)

Gracie also had a daughter, Lajune. Lajune had been in and out of custody. (72RT 7215-7216.)

ARGUMENT

GUILT PHASE

I. THE TRIAL COURT PROPERLY DENIED THE MOTIONS FOR SEPARATE TRIALS AND PROPERLY ADMITTED STATEMENTS BY APPELLANTS

Appellants contend that the trial court erred in denying their motions for severance and in admitting into evidence at the guilt phase the redacted statements of their codefendants. (ANOB 176-194; AMOB 237-248; AHOB 77-118.)[30] These claims are closely related and respondent addresses these claims under their separate legal frameworks. (See *People v. Lewis* (2008) 43 Cal.4th 415, 451.) Respondent submits that the trial court properly denied the defense motions for severance from codefendants and properly admitted the statements.

A. Applicable Law

1. Motions for separate trials

The Legislature has expressed a preference for joint trials. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) Section 1098 states the general preference for joint trials: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court order separate trials...." (§ 1098, italics added; *People v. Champion* (1995) 9 Cal.4th 879, 904, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860.) Generally, a trial court must order a joint trial as the "rule," and may order separate trials only as an "exception." (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.)

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[30] "ANOB" refers to appellant Newborn's opening brief. "AHOB" refers to appellant Holmes's opening brief. "AMOB" refers to appellant McClain's opening brief.

Among the substantial and significant benefits to the public of joinder are the conservation of judicial resources and public funds. For example, a unitary trial requires a single courtroom, judge, and court personnel. Only one group of jurors is needed, and the expenditure of time for voir dire and trial is greatly reduced over that required for separately tried cases. The public is additionally served by the reduced delay on disposition of criminal charges both in trial and appellate proceedings. (*People v. Bean* (1988) 46 Cal.3d 919, 939-940.) "A 'classic' case for joint trial is presented when defendants are charged with common crimes involving common events and victims." (*People v. Pinholster* (1992) 1 Cal.4th 865, 932, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) In this case, appellants were charged in all counts of the indictment, except for count IX. (3CT 631-644.) This was a classic case for a joint trial.

A trial court's discretion to order separate trials is guided by principles set forth by this Court. Circumstances that may warrant severance include the presence of an incriminating confession by a codefendant, the possibility of prejudicial association with codefendants, likely confusion about multiple counts, conflicting defenses, or a possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Champion, supra*, 9 Cal.4th at p. 904.) Additionally, severance may be warranted when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*People v. Lewis, supra*, 43 Cal.4th at p. 452, quoting *Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S.Ct. 933, 122 L.Ed.2d 317].) Cases do not favor either separate trials or not using a codefendant's statement. Separate trials tend to breed inconsistent verdicts. Forcing a prosecutor to choose between separate trials or forgoing the use of codefendant confessions is too high of

a price. (*Richardson v. Marsh* (1987) 481 U.S. 200, 210 [107 S.Ct. 1702, 95 L.Ed.2d 176].)

A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Lewis, supra*, 43 Cal.4th at p. 452.) In considering a defendant's motion to sever, a trial court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. Osband* (1996) 13 Cal.4th 622, 666 [motion to sever counts]; accord, *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Even if the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41.) If the court's joinder ruling was proper when it was made, however, the judgment may be reversed only on a showing that joinder resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Appellants made two pretrial motions for severance and three midtrial motions for severance. As set forth below, the trial court properly denied all motions for severance. Joinder did not result in gross unfairness amounting to a denial of due process.

2. *Aranda/Bruton*

The Sixth Amendment of the United States Constitution, extended to the States by the Fourteenth Amendment, grants a criminal defendant the right to confront and cross-examine witnesses against him. (See *Pointer v. Texas* (1965) 380 U.S. 400, 404, 406-407 [85 S.Ct. 1065, 13 L.Ed.2d 923].) This guarantee permits a defendant to test the recollection of a witness and allows the jury to assess the witness's credibility. (*Mattox v. United States* (1895) 156 U.S. 237, 242-243 [15 S.Ct. 337, 39 L.Ed. 409].)

> Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions ....

(*Richardson v. Marsh, supra*, 481 U.S. at p. 206.)

But in *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476], the United States Supreme Court,

> recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.

(*Richardson v. Marsh, supra*, 481 U.S. at p. 207.)

In *Bruton*, the nontestifying codefendant confessed to authorities during his post-arrest interrogation that he and the defendant committed the armed robbery together. (*Bruton v. United States, supra*, 391 U.S. at p. 124.) The United States Supreme Court held that in this particular context, the risk that a jury would not or could not follow the limiting instruction was "so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Id.* at p. 135.) The *Bruton* court cited with approval this Court's decision in *People v. Aranda* (1965) 63 Cal.2d 518, which reached a similar result on state law grounds. (*Id.* at pp. 130-131.)[31]

However, in *Richardson v. Marsh, supra*, 481 U.S. at page 211, the United States Supreme Court held,

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[31] To the extent that *Aranda, supra*, 63 Cal.2d 518 and any other state case were rules of evidence, they were abrogated in 1982 by the "truth in evidence" provision of Proposition 8. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465; Cal. Const., art. I, § 28, subd. (d).)

> the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when ... the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

In *Richardson*, the confession was redacted to omit all reference to the defendant. (*Id.* at p. 203.) As redacted, the confession indicated that the codefendant and another man named Martin discussed the robbery on the way to the scene in a car. During the defense case, the defendant testified to having been in the car with the codefendant and Martin, but denied having heard their conversation. The defendant was linked to the confession by other evidence properly admitted against him at trial. (*Id.* at pp. 202-203.)

The *Richardson* court held that the redacted confession did not fall within the "narrow exception" of *Bruton*. The *Richardson* court reasoned that unlike the confession in *Bruton*, the confession in *Richardson* was not incriminating on its face, and became so only when linked with evidence introduced later at trial. (*Id.* at p. 208.) "Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." (*Ibid.*) Accordingly, the *Richardson* court held, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when ... the confession is redacted to eliminate not only the defendant's name, *but any reference to his or her existence.*" (*Id.* at p. 211, italics added.) In footnote five, the United States Supreme Court stated that it "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced by a symbol or a neutral pronoun." (*Id.* at p. 211, fn. 5.)

In *Gray v. Maryland* (1998) 523 U.S. 185, 195 [118 S.Ct. 1151, 140 L.Ed.2d 294], the United States Supreme Court resolved the question left

open in footnote five of *Richardson*. In *Gray*, two defendants were tried together. Gray's codefendant, Bell, gave a statement to police admitting that he, Gray, and a third man had beaten the decedent to death. Bell's statement was redacted so that the name of Gray and the third man appeared in the written statement as blank spaces set off by commas. When the police witness read Bell's statement aloud to the jury, he replaced Gray and the third man's names with the words "deleted" or "deletion." Other witnesses identified Gray, along with Bell, as being two of the six persons who fatally beat the victim. The redacted statement was admitted only against Bell, over Gray's objection. Bell did not testify. The court gave a limiting instruction, admonishing the jury to consider Bell's statement against him alone. (*Id.* at p. 188.)

The United States Supreme Court held that,

> [r]edactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result.

(*Id.* at p. 192.) The Supreme Court reasoned that the use of a blank would not likely deflect the jury from realizing the codefendant is the deleted name; that the "obvious deletion" would cause the jury to speculate and thereby overemphasize the confession's accusation once the jury "work[ed] out" the reference; and, that an "obvious alteration" was as directly accusatory as a *Bruton*-protected statement in that the blank space in an obviously redacted statement pointed directly to the codefendant and accused the defendant in a manner similar to the statement in *Bruton*. (*Id.* at pp. 193-194.)

The high court acknowledged that the redaction in *Gray* was a less obvious reference to the codefendant than that in *Bruton*, and that in some

cases (though not in *Gray*) the inference from the alteration may not be clear. (*Id.* at pp. 193-194.) The court further acknowledged that "*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially." (*Id.* at p. 195.) Nevertheless, the court held that "inference pure and simple cannot make the critical difference ...." (*Ibid.*) Instead, whether the redaction satisfied *Richardson* "depend[s] in a significant part upon the *kind* of, and not the simple *fact* of, inference." (*Id.* at p. 196, italics in original.) The Supreme Court found the kind of redaction in *Gray* inadequate. A redacted statement facially incriminates a defendant when the redaction merely "replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol." (*Id.* at p. 194.)

B. Appellant Newborn's Pretrial Severance Motion

Appellant Newborn moved to be tried separately from the other defendants, arguing that extrajudicial statements from appellant McClain, Bailey, and appellant Holmes inculpated him and could not be effectively redacted. (4CT 821-832.) The trial court denied the motion without prejudice. (3RT 62; 4CT 868.)[32] The following colloquy occurred:

> [Appellant Newborn's counsel]: Your Honor, may I have some guidance on my motion. I have paperwork which indicates that the People have four witnesses who will, quote, identify the four co-defendants as incriminating my client.
>
> Now, I assume, in other words, confidential informant A will say that one co-defendant said something including Newborn, and on down the line. So all four of the co-defendants will be quoted, as it stands now, as incriminating Newborn and yet I don't have the right to cross-examine those co-defendants.

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[32] The prosecution later filed a motion to maintain joinder of the defendants. (4CT 877-885.)

> So, I assume that implicit in the denial for separate trial will be some indication that the People will not use those statements in their case in chief or will sanitize the statement effectively to delete any reference defendant Newborn; otherwise I have got witnesses against me that I cannot confront.

THE COURT: I understand.

(3RT 64.) The trial court explained: "So from now on I will be taking out anything that looks like or smells like *Aranda/Bruton* issues. So you make sure what you have is sanitized. Okay?" (3RT 65.)

Here, the trial court was well aware of the need to protect the defendants and stated its intent to exclude any statements that were inadmissible against a codefendant and that could not be adequately redacted. Judging the circumstances as they appeared at the time of the pretrial hearing on appellant Newborn's severance motion, the court reasonably concluded that redaction or, as necessary, exclusion of the statements would adequately protect appellant Newborn. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.) Accordingly, the trial court acted within its discretion in denying severance.

C. Appellant McClain's Pretrial Severance Motion

Appellant McClain moved to be tried separately from the other defendants, arguing that appellant Newborn's post-arrest statements made to Marlon Junor implicated appellant McClain. (4CT 1003-1058.) The prosecution filed an opposition to the motion, arguing that the statements could be redacted and attaching a redacted version. The prosecution argued that the redactions eliminated the need for severance. (4CT 1062-1123.) At the hearing on the severance motion, appellant Holmes joined appellant

Newborn's motion to be tried separately.[33] (8RT 247.) The parties argued the motion. The trial court denied the motion. (8RT 247-249; see 4CT 1003.) Appellant McClain requested an opportunity at the beginning of testimony to "revisit" the severance issue "in terms of exactly what will be coming in and how it will be stated." (8RT 249.) The trial court agreed. (8RT 250.) Ultimately, the prosecution did not call Junor as a witness. (30RT 3082-3088.)

Here, the prosecution proposed to introduce Junor's statement in a redacted form that eliminated direct references to appellant McClain, but did not eliminate all references to the existence of accomplices. The statement included references to "homeboys." (See e.g., 4CT 1091.) Appellant Newborn told Junor that there were five of them in the car, four exited the car, and three had guns. (See e.g., 4CT 1095.)

At the time of the trial court's ruling on appellant McClain's severance motion, the United States Supreme Court expressly left open the question of whether the admission into evidence of a codefendant's confession in which the defendant's name has been replaced with a blank space, the word "delete," a symbol, or a neutral pronoun violated the confrontation clause (*Richardson v. Marsh, supra*, 481 U.S. 200, 211, fn. 5), an issue that was later resolved in *Gray v. Maryland, supra,* 523 U.S. 185. In *People v. Lewis, supra*, 43 Cal.4th at p. 455, this Court recognized that before *Gray v. Maryland,* the law regarding the admissibility of redacted codefendant confessions was unsettled. This Court declined to find that the trial court abused its discretion in denying a severance motion based on *Gray* before *Gray* was decided, stating, "we cannot fault the trial court for failing to anticipate *Gray*'s holding." (*People v. Lewis, supra*, 43

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[33] At the same hearing, the prosecution agreed to separately try Bailey and Bowen. (8RT 247.)

Cal.4th at p. 455.) Judging the circumstances as they appeared at the time of the ruling on the motion, the trial court did not abuse its discretion. (See *ibid.*)

Moreover, Junor's redacted statement is significantly distinguishable from *Gray v. Maryland, supra*, 523 U.S. 185. In *Gray*, the high court took issue with the statements "that, despite redaction, obviously refer[red] directly to someone, often obviously the defendant, and which involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (*Id.* at p. 196.) Here, the use of "homeboys" and an indefinite pronoun did not give rise to inferences so strong as to appellant McClain that they would be made immediately if the statement were the first item introduced at trial. Accordingly, the trial court in the instant case properly denied appellant McClain's motion for separate trials.

D. Admission of Derrick Tate's Testimony and Appellant McClain's Midtrial Motion

Pursuant to appellant Newborn's request, a hearing was held regarding the admissibility of Derrick Tate's testimony. Appellant Newborn's counsel stated:

> I have reports that this witness, Tate, says Holmes says that the murders were committed by Mr. Holmes, Lorenzo Newborn, my client, E-Dog, who I believe to be Ernest Holly, and definitely not Herb McClain.
>
> Now, I don't know what [prosecutor Myers] intends to bring out. I think the only thing that is admissible is to have Tate say that Holmes said he did it.
>
> Now, I suspect that [the prosecutor] wants to go beyond that. I suspect that [the prosecutor] wants to have Holmes saying, "It was me and others," and that's the part –

(15RT 1337-1338.) The trial court asked if Newborn's attorney was concerned that the statements would violate *Aranda* and *Bruton*. The

prosecutor stated that he had instructed the witness "never to utter the words Lorenzo or Herb." (15RT 1338.) During discussion of the statements, the following colloquy occurred:

> Ms. Harris [appellant McClain's attorney]: My problem with it, your Honor, is simply this: He is going to have the witness testify to Mr. Holmes and others, and here sits Mr. McClain looking like others, when the witness in fact said that Mr. Holmes said that Mr. McClain wasn't there.
>
> The Court: You may ask that question in cross-examination.
>
> Ms. Harris: All right.
>
> The Court: Mr. Jones [appellant Newborn's attorney].
>
> Mr. Jones: Well, then the problem is: I sit here looking like a dummy instead of asking Mr. Tate, "Well, didn't he say Lorenzo was not there?" And I can't ask that. And that's the problem when the People wants to use these statements in their case in chief and object to a severance. When Miss Harris asked that, by my silence I am conceding that –
>
> The Court: Mr. Jones, I hate to interrupt you. I hold you in high regard.
>
> You and I spoke before this case, early in motions. I have probably had more *Aranda/Bruton* issues – I have done multiple-defendant death penalty cases. That issue arises all the times when you have multiple defendants. It puts you in a pretty tough position. When he says "others," that is what the appellate court and supreme court have held that is allowable. If you could ask the question of the witness, whether your client was there, like Miss Harris can say, I would allow that. But I don't know any other way out of this thing. I follow the law as best as I know it, Mr. Jones, as you know.

(15RT 1340-1341.) The prosecutor then proposed that the trial court instruct the jury that it was not to hold Tate's testimony against appellant Newborn. The trial judge agreed to give the limiting instruction prior to Tate's testimony. (15RT 1341-1342.) Prior to Tate's testimony, the jury was instructed: "The testimony of Derrick Tate concerning the statement of

Karl Holmes is limited to defendants Karl Holmes and Herbert McClain." (15RT 1347.)

As previously discussed (see Argument I.C., *ante*), the law regarding the admissibility of redacted codefendant confessions was unsettled. In *People v. Lewis*, this Court declined to find that the trial court abused its discretion in denying the severance motion, stating, "we cannot fault the trial court for failing to anticipate *Gray's* holding." (*People v. Lewis, supra*, 43 Cal.4th at p. 455.) Here, the prosecutor assured the trial court that Tate would not expressly incriminate appellants McClain and Newborn. (See 15RT 1338.) Judging the circumstances as they appeared at the time of the ruling on the motion, the trial court did not abuse its discretion. (See *People v. Lewis, supra*, 43 Cal.4th at p. 455.)

The admission of appellant Holmes's redacted statement, as recounted by Tate, did not violate the confrontation clause. Tate testified in relevant part as follows: appellant Holmes bragged about getting a hat that said "trick or treat" and described how the shooting occurred. He said that they were in some bushes, jumped out, and said "trick or treat." He said that they blasted when they jumped out. He said that he was a killer. He said other people were with him, and he mentioned two additional persons, but he did not say how many other people were with him. During cross-examination by appellant McClain's attorney, Tate testified that appellant Holmes had identified Ernest Holly as being involved in the shooting. Appellant Holmes had also told Tate that appellant McClain was not involved. (15RT 1346-1368; 16RT 1371-1431; see Statement of Facts I.A.10.)

During Tate's redirect testimony, appellant Newborn requested that the trial court repeat its admonition that the evidence did not relate to appellant Newborn. The trial court agreed to repeat its admonition at the end of Tate's testimony. (16RT 1393.) Appellant Newborn later argued

that Tate's testimony as to other photographic identification violated *Aranda/Bruton*. (16RT 1404.) Appellant McClain objected to the testimony, asked for a mistrial, and requested that appellant McClain be severed from the others in the trial. The trial court denied the motion, finding no violation of *Aranda/Bruton* because the word "others" was used and appellants McClain and Newborn were not identified. (16RT 1404-1405.)

Here, the trial court correctly determined that the admission of appellant Holmes's statement to Tate was not an *Aranda/Bruton* violation. The statement in *Gray* had been obviously redacted. The redacted written statement with blanks for the defendant's name was admitted into evidence and a witness also read the statement into evidence, saying the word "deleted" each of the four separate times that he encountered a blank. (*Gray v. Maryland, supra*, 523 U.S. at pp. 188-189.) In contrast, there was no indication in Tate's testimony that appellant Holmes's statement had been redacted. A juror would not have speculated as to what was changed and was not directly accusatory. The relevant redacted portions of appellant Holmes's statement were admitted as testimony, and Tate simply referred to "they," an unknown number of "others," and that appellant Holmes had mentioned two other persons, one of them being Ernest Holly.

Furthermore, after appellant McClain's cross-examination of Tate, appellant Holmes's redacted statement did not so obviously refer to appellants McClain and Newborn and did not convey the same type of "vivid" accusation that the United States Supreme Court found troubling in *Gray*. (Cf. *Gray v. Maryland, supra*, 523 U.S. at pp. 194-195 [recognizing that in some instances the person to whom a "delete" or symbol refers may not be clear because there are more participants than the confession has named].) Tate even clarified that appellant Holmes said appellant McClain was not involved. (16RT 1425.)

Indeed, the redacted statement simply alluded to other perpetrators in a manner that the Supreme Court suggested was acceptable in *Gray*. In *Gray*, the Supreme Court noted that additional redaction of a statement that uses blank spaces or the word "delete" was possible, and gave the following example:

> The witness who read the confession told the jury that the confession (among other things) said,
>
> "Question: Who was in the group that beat Stacey?
>
> "Answer: Me, deleted, deleted, and a few other guys."
>
> App.11.
>
> Why could the witness not instead, have said:
>
> "Question: Who was in the group that beat Stacey?
>
> "Answer: Me and a few other guys."

(*Id.* at p. 196.) If the use of the indefinite phrase "a few other guys" in the above example is acceptable under the confrontation clause, then "others" and "they" was equally indefinite and did not implicate anyone in the crimes charged. Rather, Tate's testimony seems to be an instance where the statement does not offend the confrontation clause because it only becomes incriminating, if at all, "when linked with evidence introduced later at trial." (See *Richardson v. Marsh*, 481 U.S. at p. 208.) Appellant Holmes's redacted statement, as recounted by Tate, did not fall within the class of statements to which *Bruton*'s protections apply.

Even if it was error to admit Tate's testimony, any error was harmless beyond a reasonable doubt. Improper admission of evidence in violation of the confrontation clause is reversible unless the prosecution shows it is harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117].) As to appellant McClain, Tate's cross-examination made clear that appellant Holmes said that appellant McClain was *not* involved. (See 16RT 1425-1426, 1430-1431.)

As for appellant Newborn, contrary to his argument (see ANOB 189), the jury would not have necessarily assumed that he was one of the persons mentioned by appellant Holmes. Tate's testimony had indicated from the beginning that appellant Holmes did not state how many others were with him. (15RT 1352.) Although Tate testified that appellant Holmes mentioned two additional persons, appellant McClain's cross-examination of Tate raised the possibility that neither of the persons mentioned was sitting at the defense table. (Cf. *Gray v. Maryland, supra*, 523 U.S. at pp. 194-195 [recognizing that in some instances the person to whom a "delete" or symbol refers may not be clear because there are more participants than the confession has named].) The jury would not have inferred that appellant Newborn was mentioned by appellant Holmes based solely on appellant Newborn's attorney not asking the same question on cross-examination as appellant McClain. Appellant Newborn cross-examined Tate before appellant McClain. It was more likely the jury would have inferred from Tate's entire testimony that appellant Holmes expressly mentioned appellant McClain but made no reference to appellant Newborn, particularly since the jury was instructed that appellant Holmes's statement was limited to only appellants McClain and Holmes. (15RT 1347.) Moreover, the jury was given a modified version of CALJIC Nos. 2.07 and 2.08. The modified version of CALJIC No. 2.07 stated in relevant part:

> Evidence has been admitted against one or more of the defendants, and not admitted against the others.
>
> At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants.
>
> Specifically:
>
> 1. The alleged statements of Karl Holmes to Derrick Tate cannot be used against any defendant other than Karl Holmes.

(6CT 1495.) CALJIC No. 2.08 provided:

Evidence has been received of a statement made by a defendant after his arrest.

At the time the evidence of this statement was received you were told that it could not be considered by you against the other defendants.

Do not consider the evidence of such statement against the other defendants.

(6CT 1496.) The jury was also given CALJIC No. 17.00, which instructed the jury to decide separately whether each of the defendants was guilty or not guilty. (6CT 1575.) Appellant McClain's attorney and appellant Newborn's attorney reminded the jury of CALJIC No. 17.00. (43RT 4474; 44RT 4573.) Appellant Newborn's attorney highlighted CALJIC No. 2.07 during his closing argument. He informed the jury that there were three defendants and three trials, and that the jury was required to separately determine guilt as to each defendant. (44RT 4571-4574.)

Even assuming that the redaction did not comport with *Aranda/Bruton*, any error was harmless beyond a reasonable doubt because the properly admitted evidence of the Halloween murders against appellant Newborn was strong. He and Hodges were members of P-9, were best friends, and were together almost every day. Appellant Newborn was Hodges's daughter's godfather. (32RT 3362-3364.) The focus of the investigation of the Hodges's murder was on the rival Raymond Avenue Crips. Appellant Newborn had a motive to participate in avenging his best friend's murder by a rival gang. (See 14RT 1160-1161, 1170-1171; 19RT 1843-1844.) After Hodges had been murdered, appellant Newborn was at Huntington Memorial Hospital. (19RT 1837-1839.) He went to Willie McFee's house in search of Crazy D, a member of the rival Raymond Crips. Appellant Newborn was upset and crying, and said that his friend Hodges had been killed. (20RT 2111-2112; 23RT 2373-2374, 2378-2384.)

The victims of the Halloween murders were passed by four or five cars with occupants who "threw up" P-9 signs. (31RT 3231.) Before they were shot, someone said, "Now, Blood." (31RT 3243, 3258.) P-9 was considered a Blood gang. (14RT 1170-1171.) One of the boys had a blue bandanna, the color of the rival gang, and the victims may have been mistaken as members of the Raymond Crips. (15RT 1300; 16RT 1466-1467, 1471, 1474-1475; 18RT 1757, 1759; 31RT 3237.) In a conversation with DeSean Holmes, appellant Newborn stated that he had been riding in a car and blamed two other people in the car who said the children were Crips. (17RT 1553, 1569-1570; 30RT 3099, 3102-3103.)

A shot was later fired at McFee's home. (23RT 2406; 29RT 3041-3042.) Appellant Newborn stated that he shot at McFee's house and that he used a nine-millimeter Glock on Blake. (17RT 1553, 1569-1570; 30RT 3099, 3102-3103.) Nine-millimeter casings found across the street from McFee's house were fired from the same gun used in the Halloween murders. (26RT 2803-2805; see Peo. Exh. 129.) Appellant Newborn told DeSean Holmes that at the times of the shooting, Bailey ran, bumped into somebody, and bullets fell out of the gun. (17RT 1571.) Matching live .38 caliber rounds were found in the front yard of 569 N. Wilson and in the driveway entrance at 830 N. Pasadena. (26RT 2802-2803; 27RT 2839; Peo. Exh. 128.)

Appellant Newborn said that they had taken a gun to Terranius Pitts's house and disassembled it there. (30RT 3099.) Appellant Newborn had told Sheriff's Deputy Keeling that he was not saying that he was not guilty. (19RT 1927, 1930, 1962.) Any error in admitting Tate's testimony was harmless.

E. Appellant Newborn's Midtrial Motion

Appellant Newborn objected to allowing DeSean Holmes to testify. (17RT 1515-1517.) Appellant McClain renewed his request for severance

and moved for a mistrial, arguing that matters raised by appellant Newborn would "spill over" to appellant McClain and that McClain could not confront or cross-examine the declarants. (17RT 1517.) Appellant McClain stated that if DeSean Holmes were permitted to testify, the defense should be allowed additional time to prepare, that the testimony should be limited to the other defendants and not involve appellant McClain, and that the trial court should instruct the jury that the statements did not relate to him. (17RT 1518-1520.) Appellant Newborn's attorney also added that DeSean Holmes claimed that appellant Newborn's "lawyer was on the phone and 'told me I had the right not to say anything and the right to do what Fuhrman did in the O. J. trial.'" (17RT 1520.) Appellant Newborn's attorney disputed that statement and indicated that appellant Holmes's attorney was also a party to the conversation and was a crucial witness for the defense to impeach DeSean Holmes. (17RT 1520-1521.)

Appellant Holmes requested that the trial court sever his case from the codefendants. Appellant Holmes's attorney noted that DeSean Holmes had an agreement with the prosecutor that he would not testify against his cousin, appellant Holmes, but that appellant Newborn's attorney intended to ask DeSean Holmes about appellant Holmes. (17RT 1522.)

The trial court ruled that it would not grant a request for mistrial and would not sever the case. The trial court stated that if the defense needed DeSean Holmes to be ordered back, the trial court would order him back. (17RT 1530.) Appellant McClain requested a limiting instruction to be given after DeSean Holmes's testimony, which the trial court granted. (17RT 1534.) DeSean Holmes testified. (17RT 1535-1686; 18RT 1710-1751; see Statement of Facts I.A.11.a.) The trial court instructed the jury that DeSean Holmes's testimony was limited to appellant Newborn. (18RT 1752; 30RT 3140.)

Here, the trial court did not abuse its discretion in denying appellant McClain's severance motion.[34] To the extent that appellant McClain's severance motion was based upon a claim that the prosecution belatedly disclosed tape recordings and reports regarding DeSean Holmes, the trial court did not abuse its discretion in denying severance and by stating that it would order DeSean Holmes back to court if necessary. (§ 1054.5, subd. (b).) In fact, it would have been an abuse of discretion for the trial court to exclude DeSean Holmes's testimony based on any allegedly belated disclosure of discovery related to DeSean Holmes. (§ 1054.5, subd. (c).) As appellants McClain and Holmes did not argue that DeSean Holmes's testimony included any incriminating statements about them, there was no *Aranda/Bruton* issue so there was no error in that regard. (See 17RT 1524-1525; *People v. Champion, supra*, 9 Cal.4th at p. 904.)

Appellant Holmes argues that the admission of appellant Newborn's statement to DeSean Holmes violated *Aranda/Bruton* because DeSean Holmes's statement was redacted in such a fashion that it gave the impression that appellant Holmes was present at the shooting at McFee's house. (AHOB at 102-103.) Respondent disagrees. DeSean Holmes testified that appellant Newborn said that he was a shooter from across the street of McFee's house and that "there were other people there." (17RT 1565.) The testimony that there were others was acceptable under the confrontation clause and did not implicate specific persons in the crimes charged. Rather, DeSean Holmes's testimony is an instance where the statement does not offend the confrontation clause because it only becomes incriminating, if at all, "when linked with evidence introduced later at trial." (See *Richardson v. Marsh*, 481 U.S. at p. 208.) Appellant Newborn's redacted statement, as recounted by DeSean Holmes, did not

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[34] Appellant Holmes's motion is discussed below.

fall within the class of statements to which *Bruton*'s protections apply. Furthermore, the fact that DeSean Holmes testified that he had seen appellant Holmes with his codefendants and Hodges on October 15, 1993 (see 17RT 1537-1538), did not violate *Aranda/Bruton* since he was subject to cross-examination about his own personal observations.

Even assuming that the redaction did not comport with *Aranda/Bruton*, any error was harmless beyond a reasonable doubt because the properly admitted evidence against appellant Holmes was strong. Hodges associated with P-9. (14RT 1161.) Appellant Holmes was a member of P-9. (19RT 1843-1844; 25RT 2550-2553.) The focus of the investigation of Hodges's murder was on the rival Raymond Avenue Crips. Appellant Holmes had a motive to participate in avenging Hodges's murder by a rival gang. (See 14RT 1160-1161, 1170-1171; 19RT 1843-1844.) After Hodges had been murdered, appellant Holmes was at Huntington Memorial Hospital. (19RT 1837-1839.)

The victims of the Halloween murders were passed by four or five cars with occupants who "threw up" P-9 signs. (31RT 3231.) Before they were shot, someone said, "Now, Blood." (31RT 3243, 3258.) P-9 was considered a Blood gang. (14RT 1170-1171.) One of the boys had a blue bandanna, the color of the rival gang, and the victims may have been mistaken as members of the Raymond Crips. (15RT 1300; 16RT 1466-1467, 1471, 1474-1474; 18RT 1757, 1759; 31RT 3237.) Pina identified appellant Holmes as the man wearing a trench coat running from Wilson Street to a Nissan Sentra on Emerson after the gunshots. (25RT 2660-2661, 2665, 2679-2680; 26RT 2782, 2789.)

Also, Tate heard appellant Holmes brag about getting a hat that said "trick or treat" and describe how the Halloween shooting occurred. Appellant Holmes said that he and two others were in some bushes, jumped out, and said "trick or treat." He said that they blasted when they jumped

out. He said that he was a killer. He explained that the reason for the trick or treat killing was that one of his friends, Hodges, had been killed by Crips. (15RT 1351-1354, 1362.)

Furthermore, it was unlikely that the jury considered DeSean Holmes's testimony against appellant Holmes because the jury was instructed with the modified version of CALJIC No. 2.07, which stated in relevant part:

> Evidence has been admitted against one or more of the defendants, and not admitted against the others.
>
> At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants.
>
> Specifically:
>
> * * * *
>
> 2. The alleged statements of Lorenzo Newborn to DeSean Holmes cannot be used against any defendant other than Lorenzo Newborn.

(6CT 1495.) As previously stated, the jury was also given CALJIC Nos. 2.08 and 17.00. (See 6CT 1496, 1575.) Accordingly, admission of DeSean Holmes's testimony was harmless beyond a reasonable doubt.

F. Appellant Holmes's Motion for Severance Prior to the Defense Case

After the prosecution rested, appellant Holmes renewed his motion for severance because the prosecution would introduce acts of violence by appellant Newborn on cross-examination of unspecified defense witnesses. The trial court stated, "I haven't allowed anything in yet." Appellant Holmes argued that appellant Newborn's acts of violence would prejudice appellants Holmes and McClain and requested that the evidence be excluded or that the cases be severed. Appellant McClain joined the motion. (32RT 3355-3356.) The trial court found "nothing under

Aranda/Bruton or anything else so far that would exclude that evidence or cause these cases to be severed." (32RT 3356.)

Here, appellant Holmes failed to set forth a sufficient basis for severance. This case was a classic case for a joint trial. The trial judge aptly pointed out that he had not yet allowed the prosecution to introduce acts of violence by appellant Newborn on any cross-examination. The trial court properly denied the motion for severance. (See *People v. Coffman and Marlow, supra*, 39 Cal.4th at p. 998.)

G. Admission of James Carpenter's Testimony

The prosecution introduced evidence that James Carpenter told Detective Uribe that appellant McClain told him that he and others had shot three Crips in Pasadena in retaliation for shooting Fernando Hodges. (23RT 2335.) This statement had been redacted from one in which appellant McClain stated that he, Cornell Daniels, and appellant Holmes had shot three Crips. (23RT 2350.) Appellant Newborn sought to bring out during cross-examination of Detective Uribe that appellant McClain did not mention appellant Newborn, and noted that appellant Holmes would be placed in a difficult position because he could not ask the same question of Detective Uribe. (23RT 2345.) Counsel for appellants Holmes and Newborn argued that they were placed in difficult positions because the trial court had refused to sever trials. (23RT 2347-2349.) The trial court permitted appellant Newborn to ask Detective Uribe about whether appellant McClain discussed appellant Newborn. The trial court pointed out that it had already instructed the jury that Carpenter's statement was limited to appellant McClain, and that "others" was a proper redaction of the statement and not in violation of *Aranda/Bruton*. (23RT 2348; see 23RT 2308 [court instructs jury that Carpenter's testimony is limited to appellant McClain].)

Appellant Holmes states, "Ultimately, the trial court denied any renewed motion for the severance and ruled that counsel for Newborn had the right to ask whether McClain neglected to mention Newborn was involved." (AHOB 84.) Although counsel for appellants Newborn and Holmes complained that they were placed in difficult positions because the trial court did not sever their cases, counsels' statements could hardly be interpreted as an attempt to renew their severance motions. (See 23RT 2335-2348.)

Appellant McClain's statement, as recounted by Carpenter, was properly admitted and did not violate *Aranda/Bruton*. "A codefendant's extrajudicial statement implicating another defendant need not be excluded when the codefendant testifies and is available for cross-examination." (*People v. Hoyos* (2007) 41 Cal.4th 872, 896, citing *Nelson v. O'Neil* (1971) 402 U.S. 622, 629-630 [91 S.Ct. 1723, 29 L.Ed.2d 222].) Here, because appellant McClain testified and was available for cross-examination, there was no *Aranda/Bruton* violation.

H. Appellants Holmes and McClain's Motion to Sever Prior to Appellant McClain's Testimony

Before appellant McClain testified, appellant Holmes moved to preclude the prosecution from asking appellant McClain about his statement to Carpenter. (36RT 3925-3926.) Appellants Holmes and McClain renewed their motion to sever. (36RT 3926.) Appellant McClain also moved to preclude the prosecution from asking him any questions about what was said to Carpenter. (36RT 3930.) Appellant Holmes joined appellant McClain's motion. Appellant Newborn did not. (36RT 3931.) The trial court denied the severance motion and ruled that the prosecution was permitted to ask appellant McClain about his statement to Carpenter. (36RT 3929, 3943-3945; 6CT 1451.)

Appellant McClain testified. (36RT 3963-37RT 4081.) After appellant McClain's testimony, appellant Newborn requested that the court instruct the jury that the statements made by appellant McClain or the questions by the prosecution of appellant McClain were limited to appellant McClain. Appellant Holmes joined. (37RT 4082.) The trial court agreed to instruct the jury that the statements made by McClain or the prosecution's questions posed to appellant McClain were to be limited to appellant McClain and told the defense to prepare the instruction. (37RT 4084.) Although the trial court instructed the jury with CALJIC No. 2.07, the instruction did not specifically address the statement made by McClain or the prosecution's questions posed to appellant McClain. (See 6CT 1495.)

In this case, Holmes and McClain's motion for severance was based upon *Aranda/Bruton* grounds. (See 36RT 3925-3931.) The trial court properly denied that motion and any claim of a due process violation is not viable because appellant McClain testified and was available for cross-examination. (*People v. Hoyos, supra*, 41 Cal.4th at p. 896.)

I. The Denial of Severance Did Not Deprive Appellants of a Fair Trial or Due Process of the Law

Appellants contend that consolidation deprived them of a fair trial. (AHOB 102-118; AMOB 237-248; ANOB 184-185.) While severance remains largely within the trial court's discretion, this Court has stated that a reviewing court may reverse a conviction when because of consolidation, "gross unfairness" has deprived the defendant of a fair trial. (*People v. Ervin* (2000) 22 Cal.4th 48, 69.) As set forth above, the trial court's rulings on the motions to sever and renewed motions to sever were proper. If the court's joinder ruling was proper when it was made, however, the judgment may be reversed only on a showing that joinder resulted in gross unfairness

amounting to a denial of due process. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.)

1. Appellant Holmes's joint trial with appellant Newborn

Appellant Holmes argues that joinder with appellant Newborn resulted in gross unfairness. Specifically, he contends that DeSean Holmes's testimony that appellant Holmes's counsel attempted to dissuade him from testifying implied appellant Holmes's guilt and attorney Nishi's belief therein, and that DeSean Holmes's agreement that he would only implicate appellant Newborn created the impression that he sought to protect appellant Holmes or was fearful of retaliation. (AHOB 102-115.) Respondent submits that the joinder did not result in gross unfairness. First, DeSean Holmes's testimony was admitted as evidence only against appellant Newborn. The jury was repeatedly instructed that it was to consider DeSean Holmes's testimony only against appellant Newborn. (18RT 1752; 6CT 1495.)

As to DeSean Holmes's testimony that appellant Holmes's counsel attempted to dissuade him from testifying, thus implying appellant Holmes's guilt, appellant Holmes introduced impeaching evidence through the stipulation of what Nishi would have testified. In particular, the jury was read the following stipulation by the parties:

> It is hereby stipulated that Thomas Nishi was called, sworn and testified as follows: that he is duly authorized to practice law in the state of California and that he is the attorney of record for Karl Holmes in the matter before the jury; that a few weeks before this trial commenced that he received a voice mail from De Sean Holmes who stated in part that he did not want to testify.
>
> Mr. Nishi never had contact with De Sean Holmes before this voicemail. To preserve the evidence that De Sean Holmes had already decided not to testify, the voice mail was not erased. The voice mail was provided to the prosecution

as part of discovery. Shortly after receiving the voice mail an attempt was made to interview De Sean Holmes at the Pasadena police station. De Sean Holmes did not want to speak with Mr. Nishi; however, he stated that he would call Mr. Nishi the following day.

The next day De Sean Holmes called Mr. Nishi and was put on a three-way call with defense attorney Carl Jones. Most of the conversation dealt with his incarceration at the Pasadena police station and whether De Sean Holmes wanted legal representation. Based upon what De Sean Holmes stated, Mr. Nishi then contacted De Sean Holmes' attorney, Daniel Nardoni, and told Mr. Nardoni of De Sean's desires. These experiences are the only encounters Mr. Nishi has had with De Sean Holmes. At no time did Mr. Nishi say or do anything to encourage De Sean Holmes not to testify.

(42RT 4318-4319.)

A court may not deny the defendant the right to present impeaching evidence through the testimony of his counsel, notwithstanding the provisions relating to testimony by counsel in the Rules of Professional Conduct. (*People v. Marquez* (1992) 1 Cal.4th 553, 574.) Appellant Holmes benefitted from the introduction of this stipulation. First, it directly countered what DeSean Holmes testified as to Nishi. Second, because Nishi's testimony was introduced in the form of a stipulation which suggested that the prosecution did not contest what Nishi would have testified, it increased Nishi's credibility. Third, the trial court also made clear to the jury that Mr. Nishi was a "great lawyer" and would not have encouraged DeSean Holmes not to testify. (See 41RT 4262; see also 44RT 4613-4614 [appellant Newborn's attorney argues that DeSean Holmes lied about Mr. Nishi], 4714 [trial court noting that it twice in open court before the jury made a finding to protect Mr. Nishi].)

Finally, prosecutor Myers initially stated that, "The person who is calling these guys liars is the same person who according to DeSean Holmes told him, DeSean, to take the 5th and be like Furman." (44RT

4675.) Appellant Holmes's attorney, however, immediately objected. And, the prosecutor quickly corrected himself and stated that he was not calling Mr. Nishi a liar and was merely pointing out that there was a discrepancy between DeSean Holmes's testimony and Mr. Nishi's stipulated testimony, and that DeSean Holmes may have misunderstood what Mr. Nishi stated. (44RT 4675-4676.) Contrary to appellant Holmes's assertion (AHOB 110), the prosecution did not use DeSean Holmes's testimony to gain an unfair advantage and unconstitutionally lighten its burden of proof. The prosecutor did not commit misconduct. (*People v. Yeoman* (2003) 31 Cal.4th 93, 145-146 [one misstatement of law, which the prosecutor immediately corrected, was not misconduct].) The statement did not infect the trial with such unfairness as to violate due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Nor was there misconduct under state law because the prosecutor did not use deceptive or reprehensible methods to attempt to persuade the jury, and because it was not reasonably likely that the jury construed or applied the challenged remark in an objectionable manner. (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

DeSean Holmes's agreement that he would only testify against appellant Newborn did not mean that he was protecting appellant Holmes or that he was fearful of appellant Holmes. Instead, the jury was presented with the contractual agreement between the prosecutor and DeSean Holmes. That agreement expressly stated that DeSean Holmes did not represent whether he had information concerning appellant Holmes. The agreement also indicated that the defense could ask him about appellant Holmes and he would honestly answer those questions. (See 41RT 4258; Peo. Exh. C.) The more reasonable inference of the agreement is that DeSean Holmes had no information concerning appellant Holmes. Moreover, DeSean Holmes never testified that he was fearful of appellant

Holmes, but rather that he was fearful of Danny Cooks and Ernest Holly. (17RT 1545-1546; see 44RT 4646 [prosecutor's argument that DeSean Holmes did not need protection from appellants, but instead from Danny Cooks, Ernest Holly, and their associates].) Accordingly, appellant Holmes cannot demonstrate that the denial of severance resulted in gross unfairness to violate due process. (See *People v. Mendoza, supra*, 24 Cal.4th at p. 162.)

2. Appellant McClain's joint trial with appellant Newborn

Appellant McClain argues that his joint trial with appellant Newborn prejudiced him because the prosecutor improperly insinuated that appellant McClain was involved in the shooting of Majhdi Parrish. (AMOB 248; see 44RT 4684.) The jury, however, was instructed that attorneys' statements and arguments were not evidence. (42RT 4332; see also 44RT 4593.) Furthermore, counsel for appellant McClain immediately objected, stating, "Your Honor, I object to that. [¶] Mr. Myers sent us a letter saying that these defendants had absolutely nothing to do with the death." (44RT 4684.) Appellant Newborn's counsel countered during closing argument that DeSean Holmes had Majhdi Parrish killed. (44RT 4612, 4615.) In any event, the prosecutor's comment was brief and he did not return to the point. (44RT 4684.) His comment could not have resulted in gross unfairness to violate due process. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 704.)

3. Appellants Holmes's and Newborn's joint trial with appellant McClain

Appellants Holmes and Newborn argue that the denial of severance resulted in gross unfairness because the prosecution referred to their failure to testify, while cross-examining appellant McClain. (AHOB 115-118;

ANOB 184-185.) Specifically, the following transpired during the prosecution's cross-examination of appellant McClain:

> McClain: You let all the rest of the Jimmy the Weasels come up here talking about play the tape and this and that because they know they're lying. You let them get away with that shit because they can't stand to be scrutinized because they're scared to get caught in a lie. Well, I'm not lying. I ain't got nothing to hide. I didn't kill no kids. I have not done that shit, period, period. I wouldn't do that to no little Black boys, man.
>
> The Court: Play that part of the tape.
>
> [Prosecutor Myers]: Thank you, your Honor. Oh, by the way, Mr. McClain, if you did kill the kids, you would get up there and admit it, wouldn't you?
>
> A: I wouldn't get up here. I wouldn't get up here.
>
> Q: If you did kill the kids, if you were on the stand right now -
>
> [Appellant McClain's counsel]: Objection: asked and answered.
>
> The Witness: I am saying my homeboys got to do what their lawyers tell them for their best interest. I'm saying that I - my personal feeling is that I feel you all are going to try and railroad me anyway, so fuck with that your lawyers talking about. I am going to get up here and let everybody know what time it is.
>
> Q: If you got up there and you did kill the kids -
>
> A: I wouldn't. I wouldn't.
>
> Q: You wouldn't what?
>
> A: I wouldn't get up here.
>
> Q: You wouldn't even admit it though, if you did?
>
> A: If I'd done it - man, first of all, I wouldn't put myself in that position to do nothing to no kids.
>
> Q: Well, when you went on Halloween night, looking for Crips to kill, driving around with your gun -
>
> A: You said it yourself, but you said it yourself -

Q: You had a motive to kill somebody and you're saying you didn't kill them?

(37RT 4053-4054.)

A prosecutor may not exploit a defendant's exercise of the Fifth Amendment right not to testify against himself or herself by directly or indirectly referring to the defendant's failure to take the stand at trial. (*Griffin v. California* (1965) 380 U.S. 609, 613-614 [85 S.Ct. 1229, 14 L.Ed.2d 106].) In *United States v. Robinson* (1988) 485 U.S. 25, 32 [108 S.Ct. 864, 99 L.Ed.2d 23], however, the United States Supreme Court held that where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege [against compulsory self-incrimination]." The *Robinson* court quoted Justice Stevens's concurrence in *United States v. Hasting* (1983) 461 U.S. 499, 515 [103 S.Ct. 1974, 76 L.Ed.2d 96]:

> "Under *Griffin* ... it is improper for either the court or the prosecutor to ask the jury to draw an adverse inference from a defendant's silence. But I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case."

(See *United States v. Robinson, supra*, 485 U.S. at p. 32.) The *Robinson* court reasoned, "It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as a substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence." (*Id.* at p. 34.)

The *Robinson* court instructed courts to examine the prosecutorial comment in context. (*United States v. Robinson, supra*, 485 U.S. at p. 33.) When viewed in context, the prosecutor's questions posed to appellant

McClain in the instant case were fairly responding to appellant McClain's testimony that the prosecution's witnesses lied on the stand and that he was telling the truth that he did not kill the victims. The fair interpretation of the prosecutor's questions was that appellant McClain was lying on the stand and did kill the victims. In context, the prosecutor's questions posed to appellant McClain could not be interpreted as a direct or indirect reference to appellants Holmes's and Newborn's failure to take the stand at trial. Indeed, appellant McClain's testimony could only be interpreted as suggesting that appellants Newborn and Holmes were also innocent and were not testifying upon advice of their attorney. (See 36RT 4053-4054.)

Moreover, it was not the prosecutor's question that referred to appellants Holmes's and Newborn's failure to take the stand. Indeed, the prosecutor had presumed in his question that even if appellant McClain had killed the victims, he would have testified. (See 36RT 4053.) Instead, appellant McClain testified that he would not testify if he was not innocent and that his codefendants had to "do what their lawyers tell them for their best interest." (36RT 4053.)

Even if the prosecutor's cross-examination questions or appellant McClain's answers to the questions violated *Griffin*, any error was harmless beyond a reasonable doubt. (*People v. Hardy, supra,* 2 Cal.4th at p. 157.) As previously argued, appellant McClain's testimony actually suggested that appellants Newborn and Holmes were also innocent and were not testifying upon advice of their attorney. (See 3RT 4053-4054.) To the extent that appellant McClain's answer to the prosecutor's question was a reference to his codefendants' silence, it was oblique and indirect. As such, it was harmless and not reversible. (*People v. Hardy, supra*, 2 Cal.4th at p. 158.)

Furthermore, the jury was also instructed:

> Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it enables you to understand the answer.

(42RT 4332.) The jury was given CALJIC Nos. 2.60 and 2.61. CALJIC No. 2.60 provides:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(6CT 1515.) CALJIC No. 2.61 provides:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(6CT 1516.) The trial court's admonishment on this point supports the conclusion that any error was harmless. (*People v. Hardy, supra*, 2 Cal.4th at p. 161.) Because any *Griffin* error was harmless, the joinder did not result in gross unfairness amounting to a denial of due process. (*Ibid.*)

Appellant Newborn also argues that reversal was required because the prosecutor used appellant McClain's testimony about his attempts to contact appellant Newborn and others. (ANOB 193.) However, appellant McClain testified that he attempted to contact appellant Newborn and others, but was unsuccessful. (36RT 3977-3993.) He testified that he wanted to retaliate, but did not. (36RT 3989.) The prosecutor could reasonably argue that appellant McClain's testimony that he was unsuccessful in contacting any fellow gang member to retaliate for Hodge's murder, was not credible. More importantly though, the jury was also

instructed that the statements made by the attorneys during the trial were not evidence. (42RT 4332.)

In sum, the record does not show that the jury was "unable or unwilling to assess independently the respective culpability of each codefendant or [was] confused by the limiting instructions. (See *People v. Ervin, supra,* 22 Cal.4th at p. 69.) No gross unfairness depriving appellants of a fair trial or due process is evident. (See *People v. Box* (2000) 23 Cal.4th 1153, 1197.)

II. THE TRIAL COURT PROPERLY DENIED APPELLANT MCCLAIN'S MOTION TO SEVER THE PRICE AND THE HALLOWEEN COUNTS

Appellant McClain contends that the trial court failed to sever the Price and the Halloween counts, violating his right to due process. (AMOB 205-237.) Respondent submits the trial court properly denied appellant McClain's motion to sever.

A. Relevant Facts and Proceedings

Appellant McClain moved to sever the Price and Halloween charges, arguing that joinder would impermissibly prejudice him. He described the factors considered in a severance motion. (4CT 814-819.) In discussing the factors, he stated:

> There is no relationship between Counts 1, 2, 3, 4, 5, 6, 7, 8, and 10 of the within Indictment and Count 9 of the within Indictment. The dates, victims, witnesses and evidence are separate and distinct for each matter. Therefore, HERBERT McCLAIN requests the aforementioned severance of counts.

(4CT 819.) The prosecution filed an opposition to the motion. (4CT 851-862.) At a hearing held on July 8, 1994, the trial court stated that the moving papers had been read and denied the motion without prejudice because the trial court saw "no reason to sever" "based on the moving papers and what we have." (3RT 60-62.)

Appellant McClain's asserts that he renewed his motion to sever the Price case and the Halloween case on June 20, 1995. (AMOB 207.) Respondent disagrees. Prior to trial, appellant McClain requested that he be tried alone or "in the very least, not tried with Mr. Newborn" because the prosecution's proposed redactions of appellant Newborn's statement were insufficient. (8RT 247.) The prosecutor stated that the motion to sever cases had already been heard and denied in 1994. Appellant McClain's attorney stated, "If it was, in fact, denied, I simply did not note it." (8RT 232.) The trial judge said, "That sounds familiar," he indicated that he would check the status as to the motion. (8RT 232.) Appellant McClain did not subsequently press for another ruling on severing the charges. (Cf. *People v. Ramos* (1997) 15 Cal.4th 1133, 1171 [failure to press for a ruling waives the issue on appeal].)

On July 6, 1995, appellant McClain had then filed a motion for separate trials from his codefendants (4CT 1003-1058 [filed on July 6, 1995].) The trial court heard argument as to that motion for separate trials from the codefendants. (8RT 246-249.) Appellant McClain's reference during his argument that he had other counts which did not relate to other defendants during the discussion of severance from his codefendants (8RT 248) cannot be construed as a renewal of his motion to sever the charges, in light of the remaining discussion at that hearing and the trial court's ruling. (See 8RT 247-249.) Even if appellant McClain's 1995 motion included the severance of the charges, the trial court still did not abuse its discretion in denying the motion. Appellant McClain did not present anything different as far as the factors considered in assessing the propriety of joinder in 1995 that had not already been presented in 1994.

B. The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Sever

This Court reviews a trial court's decision not to sever for abuse of discretion based on the record when the motion was heard. (*People v. Cook* (2006) 39 Cal.4th 566, 581.)

"The law prefers consolidation of charges." (*People v. Ochoa* (2001) 26 Cal.4th 398, 423.) Section 954 permits joint charging and trial of two or more offenses of the same class of crimes. Here, the offenses in the Price case and the Halloween case were crimes of the same class and thus came within the provisions of the statute. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1128 [murder and attempted murder are both assaultive crimes against the person, and as such are "offenses of the same class" expressly made joinable by § 954], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant McClain first argues that the trial court failed to exercise its discretion because the court failed to acknowledge authorities presented in his written motion and failed to consider all known facts in conjunction with the relevant law. He cites to no authority that requires a trial court to expressly acknowledge authorities cited in a motion before making a ruling. (See AMOB 213-216.) He also claims that the trial judge was predisposed to rule against the severance motion because the judge had been upheld on all of his severance motions, saw no difference between this case and any other multiple defendant case, and was concerned about the county's financial woes. (AMOB 213-216.) The record does not support this assertion.

The trial court was well aware of its discretion to sever the cases and properly declined to sever the cases. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1024 [rejecting contention that trial court failed to exercise its

discretion in admitting a larger photograph]; *People v. Valdez* (2004) 32 Cal.4th 73, 120 [no indication in the record that the trial court failed to consider all of the factors in deciding severance motion].) Twice, the trial judge expressly stated that he had read the motions and did not see any basis for severance (for the charges in 1994 and for the defendants in 1995). (3RT 60-61; 8RT 248-249.) In denying the 1995 severance motion, the trial judge's reference to having been upheld on all of his severance motions and that he saw no difference between this case and any other multiple defendant case, was merely the trial judge's belief that he was making the correct ruling. The statement regarding the county's financial woes was simply reference to the long-recognized substantial and significant benefits to the public of joinder to achieve conservation of judicial resources and public funds. (See *People v. Bean, supra*, 46 Cal.3d at pp. 939-940.) Contrary to appellant McClain's assertion, the statements by the trial judge did not "expressly negate" the judge's other statements and conduct.

Moreover, the trial court properly exercised its discretion in denying appellant McClain's motion to sever the charges. Factors to be considered in assessing the propriety of joinder include:

> (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense or the joinder of the charges converts the matter into a capital case.

(*People v. Mendoza, supra,* 24 Cal.4th at p. 151.)

Appellant McClain asserts that the evidence on the two cases were not cross-admissible (AMOB 216-218), but he is incorrect. "[T]he issue of cross-admissibility 'is not the cross-admissibility of the charged offenses

but rather the admissibility of relevant evidence" that tends to prove a disputed fact.'" (*People v. Geier* (2007) 41 Cal.4th 555, 576.) In *People v. Jenkins* (2000) 22 Cal.4th 900, 948-949, this Court described cases that held that evidence was cross-admissible to show motive. For instance, this Court has held that there was no error in denying severance where the evidence that one of the victims was killed on the orders of a prison gang to which the defendant belonged, and that the other victim was killed in an attempt to acquire firearms to carry out gang activities, was cross-admissible to show motive. (*People v. Price* (1991) 1 Cal.4th 324, 389.)

Similarly, evidence was cross-admissible in the instant case to show motive, i.e., appellant McClain's hostility toward the Crips. As the prosecution argued in its opposition to appellant McClain's motion, the Price case was cross-admissible evidence for the Halloween case because it demonstrated appellant McClain's "enmity toward Crips and [was] therefore relevant probative evidence on the issue of motive." (4CT 858.) "Two-way" cross-admissibility is not required. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1129.)

Moreover, the Price attempted murder was relevant as to the identity of the perpetrators in the Halloween case. Appellant McClain argues that evidence of separate charges is admissible only if there is an evidentiary connection between the charges, such as common marks. (AMOB 217.) In *People v. Zambrano, supra*, 41 Cal.4th at p. 1129, this Court rejected a similar argument, reasoning that "common marks are not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one." (Italics in original.) Like in *Zambrano*, common marks between the Price and the Halloween cases were not crucial. Rather, appellant McClain's attempted murder of Price started a series of events, resulting in the Halloween murders. As the prosecution argued in its opposition to the motion for severance, "[t]he

triple murders were also motivated by gang enmity manifesting itself in a retaliation for the murder of a fellow gang member." (4CT 860.) Price knew that he was shot by a Blood and described his assailant as "that punk motherfucker with the long jericurl and big lips." (31RT 3193-3194; see 31RT 3163.) After he was shot, he learned of appellant McClain's name. (31RT 3168.) Price wanted to shoot appellant McClain. (31RT 3169.) Three days later, though, appellant McClain's fellow P-9 gang member Fernando Hodges was believed to have been shot by Crips at the same location that appellant McClain shot Price. (14RT 1138-1139, 1160-1161; 19RT 1843-1844.) A few hours after Hodges had been shot, P-9 gang members—appellants—shot the boys on Wilson Street, a few miles from the location where Price and Hodges were shot. (31RT 3231, 3243, 3258; see 4CT 858.)

Even if the evidence in the two cases were not cross-admissible, section 954.1 expressly provides that when crimes of the same class are charged together, "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together...." (§ 954.1.) "Cross-admissibility suffices to negate prejudice, but is not essential for that purpose." (*People v. Jenkins, supra,* 22 Cal.4th at p. 948.) "[C]ross-admissibility is not the sine qua non of joint trials." (*People v. Geier, supra,* 41 Cal.4th at p. 575.) Lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder. (*Ibid.*)

Furthermore, none of the other factors for assessing prejudice arising from joinder support appellant McClain's claim that the trial court abused its discretion by denying severance. While the Halloween case had received press coverage and involved victims who were not gang members, the Price case involved egregious facts as well. In the Price case, appellant McClain brazenly shot rival gang member Price at close range and without

any provocation. "Although different in their particulars," the two cases were "equally abhorrent." (See *People v. Price, supra*, 1 Cal.4th at p. 390.)

The Halloween case carried the death penalty, but because the Price case would have been admissible anyway, joinder produced no additional prejudice in favor of capital punishment. (See *People v. Zambrano, supra*, 41 Cal.4th at p. 1130 [evidence in non-capital case joined with capital case would have been admissible to support the capital charges regardless of joinder and joinder produced no additional prejudice in favor of capital punishment].)

Neither case was so weak in evidentiary support that the aggregate evidence was likely to have affected the jury's verdict. Here, Price had selected appellant McClain's photograph from a six-pack photographic lineup and had no doubt that appellant McClain shot him. (31RT 3168-3170, 3193, 3208-3211.) One of the eyewitnesses for the Halloween offenses was certain that he saw appellant McClain as the driver of the lead car. (25RT 2679.) Appellant McClain also made several admissions to others about the offense, failed to report to James Thomas, fled the jurisdiction, and changed his appearance after the offenses. (See Statement of Facts I.A.9.) Finally, capital charges were not the result of joinder of the various incidents. (*People v. Mendoza, supra,* 24 Cal.4th at p. 162.) Appellant McClain has failed to make a clear showing of prejudice to establish that the trial court abused its discretion in denying the motion to sever the cases. (See *id.* at p. 160.)

Based in the facts known to the trial court when it heard the motion, the trial court's denial of the severance motion did not fall outside the bounds of reason. The trial court properly denied the motion to sever the charges. (See *People v. Cook, supra,* 39 Cal.4th at p. 582; *People v. Ochoa, supra*, 26 Cal.4th at p. 423.)

C. The Denial of the Motion to Sever Did Not Deny Appellant McClain Due Process

A pretrial ruling denying severance that is not an abuse of discretion can be reversed on appeal only if joinder is so grossly unfair as to deny the defendant due process. (*People v. Cook, supra,* 39 Cal.4th at p. 581) As discussed above the joinder of the two cases was not prejudicial to appellant McClain, and therefore could not have been "grossly unfair." Appellant has failed to demonstrate undue prejudice resulting from the joinder of the charges at trial. (See *People v. Zambrano, supra*, 41 Cal.4th at p. 1130.) Furthermore, the jury was instructed that it must decide each count separately. (6CT 1576 [CALJIC No. 17.02].) Appellant McClain's counsel reminded the jury of that instruction. (43RT 4474.) The trial court properly denied appellant McClain's motion to sever the cases, and there was no denial of due process by the joinder.

III. THE PROSECUTION PROPERLY EXERCISED PEREMPTORY CHALLENGES

Appellant Newborn contends that he was deprived of due process, equal protection, and a representative jury in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the prosecutor's improper exercise of peremptory challenges on six African American women. (ANOB 96-119.) Appellants Holmes and McClain join this argument. (AHOB 75; AMOB 67.) Respondent submits that the prosecution properly exercised its peremptory challenges.

A. Relevant Proceeding[35]

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[35] In his summary of facts, appellant Newborn includes a description of jury selection after a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 was made, including a "lecture" to counsel about their peremptory challenges. (ANOB 100-101.) But in fact, the trial judge made clear that he was "not admonishing" counsel and emphasized that the

(continued...)

After the prosecution exercised 12 peremptory challenges, the defense made a *Wheeler* motion. Counsel for appellant Holmes noted that the prosecution had peremptorily challenged six African American women prospective jurors (prospective juror nos. 37, 53[36], 48, 9, 88, and 94). The following colloquy occurred:

> The Court: Do you want to respond?
>
> [Prosecutor]: I want to know if the Court is going to say that there has been a prima facie showing, considering the Court has read and considered all the questionnaires and heard their answers.
>
> The Court: I don't.
>
> I said do you want to answer. I don't find a prima facie case yet. In fact, three of the jurors we had some sidebars on. We had some very difficult issues with them.
>
> We had the questionnaire [*sic*]. I didn't find anything that would be in the nature of bias or prejudice. I think they have a right to preempt those people they have done so far, and I keep track and I film everyone on this case, so I know.

(13RT 908.)[37]

(...continued)
peremptories had been proper. (13RT 948-949.) Furthermore, a trial court has no sua sponte duty to reexamine rulings on previous *Wheeler/Batson* motions. (*People v. Avila* (2006) 38 Cal.4th 491, 552.)

[36] The trial court's notes regarding voir dire indicated that prospective juror no. 53 was a Hispanic woman. (13CT 3422A [sealed].) However, based upon defense counsel's statement and prospective juror no. 53's responses in her questionnaire, it appears that the prospective juror was a Black woman. (See 18Supp. CT I 4928; 13RT 907.)

[37] Appellant Newborn argues that the trial court's response to the *Wheeler* motion was inadequate because it contained an implicit judicial speculation that the prosecutor might have had some race neutral reason for striking the African American women prospective jurors. (ANOB 107-108.) Appellant Newborn has taken the trial court's response out of context. Immediately after saying that three of the jurors had sidebars, the judge said that there had been difficult issues with the jurors and pointed to
(continued...)

B. The Prosecution Properly Used Its Peremptory Challenges

The purposeful exclusion of jurors from jury service on the basis of race violates the Equal Protection Clause of the United States Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97 [106 S.Ct. 1712, 90 L.Ed.2d 69].) In *Batson*, the United States Supreme Court set out a three-step process in the trial court to determine whether a peremptory challenge is race-based in violation of the Equal Protection Clause. First, the defendant must make a prima facie showing that the prosecutor had exercised a peremptory challenge on the basis of race. (*Ibid.*) In order to establish a prima facie showing of a *Batson* violation, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the jury on account of their race. (*Id.* at p. 96.) If a defendant makes a prima facie case showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at p. 97.) "'[I]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129], quoting *Purkett v. Elem* (1995) 514 U.S. 765 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

After *Johnson v. California*, this Court has reviewed the record independently to discern whether a prima facie showing has been made under the proper "inference of discriminatory purpose" standard in cases in which the trial court found no prima facie showing of discrimination in jury selection, and it is unclear what standard the trial court employed in making its determination. (*People v. Williams* (2006) 40 Cal.4th 287, 310.) Proof of a

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(...continued)
the jurors' questionnaires as the basis that there was no bias or prejudice. (13RT 908.)

prima facie case may be made from any information in the record available to the trial court. (*People v. Bell* (2007) 40 Cal.4th 582, 597.) This Court has explained that certain types of evidence will be relevant in determining whether a prima facie showing of discrimination has been made:

> Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may demonstrate that the jurors in question share only this one characteristic -- their membership in the group -- and that in all other respects they are heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ...the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.

(*Ibid.*, quoting *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)

Here, the defense failed to meet the reasonable inference standard. Appellant Newborn asserts that there was a statistical disparity in the use of peremptories and that the prosecution exercised 100% of its peremptories against women, minorities, or minority women. (ANOB 105-106.) Appellant Newborn cites decisions by the federal Ninth Circuit Court of Appeals. However, this Court is not required to follow the decisions of the lower federal courts. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Appellant Newborn argues that while the defense counsel "emphasized" the particular category of African American women, "the big picture is that all of the prosecutor's challenges were directed toward members of protected classes." (ANOB 106, underlining in original.) This argument is flawed and "smacks of data dredging." (See *People v. Bonilla* (2007) 41 Cal.4th 313, 344.) Appellant Newborn has broadened the

category of cognizable group to all minorities and women, such that the prosecution has happened to use peremptory challenges on members of this broadly defined category not for reasons of discrimination, but "as a simple consequence of the laws of probability." (See *ibid.*) The force of any corresponding inference of discrimination is necessarily weakened. (See *ibid.*) Throughout the voir dire until the *Wheeler* motion was made, minorities and women represented 83% of the prospective jurors in the jury box. Likewise, there were only two White males (or 17%) sitting in the box. Members of the protected class (women and minorities), as defined by appellant Newborn on appeal, constituted the majority of those called into the box. More importantly, the defense's *Wheeler* motion was made only regarding the six African American women. Accordingly, absent an appropriate challenge to the prosecution's exercise of peremptories, the issue is not preserved as to other jurors. (*People v. Bolin* (1998) 18 Cal.4th 297, 317.)

In arguing that the trial court erred in failing to find a prima facie case of discrimination, appellant Newborn relies in part on the fact that the prosecution had exercised peremptory challenges on 60% of African American women who were subject to peremptory challenge.[38] This statistical evidence alone does not establish a prima facie case. (See *People v. Bonilla*, 41 Cal.4th at p. 344.) This Court has repeatedly explained:

> To be sure, the ultimate issue to be addressed on a *Wheeler-Batson* motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." [Citation.]

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[38] Appellant Newborn erroneously asserts that the strike ratio was 67% (or six out of nine prospective jurors). (ANOB at 106.) It appears that appellant Newborn has counted prospective juror no. 53 as an African American woman who was challenged, but did not include her in the total number of African American women called to sit in the box.

> But in drawing an inference of discrimination from the fact one party has excused "most or all" members of a cognizable group [citation], a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges.

(*People v. Bell, supra*, 40 Cal.4th at p. 598, fn. 3; see also, *People v. Bonilla, supra*, 41 Cal.4th 343, fn. 12.)

"A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (*People v. Bell, supra*, 40 Cal.4th at p. 598, fn. 4.) Here, African American women comprised approximately 29% of the prospective jurors who were subject to peremptory challenges the prosecution (10 of 34). The prosecution used 50% of its peremptory challenges on African American women (6 of 12). Closer analysis, however, reveals this apparent disparity is not all it appears. (See *People v. Bonilla*, 41 Cal.4th at p. 345.)

At the time the *Wheeler* motion was made, 33% of the remaining prospective jurors who were subject to peremptory challenges were African American women. Indeed, the ultimate composition of the jury (33% African American women) essentially mirrored that of the prospective jurors who were subject to peremptory challenges. (See 13CT 3422A.) The ultimate composition of the jury is a factor to be considered in evaluating a *Wheeler/Batson* motion. (*People v. Bonilla, supra*, 41 Cal.4th at p. 346; *People v. Ward* (2005) 36 Cal.4th 186, 203.) Thus, the prosecution's use of peremptories does not suggest it attempted to, nor did it in fact, deprive appellants of a jury containing a fair cross-section of African American women.

Moreover, since appellants are not members of the group allegedly excluded as they are African American men, they do not benefit from whatever force their group membership would otherwise have had in

supporting an inference of discrimination. (*People v. Bonilla, supra*, 41 Cal.4th at p. 344.) The victims were of the same race and gender as appellants, namely African American men. As set forth below, the questionnaires and voir dire contain ample, specific non-race related reasons for excusing the six relevant prospective jurors. Plainly, the prosecution was looking for prospective jurors bearing a favorable attitude toward the prosecution's cause, not race or ethnicity, in assessing them. (*People v. Huggins* (2006) 38 Cal.4th 175, 236.)

1. Prospective juror no. 37

The record clearly demonstrates that the prosecution's motivation for exercising a peremptory challenge on prospective juror no. 37 was that she would favor the defense. Indeed, the trial judge's stated outside the presence of the venire, "I put down 'out.' I don't know why. She looks like a beautiful, nice lady. I don't know why, unless I remind myself what I did it for." (11RT 677.) Additionally, the prosecutor stated before prospective juror no. 37's voir dire, "I am going to try to get her off for cause on death and, if not, I will be preempting her." (11RT 678.)

Prospective juror no. 37's answers to the questionnaire indicated that she would sympathize with appellants. Specifically, prospective juror no. 37 had a deceased son who, while alive, used drugs, had been stopped, detained, or arrested for or charged with crimes "too many times to list"[39] (15Supp. CT I 4277), and had been in "every jail from Riverside to Wayside" (15Supp. CT I 4276A). Her son had also been in an altercation with the police in which her son's "skull was split." In connection with the altercation, she was unhappy with how she was treated by the police: "Because I was not present, I called to inquire the Sgt. involved told me

[39] Prospective juror no. 37 indicated that she wanted to discuss privately the details of question 71. (15Supp. CT I 4278.)

that I was lucky that was all that occurred. I called Johnny Cochran's office - was told that he had too many of those type."[40] (15Supp. CT I 4276A.) Although she had described her son as the victim, she stated that she tried to hire a defense attorney, "but was told that no one would believe the black and brown witnesses." As a result, she filed a complaint with the police department. She wrote, "[n]o charges were filed against him (my son) I wonder why." (15Supp. CT 4177, 4302; see 15 Supp. CT 4276A.) She strongly disagreed with the statement that the rights of the accused are too well protected. (15Supp. CT I 4288.) In this case in which the credibility of law enforcement officers was important because law enforcement officers testified as to prior statements made by witnesses who recanted at trial, the prosecutor reasonably exercised a peremptory challenge on prospective juror no. 37. Prospective juror no. 37 wrote, "*In spite of my experiences*, no one would be more fare [*sic*] juror than I" (15Supp. CT 4302, italics added), but even with such assurances, prospective juror no. 37's experiences reasonably raised concerns with the prosecution.

Prospective juror no. 37's response to question 91 also raised concern for the prosecution. Her response to question 91 of the questionnaire was as follows:

> 91. If a defendant testified, would you judge the defendant's testimony the same as any other witness? Yes √ No __
>
> Explain: he/she is innocent until proven guilty. I have seen a defendant who was adamant about his innocence and on the day of the trial guilt was admitted by another. The accused had been identified. The accused and the guilty was as different as night and day. I have also known of a person

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[40] If there was any ambiguity as to who had assaulted her son, prospective juror no. 37's reference to attorney Johnnie Cochrane and her filed complaint with the police department made clear that she thought the police had split her son's skull.

> going free and was guilty when a dishonest juror sat on both cases trying the same individual.

(15Supp. CT I 4282.) While appellant Newborn categorizes the response to question 91 as "entirely innocuous" (ANOB 111, fn. 3), the prosecution was reasonably concerned with the response to question 91 because part of the prosecution's case was partly based on eyewitness identifications.

Prospective juror no. 37's responses also indicated that she would not impose the death penalty in this case. Regarding her general feelings about the death penalty, she stated:

> 1) There are circumstances or cases that I felt warrant the death penalty.
>
> 2) I have also listened to the argument of disportioned [*sic*] no. of certain races receing [*sic*] death penalty.

(15Supp. CT I 4294.) She believed that the death penalty was used randomly and on the poor and uneducated. (15Supp. CT I 4295.) Although she felt that California should have the death penalty to deter those who commit heinous, cold-blooded, and premeditated crimes, she disagreed somewhat with the statements that: (1) anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty; and (2) anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty. (15Supp. CT I 4296-4297.) Prospective juror no. 37's race had no role in the prosecution's peremptory challenge.

Appellant Newborn appears to criticize the extent of the prosecutor's voir dire. (See ANOB 111.) This Court, however, has recognized that a prosecutor can use permissible criteria based on the questionnaire or existing voir dire answers and no further questioning was necessary because "lawyers must use their voir dire time judiciously, and should not be penalized for doing so." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1019, fn. 14.) The prosecutor had sufficient information from

prospective juror no. 37's questionnaire to determine that one question from the prosecution was all that was needed.

2. Prospective juror no. 53

Prospective juror no. 53's responses to her questionnaire revealed that she believed in jury nullification. For instance:

> 43. Are there any books, movies, or TV shows with which you are familiar that you feel fairly or accurately portray the criminal justice system?
>
> I watched Frontline on channel 28 KCET and enjoyed "Inside the Jury Room" and concluded that A [*sic*] jury stands as a buffer between the accused and the power of the state - the case was State of Wisconsin vs Leroy Reed.

(18Supp. CT I 4929.) She wrote in her questionnaire that her jury service affected her opinion of the courts and/or the criminal justice system in "that a juror can ignore the letter of the law and follow his/her conscience. I find that the courts and/or the criminal justice system is clearly a demonstration of government by, for, and of the people. A true democratic method of deciding guilt/innocence." (18Supp. CT I 4932.) During voir dire, prospective juror no. 53's description of the Frontline program clarified that this "buffer" was essentially jury nullification. (See 12RT 722-724.) She also stated that she could see herself in a situation ignoring the letters of the law and voting her conscience. (12RT 722-724.) Although the defense attempted to rehabilitate prospective juror no. 53's answers so that she could not be dismissed for cause, dismissal for cause is a different standard from peremptory challenges. (*People v. Hamilton* (2009) 45 Cal.4th 863, 901.)

Prospective juror no. 53's responses in her questionnaire also suggested that she would be unable to impose the death penalty in this case. Prospective juror no. 53 believed that the death penalty should be imposed

on the "criminally insane" who could not be reformed.[41] She did not list any other circumstance for which the death penalty should be imposed. (See 18Supp. CT I 4951-4952, 4955, 4958.) She strongly disagreed with the statements that: (1) "[a]nyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty." (18 Supp. CT I 4953); and (2) "anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty." (18Supp. CT I 4954.)

3. Prospective juror no. 48

Prospective juror no. 48 did not answer at least ten of the questions in the questionnaire. Several of those questions were regarding the death penalty. (See 17Supp. CT I 4734-4735, 4638-4742, 4745-4746.) During voir dire, the defense pointed out that prospective juror no. 48 had not answered some questions. (12RT 703.) The following colloquy occurred:

> The Court: These are your general feelings about the death penalty. On page 32, starting with the question, it gave two, three paragraphs about the death penalty. And I am sure you read it and you heard enough from the court in the last couple of days.
>
> Anyway, it talks about the procedure that we have been talking about, the guilt phase and then the penalty phase. [¶] Anyway, the first question was 141. [Defense counsel] wants to know, "What are your general feelings about the death penalty?"
>
> Question 2 is why do you feel that way and, 3, describe the strength of your views. [¶] In other words, I suppose we should ask you: if the defendants were found guilty and all the special circumstances were found to be true and we had a second hearing on the penalty phase and you heard evidence, you have the option of making a determination, either life without the possibility of parole or the death penalty.

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[41] During voir dire, prospective juror no. 53 was told that the criminally insane could not receive the death penalty. (12RT 719-720.)

Prospective juror no. 48: Yes, I could.

The Court: So you could consider both as an option as penalties; is that right?

Prospective juror no. 48: yes.

The Court: You have no strong feelings for or against the death penalty?

Prospective juror no. 48: No, I do not.

The Court: And you would be able to listen to the evidence and, if the jurors felt it was appropriate and you felt it was appropriate, you could impose the death penalty?

Prospective juror no. 48: Yes.

(12RT 704-705.)

Prospective juror no. 48 stated that life without the possibility of parole was a worse punishment. (17Supp. CT I 4748.) She disagreed somewhat with the statements: (1) "Anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty"; and (2) "Anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty." (17Supp. CT I 4747-4748.) These responses and her statements during voir dire indicated that prospective juror no. 48 had at best, lukewarm feelings toward the death penalty.

4. Prospective juror no. 9

Prospective juror no. 9 had peculiar responses in her questionnaire. In particular,

50. List the two people that you most respect and explain why (excluding family members):

1. Name: God Reason: He's the reason we awake everyday.

2. Name: Law Reason: Because they most of the time try to abind [*sic*] by their jobs to protect, and to serve.

(11Supp. CT I 3129.) She also curiously listed as two factors that she considered to be major causes of crime as "Death or murder" and "rape."

(11Supp. CT I 3136.) Security precautions that she had at her home were "prayer and lights." (11 Supp. CT I 3137.) In response to the question, "What should or could be done about crime?," she answered, "It's so out of control I have no solution." (11Supp. CT I 3137.)

More significantly, prospective juror no. 9 indicated that she believed that differing versions of an event by witnesses automatically raised a reasonable doubt. (11Supp. CT I 3139.) In this case, there were varying versions of the shootings by different witnesses. The prosecution could be reasonably concerned with this response. During voir dire, prospective juror no. 9 changed her answer to that question. (11 RT 602.) But the prosecutor was free to take into account her prior answer. (*People v. Jones* (2003) 30 Cal.4th 1084, 1104.)

The juror's responses suggested that she would select life without the possibility of parole over the death penalty in this case. In particular, she professed that she was "not really familiar" with the death penalty. (11 Supp. CT I 3150.) She felt that the death penalty was used randomly because she had not heard much about the death penalty. (11Supp. CT I 3151.) She disagreed somewhat with the statements "Anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty" and "Anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty." She explained, "hard to explain, maybe sometime letting the person or persons be able to think of what they've done may cause more discomfort than the death penalty." (11Supp. CT I 3152-3153.) In her questionnaire, she stated that death was a worse punishment than life without the possibility of parole and explained: "If the crime is severe, and the defendants [*sic*] points of view, and life are for no good." (11Supp. CT I 3153.) During voir dire, defense counsel asked prospective juror no. 9 what she meant. She stated:

> Well, I guess what I meant, since we have been here, you know, after the evidence has been weighed, evaluated, I don't strictly say just for death, but sometimes when you just sit for life without parole, that's more of a suffering than to be, you know, just be put right away to death to me, because everyone is different."

(11RT 606.) She also explained, "I guess what I mean no good, I mean upbringing, coming up in life, you know. He could have been abused, you know, different things that happen as different people grow up." (11RT 606.) She stated that if she heard that a defendant had problems growing up, she would not choose death over life without parole. (11RT 607.)

5. Prospective juror no. 88

Prospective juror no. 88's eldest child's father had been incarcerated. He had several convictions, including armed robbery and accomplice to murder. Prospective juror no. 88 also had relatives, her sister and at least two cousins, who had been incarcerated. (23Supp. CT I 6358, 6368, 6369-6370; 12RT 833, 838-842.) The prosecution would have been reasonable to have concerns about prospective juror no. 88 as a juror.

In addition, prospective juror no. 88 had served as a juror in two trials that could not reach verdicts. (23Supp. CT I 6366; 12RT 835.) For one of the trials, she was in the minority of jurors who could not reach a verdict. (12RT 835.) The prosecution could reasonably be concerned that if prospective juror no. 88 sat on the jury, there might be a hung jury.

Prospective juror no. 88 had requested a sidebar as to the question "Would your religious principles affect your ability to sit on a death penalty case?" (23Supp. CT 6366; see 12RT 835-836.) She stated at sidebar that her religious principles would not affect her ability to sit on a death penalty case. The trial judge seemed surprised with this statement. (See 12RT 837.) The trial court's surprise was appropriate since prospective juror no. 88 did not write a response to the question and had requested to discuss her

response in private. Her statement at sidebar was anticlimactic and did not appear to be forthright.

6. Prospective juror no. 94

Five months before completing the juror questionnaire, prospective juror no. 94 was the victim of spousal abuse. (24Supp. CT I 6614-6615.) She called the police, who did not arrest the prospective juror's boyfriend, but advised her to obtain a restraining order. She, however, "didn't follow through with" obtaining a restraining order because she had a "change of heart." (12RT 861-862.) At the time of the jury voir dire, she was "back together" with her boyfriend. There had not been any additional incidents of violence. (12RT 862.) Here, the prosecution would have reasonable concerns of having prospective juror no. 94 sit on the jury because of her spousal abuse experience. Appellant Newborn had battered at least four of his girlfriends. (See Statement of Facts II.A.3.b, II.A.3.c, II.A.3.d, II.A.3.e.) At the penalty phase, the prosecution introduced the evidence of appellant Newborn's batteries on his girlfriends. Given that prospective juror no. 94 did not obtain a restraining order, she may have been sympathetic with appellant Newborn. At the very least, prospective juror no. 94 presented a "wild card," such that the prosecutor could have reasonably used a peremptory for reasons unconnected to prospective juror no. 94's race and gender.

In addition, prospective juror no. 94's responses in her questionnaire indicated that she would not impose the death penalty in the instant case. Specifically, she said that California should have the death penalty "[b]ecause people that admits and caught in the act should be considered for the Death Penalty." (24Supp. CT I 6633.) During voir dire, the prosecutor asked questions about this response, noting that it was rare that someone is caught in the act and admits the crime. (12RT 865.) The trial court asked if prospective juror no. 94 needed a confession and the person

caught in the act to convict in order to impose the death penalty or life without the possibility of parole. (12RT 865.) Prospective juror no. 94 answered, "No." The trial court further explained to prospective juror no. 94 that in deciding whether to impose the death penalty, the presence of a confession is not a criteria. (12RT 966.) Prospective juror no. 94 believed that life in prison without the possibility of parole was worse punishment for the defendant. (24Supp. CT I 6635.) Although prospective juror no. 94 "strongly agree[d]" with the death penalty, she had held a different opinion within ten years of completing the questionnaire. (24Supp. CT I 6632-6633, 6639.) She also described the responsibility of causing a defendant to be sentenced to death as "It's kind of scary." The prosecution reasonably had concerns whether prospective juror no. 94 would actually impose the death penalty based upon her responses. These facts did not give rise to an inference of discriminatory purpose. (*Johnson v. California, supra*, 545 U.S. at p. 168.)

As to the six relevant prospective jurors, the jurors' responses in the questionnaires and during voir dire revealed reasons why a prosecutor might consider these prospective jurors less than ideal and use peremptories, without regard to race or gender. Accordingly, appellants failed to meet their burden to make a prima facie showing that gave rise to an inference of discriminatory purpose, and the trial court committed no error in making that ruling.

IV. THE TRIAL COURT PROPERLY DISMISSED PROSPECTIVE JUROR NO. 126

Appellant Newborn contends that he was deprived of due process and a representative jury by the erroneous excusal of prospective juror no. 126 for cause. (ANOB 119-135.) Appellant Holmes and McClain join this argument. (AHOB 75; AMOB 67.) Respondent submits that the trial court properly dismissed prospective juror no. 126.

A. Relevant Facts and Proceedings

In prospective juror no. 126's questionnaire, she expressed ambivalence as to the death penalty. (28Supp. CT I 7779, 7786.) She indicated that she would find it difficult to sit on a case where she might be called upon to impose the death penalty, stating, "who would not find it difficult to make a decision regarding someones [*sic*] life." (28Supp. CT I 7783.) When asked how she would feel about causing the defendant to be sentenced to death if she voted to impose the death penalty, she responded, "I don't think I would like that responsibility. (28Supp. CT I 7784.) She stated that she did not know if she would automatically, in every case, refuse to find a special circumstance true regardless of the evidence to avoid the issue of the death penalty. (28Supp. CT I 7785.)

During voir dire, she confirmed that she felt ambivalent about the death penalty. (13RT 944.) When the trial court asked about her ability to sit on a death penalty case, the following colloquy occurred:

> This is the last time I am going to say this – that is the issue – if the People prove the case against these defendants beyond a reasonable doubt, all defendants, to a moral certainty and they prove all the special circumstances, they are found to be true by you, the jury, in the guilt phase, then you would go to a second phase of the trial where you would hear perhaps testimony on both sides.
>
> Your job – and the only time that the jury ever does talk about penalty would be in this type of case – you would have the option of either placing the defendants in prison without the possibility of parole, which means they never get out, or the death sentence. So you would have to be able to do that. Do you understand?
>
> Are you capable of doing that? I know it is awesome. That is why we started out with some four or 500 people and we are down to 12 of you and about 25 left for the alternates.
>
> Do you understand? It is an awesome responsibility. We all know that. Do you want to think about it over the lunch hour, or do you want to give me an answer?

Prospective Juror No. 126: I can give an answer.

The Court: Okay.

Prospective Juror No. 126: I am not certain I can do that.

The Court: I appreciate what you are saying. It is not an easy thing to do. [¶] Can you think of any circumstance where you could give the death penalty?

Prospective Juror No. 126: That I could not give it?

The Court: That you could.

Prospective Juror No. 126: That I could give it?

The Court: Yes. [¶] Listen, I am not going to push you on this and the lawyers aren't either. I won't allow it. This comes from the old Hovey case. It is very difficult. I don't want to put that burden on anyone.

You, along with the other jurors, have to make that decision; and like the one question asks, if the other 11 jurors do that and you went along with that, then you actually are the one putting that person to death, along with the other jurors. [¶] Do you understand that?

Prospective Juror No. 126: Yes, I understand.

The Court: I am not attacking you. I know your feelings. Understand? I know how difficult it is. But the lawyers need to know and I need to know. [¶] Do you want to think about it?

Prospective Juror No. 126: I have thought about it since I have answered the questionnaire. It is not something I am certain I can do.

The Court: Would you feel more comfortable not sitting on a case that involved the death penalty?

Prospective Juror No. 126: I am sure we all would. Yes, I would.

The Court: All right. I am going to relieve you of that responsibility.

[The prosecutor]: Stipulate.

The Court: Would you like to ask a couple of questions?

[Appellant McClain's attorney]: I would, your Honor, if I may.

The Court: I am going to deny that. I am going to find cause.

(13RT 945-947.) In chambers, the trial court told the attorneys:

> We are in chambers. [¶] The Court has a female with pretty good credentials. It looks like she is an honest person and she is having a difficulty with imposing the death penalty.
>
> I think the Court has asked enough questions. [Appellant McClain's attorney] wants to ask questions. I don't think it is appropriate. I have been through this many times and you have, too.
>
> To put people in that position is improper, wrong; and I know you would handle it with dignity. I am not saying that. I just think you can make your record here a little bit. You can ask questions, but I can feel her heart and I don't think she wants to do that. It doesn't mean she couldn't or wouldn't, but she is saying in effect that she really couldn't do that.
>
> [Appellant McClain's attorney]: I would submit it.

(13RT 948.) The trial court excused prospective juror no. 126. (13RT 949.)

B. Applicable Law

In *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], the United States Supreme Court held:

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(See *People v. Williams* (1997) 16 Cal.4th 635, 667.) The critical question in each challenge is "'"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*."' [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319, italics in original.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 986-987.) Furthermore, the trial court's decision to excuse a prospective juror must be upheld if supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 651.) A trial court has discretion to deny all questioning by counsel where a juror gives unequivocally disqualifying answers regarding death penalty views, and may reasonably limit further voir dire of a juror who expresses disqualifying answers. (*People v. Samayoa* (1997) 15 Cal.4th 795, 823.)

C. The Trial Court Properly Excused Prospective Juror No. 126

The record clearly supports the trial court's excusal for cause of prospective juror no. 126. She stated in her questionnaire that she would find it difficult to sit on a case that might require her to impose the death penalty and did not think that she would like the responsibility of imposing the death penalty and causing a defendant to be sentenced to death. (28Supp. CT I 7783-7784.) She also indicated in her questionnaire that she did not know if she would automatically refuse to find a special circumstance true, *regardless* of the evidence, to avoid the issue of the death penalty. (28Supp. CT I 7785.) Although she indicated in her questionnaire that it would not be impossible for her to vote for or against the death penalty (28Supp. CT I 7781), during voir dire she stated that she had "thought about it" since completing the questionnaire and that imposing the death penalty was "not something [she was] certain [she

could] do." (13RT 946-947.) Prospective juror no. 126's views are sufficient and ample evidence to support the trial court's excusal for cause since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*People v. Millwee* (1998) 18 Cal.4th 96, 146-147 [excusal for cause proper where juror would have "problem" imposing death].)

Appellant Newborn also contends that the trial court erroneously refused to permit the defense voir dire regarding the issues of death qualification. (ANOB 127-132, citing *People v. Cash* (2002) 28 Cal.4th 703.) The record does not support appellant Newborn's contention. "[E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 47.) As this Court explained in *People v. Cash, supra*, 28 Cal.4th at pp. 721-722:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.... In deciding where to strike the balance in a particular case, trial courts have considerable discretion.

Here, contrary to appellant Newborn's assertion, the trial court's final word on the issue did not prohibit the defense from voir dire. Although the trial court initially denied appellant McClain's request to ask questions, trial court stated during the chambers discussion, "I just think you [referring

to appellant McClain's counsel'] can make your record here a little bit. You *can ask questions*..." (13RT 947-948, italics added.) After the trial court's clarification, appellant McClain's attorney submitted the matter, thus abandoning the request for further voir dire. (13RT 948.) Appellant Newborn fails to establish an abuse of discretion, in that this record shows that the trial court was ultimately willing to allow the defense to conduct further limited voir dire regarding the juror's views on capital punishment. (See *People v. Samayoa, supra*, 15 Cal.4th at p. 823.) Unlike in *People v. Cash, supra*, 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit voir dire by the parties as to some specific fact or circumstance. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 47.) There was substantial evidence in the instant matter that prospective juror no. 126's views on capital punishment would prevent or substantially impair the performance of her duties, and therefore the trial court properly excused her for cause.

V. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTIONS AND THE SPECIAL-CIRCUMSTANCE FINDINGS

Appellants make various claims that there was insufficient evident to support their convictions or the special-circumstance findings. Specifically, appellant Newborn contends that there was insufficient evidence as to the special-circumstance findings. (ANOB 207-213.) Appellant McClain contends that there was insufficient evidence to support his convictions of conspiracy, first degree murder, attempted murder, and the special-circumstance findings. (AMOB 95-124, 288-289.) Appellant Holmes contends that there was insufficient evidence to support his convictions for conspiracy, first degree murder, attempted murder, and the gun use allegation. (AHOB 176-195.) Respondent submits that sufficient evidence support the convictions and the special-circumstance findings.

A. Applicable Law Regarding Sufficiency of Evidence Claims

When presented with a claim of insufficient evidence, a reviewing court determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 2789, 61 L.Ed.2d 560], italics omitted; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The test is whether substantial evidence supports the [conclusion of the trier of fact], not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Crittenden, supra*, 9 Cal.4th at p. 139, citing *People v. Mincey* (1992) 2 Cal.4th 408, 432 and *People v. Johnson* (1980) 26 Cal.3d 557, 575-577.) "Even if the evidence could be reconciled with a different finding, that does not justify a conclusion that the jury's verdict was not supported by the evidence, nor does it warrant a reversal." (*People v. Romero* (2008) 44 Cal.4th 386, 400.)

Furthermore, the court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.) This standard applies with regard to direct or circumstantial evidence: "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 1053-1054.) The same standard applies to special-circumstance findings. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.)

B. There Was Sufficient Evidence to Support Appellant McClain's Conviction for Attempted Murder of Price

Appellant McClain contends that there was insufficient evidence to support his conviction for Price's attempted murder. Appellant McClain

reasons that Price's testimony is unreliable because of Price's different descriptions of what had happened, his rival gang status, and because the police gave him $200 for his medical injuries. (AMOB 122-124.)

Appellant McClain refers to the law on informant testimony. (AMOB 122.) This law appears to be inapplicable because Price was not an informant. On the contrary, he was the victim.

In *People v. Young* (2005) 34 Cal.4th 1149, 1181, this Court explained:

> In deciding the sufficiency of evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of the fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]

No inherent improbability appears in Price's testimony, and nothing about the evidence shows that the Price attempted murder was physically impossible for appellant McClain to perpetrate. Indeed, appellant McClain confirmed during his testimony that he was present at the Community Arms when Price was shot. (36RT 3970-3971.) All of appellant McClain's arguments as to why Price's testimony was not credible were presented to the jury. (See 43RT 4539-4542.) The jury, as the sole judge of credibility, could reasonably reject those arguments and accept the prosecutor's theory that Price was credible and that appellant McClain shot Price. (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

C. There Was Sufficient Evidence to Support the Conspiracy Convictions

Appellants Holmes and McClain contend that there was insufficient evidence to support the conspiracy convictions. (AHOB 180-183; AMOB 99-100.) The jury found appellants guilty of conspiracy to commit murder and found true overt act #3: "That at Pasadena Avenue and Blake Street, on

October 31, 1993 at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip." (6CT 1598, 1609, 1620.) There was sufficient evidence to support the conspiracy convictions.

"A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416.) These elements may be established by circumstantial evidence. (*People v. Bogan* (2007) 152 Cal.App.4th 1070, 1074.) They may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. (*Ibid.*) "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

Appellants McClain and Holmes highlight *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1247, for the proposition that the evidence here was insufficient to support the jury's determination that appellants conspired to commit murder. (See AHOB 182-183; AMOB 99-100.) *United States v. Garcia* is inapposite. In *United States v. Garcia, supra*, 151 F.3d at page 1244, the issue was whether testimony regarding the existence of an implicit agreement among gang members to support one another in fights against rival gang members constituted sufficient evidence

to support a conviction for conspiracy to commit assault when the conduct was otherwise insufficient.

The instant case is distinguishable from *Garcia*. Here, there was substantial evidence that appellants conspired to murder a Crip in retaliation for Hodges's murder based on the conduct of appellants, Bailey, and Bowen, before and after the conspiracy, their membership and association with P-9, and their interest in avenging Hodges's murder. Appellants, Bailey, and Bowen were members of P-9, a Blood gang. (19RT 1943-1944; 25RT 2550-2553.) Hodges associated with P-9. (14RT 1161.) The Raymond Crips attempted to get along with the P-9, but still considered the P-9's to be Bloods. (14RT 1170-1171.) Before shooting Raymond Avenue Crips gang member Price at the Community Arms, appellant McClain said, "Thank you Blood," which was an insult to a Crip. (14RT 1161; 31RT 3163, 3186.) Price wanted to shoot appellant McClain. (31RT 3169.) Hodges was shot at the Community Arms three days later around 7:20 p.m. (14RT 1138-1139, 1141.) Before paramedics took Hodges to Huntington Memorial Hospital, appellant McClain was already contacted with the news that Hodges had been shot by "some crips." (36RT 3988-3989.) The focus of the police investigation of Hodges's murder was on the rival Raymond Avenue Crips. (14RT 1160.)

Hodges's friends and family began gathering at Huntington Memorial Hospital around 7:45 p.m. (14RT 1143-1145.) A group of 20 to 30 persons who wore hooded sweatshirts and baggy attire and appeared to be gang members were gathered outside the emergency room. (15RT 1194-1195, 1229, 1253-1254.) Bowen, Bailey, appellant Newborn, and appellant Holmes[42] were at the hospital. (19RT 1838-1839.) There was a discussion

[42] Appellant Holmes did not dispute that he went to the hospital upon learning of the Hodges shooting. (43RT 4545.)

that the Crips shot Hodges and about retaliation. "[T]hey kept talking about 'Let's go riding, let's go riding, let's go riding.'" (19RT 1870-1871, 1878.) Appellant McClain shared that same sentiment. Although he testified he was innocent of the murders, he testified that he unsuccessfully tried to find his fellow gang members to retaliate against Crips. (36RT 3989-3991)

Later, McFee saw persons wearing hooded sweatshirts outside his house when appellant Newborn and Bowen went to McFee's house. (23RT 2386, 2389. 2397.) Appellant Newborn and Bowen spoke with Wendell Jefferson (appellant Newborn's "play brother"). (23RT 2375-2376.) Appellant Newborn was looking for a known Raymond Crips gang member ("Crazy D," Dion Nelson) and wanted to know where that gang member lived.[43] (20RT 2111-2112; 23RT 2378-2380, 2385.) Appellant Newborn was upset and crying and said that his friend Hodges had been killed. Appellant Newborn and Bowen appeared to be armed because they had bulges under their clothes. (23RT 2382-2384.) Appellant Newborn and Bowen walked away. (23RT 2412.) Four males ran down the street. (23RT 2386, 2300.)

Within four minutes, McFee heard several gunshots. The shots sounded as if they were coming from the railroad tracks. (23RT 2402-2404, 2411.) McFee heard a second set of shots from different weapons and from a different location -- Crazy D's home. (23RT 2403, 2406; 29RT 3041-3042.) The gunshots sounded like "crossfire" as if people were

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[43] Appellant Newborn and Bowen had a reasonable belief that McFee knew where to find Nelson. McFee told appellant Newborn and Bowen that he did not know where Nelson lived. Appellant Newborn and Bowen did not appear to believe McFee. (23RT 2386.) And, indeed, McFee contacted a friend and spoke on a three-way conversation with Nelson to warn Nelson. (23RT 2402; 24RT 2486.)

shooting at each other. A shot was then fired at McFee's house. (23RT 2405-2406.) A casing was found almost directly in front of McFee's house by the curb and another casing was found in the yard across the street. (29RT 3043, 3045.) Nine-millimeter shell casings were found in the driveway entrance and the front yard of 830 North Pasadena. (27RT 2830.) McFee's trial testimony was corroborated. Appellant Newborn later told DeSean Holmes that appellant Newborn went to McFee's house and ended up shooting at the people with whom he came. He went to McFee's house looking for his brother, Wendell Jefferson. (17RT 1543-1544.) He said that he used a nine-millimeter on Blake Street in Pasadena, which was corroborated by ballistics evidence. (17RT 1553; see 27RT 2838.) Baker confirmed that Jefferson and James Riley were at McFee's house on October 31, 1993, and that shots were fired. (29RT 3037-3039, 3045.)

The shootings at or near McFee's house were linked to the shooting on Wilson Street (20RT 2080; 23RT 2404; 26RT 2803-2805, 2816-2817; 27RT 2822-2823, 2838; see Peo. Exh. 129), as the casings show the same nine-millimeter gun was used at both locations. Moreover, the same .38 special ammunition was found at both crime scenes.

Four or five cars proceeded in a caravan past the victims. The cars were full of Black males. The occupants "threw up" P-9 signs. (15RT 1296, 1310, 1311, 1334; 19RT 1979, 1996-1997; 20RT 2001-2002, 2012-2013; 31 RT 3231, 3235.) The boys were mistaken for rival Crip gang members. (See 15RT 1300 [Antwaun had a blue bandanna in his pocket]; 16RT 1466, 1475; 17RT 1569 [appellant Newborn blamed two persons because they said the boys were Crips]; 32RT 3300-3301; 25RT 2545 [appellant McClain told Stevens that he and his homeys went to Wilson and shot some Crips]) The occupants were "staring awfully hard at the boys." (19RT 1980; 20RT 32012.) The cars then traveled along streets so that they could get ahead of the boys. (See 22RT 2221-2222, 2224-2227; 23RT

2288; 25RT 2636-2640, 2655; 31RT 3239.) The assailants were behind bushes when the boys were fired upon on Wilson Street. (18RT 1759-1760; 19RT 1993; see 15RT 1351-1354, 1362 [appellant Holmes told Tate that they were in some bushes and they "blasted" when they jumped out].) Someone said, "Now, Blood" before the attack began. (31RT 3243, 3258.) Viewing the evidence of the Wilson Street shooting and the shooting at and near McFee's home in the light most favorable to the prosecution, a rational trier of fact could have found that appellants had the specific intent to commit murder, specifically that appellants agreed and intended to murder a Crip, and that they and coconspirators had committed the overt act of firing at and near McFee's home in furtherance of the conspiracy.

Appellant McClain argues that his "truthful testimony that he was looking for Crips to kill to avenge the death of his of his friend Fernando Hodges does not prove that he conspired with others or acted to kill the victims in this case." (AMOB 100.) Although appellant McClain testified that he could not find anyone, the jury could have reasonably rejected that claim since he was later identified by Pina as the person who approached in one of the four cars involved in the Wilson street shooting and peered out of the front window. (25RT 2647-2648; see 25RT 2666, 2679; 26 RT 2782.) Based upon the evidence, the jury could reasonably conclude that appellant McClain joined in an agreement with appellants and others to commit murder, even if appellants Newborn and Holmes and others formed the agreement at Huntington Memorial Hospital. "One need not be a member of a conspiracy from its inception but may join after it is formed and actively participate in it, thereby adopting the other conspirators' acts and declarations." (*People v. Aday* (1964) 226 Cal.App.2d 520, 534.)

In the same vein, appellant Holmes argues that the evidence of the agreement was based solely on his presence at the hospital. (AHOB 182.) While Carr did not specifically testify that appellant Holmes spoke with

appellants Newborn, McClain, Bailey, or Bowen at the hospital, she did testify before the grand jury that there was a discussion at the hospital that the Crips shot Hodges and they discussed retaliation. "[T]hey kept talking about 'Let's go riding, let's go riding, let's go riding.'" (19RT 1870-1871, 1878.) Moreover, Pina identified appellant Holmes as the person wearing the trench coat who returned to the car on Emerson after the gunshots. (25RT 2660-2661, 2665, 2679-2680; 26RT 2782-2789.) Based upon the evidence, the jury could reasonably conclude that appellant Holmes joined in an agreement with appellants and others to commit murder. (*People v. Russo, supra*, 25 Cal.4th at p. 1135.)

Appellants McClain and Holmes also argue that there was insufficient evidence that the shooting at Pasadena and Blake occurred about 9:00 p.m. Instead, they argue that logs indicated that complaints of a shooting were logged at about 1:00 a.m. (AMOB 100; AHOB 183.) But Sergeant Korpal explained that there was no indication whether the shots had occurred when the calls were made or had occurred earlier. (35RT 3767.) McFee testified that he did not call the police. He did not remember whether anyone called the police. (23RT 2408.) Baker also did not call the police. (29RT 3048.) Moreover, Baker testified that the shooting occurred between 9 and 9:30 p.m. (29RT 3046.) Baker explained, "I knew it was fairly early. It wasn't that late because we went trick or treating earlier on that day, and I knew it was a school day the next day so we came back early. So it had to be around in that time frame, somewhere around in there." (29RT 3046.) His time estimate was also based upon the fact that McFee's son was awake when the gunshots were fired. (29RT 2060-2061.)

D. There was Sufficient Evidence to Support the Convictions for First Degree Murder and Attempted Murder on Wilson Street

Appellants Holmes and McClain contend that there was insufficient evidence to support convictions for the first degree murders and attempted murders on Wilson Street. Essentially, they argue that the evidence was insufficient to identify them as the perpetrators of the murders and attempted murders. (AHOB 183-193; AMOB 121-122.) Respondent disagrees.

There was substantial evidence to identify appellants Holmes and McClain as the perpetrators of the crimes on Wilson Street. Motive evidence implicated appellants Holmes and McClain. (See *People v. DePriest* (2007) 42 Cal.4th 1, 44.) As explained above (see Argument V.C., *ante*), appellants wanted to murder Crips to avenge Hodges's murder.

Additionally, appellants McClain and Holmes were identified by an eyewitness. "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Pina identified appellant Holmes as the person returning to the car on Emerson after the gunshots. (25RT 2665.)[44] Pina identified appellant McClain as the driver of the lead car of the caravan. (25RT 2647-2648; see 25RT 2666.) Pina recognized appellant McClain's hair. Pina explained that he was not good with describing features. (25RT 2652.) Pina remembered appellant Holmes's facial features and that he was wearing a "tannish" trench coat because,

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[44] Appellant Holmes asserts that Carr's grand jury testimony did not place him at the crime scenes. (AHOB 184.) With this assertion, he knocks down a straw man that he set up. Regardless of whether Carr placed Holmes at the crime scene, he was identified as one of the assailants by Pina.

after hearing the gunshots, his "main thing was to focus on one of them -- the closest person towards" him. (25RT 2661.) He moved close enough to see appellant Holmes's face. (25RT 2678.) His vision was 20/20, and he had hobby radio-controlled gliders that required good eyesight. (25RT 2678-2679.)

Statements by appellants McClain and Holmes also connected them to the Halloween murders and attempted murders. On November 1, Stevens saw appellant McClain at King's Manor. (25RT 2542-2544.) Appellant McClain said that he and his "homeys" went to Wilson and shot some Crips. (25RT 2545.)

On November 2, appellant McClain, Alonzo Hamilton, and Laward Looney went to Tulare. (23RT 2303-2305; see 23RT 2335; 36RT 3963-3694.) Welcome and Carpenter saw appellant McClain in a burgundy rental car. Appellant McClain said that he and others had shot three Crips in Pasadena in retaliation for the Hodges shooting. When he later heard that the victims were children and not Crips, appellant McClain became nervous. (23RT 2335,-2336; 31RT 3279-3280.) Welcome saw appellant McClain with either a .380 or a nine-millimeter gun. (28RT 2951.) He sang along with a rap song, "I put in work with this. I put it down." (28RT 2952.) He also said, "Boom boom pow pow."[45] (23RT 2335; 31RT 3278.)

Tate said that appellant Holmes bragged about being a killer and a gangster and that he was going to get a hat that said trick or treat. He said that he was with others and that they were riding around looking for somebody, were in bushes, and jumped out. The killing was in retaliation for the Hodges killing, which was believed to have been perpetrated by the

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[45] The prosecutor argued in closing argument that "boom boom pow pow" corresponded with two different gun sounds and that ballistics evidence indicated that two different types of firearms were used (two .357 or .38 caliber and a nine-millimeter). (42RT 4449.)

Crips. (15RT 1351-1354, 1362.) Ballistics evidence and the boys' testimony also indicated that the assailants had been in the bushes just before the shooting. (18RT 1759-1760; 19RT 1993; 20RT 2079, 2085; see Peo. Exh. 32.)

Finally, appellant McClain's conduct after the murders suggested a consciousness of guilt. (See *People v. Pride* (1992) 3 Cal.4th 195, 246.) After the crimes, appellant McClain fled to Tulare. (23RT 2303-2305; see 23RT 2335; 36RT 3963.) He changed his appearance by cutting his signature shoulder-length hair while in Tulare. (28RT 2962; 23RT 2336 or 31RT 3280; 36RT 3964-3965.) He flew out of Ontario to Memphis in early November. He used an alias for his ticket. (22RT 2268-2271; 23RT 2273; 36RT 3965.) He told Underwood that he flew out of Ontario as opposed to Los Angeles because he was concerned about being stopped and hassled by the police at the airport. (23RT 2274.) He also failed to report to Thomas. (20RT 2064-2070.)

Appellants Holmes and McClain argue that the jailhouse informants[46] were inherently unreliable. (AHOB 185-189, AMOB 102-103.) But as appellant McClain recognizes (AMOB 102), this Court has consistently rejected claims that the testimony of jailhouse informants is inherently unreliable. (*People v. Hoyos, supra,* 41 Cal.4th at p. 898.) Moreover, appellant McClain's attorney urged the jury to find Carpenter, Welcome, and Stevens not to be credible and pointed to their felonies. (43RT 4499.) Appellant Holmes's attorney made a similar argument regarding Tate. (43RT 4546-4552.) The prosecutor stated during closing argument: "We

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[46] Appellant Holmes recognizes that he allegedly made his comments to Tate while neither was in custody. Nevertheless, he asserts without any supporting authority that Tate should be treated as a jailhouse informant because he gave the information after he was arrested and was motivated by having charges dropped and reward money. (AHOB 189.)

never told you our witnesses were going to be angels.... We were up front about the fact that our witnesses were not the greatest people in the world." (43RT 4462.) Nothing that appellants Holmes and McClain present warrants reconsideration of this Court's conclusion. (*People v. Hoyos, supra*, 41 Cal.4th at p. 898.)

The jury was also instructed that in determining the credibility of witnesses, to consider their prior felony convictions, the existence of any bias, interest, or motive to lie, and their inconsistent statements, if any. (6CT 1500, 1503-1504.) The jury was further instructed that "[t]he testimony of an in-custody informant should be viewed with caution and close scrutiny," and that in evaluating the testimony, the jury should consider "the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness." (6CT 1529.) "The jury was well-equipped to evaluate" the jailhouse informants' testimony. (*People v. Hovarter* (2008) 44 Cal.4th 983, 998.)

Appellants Holmes and McClain argue that Pina's identification of them was based on impermissibly suggestive procedure. (AHOB 190; AMOB 117.) As set forth below (see Argument X., *post*), Pina's in-court identifications of appellants Holmes and McClain were not based on impermissibly suggestive procedures and were admissible.

Appellants Holmes and McClain argue that Pina's testimony was inherently unreliable. (AHOB 190; AMOB 117-121.) They assert that Pina did not come forward until a reward was offered. (AHOB 191; AMOB 117-118.) At trial, Pina explained that he did not initially identify appellant McClain in the courtroom because he felt "intimidated" and hesitant to come forward because appellants were gang members. (25RT 2666, 2668-2669.)

Appellants Holmes and McClain contend that Pina's descriptions of the cars varied and that Gonzalez's testimony undercut critical elements of

Pina's testimony. (AHOB 191-193; AMOB 118-121.) But resolution of the inconsistencies in Pina's descriptions of the cars and discrepancies between Pina's testimony and Gonzales's testimony was within the jury's exclusive province. (*People v. Young, supra*, 34 Cal.4th at p. 1181.) Moreover, discrepancies in Pina's descriptions of the cars did not necessarily make Pina's identifications of appellants Holmes and McClain inherently unreliable.

There was nothing inherently improbable about Pina's testimony. (See *People v. Boyer, supra*, 38 Cal.4th at p. 480.) Defense counsel had a full opportunity to cross-examine Pina and Gonzales, not only about the actual degree of certainty of Pina's identifications, but also how Pina came to identify appellants Holmes and McClain and the discrepancies in his statements to the police and testimony before the grand jury and at trial. (26RT 2682-2777, 2782-2789, 2790-2791.) Appellant Holmes presented evidence about Pina's initial statements to the police (35RT 3741-3747; 36RT 3882-3886, 3901-3905) and his contact with the police. (36RT 3907-3911.) Appellant Holmes also presented expert testimony on factors affecting the accuracy of eyewitness identifications. (34RT 3654-3666; 35RT 3834-3836.) All of the arguments as to why Pina's testimony was not credible were presented to the jury. (See 43RT 4479-4498, 4553-4561.) Under these circumstances, the jury was able to evaluate the credibility of Pina's identifications. The weight of Pina's testimony was for the jury to resolve. (*People v. Boyer, supra*, 38 Cal.4th at p. 481.) The jury, as the sole judge of credibility, could reasonably reject the defense arguments and accept the prosecutor's theory that Pina's identification of appellants Holmes and McClain was credible. (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

E. There Was Sufficient Evidence to Support the Finding that Appellant Holmes Personally Used a Firearm

The jury found that appellant Holmes personally used a firearm in the commission and attempted commission of the murders and attempted murders, within the meaning of section 12022.5, subdivision (a). (6CT 1611-1613, 1615-1619.) Appellant Holmes contends that there was insufficient evidence to support the gun use finding. (AHOB 193-195.) Here, there was substantial evidence to support the jury's finding.

Tate testified that appellant Holmes said that they were in some bushes, jumped out, and said "trick or treat." They blasted when they jumped out. Appellant Holmes told Tate that he (Holmes) was a killer. (15RT 1351-1354, 1362.) Gonzales testified that the person who was in the trench coat had a gun. (22RT 2234.) Pina identified appellant Holmes as the person in the trench coat. (25RT 2665, 2679-2680.)

Appellant Holmes argues that "[f]or all the reasons discussed above, in its entirety Derrick Tate's testimony should be discounted." (AHOB 193.) However, as previously argued, Tate's testimony was admissible and not inherently unreliable. (*People v. Hoyos, supra*, 41 Cal.4th at p. 898.)

As for Gonzales, appellant Holmes argues that her testimony lacked indicia of reliability because: (1) she failed to previously mention that the person running around the corner was wearing a trench coat and was carrying a gun; (2) she did not give much details about the handgun; and (3) her vision was 20/400. (AHOB 193-195.) The defense fully developed during cross-examination that Gonzales failed to previously mention that the person running around the corner was wearing a trench coat and was carrying a gun. (See 22RT 2254-2258, 2263, 2265-2266.) Gonzales explained that her vision was 20/400 only in one eye. The other eye was "almost 20/20" and she did not regularly wear glasses, even while driving. (22RT 2264.) Also, Gonzales explained that she was never asked what the

persons looked like or what they wore. (22RT 2259-2260.) "Except in ... rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) It was solely for the jury to determine the credibility of Gonzales's statement that the person wearing the trench coat had a gun. (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

F. There Was Sufficient Evidence to Support the Special-Circumstances Findings As to Appellants McClain and Newborn

Appellants McClain and Newborn contend that there was insufficient evidence to support the special-circumstance findings. (AMOB 288-289; ANOB 207-213.) On the contrary, because there was substantial evidence to support at least an aiding and abetting theory of appellant Newborn's and appellant McClain's liability for the murders, the special-circumstance findings properly attached to the murders.

Here, the jury found true the lying-in-wait and multiple murder special-circumstance allegations. (6CT 1590-1593, 1600-1603.) At the time of the crimes (1993), section 190.2, subdivision (c), provided:

> Every person not the actual killer who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term life without the possibility of parole, in any case in which one or more of the special circumstance enumerated in subdivision (a) of this section has been found to be true under Section 190.4.

There was substantial evidence to support an aiding and abetting theory of liability of the murders. Accordingly, appellant Newborn's and appellant McClain's argument that the special-circumstance findings cannot attach to the murders, must be rejected. (*In re Hardy* (2007) 41 Cal.4th 977, 1035, fn. 19.)

Appellants McClain and Newborn appear to suggest that because the jury found not true the personal use of firearm allegation and found true only one overt act alleged in conjunction with the conspiracy charge[47], it necessarily found they were not major participants and the special-circumstance liability for the murders was improperly attributed to each of them since they jury must have concluded they were unarmed and in the vicinity of McFee's house only. (AMOB 285-287; ANOB 207-209.) Their reasoning is unsound. This Court cannot interpret the jury's true finding of *one* overt act as a finding that the other alleged overt acts were false. Instead, one possibility is that the jury, which was instructed to convict a defendant of conspiracy so long as it unanimously agreed that at least one overt act was true, decided that once it unanimously agreed on one overt act, it did not have to decide whether the remaining alleged overt acts were true. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 862.)

Rather, viewed in the evidence in the light most favorable to the findings, a rational jury could find that appellants McClain and Newborn were at least aiders and abettors in the murders as previously discussed. (Argument V.C., *ante*.)

Viewing the evidence of the Wilson Street shooting and the shooting at and near McFee's home in the light most favorable to the prosecution, a rational trier of fact could have found that appellants Newborn and McClain had the specific intent to commit murder. Specifically, appellants and others agreed and intended to murder a Crip, they and coconspirators had committed the overt act of firing at and near McFee's home in furtherance of the conspiracy, and they then traveled in a caravan of cars (with the lead car driven by appellant McClain) and ambushed the boys.

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[47] The jury did not render "not true" findings for the remaining overt acts; rather, it simply did not render any findings at all.

Accordingly, there was sufficient evidence to support the special-circumstance findings against appellants McClain and Newborn.

VI. THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION OF DESEAN HOLMES

Appellant Newborn contends that he was deprived of due process, a fair trial, and his right to confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the trial court's excessive restrictions on the cross-examination of DeSean Holmes. Specifically, he argues that he should have been permitted to ask questions on six subjects: (1) the nature and severity of the offense for which DeSean Holmes was already in custody in early 1995 when he was arrested for the McFee burglary; (2) the May 10, 1994 double homicide that DeSean Holmes attributed to Cooks and Holly in order to gain favor from law enforcement; (3) the August 25, 1995 incident in which DeSean Holmes committed a noontime drive-by shooting, but that evening approached the police and gave a self-serving exculpatory version of the incident; (4) a carjacking committed by DeSean Holmes; (5) DeSean Holmes's involvement in violence regarding Majhdi Parrish that resulted in a criminal charge against DeSean Holmes, after which Parrish was murdered; and (6) DeSean Holmes's civil lawsuit against the Pasadena Police Department. (ANOB 135-155.) Appellants Holmes and McClain join this argument. (AHOB 75; AMOB 68.) Respondent submits the trial court properly limited the cross-examination of DeSean Holmes.

A. Applicable Law

"[T]he Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" (*Pointer v. Texas, supra,* 380 U.S. at pp. 404-405.) In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674], the United States Supreme Court held:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.

However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. California law is also in accord. (*People v. Chatman, supra*, 38 Cal.4th at p. 372.) "A trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352."[48] (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207.) "The latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Ayala* (2000) 23 Cal.4th 225, 301 [quoting *People v. Wheeler* (1992) 4 Cal.4th 284, 296].) Unless the defendant can show that the prohibited cross-examination would have produced a significantly different impression of a witness's credibility, the trial court's exercise of its discretion in prohibiting cross-examination does not violate the Sixth Amendment. (*People v. Chatman, supra*, 38 Cal.4th at p. 372.)

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[48] Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The trial court's restriction of cross-examination is reviewed for an abuse of discretion. (*People v. Chatman* (2006) 38 Cal.4th 344, 374.)

B. The Nature and Severity of Offense for Which DeSean Holmes Was Already in Custody in Early 1995

Appellant Newborn contends that the trial court imposed an excessive restriction on the cross-examination of the nature and severity of the offense for which DeSean Holmes was already in custody in early 1995. (ANOB 149.) This claim is not cognizable on appeal. When appellant Newborn's attorney asked whether DeSean Holmes had been arrested a couple months after he burglarized McFee's home, the following colloquy occurred:

> A. I was already in custody.
>
> Q. We will get to that.
>
> It was a couple of months before you were arrested on the burglary, correct?
>
> A. I can't get arrested twice. I was already in custody and then they filed the case on me.
>
> Q. All right.
>
> [The prosecutor]: Objection, motion to strike, nonresponsive.
>
> The Court: Sustained. I think he is trying to get an answer.
>
> Q. By Mr. Jones: What were you in custody for?
>
> [The prosecutor]: Objection, irrelevant.
>
> The Court: Overruled.
>
> The witness: I was in –
>
> [The prosecutor]: May we have a sidebar, please your Honor?
>
> The Court: Let me get this. He asked the question about the burglary. Were you arrested after the burglary, two months after the burglary? Is that when you were arrested?
>
> The witness: I was already in custody.

The Court: Wait a minute. Look at me. When you committed the burglary, you weren't in custody, right?

The witness: No.

The Court: So after the burglary, two months later, were you arrested for that burglary?

The witness: Yes.

The Court: All right. You can go from there.

Q. By Mr. Jones: And when you were arrested for that burglary, were you in custody on some other charge?

[The prosecutor]: Objection, irrelevant.

The Witness: Yes.

[The prosecutor]: Motion to strike.

The Court: I will sustain the objection. The answer in custody will stand.

I don't want to go into any detail *unless I have something else*. You can say yes if that is true.

Listen: were you on bail or something like that from another case?

The witness: I was in custody for another case.

(17RT 1583-1584, italics added.)

Here, appellant Newborn never made an offer of proof as to evidence of the underlying conduct of the arrest and did not ask to present any such evidence when the trial court gave him that opportunity. (See 17RT 1584.) Accordingly, appellant Newborn's claim that the trial court did not permit him to present evidence of the nature and severity of the offense for which DeSean Holmes was in custody, is not cognizable. (Evid. Code, § 354, subd. (a); *People v. Valdez, supra,* 32 Cal.4th at p. 108.) This Court has refused to address the merits of a new theory based on a hypothetical offer of proof. (*Id.* at p. 109; see *People v. Chatman, supra*, 38 Cal.4th at p. 373 [refusing to address the merits of a theory where the defendant made no such argument at trial, did not ask to present any such evidence, and made no offer of proof].) As this Court explained, "it is difficult to judge the

correctness of a ruling the court was never asked to make." (*People v. Chatman, supra*, 38 Cal.4th at p. 373.) Accordingly, this claim fails.

C. May 23, 1994 Double Homicide[49]

Appellant Newborn contends that the trial court imposed an excessive restriction on the cross-examination of DeSean Holmes on the May 10, 1994 double homicide that DeSean Holmes attributed to Cooks and Holly. (ANOB 149.) Specifically, appellant Newborn states that the trial court "sustained the prosecutor's objection on relevance grounds to attorney Jones' questioning Holmes about whether he had 'A motive, interest, and bias in order to get Mr. Holly into trouble,' apparently relating to Holmes dating Holly's ex-girlfriend." (ANOB 144.) His contention that the trial court restricted cross-examination of DeSean Holmes on that point is not supported by the record.

The following colloquy occurred during appellant Newborn's attorney's cross-examination of DeSean Holmes:

> Q. In September of 1995 when you went to the police were you dating anyone?
>
> A. Yes.
>
> Q. Who?
>
> [The prosecutor]: Objection, irrelevant.
>
> The Court: Yes, sustained.

(17RT 1655.) DeSean Holmes denied he had "a motive, interest and bias in order to get Mr. Holly into trouble." (17RT 1655.) He also denied that he had "a motive, interest and bias against" appellant Newborn, stating, "I didn't have any reason to lie." (17RT 1655-1656.) Appellant Newborn's

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[49] Although during Deputy Brown's testimony in support of an order to protect DeSean Holmes, Deputy Brown stated that the double homicide occurred on May 10, 1994 (16RT 1510), he later testified at trial that the double homicide occurred on May 23, 1994 (see e.g., 30RT 3112).

attorney then adduced during DeSean Holmes's cross-examination: that DeSean Holmes dated Ernest Holly's ex-girlfriend in February 1994, not September 1995. (17RT 1656.) There were no follow-up questions as to whether he was still dating her in September 1995.

Here, the trial court did not abuse its discretion in sustaining the prosecution's earlier objection to the broad question of whom DeSean Holmes was dating in September 1995. Evidence that would support the theory that DeSean Holmes would lie about Cooks and Holly in an unrelated double homicide because DeSean Holmes was dating Holly's girlfriend at some time, was tangential impeachment evidence at best. Its probative value as to DeSean Holmes's credibility was substantially outweighed by the undue consumption of time and confusion. (Evid. Code, § 352.) This type of evidence would have caused the "nitpicking wars of attrition over collateral credibility issues" that this Court warned against. (*People v. Harris* (2008) 43 Cal.4th 1269, 1291.) In any event, appellant Newborn cannot show that the alleged prohibited cross-examination would have produced a significantly different impression of the DeSean Holmes's credibility because appellant Newborn's attorney was able to bring out the fact that DeSean Holmes dated Ernest Holly's ex-girlfriend in February 1994, as well as point out other areas of impeachment. (*People v. Chatman, supra*, 38 Cal.4th at p. 372.)

D. August 25, 1995 Drive-by Shooting

During cross-examination, DeSean Holmes asserted that he was a victim of a shooting. The prosecution objected based on Evidence Code section 352 when DeSean Holmes was asked how he was a victim of a shooting. The question was withdrawn. (17RT 1586-1587.) Appellant Newborn's attorney asked, "So you were a victim of some crime involving the case against Danny Cooks?" DeSean Holmes responded, "I would like to take the 5th on that, please." (17RT 1587.) He said that he picked up a

subpoena from the Altadena police station for a case in which the defendant's name was Charlie Bell. After picking up the subpoena, he had problems. He then spoke with Deputy Brown about obtaining protection. (17RT 1592.)

DeSean Holmes agreed that "the shooting case where [he said he was] the victim, nobody shot at [him]." (17RT 1611.) The prosecutor objected. The trial court stated:

> I don't know if it is relevant or not because he is talking about things that happened to him and a series of events where he is in fear for his life. He is taken into custody, he voluntarily goes in. I mean it has some relevance.
>
> We have got the answer. Let's not probe into it any further.

(17RT 1612.)

Later, outside the presence of the jury the following colloquy occurred:

> [Appellant Newborn's attorney]: Your Honor, unrelated to that, yesterday this witness, De Sean Holmes, indicated that he was a victim in the August 25, 1995 shooting case.
>
> Your Honor cut me off, and I understand that. I would like to make an offer of proof just to protect our record, if the Court pleases, and also ask for reconsideration of that ruling.
>
> The Court: Thank you. Proceed.
>
> [Appellant Newborn's attorney]: To the contrary–
>
> The Court: This is when he said he was the victim of a shooting?
>
> [Appellant Newborn's attorney]: That's correct. [¶] What he was was the driver of a car from which shots were fired at another gentleman. After the shots were fired out of the car driven by this witness, they fled the scene and there was a high-speed pursuit, at which time the driver, Mr. De Sean Holmes, bailed out of the car and fled. That was approximately noontime.
>
> At 8 p.m. later that night, after discussing the matter with numerous parties, the report indicates Mr. De Sean Holmes

came back to the police station and indicated that – matters that tended to totally exonerate him.

The Court: I missed that. I apologize. What exonerated him?

[Appellant Newborn's attorney]: His version eight hours after the fact tended to deny any knowledge of what was happening, driving away because he was afraid, bailing out because he was afraid and remaining a fugitive for the eight hours because he was afraid.

The Court: But the District Attorney's Office or the police agency filed no case on him?

[Appellant Newborn's attorney]: They did not.

The Court: You want to show it as a bad act of some type, to show his –

[Appellant Newborn's attorney]: I want to show that he was not a victim. That is totally misleading.

The Court: What about that, [the prosecutor]? I mean I agree he is not a victim; but on the other hand, the law doesn't provide for you to go into those kinds of acts of conduct.

And we wouldn't like to use it against the defendant if one of your clients were arrested in the same situation. [¶] Let me see how I can get around it.

[The prosecutor]: I think a lot goes into the word, how Mr. Holmes is defining victim. In that case the victim was a guy – the person at whom the shots were fired was someone by the name of Tony Lopez, I believe the name was.

The Court: The shots, I understand, [prosecutor], were fired from the car he was driving?

[The prosecutor]: Now, Lopez and De Sean Holmes are very close friends. Lopez, in fact, said, "I don't think De Sean Holmes had anything to do with the fact that I was shot at." Rather, what happened, according to De Sean and what seems to be borne out by the evidence, is that the shooter just convinced De Sean to go back because De Sean knows Lopez and the shooter started firing at Lopez.

De Sean immediately took off and said, "What the hell is going on here?" Pardon my expletive there.

The Court: I understand.

[The prosecutor]: "I am not – you know, this was not supposed to happen. I feel like I am a victim in this case."

The Court: Thank you. [¶] I don't think you can probe it legally. If you enter a stipulation he is not a victim, because he is not a victim, that is what he said on the stand.

[The prosecutor]: I would enter into that stipulation.

The Court: [Appellant Newborn's attorney], you can probe it if it shows a specific act of misconduct or something like that, or a possible act, if he was filed on.

But I think you can stipulate that he was not a victim in that particular situation. You can work it out. That is what I will allow.

(18RT 1691-1694.)

During Deputy Brown's cross-examination, appellant Newborn's attorney asked:

Now, in addition to whatever exposure De Sean Holmes had or did not have with respect to the murder of Mr. Parrish, he was also – you also discussed with him being in jail on assault with a deadly weapon charges where Mr. Holmes was in a car from which shots were fired in a drive-by, right?

(30RT 3117.) Deputy Brown was also later asked, "And so either you or [Detective] Carr intervene there and say that De Sean was the driver and unknowingly the passenger reached across him and shot out the car and no charges have been filed on De Sean yet. [¶] Do you see that?" (30RT 3119.) Deputy Brown thought that the statement was regarding the May 23, 1994 double homicide, and not the drive-by shooting. (30RT 3120-3121.) Deputy Brown never filed any charges against DeSean Holmes. (30RT 3125.)

"Impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence courts may and should consider with particular care whether the admission of such evidence might involve

undue time, confusion or prejudice which outweighs its probative value." (*People v. Chatman, supra*, 38 Cal.4th at p. 372.) Here, the trial court acted within its discretion by permitting the parties to stipulate that DeSean Holmes was not a victim in the drive-by shooting to impeach DeSean Holmes's assertion that he was a victim of a shooting, particularly in the absence of any direct evidence of DeSean's criminal liability for the drive-by shooting. (*Id.* at p. 373.) Beyond the admission of a stipulation that DeSean Holmes was not a victim in the drive-by shooting, the probative value of any additional evidence regarding the drive-by shooting would have been substantially outweighed by an undue consumption of time. The trial court did not abuse its discretion in limiting the cross-examination of DeSean Holmes on the drive-by shooting.

E. Carjacking and Violence Against Majhdi Parrish

Appellant Newborn argues that the trial court erred in precluding defense counsel from asking DeSean Holmes any questions about his involvement in carjacking and violence against Majhdi Parrish. (ANOB 149.) Outside the presence of the jury, the following discussion occurred:

> [Appellant Newborn's attorney]: The last issue, your Honor, the very last-
>
> The Court: Yes, sir.
>
> [Appellant Newborn's attorney]: –is there was an insinuation by this witness yesterday that he was so afraid based on the death of Mr. Parrish. [¶] In fact, Mr. Parrish was killed and Mr. Parrish was the victim of a carjacking perpetrated by Mr. Holmes. So –
>
> The Court: May I ask: who is Mr. Parrish?
>
> [Appellant McClain's attorney]: Majhdi.
>
> The Court: Is this part of the – excuse me. Let me think. [¶] Was I told about this somewhere?
>
> [The prosecutor]: Yes, of course.

> The Court: Was [appellant Holmes's attorney] present and [appellant Newborn's attorney] and we were talking about something about the witnesses in this case?
>
> [The prosecutor]: Yes, your Honor.
>
> The Court: And I think at that time you stated that there was no evidence that it was directly related to Mr. Parrish.[50]
>
> [Appellant Newborn's attorney]: That's correct. Yes, your Honor. I have a letter from the District Attorney's Office that says the death of Parrish –
>
> The Court: Say no more. [¶] How do you want to handle it?
>
> [Appellant Newborn's attorney]: I want to probe, if [the prosecutor] does not do it on redirect, the fact that his fear stems from the death of a victim of this carjacking by him, Ernest Holly – pardon me, De Sean Holmes and Danny Cooks.
>
> The Court: I understand exactly. There is a – I will let him ask the question and you can come back. [¶] There is a possibility that his interpretation might be that it was related. I don't know that, but I will let you both ask a few questions about that. Okay?

(18RT 1699-1701.) The prosecutor then pointed out that there was a problem because DeSean Holmes would assert his Fifth Amendment right against self-incrimination. (18RT 1701.) The trial court stated:

> This is a classic situation, as in all cases. We have a person that is affiliated some way, either directly or indirectly, with a gang. That is the problem with gang cases and multiple-defendant cases.
>
> There is no question, and I have prefaced this in this trial, in the last three cases we have had many people killed. I hold people responsible involved in those gangs that kill witnesses. I think it is incredible and I think we ought to eradicate those things. Those questions do come up. People do have normal fears.

---

[50] The trial court was apparently referring to the discussion located at 17RT 1529.

> I think you can still ask the question, [prosecutor], if he felt that was the reason why. You can ask; you can get into it. If he wants to take the 5th, he can take the 5th on that issue. But I think the defense can ask one or two questions about that relating to this case. I think so....

(18RT 1702.) The trial court indicated that it would "hold" the defense attorneys to "just one or two questions." (18RT 1703.) The trial court later stated that the carjacking was collateral and that "we are not going to go into a carjacking. [¶] He said he is afraid. You can ask him about it. You can word it, limit it." (18RT 1704.)

During cross-examination, the following colloquy occurred:

> Q. Now, one of the reasons that you agreed to testify was because of your fear of being physically harmed?
>
> A. Yes.
>
> Q. And your exact answer –
>
> [The prosecutor] asked you, "Have you heard about other witnesses, things happening to other witnesses?"
>
> And you answered, "Yes.
>
> "What have you heard?
>
> "They got killed and stuff like that." [¶] Do you remember that?
>
> A. Yes.
>
> Q. That was Majhdi Parrish?

(18RT 1733.) DeSean Holmes asserted his Fifth Amendment right against self-incrimination. (18RT 1733.) When asked, "When you said that you had heard about witnesses getting killed and stuff like that, were you talking about Majhdi Parrish?," he again "plead the 5th." (18RT 1733-1734.) The trial court instructed him to answer the question, and he said, "Yes I did hear." (18RT 1734.) The trial court stated, "No more questions on that." Appellant Newborn's attorney asked one additional question: "With respect to Mr. – your fear about Mr. Parrish and your concern, was Mr. Parrish the victim in a case that was charged against you and Danny

Cooks, whether you were innocent or guilty? I want to know if you were concerned about your former victim's death." (18RT 1734.) The trial court sustained an objection that the question was compound. (18RT 1734.) DeSean Holmes "plead the 5th" when asked: "Was Mr. Parrish a complaining victim in a case filed against you and Danny Cooks?" (18RT 1735.)

Here, cross-examination of DeSean Holmes on the carjacking and the violence against Parrish extracted nothing but invocations of the Fifth Amendment. The trial court could not compel him to testify regarding the carjacking and the violence against Parrish. Any additional cross-examination of DeSean Holmes on the carjacking and violence against Parrish would have necessitated an undue consumption of time and substantially outweighed any probative value of the evidence. (Evid. Code, § 352.)

In addition, the alleged prohibited cross-examination of DeSean Holmes did not produce a significantly different impression of DeSean Holmes's credibility. He asserted his right against self-incrimination whenever questioned about Parrish. In addition, the defense was able to adduce from other witnesses that DeSean Holmes was involved in violence against Majhadi Parrish. The prosecutor had suggested during a discussion at the bench that appellant Newborn's attorney had "alternative means; he can call Deputy Brown as a witness and impeach -- impeach Mr. Holmes with Deputy Brown." (17RT 1689.) And indeed, appellant Newborn cross-examined Deputy Brown to impeach DeSean Holmes. The defense adduced during Deputy Brown's cross-examination: DeSean Holmes, Ernest Holly, and Ed Sweett were in jail; that Parrish was then murdered; and DeSean Holmes, Ernest Holly, and Ed Sweett were released from jail.

(30RT 3117.)[51] Specifically, Deputy Brown agreed that he was present when Sergeant View stated to DeSean Holmes: "Subsequent to your arrest Parrish was killed and that case was dropped against the three of you that you were in custody for." (30RT 3110-3111; see also 30RT 3109.) Deputy Brown did not recall DeSean Holmes expressing any concerns for Parrish's possible murder. (30RT 3111.) The trial court properly restricted cross-examination of DeSean Holmes on the carjacking and violence against Parrish.

F. Civil Lawsuit Against Pasadena Police Department

During DeSean Holmes's redirect, he stated that he had been holding back when he was interviewed by Sergeant Korpal. DeSean Holmes did not trust Sergeant Korpal because he "had a case against him." (18RT 1713-1714.) On cross-examination, the following colloquy occurred:

> Q. When you told [the prosecutor] that you had a case against him – [¶] First of all, is that what you said?
>
> A. Yes
>
> Q. And "a case against him," being Sergeant Korpal?
>
> A. No.
>
> Q. Who?
>
> A. The Pasadena police.
>
> Q. And a case meaning some type of lawsuit?
>
> A. Yes.
>
> Q. And what was that?
>
> [The prosecutor]: Irrelevant.
>
> The Court: Sustained. He has answered it "Yes." Just the fact that he has a suit is sufficient. [¶] Sustained.

---

[51] DeSean Holmes was in custody when Parrish was killed. (30RT 3132.) He was not a suspect in that homicide. (30RT 3137.) Deputy Brown never filed any charges against DeSean Holmes. (30RT 3125.)

Q. [By appellant Newborn's attorney]: Do you have a lawsuit pending?

A. I think so, yes.

Q. Do you have a lawyer?

A. Yes.

Q. Who is it?

[The prosecutor]: Objection, irrelevant.

The witness: I don't know his name.

The Court: Sustained. [¶] It is not Mr. Nardoni; is that right?

The witness: No.

(18RT 1721-1722.)

Here, additional questions regarding the lawsuit against the Pasadena Police Department would be minimally probative as to DeSean Holmes's credibility. Appellant Newborn suggests that he should have been permitted to demonstrate how much DeSean Holmes stood to gain in his civil suit if the Pasadena Police Department wanted to reward him for his testimony against Newborn in this high profile capital case. (ANOB 152.) This theory, however, is highly speculative. Appellant Newborn never proffered to the trial court that the Pasadena Police Department would have rewarded DeSean Holmes in his civil suit against the department based upon his testimony against appellant Newborn. This Court has refused to address the merits of a new theory based on a hypothetical offer of proof. (*People v. Chatman, supra*, 38 Cal.4th at p. 373; *People v. Valdez, supra*, 32 Cal.4th at p. 109.) The probative value of any additional evidence regarding DeSean Holmes's suit against the Pasadena Police Department was substantially outweighed by the undue consumption of time. The trial court properly restricted cross-examination on the topic.

G. The Alleged Limitations on Cross-Examination Did Not Produce a Significantly Different Impression of DeSean Holmes's Credibility

Here, none of the alleged prohibited cross-examination of DeSean Holmes produced a significantly different impression of DeSean Holmes's credibility. He admitted that he had lied to law enforcement officers. (18RT 1718-1721; 18RT 1742.) He also admitted that he lied while testifying under oath at the trial. (18RT 1723-1724; cf. 18RT 1749.) He answered multiple questions by asserting his Fifth Amendment right against self-incrimination. (18RT 1733-1735.) He acknowledged that he had an upcoming probation violation hearing on a burglary conviction and that he believed that he would be released a week after testifying. (17RT 1575; see 17RT 1584.) While in the Pasadena Police Department's custody, he felt threatened by the prosecutor because he "didn't know that much." (18RT 1746.) The trial court did not abuse its wide discretion in restricting cross-examination of DeSean Holmes, and there was no Sixth Amendment violation. (*People v. Chatman, supra*, 38 Cal.4th at p. 372.)

H. In any event, any error was harmless

Assuming for the sake of argument that the trial court should have overruled the prosecution's objections, the error was harmless under any standard. (See *People v. Hernandez, supra,* 30 Cal.4th at p. 858.) If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.)

Here, even appellant Newborn agrees that the trial court permitted the defense to establish the existence of the "incidents" for impeaching DeSean

Holmes's bias and credibility. (ANOB 148-149.) Any additional information on the incidents was cumulative in nature and largely tangential.

Cross-examination of DeSean Holmes was extensive. DeSean Holmes admitted that he had been convicted of burglarizing his uncle's home. (17RT 1576.) He wanted to steal narcotics and money from his uncle's house. (17RT 1579.) He also testified that he intended to burglarize and kill his uncle because his uncle was a witness on the instant case. (17RT 1629-1630.) He acknowledged that he had an upcoming probation violation hearing on the burglary conviction and that he believed that he would be released a week after testifying. (17RT 1575; see 17RT 1584.) DeSean Holmes admitted that he had lied to law enforcement officers. (18RT 1718-1721; 18RT 1742.) He also admitted that he lied while testifying under oath at the trial. (18RT 1723-1724; cf. 18RT 1749.) He answered multiple questions by asserting his Fifth Amendment right against self-incrimination. (18RT 1733-1735.) While in the Pasadena Police Department's custody, he felt threatened by the prosecutor because he "didn't know that much." (18RT 1746.) He claimed that he had confused attorney Jones with attorney Nishi in a handwritten statement and that he was "not a very good speller or writer." (17RT 1590.)

DeSean Holmes's testimony regarding appellant Newborn's statement was substantially corroborated. Los Angeles County Sheriff's records confirmed that DeSean Holmes was housed in proximity with appellant Newborn. (28RT 2923, 2926.) DeSean Holmes's testimony of what appellant Newborn had told him had occurred at McFee's house was corroborated by McFee, Charles Baker, and ballistics evidence. (23RT 2373-2406; 26RT 2803-2805; 29RT 3037-3045, 3049-3051; see Peo. Exh. 129.)

Finally, the prosecution's evidence against appellant Newborn was strong. He and Hodges were members of P-9, were best friends, and were together almost every day. Appellant Newborn was godfather to Hodges's daughter. (32RT 3362-3364.) The focus of the investigation of the Hodges's murder was on the rival Raymond Avenue Crips. Appellant Newborn had a motive to participate in avenging his best friend's murder by a rival gang. (See 14RT 1160-1161, 1170-1171; 19RT 1843-1844.) After Hodges had been murdered, appellant Newborn was at Huntington Memorial Hospital. (19RT 1837-1839.) He went to Willie McFee's house in search of Crazy D, a member of the rival Raymond Crips. Appellant Newborn was upset and crying, and said that his friend Hodges had been killed. (20RT 2111-2112; 23RT 2373-2374, 2378-2384.) A shot was later fired at McFee's home. (23RT 2406; 29RT 3041-3042.)

The victims of the Halloween murders were passed by four or five cars with occupants who "threw up" P-9 signs. (31RT 3231.) Before they were shot, someone said, "Now, Blood." (31RT 3243, 3258.) P-9 was considered a Blood gang. (14RT 1170-1171.) One of the boys had a blue bandanna, the color of the rival gang, and may have been mistaken as members of the Raymond Crips. (15RT 1300; 16RT 1466-1467, 1471, 1474-1475; 18RT 1757, 1759; 31RT 3237.)

Nine-millimeter casings found across the street from McFee's house were fired from the same gun that was used in the Halloween murders. (26RT 2803-2805; see Peo. Exh. 129.) This was consistent with appellant Newborn's presence at both places, corroborating DeSean's statement that appellant Newborn admitted using a nine-millimeter in the Halloween murders. Accordingly, any error in restricting the cross-examination of DeSean Holmes was harmless under any standard. (See *People v. Hernandez, supra*, 30 Cal.4th at p. 858.)

VII. THE TRIAL COURT PROPERLY LIMITED THE CROSS-EXAMINATION OF PRICE

Appellant McClain contends that the trial court violated his right to confront witnesses, due process, and a fair trial when it prevented him from testing on cross-examination the veracity of Price's claimed motive for testifying. (AMOB 154-167.) Respondent submits that the trial court properly limited the cross-examination of Price.

Price testified that he received $200 for medical reasons and "for the injuries that he sustained." (31RT 3171-3172.) During his cross-examination, the following colloquy occurred:

> Q. Sir, you were given that money for your testimony at the grand jury, weren't you?
>
> A. No.
>
> [Appellant McClain's attorney]: Referring Court and counsel to the grand jury transcript of March 7th, page 404.
>
> Q. Sir, do you recall [the prosecutor] asking you the following question:
>
> "Now then, let me fast forward to today. Has there been any more information about the reward that has come to your attention or about money?"
>
> Your response:
>
> "Yeah. Well, they offered me today – Pasadena Police Department told me if I come down and give my statement today they would give me $200.
>
> Q. So for today's statement" – and this is a question to you from [the prosecutor] – "It is your understanding that you will receive $200 out of the reward money; is that right?"
>
> You responded, "I don't know if it's from the reward money or where it's from."

(31RT 3188-3189.) Price then explained that his reason for taking the money was for medical reasons (31RT 3189): "Well, say it like this, it was given to me to come down for the grand jury but it was for medical reasons." (31RT 3190.) He was also explained that prior to his grand jury

testimony, he was given an additional $100 to go to the hospital to see if the bullet could be removed from his leg. (31RT 3191.)

On redirect, he testified that he received $200 after testifying at the grand jury. The prosecutor asked Price: "Weren't you also asked at the grand jury, are you testifying because of the reward money or are there other reasons that you are testifying?" (31RT 3197.) Appellant McClain objected, arguing that the question went beyond the scope as cross-examination only covered what Price had received. The trial court overruled the objection. (31RT 3198.) He said he had answered before the grand jury, "Well, personally, you know, one of those kids, one of those kids that got killed, I was knowing their parents. So, you know, it kind of touched me, you know. So I personally – whoever did it, I would like to see them, you know, get paid, get convicted of that." (31RT 3198.)

On further recross-examination, Price was asked: Sir, you have been arrested for lewd and lascivious conduct on a minor --" (31RT 3198.) The prosecution objected. (31RT 3198.) The prosecutor stated:

> [Price] was arrested for 288. I don't know the circumstances of that arrest. I don't think an arrest is evidence of anything. And unless she has any offer of proof that she can give me as to how this is relevant, I don't find that she can impeach him with a sole – solely one arrest or contact.

(31RT 3199.) Appellant McClain's attorney responded:

> Okay. I would agree, and that is exactly why I stopped examining him before he got into how he feels about children. But if a man has such a contact with the police, I think I am able to explore it.

(31RT 3199.) The trial court stated: "The problem is you objected to her going any further, the questions about the money, but it went to his state of mind of why he testified. She went one step further. [¶] But to go into an arrest, I don't think is sufficient. I am not going to talk about it any more. Just leave it alone." (31RT 3199-3200.)

Appellant McClain argues that the trial court failed to exercise its discretion because it conducted no analysis under Evidence Code section 352. (AMOB 158-159.) On the contrary, the record demonstrates that the trial court affirmatively weighed the prejudicial value and the probative value. Here, the prosecutor stated that she did not have any information as to the underlying conduct and argued that unless appellant McClain had any evidence of the underlying conduct, the arrest alone essentially had very little probative value. (31RT 3199.) At that point, defense counsel for appellant McClain "agreed" and did not offer to present any evidence of the underlying conduct, but rather argued that evidence that "a man has such a contact with the police" was relevant. (31RT 3199.) The trial court stated that the arrest was insufficient. (31RT 3200.) The trial court clearly engaged in a deliberative weighing process, and its ruling is reviewed for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1170.)

Here, the trial court did not abuse its discretion in limiting the cross-examination of Price. Appellant McClain sought to introduce evidence solely that Price had been arrested for lewd and lascivious activity with a child. Appellant McClain never made an offer of proof as to evidence of the underlying conduct of the arrest and did not ask to present any such evidence when the trial court gave him that opportunity. (See 31RT 3199-3200.) The arrest, untethered to the underlying conduct, had very little impeachment value and was substantially outweighed by its prejudicial value. (Evid. Code, § 352.)

Furthermore, the prohibited cross-examination of Price would not have produced a significantly different impression of Price's credibility. He was an admitted gang member in a rival gang of the P-9's. He had five felony convictions for: assault with a firearm, second degree burglary, sales of narcotics, receiving stolen property, and corporal injury to a cohabitant. At the time of the trial, he had recently been in jail for a misdemeanor.

(31RT 3172-3173.) He admitted that he had consumed alcohol that day. (31RT 3168.) He also admitted that he had lied to the police that he did not know who shot him because he wanted to shoot his assailant. (31RT 3169.) The defense fully cross-examined him as to whether he was paid to testify or paid for medical reasons. (31RT 3188-3189.) The Pasadena Police Department paid him $300, $200 of which was for testifying. (31RT 3191-3192.) The trial court did not abuse its discretion in limiting the cross-examination of Price.

Similarly, any error in the trial court's restriction of Price's cross-examination was harmless under any standard. (See *People v. Hernandez, supra*, 30 Cal.4th at p. 858.) As described above, Price was extensively cross-examined and impeached by five prior criminal convictions. Finally, the prosecution's case was strong because Price selected appellant McClain's photograph from a six-pack photographic lineup and had no doubt that appellant McClain shot him. (31RT 3168-3170, 3193, 3208-3211.) He also explained why he had not immediately identified appellant McClain as his assailant. Any error was harmless.

VIII. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS FROM LACHANDRA CARR

Appellants Newborn and Holmes contend that they were deprived of due process, a fair trial, and their right of confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the admission of incriminating hearsay from LaChandra Carr. Specifically, they argue that the trial court erred in admitting Carr's trial testimony that: (1) she testified before the grand jury that appellants Holmes and Newborn were at the hospital; (2) Bowen said he was involved in the Halloween killings as a driver, but not a shooter; and (3) Bowen told her that appellant Newborn was at the hospital. (ANOB 155-164; AHOB

119-125.) Respondent submits the trial court properly admitted these statements from Carr.

A. Testimony that Appellants Holmes and Newborn Were at the Hospital

First, appellants Holmes and Newborn contend that Carr should not have been permitted to testify about her grand jury testimony that both appellants were at the hospital and that Bowen had told her that both had been there. (AHOB 124-125; ANOB 159-160.) Carr's testimony regarding her grand jury testimony was admissible as a prior inconsistent statement. Her testimony that Bowen told her that appellants Holmes and Newborn were at the hospital was admissible to explain the inconsistency between her trial and grand jury testimony.

At trial, Carr testified that she was not at the hospital on the night of Hodges's murder. (18RT 1812-1816; 19RT 1829-1830.) Carr, however, testified before the grand jury that she was at the hospital, and saw some other persons at the hospital, including appellants Newborn and Holmes. (19RT 1837-1839.) The following colloquy occurred at trial:

> Q. So of the five people pictured there, you told the grand jurors and [the prosecutor] that four of those people were present at Huntington Memorial when you were there, right?
>
> A. Yes.
>
> Q. And you told us yesterday you weren't there?
>
> A. Correct.
>
> Q. Which is the truth, since you took an oath at the grand jury and you took an oath here?
>
> A. Well, I just – I don't know why I said they were there. It is just that I knew they were there from Solomon when he called me from the hospital. I just knew everyone who was there.
>
> [Appellant Holmes's attorney]: Your Honor, I am going to move to strike as hearsay.
>
> [The prosecutor]: It goes to explain here conduct.

The Court: I am not sure it is offered for the truth of the matter that they were there. The witness has now testified twice under oath and said two different things. The People have a right to go into it and see why she is saying that.

[Appellant Holmes's attorney]: Can the Court instruct the jury as to the purpose?

The Court: I will when she is finished.

(19RT 1839-1840.) The trial court instructed the jury:

> While she is reading [her grand jury transcript], [counsel for appellants Holmes and Newborn] have asked – they are talking about a hearsay objection if this is offered to prove the truth of the matter whether or not certain things happened. [¶] The district attorney is telling us that she is offering this evidence either to show a prior consistent statement or prior inconsistent statement. [¶] Do you understand? It is limited to that only. It doesn't make it true or not true.

(19RT 1845-1846.)

On cross-examination, Carr testified that her grand jury testimony "dealing with whether or not you went to the hospital" was untrue. (19RT 1857.) When asked why she testified before the grand jury that she had gone to the hospital, she said she was unsure. (19RT 1857.) She never saw any of the individuals at the hospital and did not know who was there. (19RT 1857.) She did not see certain persons at the hospital because she was not at the hospital. She explained that she lied when she testified before the grand jury that she saw appellant Newborn at the hospital. (19RT 1872-1874.)

On redirect, Carr testified that she did not make up who was at the hospital. (19RT 1881.) She explained that she knew who was at the hospital because: "Well, I'm pretty sure Solomon is not going to lie." (19RT 1882.) During recross-examination, Carr testified that Bowen told her on the telephone that appellant Newborn was at the hospital. (19RT 1884-1885.) She bore no ill will toward appellant Newborn. She knew of no reason why Bowen would lie about appellant Newborn. (19RT 1889.)

Defense counsel moved for mistrial, arguing that Carr's statement that appellant Newborn was at the hospital was double hearsay. (20RT 2027.) The trial court stated:

> The Court: I understand exactly what you are saying, and I think I made my ruling pretty clear. When a person testifies under oath at two different proceedings and says different things, you have got to let it in for some reason. And I think you did an adequate job on how she did it, what she did, whether it was a consistent or inconsistent statement. [¶] And I think you misstated yourself once about the innocence or not guilty. I was trying to go along with you. [¶] He said it, she said. I don't see how you can't let it in. How can you not let it in?
>
> [Appellant Newborn's attorney]: Judge, because it is hearsay. Something she says is admissible to impeach her. But something she says Bowen says is not admissible to impeach her. And it certainly should not be admitted to –
>
> The Court: I don't think you are saddled with it. I think I told the jurors they are going to have to make the determination whether what she said is true, whether she was at the hospital or not at the hospital.

(20RT 2028.) The trial court denied the mistrial motion and explained: "It was my impression it was not offered for the truth of the matter asserted, but only to explain the differences in her testimony." (20RT 2030.)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 states:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action.

Appellant Newborn argues that Carr never had an occasion to testify at trial whether appellant Newborn or anyone else was at the hospital, and as a result, Carr's trial testimony that she was not at the hospital was not inconsistent with her grand jury testimony that appellant Newborn was at the hospital. (ANOB 160.) Appellant Newborn essentially demands an express contradiction. However, this Court has held otherwise. "[J]ustice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case for the forgetful witness." (*People v. Fierro* (1991) 1 Cal.4th 173, 221; see also *People v. Hovarter, supra,* 44 Cal.4th at pp. 1008-1009.) Here, Carr's trial testimony was inconsistent in effect with her grand jury testimony. Carr's grand jury testimony that appellants Newborn and Holmes were at the hospital was admissible as a prior inconsistent statement.

Furthermore, as the trial court correctly observed, Carr's testimony that Bowen told her that appellants Newborn and Holmes were at the hospital was also admissible as an explanation of the inconsistency between her trial and grand jury testimony. (Evid. Code, § 770.) "The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court." (1 Witkin, Evidence (4th ed. 2000) Hearsay, § 156, p. 868.) Here, Bowen's statement to Carr was admitted on a non-hearsay basis -- to explain why she testified before the grand jury that

appellants Newborn and Holmes were at the hospital when she was not at the hospital.

In any event, any error in admitting Carr's grand jury testimony and her explanation for the discrepancy between her grand jury and trial testimony was harmless. The erroneous admission of hearsay evidence requires reversal when it is reasonably probable that the jury would have reached a result more favorable to the defendant in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris* (2005) 37 Cal.4th 310, 336.) The trial court instructed the jury that "[t]he alleged statement of Solomon Bowen to LaChandra Carr cannot be used against any defendant." (44RT 4672.) Appellant Holmes did not dispute that he went to the hospital upon learning of Hodges's murder. (43RT 4545.) As for appellant Newborn, even in the absence of any error in admitting Carr's testimony that he was at the hospital, it is not reasonably probable that the jury would have reached a result more favorable to him. He was at McFee's house, looking for a known rival gang member. (20RT 2111-2112; 23RT 2375-2376, 2378-2380, 2385-2386, 2389, 2397.) The shooting at McFee's house was linked to the shooting on Wilson Street. (20RT 2080; 23RT 2404; 26RT 2803-2805, 2816-2817; 27RT 2822-2823, 2838; see Peo. Exh. 129.)

B. Carr's Testimony of Bowen's Involvement in the Halloween Murders

Appellant Holmes contends that it was error to permit Carr to testify about Bowen's involvement in the Halloween murders. (AHOB 122.) At trial, Carr contradicted her former testimony that she had been at the hospital and she had seen Bowen, Bailey, and appellants Holmes and Newborn. (Compare 18RT 1812 with 19RT 1838-1839.) Carr was Bowen's girlfriend at the time of the shooting and thus had had a motive to protect Bowen, by minimizing her alleged knowledge. When Carr was first

asked about her statement to the Pasadena police detectives regarding Bowen's involvement in the Halloween murders, she appeared to be evasive. In response to whether she was aware that she was being tape-recorded, she answered: "I don't remember nothing." (18RT 1818.) Additionally:

> Q. So did you give a statement about [Bowen's] involvement in these murders on Halloween?
>
> A. And what did I say?
>
> Q. That's not my question.
>
> A. Did you give a statement?
>
> A. Yes.
>
> Q. You did?
>
> A. Yes.
>
> Q. Do you remember what you said?
>
> A. No.

(18RT 1820.) Additional questioning on direct examination adduced the following:

> Q. Do you remember telling the detectives on December 22nd – this is in response to questions about Solomon's involvement, not any of these defendants – saying to the detectives, "Okay. The truth is he didn't shoot the kids. He was there, he was no driver, but he did not know they were going to do it. That's what he told me"?
>
> A. I said that?
>
> Q. Do you recall using those words?
>
> A. No.
>
> Q. Do you want to look at the transcript of what you said?
>
> A. I have to be there if you said it, but I don't remember saying it.
>
> Q. You don't remember saying those words?
>
> A. No.
>
> Q. Well, could you have said those words?

A. I probably have.

(18RT 1822.) During Carr's direct examination, the trial court reprimanded Carr, stating: "You do think you are kind of cute. Let me tell you something. We have three young men into eternity, three young men are facing the death penalty.... These jurors are here, these lawyers are doing their job and you think this is cute, so I will tell you what --" (18RT 1826.) Carr interrupted the trial judge, asking, "How is it cute when I am telling the truth?" The trial court stated: "Listen to me: I will put you in jail. What we are going to do, we will stop the proceedings tonight. You think about how cute these proceedings are." (18RT 1826.) Later, the trial court stated: "If you think you are helping either side here, you're not. What you are doing is acting like this is for you.... The jurors are trying to do their job and you are sitting there acting like you don't care and you don't want to answer any questions, and I am not going to tolerate it." (18RT 1827.) The trial court later added:

> I am not into that stuff. You are going to be here tomorrow and I am going to insure that by putting you in custody and make sure that you come back tomorrow.
>
> You can answer however you want tomorrow, but I'll tell you something, you are not helping either side here. This is a court of justice. That is what we are going to have.

(18 RT 1827.)

The next day, when Carr was asked what she told the detectives as to Bowen's involvement, she responded, "What did I say? He was there, he was a driver." (19RT 1832-1833.) The defense objected that the statement was hearsay. (19RT 1833.) Carr was given a transcript of her statement to the police to refresh her recollection. When asked again what she told the detectives, the defense again objected, arguing that the statement called for hearsay, speculation, and conclusion. When the prosecutor argued: "It is not offered against these defendants in this case, but it is a statement

regarding another defendant's participation and doesn't implicate any of these defendants here at all." (19RT 1834.) Appellant Newborn's attorney stated: "I would agree that it doesn't involve these people, but what she said was something she – she said she just knows. It appears that that is conclusionary on her part." (19RT 1834.) The trial court stated: "Let's find out. I don't know if this is for Greening or impeachment. I have no idea until she answers. [¶] We had some commotion yesterday. We want to find out what the answers are. Overruled." (19RT 1834.) Carr then testified that she told the detectives that Bowen told her that "he was there but he was not driver and he was no shooter." (19RT 1834.) The defense objected to the statement as hearsay and also that the statement was irrelevant. The trial court overruled the objection. (19RT 1835.)

This Court has explained:

> "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement [citation], and the same principle governs the case of the forgetful witness." [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220, fn. omitted.) Here, as indicated in the trial court's statement at the end of the first day of Carr's testimony and also in overruling the defense's objection to Carr's testimony, Carr's testimony on the first day was deliberately evasive when she stated that she could not remember what she told the detectives about Bowen's involvement in the Halloween murders. Her knowledge of Bowen's involvement was relevant to her credibility and motive as to why she would alter her statements and deny being present at the hospital.

Accordingly, her statement to the detectives was admissible as a prior inconsistent statement under Evidence Code sections 1235 and 770. (*Ibid.*)

Even assuming arguendo it was error to admit Carr's testimony of Bowen's involvement in the Halloween murders, it was harmless. The erroneous admission of hearsay evidence requires reversal when it is reasonably probable that the jury would have reached a result more favorable to the defendant in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Harris, supra,* 37 Cal.4th at p. 336.) Bowen's statement only indicated that he was present during the murders. He denied being a driver or a shooter. Moreover, Bowen did not incriminate appellants. Finally, the trial court instructed the jury that "[t]he alleged statement of Solomon Bowen to LaChandra Carr cannot be used against any defendant." (44RT 4672.) Accordingly, any error was harmless.

IX. THE TRIAL COURT'S DETENTION OF CARR DID NOT VIOLATE APPELLANTS' RIGHTS TO DUE PROCESS; APPELLANTS' ABSENCE FROM THE HEARING ON CARR'S DETENTION DID NOT VIOLATE THEIR RIGHTS TO CONFRONTATION AND DUE PROCESS

Appellants Newborn and Holmes contend that they were deprived of due process, a fair trial, and their right of personal presence by the trial court's decision, made in appellants' absence, to detain Carr overnight. (ANOB 164-175; AHOB 126-132.) Respondent submits the trial court's detention of Carr did not violate their rights to due process. Appellants' absence from the hearing on Carr's detention did not violate their rights to confrontation and due process.

As previously summarized, Carr was evasive and did not answer questions regarding Bowen's involvement in the Halloween murders. (See Argument VIII.B., *ante*) The following colloquy occurred:

The Court: You do think you are kind of cute. [¶] Let me tell you something. We have three young men into eternity, three young men are facing the death penalty. [¶] Do you understand that?

[Carr]: Yes.

The Court: These jurors are here, these lawyers are doing their job and you think this is cute, so I will tell you what –

[Carr]: How is it cute when I am telling the truth?

The Court: Listen to me: I will put you in jail. What we are going to do, we will stop the proceedings tonight. You think about how cute these proceedings are. Tomorrow morning 8:45. Tomorrow morning be here on time.

(18RT 1825-1826.)

The trial court then held proceedings outside the presence of appellants and the jury, but not counsel. (18RT 1826.) The trial court stated:

All right. Defendants are not present. This is a hearing on this witness. [¶] I am going to put you in custody because I don't think you are going to return. [¶] Because you testified before the grand jury and you haven't been cross-examined, that means you would be unavailable. [¶] This is a very serious case. You don't think it is. I do, and so what I am going to do is keep you in custody and make sure you return tomorrow.

If you think you are helping either side here, you're not. What you are doing is acting like this is for you.... The jurors are trying to do their job and you are sitting there acting like you don't care and you don't want to answer any questions, and I am not going to tolerate it.

(18RT 1826-1827.) The trial court later added:

I am not into that stuff. You are going to be here tomorrow and I am going to insure that by putting you in custody and make sure that you come back tomorrow.

You can answer however you want tomorrow, but I'll tell you something, you are not helping either side here. This is a court of justice. That is what we are going to have.

(18 RT 1827.) When one of the prosecutors asked the bail amount, the trial court set bail at $5,000. (18RT 1828.) The other prosecutor notified the court that Carr wanted to say something to the court. The trial court responded, "No, I don't want to hear from her. This is not a hearing. If counsel want to talk to me in chambers, if you want to convince me otherwise, but I am not going to listen to her." (18RT 1828.)

The record indicates that the evening adjournment was taken. (18RT 1828.) However, it appears that further proceedings may have occurred and that the court and counsel discussed securing Carr's presence at court. The minute order of the proceedings included additional information that is not reflected in the Reporter Transcript. It stated:

> Hearing as to the witness LaChandra Carr pursuant to Penal Code section 1332 re material witness is heard. The court finds good cause and orders said witness into the custody of the District Attorney Investigators and ordered secured as a material witness.
>
> The Sheriff is directed to allow each defendant with a shower and hot meal when returning from court while trial is in progress.
>
> Counsel and defendants are ordered to return. Defendants remain remanded.

(5CT 1297.) In addition, the trial court later made reference to a hearing in which "we suggested that she go to the hotel." (19RT 1900.)

Ultimately, Carr was not incarcerated in jail. Rather, she was placed in the custody of the District Attorney's investigators and stayed overnight in a motel. (5CT 1297; see 19RT 1875.)

Both appellants Holmes and Newborn argue that the trial court's placement of Carr in a motel was a "rogue action." (AHOB 126; ANOB 164.) The trial court's action, however, was proper. It is well within the trial court's power to compel the attendance and testimony of witnesses. (See §§ 1331, 1332, 1564; Code Civ. Proc., § 1209; *Vannier v. Superior*

Court (1982) 32 Cal.3d 163, 171.) This Court has explained, "[a] judicial system with power to compel attendance of witnesses is essential to effective protection of the inalienable rights guaranteed by [the California Constitution.]." (*Vannier v. Superior Court, supra*, 32 Cal.3d at p. 171.) "The government's authority to arrest and imprison material witnesses was 'the long established rule in English Law, in effect when the United States became a nation.' The power developed as a necessary corollary to the establishment of compulsory process for the attendance of witnesses." (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1071, quoting *Bacon v. United States* (9th Cir. 1971) 449 F.2d 933, 938-939 and citing *Blair v. United States* (1919) 250 U.S. 273, 279-280 [39 S.Ct. 468, 63 L.Ed. 979 and *Barry v. United States ex rel. Cunningham* (1929) 279 U.S. 597, 617 [49 S.Ct. 452, 73 L.Ed. 867].) The United States Supreme Court has explained: "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned...." (*Blair v. United States, supra*, 250 U.S. at p. 281.) Accordingly, "where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases,...he may be held to bail to appear at the trial and may be committed on failure to furnish it...." (*Barry v. United States ex rel. Cunningham, supra*, 279 U.S. at p. 618.)

In this case, the trial court relied upon section 1332 in ordering Carr placed in the custody of the District Attorney investigators. (5CT 1297.) Under that section, on an appropriate sworn showing, a trial court may detain a material witness when it finds good cause to believe that the witness will not attend the trial and testify. (See § 1332; see also *In re Francisco M., supra*, 86 Cal.App.4th at pp. 1073-1074, 1076-1077 [formal, on-the-record inquiry, and written undertaking not required under § 1332].)

However, the statute does not confer unfettered discretion to detain a material witness. Article I, section 10 of the California Constitution states in relevant part that "[w]itnesses may not be unreasonably detained."

Appellants Holmes and Newborn contend that the trial court erred in summarily taking Carr into custody. (AHOB 128-130; ANOB 168-172.) Here, the relevant inquiry is not whether the trial court failed to follow the procedures set forth under section 1332 or erred in summarily taking Carr into custody. Appellants have no standing to assert the violation of Carr's constitutional rights in the trial court's detention of Carr. (*People v. Boyer, supra,* 38 Cal.4th at p. 444.) "The coerced testimony of a witness other than the accused is excluded in order to protect the defendant's own federal *due process* right to a fair trial, and in particular, to ensure the *reliability* of testimony offered against him." (*Id.* at p. 444, emphasis in original.) This Court has held: "A claim that a witness's testimony is coerced thus cannot prevail simply on grounds that the testimony is the 'fruit' of some constitutional transgression against the witness. Instead, the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself." (*Ibid.*)

Appellants Holmes and Newborn assert that the trial court's actions sent a clear message to Carr that she would be better off if she incriminated appellants or her testimony was prosecution-oriented. (AHOB 130; ANOB 172.) Their assertion is not borne out by the record. After having been detained at the motel, Carr still testified that she was not really at the hospital and that her testimony given on the previous day was correct. (19RT 1839.) She agreed with appellant Newborn's attorney's statement, "The truth is you don't know whether [appellant Newborn] was -- he might well have been at the hospital, but you don't know whether he was there, right?" (19RT 1875.) During cross-examination, Carr confirmed that even

after not being permitted to go home and being forced to stay in a motel, that she was telling the truth:

> Q. You were not permitted to go home last night?
>
> [The prosecutor]: Objection, irrelevant.
>
> The Court: She can answer.
>
> The witness: Correct.
>
> Q. [By appellant Newborn's attorney]: And then you are back here this morning?
>
> A. Correct.
>
> Q. Same outfit and probably unhappily so, right?
>
> A. Correct.
>
> Q. You didn't come here last night with personal items to spend the night at a motel?
>
> A. Correct.
>
> Q. Are you – [¶] And you are back here to this morning to tell the truth?
>
> A. Correct.

(19RT 1876.) Appellants Holmes and Newborn fail to demonstrate how the trial court's detention of Carr in a motel directly impaired the free and voluntary nature of Carr's testimony in the trial. Carr was not improperly coerced and appellants' due process right to a fair trial was not violated. (*People v. Boyer, supra*, 38 Cal.4th at pp. 444-445.)

Appellants Holmes and Newborn also contend that the trial court erred in conducting the hearing on Carr's detention in their absence. (AHOB 130-132; ANOB 173-175.) Respondent disagrees.

Under the Sixth Amendment's confrontation clause, a defendant has the right to be personally present at any proceeding in which his or her appearance is necessary to prevent "interference with [his or her] opportunity for effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17 [107 S.Ct. 2658, 96 L.Ed.2d 631].) The right to be present at any stage that is critical to the outcome and where the

defendant's presence would contribute to the fairness of the procedure is guaranteed as a matter of due process by the Fourteenth Amendment. (*Id.* at p. 745.) "The state constitutional right to be present at trial is generally coextensive with the federal due process right." (*People v. Harris, supra,* 43 Cal.4th at p. 1306.) A criminal defendant has no statutory or constitutional right to be personally present in chambers or at bench discussions outside the jury's presence on questions of law or other matters as to which his or her presence bears no reasonable, substantial relation to his or her opportunity to defend the charges against him or her. (*Ibid.*)

The hearing on Carr being a material witness and her detention in a motel were not critical to appellants' opportunity to defend, and appellants Holmes's and Newborn's arguments that they could have contributed to the fairness of the proceedings (AHOB 131; ANOB 174) amount to no more than speculation. (See *People v. Harris, supra*, 43 Cal.4th at p. 1307.) No question regarding the substantive testimony that Carr would have given during trial would have been asked at the material witness hearing. (See § 1332; *Kentucky v. Stincer, supra*, 482 U.S. at pp. 745-746.) Furthermore, appellants' assertion that defense counsel did not accept the trial court's invitation to make further presentation in chambers appears to be contradicted by the record. Apparently after further discussion, the trial court changed Carr's detention from jail to a motel. (See 19RT 1900.) Furthermore, Carr testified that she returned to court to tell the truth. (19RT 1876.) Appellants fail to show how their presence during the discussion of Carr's detention would have contributed to the fairness of the procedure, or that their opportunity for effective cross-examination was interfered with. According, they fail to establish any violation of the controlling constitutional standards, or that, assuming error, they suffered any prejudice.

X. THE TRIAL COURT PROPERLY ALLOWED PINA TO TESTIFY

Appellants McClain and Holmes contend that the trial court erred in failing to suppress Pina's eyewitness testimony because it was unreliable and resulted from highly suggestive pretrial procedures. (AMOB 69-95; AHOB 150-175.) Respondent submits the trial court properly allowed Pina to testify.

A. Pina's Grand Jury Testimony

Appellants McClain and Holmes moved to suppress Pina's identifications based on Pina's grand jury testimony. During his grand jury testimony, Pina testified to the following. He and Gonzales took his dog for a walk on October 31, 1993. They proceeded northbound on the west side of Mentor and closer to Wilson. As they proceeded along Mentor, he noticed four cars racing up the street; he told Gonzales to make sure the dog did not run into the street. He looked at the cars and the people in them to give them a "dirty look" to slow down because it was a residential street. The first two cars were close together. They were heading north toward Orange Grove and then turned right onto Orange Grove. (2CT 429-431.)

The first car was a new model. Pina did not know what kind it was, but believed it to be a small import car. It was a dark green or dark blue Toyota MR-2 or Corolla, a newer style, "anywhere from like '95 – I mean '94 to '93." The second car was a two-door white Nissan Sentra. The third car was a maroon or brown Honda Civic DX hatchback. He did not remember the fourth car. (2CT 432, 435.)

Pina explained that there was not enough light to get a precise color for the Toyota. The Toyota was lowered, had tinted windows, and something hung from the rearview mirror. It had a red license plate frame. Instead of a front license plate, it had an advertisement like a new car in the front plate area. There was one male driver in the first car. The driver was

Black, in his 20's, had stringy hair to his shoulders. (2CT 433-434.) It "had that wet look," but Pina could not "really tell at that time." (2CT 434.) Pina could not see if there were any passengers in the back of the car because the windows were darkly tinted. (2CT 434.)

The second car was occupied with a Black male driver, who had "real short" curly or nappy hair. The driver was "clean-cut" and was probably in his 20's. Pina could not recall if there was anybody else in the car. Pina did not remember seeing tinted windows on the second car, but he did not "really pay too much attention to that particular vehicle at that time." (2CT 436.) The third car did not have tinted windows. It was not modified. (2CT 436.) Pina remembered that there was a driver in the third car who was young, clean cut, and had nappy hair that was close to his head. (2CT 437.) At the time that he looked at the Honda, he knew what model it was, but when he testified before the grand jury, he could no longer remember it. There were two or three Black males in the car. (2CT 437-438.) Pina remembered that someone in the cars was wearing a white shirt, but he could not remember which one. (2CT 437.) The headlights were on, except for the MR-2, which had its parking lights on. (2CT 441.)

As Pina and Gonzalez walked southbound on Catalina toward Emerson, Pina realized that the cars he had previously seen were parked on the left-hand side on the corner of Emerson and Catalina. The cars were facing toward Orange Grove and across the street from Pina. All of the cars, except for the MR-2, were stationary. (2CT 438-439.) There were two persons in the Nissan. (2CT 445.)

The MR-2, with its parking lights on, approached Pina and Gonzales and was right next to them. The MR-2 was there a second as Pina and Gonzales continued to walk. (2CT 440.) Pina could see into the car because of the lighting from the street lights. When the car was next to them, they were underneath a street light. They made "eye-to-eye" contact.

(2CT 442.) The driver leaned forward, as if to get a "good look" at Pina, and Pina saw the MR-2 driver. (2CT 442.) Pina looked at the driver twice. The MR-2 backed up, as Pina and Gonzales continued to walk. The MR-2 pulled up again. Pina saw the driver better the second time because of the lighting. (2CT 442.)

The MR-2 traveled in reverse in the middle of the street to the first parked car. Pina was "paranoid" of the situation. (2CT 440.) Pina told Gonzales to keep her eye on the dog and make sure it did not run away. (2CT 440.) The MR-2 was at the side of the street, apparently talking with some ten to fifteen Black males gathered in front of a house. (2CT 438-439, 441, 443.) The Black males were wearing costumes. (2CT 441.) One person wore a joker costume with black and white checkers and a long jester's hat. (2CT 442.) They were talking loudly. (2CT 443.) Someone in the Sentra honked the horn. (2CT 448.) One or two of the males yelled, "Hey, come on. Hurry up." (2CT 443.)

The MR-2 backed up farther, turned backwards toward Emerson, went toward Wilson and parked at the corner of Emerson and Wilson. (2CT 444.) The Nissan Sentra drove behind the MR-2 and parked in a similar spot. (2CT 446.) Two cars remained on Catalina. A majority of the persons still outside of those cars jumped into those cars. (2CT 448-449.) Pina heard car doors closing. (2CT 451.) The persons were approximately 20 feet from Pina. Pina did not know what happened to those cars, but believed that they drove north when the commotion began. (2CT 449-450.) Instead, he was focused on the first two cars, particularly the MR-2 because the driver was "just acting too weird." (2CT 450.) Pina told Gonzales, "If something happens, go hide over a fence or something." (2CT 451.)

A few seconds later as Pina was heading west on Emerson, he heard gunfire. (2CT 451.) Pina instructed Gonzales to take the dog and run

home. (2CT 451.) Pina watched the MR-2 and the Sentra because he feared that they would back up. (2CT 452.) It was well lit where the cars were. The car engines were still running, but their headlights were off. Pina saw two persons running around the corner northbound on Wilson. One person went into the MR-2, while the other person entered the Sentra. (2CT 452-453.) Pina focused on the person running to the Sentra because this person was in front of the person who went into the MR-2. The person running to the Sentra wore a trench coat. As he entered the car, he looked back toward Pina, so Pina "had a pretty good look at him." (2CT 453.) Pina was beyond 31 feet from the person. (2CT 452-453.)

Approximately a month or a couple months after the incident, Pina glanced at a cable television program that said, "help catch them." The program caught his attention because he recognized a picture on the program as the MR-2 driver. Pina talked to a detective. (2CT 461-462.) Pina identified appellant McClain from a six-pack photographic lineup as the MR-2 driver. (2CT 444; see 2CT 397.) He had a hard time with the photographic lineup at first because the photograph of the MR-2 driver was "mostly with his chin up and his head tilted back" and the hair was different. (2CT 463.) Pina told the detective, "This one looks pretty close to the guy, but I can't tell unless I really see him look down." (2CT 463.) The detective showed photographs out of a newspaper and Pina "right then" "recognized him." (2CT 463; see 2CT 464 [there were other photographs, but Pina focused on the one photograph].) The newspaper was folded up "in such a way that [Pina] couldn't really tell" and was held "pretty far away." (2CT 464.) That photograph depicted the same person that Pina had selected from the photographic lineup. Pina's hesitation of his selection from the photographic lineup was based on the angle of the photograph. He wanted to make sure of his selection before saying, "that looks familiar." (2CT 463.) The person in the photograph that he selected

had more hair on top and had his hair back in a ponytail. The MR-2 driver's hair was hanging down when Pina saw him. (2CT 463-464.) Pina remembered the MR-2 driver's face because of its features. There were blemishes on the driver's skin that made him stand out. The light was strong enough that Pina could see the driver "pretty good." (2CT 465.)

Pina also selected appellant Holmes from a six-pack photographic lineup as the person who entered the Sentra. (2CT 459-461; see 3CT 546.) He saw that person crawl into the back seat of the car. (2CT 465.) During his grand jury testimony, Pina identified photographs of appellants McClain and Holmes. (2CT 466-467; see 1CT 8-9.) He remembered appellant McClain because of the way his hair was. Pina remembered appellant Holmes because he was the one who ran back to the car. (2CT 467.)

B. Relevant Proceedings

Pursuant to section 995, appellant McClain moved to set aside the indictment against him. He argued, inter alia, that Pina's identification of him was based upon impermissibly suggestive procedures by the investigating officer and the deputy district attorney. (4CT 891-925 [citing Pina's grand jury testimony transcript].) Appellant Holmes joined appellant McClain's motion to set aside the indictment. (4CT 976-978.) The prosecution filed an opposition to the motion and argued, in part, that Pina's identification of McClain was reliable. (4CT 946-952.) The motion was denied. (8RT 227.)

Appellant McClain moved to suppress Pina's pretrial identification of him. (4CT 926-934.) Appellant Holmes joined the motion to suppress the identification evidence. Appellant Holmes apparently argued that the same photograph of him that was shown on the television was used in the six-pack photographic lineup from which Pina positively identified him. (4CT

979-984.)[52] The parties argued the motions to suppress the identifications. (22RT 2158-2169.) In addition to the grounds set forth in his motion to suppress, appellant McClain also argued at the hearing that only one other person in the photographic lineup had hair as long as in his photograph. (22RT 2159-2160.) He also argued that his photograph stood out in the lineup because he was the only person in the photographic lineup wearing a gold chain around his neck and his photograph was darker. (22RT 2163.)

Appellant Holmes argued that when Pina was spoken to shortly after the event, he could not indicate any physical description of any of the participants. (22RT 2160-2161.) His photograph was also in the newspaper clipping shown to Pina. He also argued that he was in two photographic lineups. (22RT 2161.)

The prosecutor argued that there was no substantial likelihood of misidentification or suggestive identification. There were six different hairstyles in the photographic lineup with appellant McClain's photograph and none necessarily tended to point out appellant McClain. There were also five other photographic lineups and other photographs of persons with long hair in those photographs. Addressing appellant Holmes's argument, the prosecutor commented that only one of the two photographs of appellant Holmes was selected and would probably be noted in cross-examination. The two photographs of appellant Holmes in the photographic lineups were dissimilar because he had different haircuts and was of different ages. (22RT 2262.) The trial court denied the motions to suppress the identifications. (22RT 2269.)

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[52] One page of appellant Holmes's motion is missing from the record. (See 4CT 982-983.)

C. Applicable Law

In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. The defendant bears the burden of demonstrating the existence of the unreliable identification procedure. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.) "A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police." (*People v. Ochoa, supra*, 19 Cal.4th at p. 413, quoting *People v. Slutts* (1968) 259 Cal.App.2d 886.)

Only if a defendant makes that showing does the burden shift to the prosecution to show that the identification was nevertheless reliable and credible under the totality of the circumstances. (*People v. Ochoa, supra,* 19 Cal.4th at p. 412.) A due process violation occurs only if the identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (*Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247].) Despite an unduly suggestive identification procedure, the Court may deem the identification reliable under the totality of the circumstances, after considering such factors as: (1) the witness's opportunity to view the suspect at the time of the offense; (2) the witness's degree of attention at that time; (3) the accuracy of the witness's prior description; (4) the level of certainty the witness expressed when making the identification; and (5) the lapse of time between the offense and the identification. (*People v. Cook* (2007) 40 Cal.4th 1334, 1354; see *Manson v. Brathwaite* (1977) 432 U.S. 98, 114 [97 S.Ct. 2243, 53 L.Ed.2d 140].)

In reviewing the trial court's suppression ruling, this Court considers only the evidence that was before the trial court when it ruled on the motion to suppress the identification. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 8.) This Court reviews deferentially the trial court's findings of historical facts, especially those that turn on credibility determinations, but this Court independently reviews the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 943.)

D. The Trial Court Properly Denied the Motions to Suppress the Identifications

As an initial matter, appellants Holmes and McClain rely heavily on Pina's testimony at the trial in support of their argument that the trial court erred in denying their motion to suppress the identifications. (See AMOB 81-93; AHOB 166-173.) Pina's subsequent testimony at trial is irrelevant for the issue of whether the trial court, at the time of the pretrial ruling, properly suppressed the identifications. (*In re Arturo D., supra*, 27 Cal.4th at p. 77, fn. 8.)

Appellants Holmes and McClain argue that Pina's pretrial identification of them was unduly suggestive because Pina saw their pictures on television before identifying them. (AHOB 166; AMOB 82.) The argument that Pina viewed appellant Holmes's photograph on the television, resulting in an unduly suggestive identification procedure, is meritless. Pina only recognized one of the pictures on the television as that of the MR-2 driver (who Pina later identified as appellant McClain), not appellant Holmes. (See 2CT 461-462.)

Even if Pina saw appellants Holmes's and McClain's photographs on the television, the viewing was not an unduly suggestive identification process. "[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to

the witness - i.e., it must wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa, supra*, 19 Cal.4th at p. 413.) Pina's viewing of appellants Holmes's and McClain's photographs on the television was not part of the identification process. (*State v. Jacobs* (La. 2005) 904 So.2d 82, 87 [the viewing of television news coverage of a defendant's arrest or seeing his picture in a newspaper is not an element of an identification procedure].)

Appellant Holmes argues, as he did at the hearing on the suppression motion, that Pina did not select his picture until after he was shown the newspaper that contained appellant Holmes's picture. (AHOB 166.) Although appellant Holmes's counsel argued at the hearing that Pina selected appellant Holmes's photograph only after being shown the newspaper, Pina's testimony at the grand jury did not bear out counsel's assertion. Pina never testified there that a photograph of the person who entered the Sentra was in the newspaper. He indicated that there were several photographs in the newspaper, but the only one that he recognized and focused upon was that of the MR-2 driver (McClain). (2CT 464.) Pina's subsequent testimony at trial appears to indicate that Pina viewed the photographic lineups, was shown the newspaper, and then selected appellant Holmes from the lineup. (26RT 2758.) However, Pina's subsequent testimony is irrelevant for the issue of whether the trial court properly suppressed the identifications at the time of its earlier ruling. (*In re Arturo D., supra*, 27 Cal.4th at p. 77, fn. 8.) Appellant Holmes failed to demonstrate that the suggestive identification procedures were used.

Appellant McClain argues that Pina could not make a "conclusive identification" until after he was shown the photograph in the newspaper. (AMOB 82.) The instant case is similar to *People v. Ochoa, supra*, 19 Cal.4th at pages 411-413. In *Ochoa*, the victim was shown two photographic lineups. Viewing the defendant in a photographic lineup, she

identified him less than positively, telling the police detective that he "looked familiar, but I needed a side profile." (*Id.* at p. 412.) She "didn't want any doubt to be there in [her] mind at all...." (*Ibid.*) The police detective happened to have a photographic profile of the defendant from the investigation, but none of any other lineup participant, and showed it to the victim. He asked the victim if the subject looked familiar and told her it was the only profile he had, but that this fact should not influence her. Seeing it, the victim recognized the defendant, "broke down," and felt physically ill and scared. She testified at in limine hearing on the motion to exclude the identification that "[o]nce I saw the side profile, I had no doubt whatsoever." (*Ibid.*) This Court held that the defendant in *Ochoa* did not meet the burden of showing an unduly suggestive identification procedure, explaining, "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything." (*Id.* at p. 413.)

Like the victim in *Ochoa*, Pina had already viewed the photographic lineup and had told the detective, "This one looks pretty close to the guy, but I can't tell unless I really see him look down." (2CT 463.) The detective showed photographs out of a newspaper and Pina "right then" "recognized him." (2CT 463.) Unlike *Ochoa*, this was not a case of a single photograph being shown. Rather, there were other photographs in the newspaper. The detective did not suggest anything, but rather was providing useful further information in response to Pina's request. Appellants Holmes and McClain failed to meet their burden of showing unduly suggestive identification procedures. (*People v. Ochoa, supra*, 19 Cal.4th at p. 413.) They essentially argue that Pina's identifications are not credible, which was within the jury's exclusive province. (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

Even if appellants had met their burden of showing unduly suggestive identification procedures, the identifications were nevertheless credible and reliable under the totality of the circumstances.

1. Opportunity to view

Pina had an opportunity to observe appellants McClain and Holmes. Appellant McClain was the driver of the MR-2 which Pina first noticed racing northbound on Mentor, turning eastbound on Orange Grove, and then parking facing northbound on Catalina across the street from Pina. (2CT 430-432, 437-439.) Pina could see into the car because of the lighting from the street lights. When the car was next to them, they were underneath a street light. They made "eye-to-eye" contact. (2CT 442.) The driver leaned forward, as if to get a "good look" at Pina, and Pina was able to see him. (2CT 442.) Pina looked at the driver twice. The MR-2 backed up, as Pina and Gonzales continued to walk. The MR-2 pulled up again. Pina saw the driver better the second time because of the lighting. (2CT 442.)

Pina focused on appellant Holmes, the person running to the Sentra, because he was in front of the person who went into the MR-2. As appellant Holmes entered the Sentra, he looked back toward Pina, so Pina "had a pretty good look at him." (2CT 453.)

2. Degree of attention

Pina had a high degree of attention at that time. He focused on the MR-2 and the Sentra, particularly the MR-2, because he was concerned for his, Gonzales's, and his dog's safety. (2CT 450-452.)

3. Accuracy of prior description

Appellant McClain's motion to suppress the identification stated: "Counsel for defendant is unaware at the present time of any substantial

discrepancy in description." (2CT 933-934.) Accordingly, this factor did not assist appellants Holmes and McClain.

4. Level of certainty in making identification

Pina testified before the grand jury that when he first looked at the photographic lineups, he had a "hard time" time identifying the MR-2 driver (McClain) because of the angle of the photographs in the lineup were different from the one he saw of the MR-2 driver on Halloween. (2CT 463-464.) He said, "This one looks pretty close to the guy, but I can't tell unless I really see him look down." (2CT 463.) But when shown the photograph from the newspaper, Pina "recognized" appellant McClain, thereby demonstrating a high level of certainty.

Pina did not testify as to any uncertainty in identifying appellant Holmes. (2CT 464-465.) Indeed, he said that he selected "an exact picture" of the person that he saw entering the Sentra. (2CT 461.) Therefore, this factor did not assist appellant Holmes.

5. Lapse of time between the offense and the identification

Pina testified before the grand jury that he identified appellants Holmes and McClain a month or two after the offenses. (2CT 462.) Sergeant Korpal testified at the grand jury hearing that Pina made his identifications in January 1994. (3CT 548.) A couple of months is not a substantial lapse of time to weigh in favor of appellants Holmes and McClain.

Thus, the five factors of reliability are not outweighed by the alleged suggestive effect of the identification procedure. Based on the totality of the circumstances, Pina's identifications were reliable. The trial court properly admitted the identifications.

E. Even Assuming Arguendo the Trial Court Erroneously Admitted Pina's Identification of Appellants Holmes and McClain, the Alleged Error Was Harmless

Even if the trial court erroneously admitted Pina's identification of appellants Holmes and McClain, the alleged error was harmless. (*People v. Cook, supra*, 40 Cal.4th at p. 1355.) Here, defense counsel had a full opportunity to cross-examine Pina and Gonzales, not only about the actual degree of certainty of Pina's identifications, but also how Pina came to identify appellants Holmes and McClain and the discrepancies in his statements to the police and testimony before the grand jury and at trial. (26RT 2682-2777, 2782-2789, 2790-2791.) Appellant Holmes presented evidence about Pina's initial statements to the police (35RT 3741-3747; 36RT 3882-3886, 3901-3905) and his contact with the police (36RT 3907-3911.) Appellant Holmes also presented expert testimony on factors affecting the accuracy of eyewitness identifications. (34RT 3654-3666; 35RT 3834-3836.) All of the arguments as to why Pina's identification was not credible were presented to the jury. (See 43RT 4479-4498, 4553-4561.) Under these circumstances, the jury was able to evaluate the credibility of Pina's identifications. The weight of Pina's testimony was for the jury to resolve. (*People v. Boyer, supra*, 38 Cal.4th at p. 481.) The jury, as the sole judge of credibility, could reasonably reject the defense arguments and accept the prosecutor's theory that Pina's identification of appellants Holmes and McClain was credible. (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

Moreover, other evidence connected appellants Holmes and McClain to the murders. Statements by appellants McClain and Holmes connected them to the Halloween murders and attempted murders. On November 1, Stevens saw appellant McClain at King's Manor. (25RT 2542-2544.)

Appellant McClain said that he and his "homeys" went to Wilson and shot some Crips. (25RT 2545.)

On November 2, appellant McClain, Alonzo Hamilton, and Laward Looney went to Tulare after the shootings. (23RT 2303-2305; see 23RT 2335; 36RT 3963-3694.) Welcome and Carpenter saw appellant McClain in a burgundy rental car. Appellant McClain said that he and others had shot three Crips in Pasadena in retaliation for Hodges's murder. When he later heard that the victims were children and not Crips, appellant McClain became nervous. (23RT 2335-2336; 31RT 3279-3280.) Welcome saw appellant McClain with either a .380 or a nine-millimeter gun. (28RT 2951.) He sang along with a rap song, "I put in work with this. I put it down." (28RT 2952.)

Tate said that appellant Holmes bragged about being a killer and a gangster and that he was going to get a hat that said trick or treat. He said that he was with others, and that they rode around looking for somebody, were in bushes, and jumped out. The killing was in retaliation for Hodges's murder, which was believed to have been perpetrated by the Crips. (15RT 1351-1354, 1362.) Ballistics evidence and the boys' testimony also confirmed that the assailants had been in the bushes just before the shooting. (18RT 1759-1760; 19RT 1993; 20RT 2079, 2085; see Peo. Exh. 32.)

Finally, appellant McClain's conduct after the murders suggested a consciousness of guilt. (See *People v. Pride, supra*, 3 Cal.4th at p. 246.) After the crimes, appellant McClain fled to Tulare. (23RT 2303-2305; see 23RT 2335; 36RT 3963.) He changed his appearance by cutting his signature shoulder-length hair while in Tulare. (28RT 2962; 31 RT 3280; 36RT 3964-3965.) He flew out of Ontario to Memphis in early November. He used an alias for his ticket. (22RT 2268-2271; 23RT 2273; 36RT 3965.) He told Underwood that he flew out of Ontario as opposed to Los

Angeles because he was concerned about being stopped and hassled by the police at the airport. (23RT 2274.) He also failed to report to Thomas. (20RT 2064-2070.)

F. Eighth Amendment Claim

Appellants Holmes and McClain argue that they were denied a reliable determination of their penalties guaranteed by the Eighth Amendment, citing *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944]. (AHOB at 165-166; AMOB 79-81.) *Woodson* invalidated a law that provided a mandatory penalty of death for all first degree murders. Appellants fail to explain how this case has any relevance to the instant case. (*People v. Prince* (2007) 40 Cal.4th 1179, 1217, fn. 4.) In any event, Pina's identifications were not the product of unduly suggestive procedures and were not unreliable as appellants claim, so there was no Eighth Amendment violation.

XI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT

Appellant Newborn contends that he was deprived of due process and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by prosecutorial misconduct in the form of flagrant appeals to the jury's passion and prejudice during closing argument. (ANOB 195-206.) Appellant Holmes and McClain join this argument. (AHOB 75; AMOB 68.) Appellant McClain separately argues that the prosecutor committed misconduct in closing argument. (AMOB 145-153.) Respondent submits that the prosecutor did not commit misconduct during closing argument.

A. Relevant Facts and Proceedings

Prosecutor Myers argued the rebuttal closing argument. Appellant Newborn argues that in the following passages of argument, Mr. Myers

committed prosecutorial misconduct. Near the beginning of rebuttal, Mr. Myers said:

> Because no matter who is going to be doing the spin up here, whether it is Mr. Nishi or Miss Harris, Miss Callahan or Mr. Jones or even me, what we say is not evidence. We aren't the ones who are going to be deciding if there will be justice for Stephan Coats and Reggie Crawford and Edgar Evans, whose names I did not hear the defense utter once. We are not going to be the ones to decide if they are going to rest in peace. That decision is in your hands.

(44RT 4624-4625.) In closing his rebuttal, he stated:

> I am going to wrap it up. I just want to let you see a few things, and I will be done before 4:30. I want you to remember something. (Pause.) It is always the last place you look.
>
> I did not bring you these pictures. I didn't do this to you. This is not my handiwork. These are dead children; big children, but dead children. They were gunned down because these guys went out to smoke some Crips that night. They shot at each other earlier and then they went looking again, and they picked the wrong target a second time. This is what they have given you[,] this is what they have given Pasadena.
>
> Now, Miss Harris said something yesterday that I thought was interesting. She said, "You are the only thing between the police and McClain." Well, if I were the only thing between the police and McClain, I would stand out of the way. Mr. McClain has told you he hasn't killed any – well, he claims he hasn't killed anybody yet. But he used the word "yet." And De Sean has told you that Lorenzo has a list of people to smash when he gets out.
>
> You are not the only thing between McClain and the police. You are the only thing between them and their next victims.
>
> Ms. Harris: Your Honor, I object –
>
> Mr. Jones. I object to that. That is a patent appeal to passion and prejudice. It is improper; it is misconduct.
>
> The Court: Sustained, Mr. Jones.

All counsel have used some emotion. He is closing it up. This trial is about the defendants' right to a fair trial, but also the reason they have a right to a fair trial, but also the reason they have a right to a fair trial is because we have three dead people. He has a right to comment on it.

You are almost out of time.

Mr. Myers: Yes, I understand it.

The Court: About five minutes.

Mr. Myers: This is what they brought you. I didn't say I was going to smash anyone when I got out. That was Lorenzo who said that. I didn't say I haven't killed anybody yet. That was Herb who said that.

These guys aren't going to be home for Christmas ever again, and they sent them to eternity. Herb did, Lorenzo did and Karl did. They lit the fuse, they let it burn; and now that it has exploded all over them, they want to run away from it.

I didn't make Herb and Lorenzo and Karl what they are, felons, convicted firearm offenses, dope dealers, women beaters, gang members, child killers. I didn't do that; Detective Uribe didn't do that; Sergeant Korpal didn't do that; Miss Callahan didn't do that; Reggie Crawford didn't do that; Stephan Coats didn't do that; Edgar Evans didn't do that. They did it by their own hands. By their own hands they have become what they are.

You are the only people now who stand between them and this. And by your verdict you will be sending a message, one way or the other, but it is unavoidable.

Miss Harris: Your Honor, I again object.

Mr. Jones: I will object to that.

The Court: The jury's duty is not to send a message but to determine the evidence in this case and make a determination in deliberation.

Mr. Myers, you're through. You have 30 seconds.

Mr. Myers: Thank you.

The Court: You're welcome. [¶] Anything else?

Mr. Myers: 30 seconds. [¶] You will be reaching a verdict and a just verdict based upon the evidence.

> I simply ask this: if you're the ones who are standing between the defendants and this (pointing to photographs of victims), don't stand aside; stand tall, stand firm, stand your ground, stand your principles, don't stand down, stand for a just verdict. Stand up for Edgar, Stephan and Reggie. Come back with a guilty verdict so they can also rest in peace.

(44RT 4701-4703.)

The defense moved for a mistrial on the ground that the prosecutor appealed to the jury's passions and prejudice as objected to by the defense. The trial court found that the objections were timely made, but that the court had "covered it." The court noted that emotions were not unusual. (44RT 4715.) The following colloquy occurred:

> Ms. Harris: I am joining Mr. Jones' motion and just saying, for the record, that at one point during the course of the argument when there was a statement of appealing to prejudice – pardon me – passion and emotion, there were the photographs of the decedents in this matter placed up for the jurors to see and the coroner's diagrams.
>
> When we talked about this matter as to what should go into evidence, the prosecution told the court that it was for the showing of entry wounds and so forth.
>
> I think they wanted those things in evidence to do with what they did – what was done with them this afternoon, and that is to appeal to people's prejudice and passions and emotions in terms of young people being dead. [¶] And that's another ground for the motion, your Honor.
>
> The Court: Thank you. [¶] The Court thinks that any exhibit like that, that is what the case is about. I made the statement that the case is about your defendants having the right to a fair trial, that they have that right; they are presumed innocent. That is for the jury to decide.
>
> And also, without question, the victims are part of the trial and I think the prosecution can argue that. They can show the pictures. It was a limited period of time. There is no question it goes to an emotional thing, but it also shows what the case is about. That is what I ruled and I will rule now. [¶] Do you want to say anything else? I am not cutting anyone off.

Ms. Harris: Yes. There was one other thing, the arguments as to the future dangerousness of Mr. McClain. I felt that was inappropriate and improper, and I would ask the court for a mistrial and, if not a mistrial, at least something limiting to the jury to tell them that they are not to consider anything such as that in terms of reaching their decision.

The Court: And I think I handled it. Again, your objection was timely. The Court made the statement that the jury's duties are what they are. Mr. Jones and Mr. Nishi both joined in that.

And the Court made, I think, the appropriate statement that that was not their duty or job. And almost in every trial someone will say something that they are not supposed to do. We all know better.

(44RT 4716-4717.)

B. Applicable Law

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) A prosecutor is given wide latitude during closing argument. (*Ibid.*) "The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom." (*Ibid.*) "A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness,..." (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568, internal quotations marks and citations omitted.)

On claims of prosecutorial misconduct, the state law standards differ from those under the federal Constitution. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070.) Under state law, it is misconduct when a prosecutor uses deceptive and reprehensible methods to attempt to persuade either the court or the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Under the

federal Constitution, conduct by the prosecutor constitutes prosecutorial misconduct only if it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].)

C. Statement That Jury's Verdict Would "Send a Message"

Appellant Newborn contends that the prosecutor incited the passions and prejudices of the jurors when he stated: "You are the only people now who stand between them and this. And by your verdict you will be sending a message, one way or the other, but it is unavoidable." (44RT 4703; see ANOB 200-201.) He argues that the prosecutor essentially requested the jury to send a message to the defendants and to society at large about crime in general. (ANOB 200-201.) The prosecutor, however, did not expressly request the jury to send a message to the defendants and to society at large about crime in general. Rather, the prosecutor stated that no matter what verdict the jury rendered, it would be sending out a message. The prosecutor's statement was in response to appellant McClain's attorney's closing argument. (See 44RT 4701.) Specifically, appellant McClain's attorney argued that the jury should not convict the defendants because they were gang members. She also argued that the police had run "roughshod" over the defendants' rights. (43RT 4489.) She stated, "You are the only people who stand between the police and Herbert McClain." (43RT 4489.) The prosecutor's statement was a fair response to the defense's argument and did not incite the passions and prejudices of the jury. (See *People v. Parson* (2008) 44 Cal.4th 332, 364.) Placed in context, the prosecutor's statement was neither deceptive nor reprehensible. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 665 [prosecutor's statements must be viewed in the context of the argument as a whole].) In addition, the

argument did not inject such unfairness to make the resulting conviction violate due process.

In any event, this Court need not decide whether the prosecutor committed misconduct because the trial court sustained the defense's objections and admonished the jury to disregard the allegedly improper comments. "When the defendant's objections are sustained and the court admonishes the jury to disregard the improper comments, we assume the jury will follow the admonishment and any prejudice is avoided." (*People v. Mendoza, supra,* 42 Cal.4th at p. 702.) Here, after the defense objected, the trial court instructed the jury: "The jury's duty is not to send a message but to determine the evidence in this case and make a determination in deliberation." (44RT 4703.) The prosecutor's alleged misconduct was not prejudicial. The trial court admonished the jury that its duty was not to send a message and that it was to determine the evidence in this case. The jury presumably understood that its duty was not to send a message.

D. Use of Photographs of Victims during Rebuttal Argument

Appellant Newborn argues that the prosecutor used the photographs of the deceased victims during the rebuttal argument for a different purpose than for what they were admitted and in a prejudicial manner. (ANOB 201.) Defense counsel argued below that the prosecution sought admission of the victim photographs and the coroner photographs to show "entry wounds and so forth." (44RT 4716.) Appellant Newborn, however, points to no portion of the record in which the prosecutor sought only limited admission of the victims' photographs and coroner photographs to show those "objective" facts. (See ANOB 201.) Instead, the record indicates that the defense objected to the coroner's photographs as gruesome and shocking. The defense argued that there was no dispute as to the cause of

death and that showing the photographs was unnecessary.[53] The trial court found that the photographs were not gruesome and shocking. (27RT 2878; see also 32RT 3317-3318.) Accordingly, the prosecutor did not use the photographs for a different purpose than for what they were admitted.

The photographs had been admitted as exhibits and the trial court also found them not to be gruesome. And as the trial court observed, the victims were part of the trial. (44RT 4717.) The prosecutor properly used the photographs during the rebuttal closing argument. Additionally, the photographs were only displayed for a limited time. (See 44 RT 4717.) The prosecutor's conduct neither rendered the trial fundamentally unfair nor constituted a deceptive and reprehensible method to persuade the jury. (See *People v. Coddington* (2000) 23 Cal.4th 529, 633 [use of properly admitted coroner's photographs during closing argument of penalty phase was not prosecutorial misconduct], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1055 [prosecutor's display during rebuttal argument of photographs of victims while alive was not prosecutorial misconduct].)

E. Comments on Future Dangerousness

Appellant Newborn contends that the prosecutor committed misconduct by urging the jury to consider the defendants' future dangerousness. Respondent submits that even though the trial court found the comments to be inappropriate (44RT 4702), the comments were nevertheless proper. In *People v. Brown* (2003) 31 Cal.4th 518, 553, this Court held that suggesting that a defendant will commit a criminal act in

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[53] The cumulative nature of a photograph and the availability of other evidence to establish the prosecution's case does not lessen a photograph's relevance or require its exclusion. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1168.)

the future is an appropriate comment when there is sufficient evidence in the record to support the statement. Here, there was sufficient evidence to support the prosecutor's argument regarding future dangerousness. The prosecution presented evidence that appellant Newborn indicated that once he got out of custody, appellant Newborn was going to "smash" everyone that was on his list. (17RT 1573.) Appellant McClain stated while being cross-examined that he had "never killed nobody as yet." (36RT 3991.) The prosecutor clarified during his argument after the defense raised an objection, that the basis of considering the defendants' future dangerousness was these statements. (44RT 4702.)

Moreover, even if the comment were improper, it could not have prejudiced appellants. The remarks asserted "nothing the evidence did not already suggest: defendant[s] posed a danger to the people in the community. Any misconduct was harmless." (*People v. Brown, supra*, 31 Cal.4th at p. 554.)

F. Statements That Guilty Verdicts Was Necessary So That the Victims Could "Rest in Peace"

Appellant Newborn contends that the prosecutor committed misconduct by arguing that guilty verdicts were necessary so that the victims could rest in peace. (ANOB 202-203.) Appellant Newborn has forfeited this claim. "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown, supra*, 31 Cal.4th at p. 553.) "Failure to make a specific and timely objection and request that the jury be admonished forfeits the issue for appeal unless such an objection would have been futile." (*Ibid.*) Defense counsel objected to the prosecutor's argument as appealing to the sympathies and prejudices, but only as to the sending a message, future dangerousness, and the use of photographs. Defense counsel never

objected to the prosecutor's argument that a guilty verdict was necessary to allow the victims to rest in peace. (44RT 4625, 4703, 4713-4718.) Accordingly, this claim was not preserved for appeal.

Even if the issue were properly preserved and to the extent that the prosecutor's statements could be interpreted as appeals for sympathy for the victims (see *People v. Kipp* (2001) 26 Cal.4th 1100, 1130), reversal is not required because the prosecutor's argument did not contribute to the verdict. (See *People v. Hardy, supra,* 2 Cal.4th at pp. 172-173.) A defendant's conviction will not be reversed for prosecutorial misconduct that violates state law unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*People v. Wallace, supra*, 44 Cal.4th at p. 1071.) On the facts of this case, no reasonable probability exists that without the allegedly objectionable comments in the prosecutor's argument, the jury would have reached a guilt phase verdict more favorable to the defendants. (See Argument V., *ante*.)

While appellant Newborn asserts in passing that the concept of "resting in peace" is a religious abstraction, he does not contend that the prosecutor was appealing to religious authority. (See ANOB 204-205.) There is no reasonable likelihood the jury understood the prosecutor's statements of "resting in peace" as an appeal to religious authority. (See *People v. Harrison, supra,* 35 Cal.4th at p. 247.)

G. McClain's Prior Uncharged Offense

Appellant McClain argues that the prosecutor led the jury to believe that appellant McClain and Bowen were engaging in conduct similar to the Halloween killings. (AMOB 146.) He argues that the prosecutor committed misconduct during closing argument because the prosecutor misstated material facts and the law and argued facts not in evidence. (AMOB 145-150.) The prosecutor made no such argument.

The prosecutor argued that appellant McClain's "stories" were not credible. (See 44RT 4685). He quoted appellant McClain's testimony and commented on it:

> "Okay. Did you find any of the people who you were paging?
>
> "No."
>
> That's a lie.
>
> "If you were going to kill a Crip, why would you page these other people?
>
> "First, to inform them and let them know what has happened. Then, you know, see what is in their mind, their knowledge was, see if they knew any additional information or any lead that I could go on."
>
> That was Detective McClain.
>
> "You wouldn't be paging them to help you in your plan to kill crips, would you?
>
> "A. I don't do mine like that.
>
> "You do them all by yourself?
>
> "A. Yes."
>
> Remember from the testimony of Banuelos that just a year earlier he wasn't doing it by himself; he was out with Solomon Bowen --
>
> [Appellant McClain's counsel]: Objection, your Honor. McClain was arrested with a gun, not shooting at anyone. There was no testimony of that.
>
> The Court: Let's proceed.
>
> You have about 12 minutes left here.
>
> [The prosecutor]: He was with Bowen and they each had guns. Is that doing it by himself?

(44RT 4688-4689.)

Here, appellant McClain's attorney interrupted the prosecutor's sentence.[54] More importantly, the jury could not have possibly believed that the McClain and Bowen were engaging in conduct similar to the Halloween killings because of the subsequent statements by appellant McClain's attorney and the prosecutor. (44RT 4689.) The prosecutor did not use deceptive and reprehensible methods to attempt to persuade either the court or the jury. (See *People v. Earp, supra,* 20 Cal.4th at p. 858.) The prosecutor's conduct did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (See *Darden v. Wainwright, supra,* 477 U.S. at p. 181.)

H. McClain's Use of a Firearm In the Murders

Appellant McClain argues that the prosecutor misstated the law in arguing that if appellant McClain used a gun in the Price case or the Halloween murders case, the jury could find him guilty of both. (AMOB 145-150.) Appellant McClain concedes that he did not object to the prosecutor's alleged misstatement of the law, but argues that the misconduct was so harmful that reversal is required. (AMOB 148.) Respondent disagrees. By failing to object to the statement, appellant McClain has forfeited this claim and the claim is not preserved for appeal. (*People v. Brown, supra*, 31 Cal.4th at p. 553.)

In any event, the prosecutor did not misstate the law. Here, the prosecutor stated:

> The fact of the matter is what Troy Welcome says is, "When that music was playing McClain took out his gun, his .380. This is my" N word, "put in work with this. I put it down with this gun."

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[54] For instance, the prosecutor could have finished his sentence as he subsequently stated that appellant McClain "was out with Solomon Bowen and they each had guns." (See 44RT 4689.)

> Was he talking about the Halloween murders or was he talking about Robert Lee Price? Does it really matter? No, because McClain is refuging [*sic*] himself up in Tulare. He pulls out the .380 and said he used it. He used it. Price is shot with a .380. Price told you it was a .380.

(44RT 4683.)

The prosecutor's point was that appellant McClain admitted to using a gun for gang purposes. The prosecutor also pointed out that Price was shot with a .380. The prosecutor, however, did not argue that if the jury found that appellant McClain used the gun, it could find him guilty for both the Halloween murders and the Price attempted murder. There was no misstatement of law. The prosecutor did not use deceptive and reprehensible methods to attempt to persuade either the court or the jury. (See *People v. Earp, supra,* 20 Cal.4th at p. 858.) The prosecutor's conduct did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (See *Darden v. Wainwright, supra,* 477 U.S. at p. 181.)

I. Any Misconduct Was Harmless

In any event, any misconduct was harmless. (*People v. Huggins, supra,* 38 Cal.4th at p. 208 [harmless error standards are *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], for federal constitutional violation, and *People v. Watson, supra,* 46 Cal.2d at p. 836 for state law violation].) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Here, the remarks were brief and fleeting, in comparison to the total length of the prosecution's opening and rebuttal arguments. (See 42RT 4388-4469, 4624-4703.) Indeed, as appellant Newborn acknowledges, there were no defense objections during

the course of the opening argument. (See ANOB 195.) On the facts of this case, no reasonable probability exists that without the allegedly objectionable comments in the prosecutor's argument, the jury would have reached a guilt phase verdict more favorable to the defendants. (See Argument V., *ante*.)

XII. THE TRIAL COURT PROPERLY ADMITTED GANG EVIDENCE; APPELLANTS MCCLAIN AND HOLMES WERE NOT CONVICTED MERELY BECAUSE THEY WERE GANG MEMBERS

Appellants McClain and Holmes contend that as a result of the trial court's errors and the prosecutors' misconduct, they were convicted because they were gang members. Specifically, they argue that the trial court erroneously admitted evidence concerning (1) threats against witnesses and the witnesses' fear of testifying; and (2) gang photographs, identification and history. They argue that the prosecutor further exacerbated the evidentiary error by committing misconduct in examination and argument. (AMOB 168-205; AHOB 133-149.) Respondent submits that the trial court properly admitted gang evidence and the prosecutor did not commit misconduct.

Appellant Holmes argues that evidence of his gang membership was weak. (AHOB 136-137.) The alleged weakness of the evidence of Holmes's gang membership did not render the gang evidence inadmissible. Rather, it was for the jury to determine the weight of the evidence. (See *People v. Zapien* (1993) 4 Cal.4th 929, 957-958.)

A. Evidence of Threats and Fear of Testifying

Appellants Holmes and McClain argue that the trial court erroneously admitted evidence of threats against DeSean Holmes, Derrick Tate, and Willie McFee, and that these witnesses feared testifying. (AHOB 133-149; AMOB 170-175.) The trial court properly admitted the evidence in question.

DeSean Holmes testified that he was uncomfortable testifying and that his life had been threatened. His mother had received calls that threatened her. (17RT 1545.) He explained that he had picked up a subpoena from the Altadena station for a case in which the defendant's name was Charlie Bell. After picking up the subpoena, he had problems. (17RT 1592.) Cooks believed that DeSean Holmes was going to testify against him. (17RT 1680.) Cooks telephoned DeSean Holmes's mother and made threats. Conveying through DeSean Holmes's coach, Cooks also said that he was going to hunt DeSean Holmes down and "do" him like Majhdi Parrish, who was killed at his house. (17RT 1680-1681.) DeSean Holmes then spoke with Deputy Brown about obtaining protection for fear that Ernest Holly and Cooks were trying to kill him. (17RT 1546-1547, 1592.) DeSean Holmes heard about other witnesses being killed, which factored into his decision as to testifying. (17RT 1674.)

When DeSean Holmes was asked what Cooks had threatened, appellant McClain objected on the ground that it was hearsay. Appellant Newborn objected as irrelevant to the instant case. The prosecutor explained that the testimony would explain DeSean Holmes's demeanor. The trial court agreed and overruled the objections. (17RT 1681.)

Appellant Newborn later objected that DeSean Holmes was permitted to testify that he was afraid because Parrish was killed, and asked that he be allowed to present evidence that DeSean Holmes was involved in carjacking Parrish. (18RT 1699-1702.) The trial court denied the request, finding that the carjacking was collateral, and suggested that the prosecutor ask DeSean Holmes about being afraid. (18RT 1705.)

Appellant Newborn's attorney asked DeSean Holmes: "When you said that you had heard about witnesses getting killed and stuff like that, were you talking about Majhdi Parrish?" (18RT 1733-1734.) DeSean Holmes asserted his Fifth Amendment right against self-incrimination.

(18RT 1734-1735.) He had heard that other witnesses had been killed or harmed. (18RT 1733.)

Deputy Brown testified that he had offered DeSean Holmes protection because Cooks and Holly were threatening his life. DeSean Holmes had been asked to kill two witnesses that had been responsible for sending two of his friends to jail, but he did not kill the witnesses. (16RT 1509-1510.)[55]

Tate testified that he visited Pitts, who associated with P-9 members, when appellant Holmes bragged about the murders. (15RT 1351-1354, 1362, 1395.) On redirect examination, Tate explained that he did not contact law enforcement earlier because "look at what happened to the kids." (16RT 1392.) Tate's mother and girlfriend received threats. The defense objected to the testimony as hearsay and lacking in foundation. The trial court overruled the objection because Tate did not testify what was said to Tate's mother and girlfriend. (16RT 1392-1393.) Tate did not know who had made the threats. (16RT 1395.) Tate indicated that the presence of Pitts's girlfriend in the courtroom made him uncomfortable. The trial court excluded Pitts's girlfriend from the courtroom. (16RT 1395-1396.) Tate's family in Illinois informed him that Pitts had gone by his house and said that Tate had "better not show up in court and all the stuff like that." (16RT 1396-1397.)

The jury was admonished that the evidence of Tate's motivation for testifying was not offered for the truth of the matter it was made, but to show his state of mind, "why he is testifying," and "why he did certain things." (16RT 1394.) Tate heard that a witness who was involved in this

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[55] The parties stipulated that Deputy Brown's testimony could be considered only as to appellant Newborn (30RT 3140), presumably because DeSean's testimony primarily incriminated appellant Newborn.

case had been killed. He was afraid, but testified for the children. (16RT 1399-1400.)

Over defense objection, the trial court allowed the prosecutor to play during redirect examination a tape in which McFee told Detective Uribe that he was receiving threats in the form of anonymous phone calls. (See 24RT 2475-2479; Peo. Exh. 47-A.) McFee testified as to the reason he was testifying:

> For a year and a half my life has been threatened for no apparent reason, for nothing, for something I supposed to have said and I never had said. I have been on the run. As of today, today I am still running behind my back, watching my back for nothing, for nothing. I had to move for no apparent reason. It's – It's a lie, man. It's a lie.

(24RT 2490.) When asked on recross-examination, McFee testified that he did not remember when he first reported the threats to the police. In April 1995, he told one of the prosecutors that his life had been threatened. (24RT 2492.) McFee did not know who threatened his life, but speculated it was gang members. (24RT 2493.)

B. The Testimony of Witnesses That They Had Been Threatened And Feared Testifying Was Admissible

On appeal, this Court applies an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The jury may consider the existence or nonexistence of a bias, interest, or other motive in determining a witness's credibility. (Evid. Code, § 780, subd. (f).) "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "An explanation of the basis for the witness's fear is likewise relevant to the jury's assessment of his or her credibility and is well within the discretion of the trial court."

(*People v. Guerra, supra*, 37 Cal.4th at p. 1142.) This Court has further explained: "For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*Ibid.*)

Here, evidence that DeSean Holmes, Tate, and McFee had received threats and feared testifying against appellants was offered for the nonhearsay purpose of explaining inconsistencies in portions of their testimony, including equivocal responses. These witnesses exhibited hesitancy in responding to questions and fully cooperating as witnesses. (See e.g., 16RT 1395-1398; 17RT 1545; 23RT 2374-2375; see 17RT 1681.) This evidence was relevant to their credibility. "The jury was entitled to consider the explanations in evaluating their credibility." (*People v. Guerra, supra*, 37 Cal.4th at p. 1142.) The court also further admonished the jury that the defendants are presumed to be innocent and the fact that they belong or do not belong to a gang "does not make them, per se guilty of the crime." (11RT 535.) Accordingly, the trial court properly exercised its discretion in admitting the challenged testimony.

Appellant Holmes also complains that over a defense objection, Latoya Carr was permitted to name a friend who had been killed between Halloween and the date of her testimony. (AHOB 140.) However, this testimony was fleeting. Carr never stated that these friends were killed in connection with the instant case. (33RT 3604-3605.) Without more, Carr's testimony did not even suggest that she had been threatened or was fearful of testifying.

C. Gang Photographs, Identification, and History

In establishing that Detective Carter was a qualified gang expert, the prosecutor asked Detective Carter: "Approximately how many contacts with admitted gang members, Pasadena gang members, would you say that you have had in your tenure with Pasadena Police Department?" (14RT

1159.) Appellant Newborn's counsel objected on the ground that it was irrelevant and was joined by appellant McClain's counsel. The trial court overruled the objection "unless you want to stipulate he is a gang expert." (14RT 1159.) The defense then stipulated that Detective Carter was a qualified gang expert. (14RT 1159.)

Detective Carter identified P-9 members from photographs and testified about the history of P-9. He also testified that the focus of the investigation of the Hodges shooting was on the Raymond Avenue Crips. (14RT 1160.) Hodges was associated with the Parke Street Nine Lives (P-9) gang. (14RT 1161; see 14RT 1172.) P-9 was not a Crip gang. The Raymond Avenue Crips attempted to get along with the P-9's, but still considered the P-9's to be Bloods. (14RT 1170-1171.) The Squiggly Lane Bloods (S-9) combined with the P-9's. (14RT 1170-1171; 18RT 1714.) Other P-9 or S-9 members or associates included Alonzo Hamilton, Ivan Warren, Carlos Clayton, Laward Looney, Tyrone Anderson ("T Crazy"), Cornell Daniels, Ivan Warren, DeSean Holmes, and Danny Cook ("Two Punch"). (14RT 1163-1171; 17RT 1539-1540; Peo. Exh. 4 [photograph of five persons "throwing" a gang sign, including Hodges and appellant Newborn]; Peo. Exh. 5 [photograph of 12 persons, including appellant Newborn, Hamilton, Warren, Clayton, and Hodges]; Peo. Exh. 6 [photograph of a bandanna with gang writing "P-9 L-I-V" and "Ishmael, Mike D Laward, T Crazy, Little Carlos, Mando, Royce, Cornell, Trey Kay, Solomon, Herb Dog, Alonzo, Red, Gil, Hate, and T Crazy."].) Hamilton was appellant Newborn's brother. (14RT 1169.) Other witnesses testified that appellants, Bailey, and Bowen were members of P-9. (19RT 1843-1844; 25RT 2550-2553.)

The following colloquy occurred during Detective Carter's direct examination:

Q. Are you familiar with a person by the name of Ishmael Offutt?

A. Yes.

Q. How do you know him?

[Appellant Newborn's counsel]: Objection, irrelevant.

The Court: Overruled.

The witness: Ishmael was a P-9 gang member who is now dead.

(14RT 1167.) Appellant Newborn's attorney objected that the answer was nonresponsive and asked that the witness be admonished to answer the question. Although the trial court overruled the objection, the court then proceeded to instruct Detective Carter: "When you are asked a question, unless you are used to testifying, we have a tendency to ask you the time and you tell us how to make a watch. [¶] Answer the question any counsel asks you okay?" (14RT 1168.)

Appellant McClain's counsel then objected to all of Detective Carter's testimony as being irrelevant. The trial court stated: "I think part of the People's case is it is a retaliation drive-by shooting. That is part of the argument. [¶] I think that the gang activity may be relevant, so I am going to allow it and overrule your objection, but it is noted for the record." (14RT 1168-1169.) Appellant Newborn's attorney objected to any further testimony on gang activity. The trial judge stated that he wanted to hear the testimony, but explained, "I don't think we have to go through every possible or potential P-9 or Blood or Crip in the United States of America." (14RT 1169.) The trial court overruled the defense's objection on relevance as to whether P-9 originated from Pasadena. (14RT 1171.) The trial court, however, stated:

> Listen, let's get this out. I have said it before, I don't give gangs much stature. [¶] I think we all know from the last ten years what they do, how they operate and, only if it is relevant to this case, what they are doing.

(14RT 1172.)

When Detective Carter was asked whether he looked at Hodges while at the hospital, appellant Newborn's counsel objected to that area of questioning as irrelevant. The trial court stated:

> I presume the People's philosophy of the case is a retaliation shooting. They are trying to establish that the defendants possibly, mistakenly or some other way associate with a gang, retaliation for the shooting.
>
> I said I will let the People go through this rather briefly. You can cross-examine on it. I find it to be somewhat relevant. I understand your objection.

(14RT 1173.)

Appellants Holmes and McClain assert that over defense objection, Deputy Keeling was permitted to testify that his job was to interact with gang members in custody. (AHOB 141; AMOB 177.) The defense, however, did not object to this testimony below. (See 19RT 1935.)

D. The Trial Court Properly Admitted Gang Photographs, Identifications, And History Evidence

On appeal, this Court applies an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Guerra, supra*, 37 Cal.4th at p. 1140.) A trial court's decision to admit expert testimony is reviewed for abuse of discretion. (*People v. Prince, supra,* 40 Cal.4th at p. 1222.) In determining the admissibility of expert testimony, the pertinent question is whether even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (*Ibid.*) This Court has admitted expert testimony regarding gang culture and witness intimidation by gang members. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 944-949.) This Court has also recognized the subject matter of the culture and habits of criminal street gangs satisfies the criterion of admissible expert testimony under Evidence Code section 801. In *People v. Champion, supra,* 9 Cal.4th at p. 922, this Court approved the

admission of a juvenile gang expert's testimony on the defendants' gang membership as relevant to establish their identities as perpetrators of the charged offenses and to explain why the victims, who were not gang members, were targeted. Likewise, Detective Carter's testimony was relevant to establish the identities of the perpetrators in the charged offenses. (See Argument V., *ante*.)

As to appellant Holmes's claim that gang membership evidence was weak as to him, appellant Holmes was able to underscore this alleged weakness through cross-examination of Detective Carter. For instance, as to People's Exhibit 4, Detective Carter agreed that he had no idea whether the three other individuals in the photographs were P-9 members and that appellant Holmes was not in the photograph. (14RT 1176.) Detective Carter also testified during cross-examination that he did not know two of the individuals in People's Exhibit 5, that appellant Holmes was not in the photograph, and that it was not rare for people who were not associated with P-9 gang members to be seen with P-9 gang members. (14RT 1176-1177.) Detective Carter also agreed that the names "Karl," "Holmes," and "Boom" were not listed on the bandanna in People's Exhibit 6. (14RT 1178.) Detective Carter also did not know who wrote on the bandanna. (14RT 1179.)

E. Prosecutorial Misconduct

Appellants Holmes and McClain argue that the prosecutor committed misconduct. Specifically, they argue either individually or together that the prosecutor: (1) asked the jury to solve social problems; (2) appealed to the jurors' fears for their own safety; (3) argued guilt by association; (4) misstated evidence; (5) argued evidence that the trial court had stricken; and (6) shifted the burden of proof to the defense. (AHOB 145-148; AMOB 189-200.) The applicable law for claims of prosecutorial

misconduct has been previously set forth (see Argument XI.B., *ante*). Respondent submits that the prosecution did not commit misconduct.

1. Request to Solve Social Problems

Appellants McClain and Holmes argue that the prosecutor improperly asked the jury to solve social problems. (AHOB 146; AMOB 190.) Respondent submits that the prosecutor did not commit misconduct.

Appellant Newborn's counsel argued that the prosecution's theory that Hodges was killed by Crips in a gang shooting, was incorrect:

> and, if you listened carefully, we know that that wasn't the situation at all. Fernando Hodges was killed by Felton Leagons and Dawon Green, P-9 fellow gang members and they were charged with that murder. [¶] . . . This is testimony of paramedic Bergstrom.

(44RT 4579-4580.) Appellant Newborn's counsel also argued that the security guards at the hospital "added nothing on" appellant Newborn. (44RT 4583-4584.)

In response to these arguments, the prosecutor argued on rebuttal:

> It is a fact that at or near 7:30 p.m. on Halloween night Fernando Hodges was gunned down. And it is a fact that everybody that night thought that the perpetrators were Crips.
>
> Now, there was a little smidgen of testimony by the paramedic Bergstrom about being in some proceeding involving Felton Leagons and Green, but we don't know what that proceeding was. We don't know if it was a coroner's hearing, a grand jury proceeding, a civil proceeding. That is just sort of smoke because the issue is not what sort of proceeding Bergstrom was in, whenever it happened; the issue is what did the P-9's think when Fernando Hodges was laying there in the Community Arms just days after a fellow P-9 had gunned down a Raymond Crip, Robert Lee Price.
>
> What were the P-9's thinking? Well, you heard Herb tell you what the P-9's were thinking. It was the Crips who shot Fernando Hodges. There is no dispute about that. This Leagons and Green stuff, that's nonsense. That night the retribution, the revenge, the payback, the smoking is going to

be directed at the Crips because of this (pointing at photograph of Fernando Hodges). And this (pointing at photographs of victims Coats, Crawford and Evans) is a result of that, Herbert McClain. For had McClain not taken it upon himself to be some sort of Community Arms enforcer, to keep the Crips out because he is a big old man in Community Arms and hanging out with his P-9's, had he not shot Robert Lee Price, this would not have happened.

And this shooting of Fernando Hodges was the beginning of the end for three kids who happened to be in the wrong place at the wrong time wearing the wrong attire, being too big for their age, not smart enough not to confront cars. Can you believe that? You can't even get in a confrontation with cars. You don't do anything. You have to live in fear.

You have to live like Horace Carlyle says. He works at the hospital. This guy is a security guard. He is a security guard and he said, "You know what? Yeah, all these gang members are out there and I don't see them. If they don't have a gun, if they're not causing trouble, I don't see them."

This fear is pervasive, it is invasive, it is wrong, it must stop and it must stop here in this courtroom now. This was the beginning of the end for three boys. And this was caused by him, for starting all this stuff happening.

(44RT 4626-4627.)

Here, as a preliminary matter, appellants McClain and Holmes forfeited this claim by failing to object to the prosecutor's argument. (*People v. Brown, supra*, 31 Cal.4th at p. 553; see 44RT 4626-4627.) Appellant McClain appears to suggest that the defense had objected to these arguments when the defense objected to the display of photographs of the victims and coroner's diagrams as appealing to passion and prejudice. (See AMOB 193.) However, those objections were only to the display of the victims' photographs and the coroner's diagrams and fail to cover the objections raised now for the first time on appeal. (Compare 44RT 4701-4703, 4713-4716.) Accordingly, this claim was not preserved for appeal.

Furthermore, the prosecutor's statement was a fair response to the defense's argument that Leagons and Green killed Hodges. The prosecutor emphasized the identity of Hodges's actual killers was irrelevant and that the P-9's belief as to who murdered Hodges (i.e., the Raymond Crips) was relevant as to the motive for the Halloween murders. The prosecutor also fairly responded to the defense's criticism that the security guard's testimony "added nothing." The prosecutor explained that Horace Carlyle, the security guard at the hospital, did not testify to any additional detail out of fear of the gang members. This argument was based on Carlyle's testimony: "Well, they would scare me. I was scared. I don't mean scared scared; but yeah, I was aware of them. I was watching." (15RT 1255.) He also testified that he did not note the physical features of any of the gang members and did not look at them because the hospital was "a neutral territory. Unless they are carrying a gun or making a direct threat to patient or a visitor, I don't see them." (15RT 1256.) And while the prosecutor stated that the fear needed to stop in the courtroom, it was only a fleeting remark and did not incite the passions and prejudices of the jury. (See *People v. Parson, supra*, 44 Cal.4th at p. 364.) Placed in context, the prosecutor's statement was neither deceptive nor reprehensible. (See *People v. San Nicolas, supra*, 34 Cal.4th at p. 665.) In addition, the argument did not inject such unfairness to make the resulting conviction violate due process. Read in context, the prosecutor was not asking the jury to solve social problems but to render a verdict without fear.

2. Appealing To Jurors' Fears

Appellants Holmes and McClain argue that the prosecution treated the witnesses as if they were in grave danger and appealed to the jurors' fears for their own personal safety and of gangs. (AHOB 146-147; AMOB 193-196, 198-200.) Here, the prosecution did not treat the witnesses as if they were in grave danger. Instead, the prosecution simply acknowledged the

facts in evidence that these witnesses and their family members had received threats and that these threats affected their testimony, which was relevant. (See, e.g., 43RT 4463 ["The reality is, ladies and gentlemen, our witnesses have been threatened and intimidated. We heard that over and over and over again. They have come to court at the risk of personal harm and personal jeopardy, some of them albeit reluctantly."]; see Argument XII.A., *ante*)

Likewise, the record does not support appellants' argument that the prosecution appealed to the jurors' fears for their own safety. Contrary to this Court's instruction, appellants take the prosecutors' arguments out of context. (See *People v. San Nicolas, supra,* 34 Cal.4th at p. 665 [prosecutor's statements must be viewed in the context of the argument as a whole].) For instance, when the defense objected to the prosecutor's argument regarding Pina's testimony as "suggesting to the jurors that their lives are somehow in danger," the prosecutor stated, "I wasn't suggesting that at all." (44RT 4663) The trial court overruled the objection and explained, "I think he can argue the fact why a witness may or may not be hesitant to testify." (44RT 4663.)

In the same vein, appellants cite to another passage out of context. They argue that the jurors would believe that appellants had "the juice to get you." (AHOB 147-148; AMOB 194.) Instead, prosecutor's argument made no such suggestion. Rather, the prosecutor addressed the defense's argument that the witnesses did not testify truthfully because they were motivated by such things as reward money and gang rivalry. (44RT 4697-4698.) The prosecutor then stated:

> Now Troy [Welcome] isn't coming here to take care of competition. Troy is coming here to tell you exactly what it was that he heard. These people have everything to lose and very little to gain. Even Pina was vilified. You know, of all the people in the world to lie on, to fib about, to implicate,

> you are going to lie on Lorenzo Newborn, you are going to lie on Karl Holmes, you are going to lie on Herb McClain?
>
> These people have the juice to get you. *Maybe that was an unwise choice of words*. These people have the power and the connections to get you, to make you pay for lying on them. So why choose them to lie on.

(44RT 4698, italics added.) The prosecutor immediately retracted the statement at issue. Viewed in the context of the argument as a whole, the prosecution was not arguing about the jurors' safety, but was referring to the evidence of threats made against witnesses and the witnesses' credibility. (44RT 4697-4698; see also 43RT 4463-4465.)

3. Improper Vouching

Appellant Holmes contends that the prosecutor improperly vouched for the truth of the witnesses' grand jury testimony in stating that the grand jury was a sanctuary that provided safety from the intimidating scowls of convicted gang members. (AHOB 146-147, citing 44RT 4630-4631.) Appellants Holmes forfeited this claim by failing to object to the prosecutor's argument. (*People v. Bonilla, supra,* 41 Cal.4th at p. 336; see 44RT 4630-4631.)

In any event, the prosecutor did not commit misconduct. "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper." (*Id.* at p. 337, quoting *People v. Frye, supra,* 18 Cal.4th at p. 971.) Here, the prosecutor addressed the discrepancies between Lachandra Carr's statements to police, her grand jury testimony, and her trial testimony. He argued that Lachandra Carr's grand jury testimony was the truth, and that Carr was not truthful at trial, in part because the grand jury provided sanctuary and safety. (44RT 4630-4631.) The prosecutor explained: "Now

she is in court, the press is here, people from the neighborhood are here, everybody knows who she is, is there maybe some incentive for her to say, 'oh, I never said that. Oh, I lied. Oh, I made it up. . . .' That is what she is testifying to now. She said she heard everything from Bowen." (44RT 4631.)

The prosecutor's challenged remarks fall within the wide latitude given to prosecutors during argument. On March 2, 1994, Carr testified before the grand jury. (18RT 1823-1824.) She was afraid of Bailey, Bowen, and appellants Holmes and Newborn at the grand jury. (19RT 1849.) At trial, Carr initially disavowed her statements to the police and disavowed her grand jury testimony. (18RT 1823; 19RT 1839.) The prosecutor's comments cannot be characterized as improper vouching. (See *People v. Bonilla, supra*, 41 Cal.4th at p. 337.)

4. Guilt by Association Argument

Appellants Holmes and McClain contend that the prosecutor argued that appellants were guilty by association. (AHOB 145-146; AMOB 198-199.)[56] Appellants McClain and Holmes forfeited this claim by failing to object to the prosecutor's argument. (*People v. Brown, supra*, 31 Cal.4th at p. 553; see 44RT 4626-4628.) Accordingly, this claim was not preserved for appeal.

It is improper for a prosecutor to argue that a defendant is guilty by association. (See generally, *People v. Lopez* (2008) 42 Cal.4th 960, 967.) But the prosecutor here did not argue "guilt by association" by simply linking appellants Holmes and McClain to the P-9's. Instead, these remarks clearly were part of the prosecutor's overall attempt, based on the

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[56] Although Appellant McClain has characterized the prosecutorial misconduct as one that appealed to fear of gangs and guilt by association, the claim is more akin to one of an appeal to fear of gangs than of guilt by association. (See AMOB 198-199.)

evidence, to show a motive for the Halloween murders. (See 44RT 4626-4628; see e.g. 44RT 4628 ["You may consider motive or lack of motive as a circumstance in this case. . . . We've got a whale of motive . . . . We have got very, very heavy motive going on here; and you should give it very, very heavy weight."].) Accordingly, the prosecutor did not commit misconduct. (See *People v. Lopez*, *supra*, 42 Cal.4th at pp. 967-968.) As previously asserted, the evidence was sufficient to support each of appellants' convictions. (See Argument V., *ante*.)

5. Misstatement of Evidence and Misleading the Jury

Appellant McClain argues that the prosecutor misstated the evidence and argued stricken evidence when he said that Carlyle saw gang members at the hospital, after the trial court struck from the record Carlyle's testimony that he suspected they might be gang members. (AMOB 196-197.) Here, as a preliminary matter, appellants McClain and Holmes forfeited this claim by failing to object to the prosecutor's argument. (*People v. Brown, supra*, 31 Cal.4th at p. 553; see 44RT 4628-4629.) Accordingly, this claim was not preserved for appeal.

Furthermore, this claim is meritless. The record does not support the premise of appellant McClain's claim. During Carlyle's testimony, the following colloquy occurred:

> Q. Was there anything about that group that appeared somewhat unusual to you?
>
> A. Yeah. They were quiet.
>
> Q. Why would that be unusual?
>
> A. Because usually they are not quiet.
>
> Q. Did you form an opinion that these may have been gang members?
>
> A. It would be my individual opinion that they were probably some type of gang relationship. I have no proof of that.

Q. On what was your opinion based?

A. Just based on experience, multiple shootings over a number of years.

Q. Okay. Could you elaborate on that, please?

[Appellant Newborn's counsel]: Objection.

The Court: Sustained.

Q. By [the prosecutor]: Is it unusual when there is a – strike that.

So you saw these people who appeared to be gang members and you said they were – how did you describe their demeanor?

(15RT 1254-1255.) The record clearly indicates that Carlyle testified that the group of people that he saw appeared to be gang members. The trial court did not strike that testimony. Rather, the trial court sustained an objection on the request that Carlyle elaborate on his experience of multiple shootings that was a basis for his opinion the persons were gang members. (15RT 1254.) Therefore, the prosecutor did not misstate the evidence and did not rely on evidence that had been stricken in his argument.

Appellant McClain also argues that the prosecutor misled the jury and shifted the burden of proof when he argued that no officer testified that members of P-9 could not go into King's Manor. (AMOB 197.) Specifically, appellant McClain contests the prosecutor's argument regarding Mario Stevens's credibility:

King's Manor. Mr. McClain told you he would have no business going up to King's Manor because that is a place where he wouldn't be welcome, that the P-9's cannot hang out there.

Detective Carter, Lopez, Luna, all those gang officers testified here; and how come we don't have anything to corroborate that, in fact, Herbert McClain can't go down to King's Manor because there is a do not enter sign regarding P-9's being there? The only thing we have is Herbert McClain's word.

(42RT 4446.)

Initially, appellant McClain forfeited this claim by failing to object to the prosecutor's argument. (*People v. Brown, supra*, 31 Cal.4th at p. 553; see 42RT 4446.)

The ultimate issue is "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Here, the prosecutor merely told the jurors that the gang officers testified, and none of them testified that King's Manor was unsafe for P-9's. This statement was accurate because no officer testified about King's Manor being safe or unsafe for P-9's. Thus, as the prosecutor pointed out, appellant McClain's testimony about King's Manor was uncorroborated. The prosecutor's remark did not shift the burden to appellant McClain. (See *ibid.*; see also *People v. Hughes* (2002) 27 Cal.4th 287, 372 [prosecutor allowed to comment on failure of defendant to introduce material evidence].) There was no misconduct.

6. Shifting the Burden

Appellant McClain also argues that the prosecutor improperly shifted the burden of proof onto him. (AMOB 197-198.) This claim is meritless.

First, appellant McClain contends that the prosecutor blamed him for the poor quality of the prosecution's witnesses. Prosecutor Callahan said:

> We never told you our witnesses were going to be angels. Mr. Myers told you that in opening statement. We were up front about the fact that our witnesses were not the greatest people in the world.
>
> But who do you think people like Lorenzo Newborn, Karl Holmes or Herb McClain would associate with? With whom do you think they would talk, confide, hang out? They hang out with people like themselves. . . .

(43RT 4462-4463.) Appellant McClain has forfeited this claim by failing to object to the prosecutor's argument. (*People v. Brown, supra*, 31 Cal.4th

at p. 553; see 43RT 4462-4463.) In any event, the remark was not such as to deny appellant McClain "a fair trial, divert the jury from its proper role, or invite an irrational, purely subjective response." (See *People v. Visciotti* (1992) 2 Cal.4th 1, 83 & fn. 46.)

Second, appellant McClain complains that the prosecutor argued that if anyone in P-9 resembled appellant McClain, he would have presented the jury a photograph of that person. (AMOB 198.) During his defense, appellant McClain presented evidence that he had worn his hair long since 1986. Darrell Johnson and Ishmael Offutt also wore their hair long and were Hodges's friends. (36RT 3970.) The prosecutor argued:

> If Ishmael Offutt looked anything like Herb McClain did in October, 1993, you would have a picture of it. You would have testimony concerning it. You would have other P-9's coming in and saying, "Oh, yeah, those two are often mistaken." They looked nothing alike. In fact, if any other P-9 had a receding hairline and a long jheri curl, you could bet your boots either McClain would have mentioned that or you would have had a picture of somebody who looked like that, but you don't. And the reason you don't is because there ain't no such person. That type of person does not exist. There is no one in the P-9 who looks anything like Herb McClain. He was unique. He knew he was unique. That's why he shaved his hair off. He knew he was unique. That's why he changed his appearance. Okay.

(44RT 4662.)

A prosecutor's comment upon a defendant's failure to introduce material evidence or to call logical witnesses is not improper. (*People v. Panah* (2005) 35 Cal.4th 395, 464.) Here, by presenting evidence that other P-9 gang members had long hair, appellant McClain suggested that another P-9 gang member could have committed the crimes. The prosecutor's argument was a proper rebuttal to that claim.

F. In Any Event, Any Prosecutorial Misconduct or Error In Admitting the Evidence of Threats, Fear of Testifying, Gang Photographs, Identification, or History Was Harmless

In any event, any misconduct was harmless. (*People v. Huggins, supra*, 38 Cal.4th at p. 208 [harmless error standards are *Chapman v. California*, *supra*, 386 U.S. at p. 24 for federal constitutional violation, and *People v. Watson, supra*, 46 Cal.2d at p. 836 for state law violation].) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye , supra,* 18 Cal.4th at p. 970.)

As to the gang evidence, any error in admitting the complained of portions of the gang evidence was harmless. The history of the P-9 gang, photographs of gang members, and other passing information about the gang were minor portions of the gang evidence. The primary point was that appellants were P-9 members who had a motive to exact revenge against perceived rival Crip gang members as a result of Hodges's murder. Since the evidence demonstrating that point was properly admitted, the additional evidence complained of by appellants would not have been prejudicial to appellants' case.

Moreover, the prejudicial effect of all the gang evidence was tempered by the trial court's statements and instructions to the jury. During jury selection, the trial court stated to prospective jurors:

> And there is obviously an issue of gangs because on page 31 it is written in there; it says gangs. Do you have a general impression or opinion of street gangs? Most of you put down yes; some said no.
>
> During the trial if any person is described as a gang member, will this description cause you to view the person differently? Some say yes; some say no. We will probably want to know.

> Again, as the defendants sit there, they are presumed to be innocent until the contrary is proved. The fact that they belong to a gang or may not belong to a gang does not make them, per se guilty of the crime.

(11RT 535.) Furthermore, the jury was instructed in relevant part:

> You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. . . . You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(6CT 1484-1485.) The jury is presumed to have followed the court's instructions. (*People v. Doolin, supra,* 45 Cal.4th at p. 444.)

Also, the closing arguments arguments of the prosecutor, even if error, were not terribly damaging to appellants. The United States Supreme Court has recognized that:

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

(*Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Additionally, any error was cured in part by the responding closing arguments by the defense. Appellant McClain's counsel argued that the jury could not convict appellant McClain simply because he was a gang member. She stated:

> And what the prosecution is suggesting to you that you do is to take this suspect identification [by Pina] and convict my client because he's a gang member, because he's not a nice person.

* * * * *

> You know, let me digress for a moment. I think of the McCarthy era, when the question was posed to people, "Are you now or have you ever been a member of the Communist party?"
>
> That's what's happening here. "You are now and you have been a member of P-9; therefore, you have no constitutional rights. You are a gang member; we don't have to treat you like a human being." A very dangerous thought, ladies and gentlemen. It's a thought that will allow you to convict innocent people. It's a thought that will allow the police to run ram shod – roughshod over people's rights. And you are the only people who stand between the police and Herbert McClain.
>
> And you know, quite frankly, he is not a likable fellow; but that's no reason to convict him. And if he doesn't respect women, that's no reason to convict him. They have got to give you credible evidence. . . .

(43RT 4489-4490.) On the facts of this case, any prosecutorial misconduct or error in admitting the evidence of threats, fear of testifying, gang photographs, identification, or history was harmless. (See Argument V., *ante*.)

XIII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT MCCLAIN'S ARREST WITH BOWEN FOR GUN POSSESSION

Appellant McClain contends the trial court erred in admitting evidence of his arrest with Bowen for gun possession. (AMOB 124-154.)

A. Relevant Facts and Proceedings

The prosecution filed a motion to admit evidence of appellants' prior arrests with the codefendants, including appellant McClain's arrest with Bowen for possession of weapons. The prosecution argued that the criminal conduct involving codefendants disclosed a distinctive modus operandi and was admissible as proof of conspiracy and identity. (5CT 1252-1257.) Appellants opposed the motion. (5CT 1303-1309.)

At the hearing on the motion, the prosecution argued that the prior bad act was relevant to show that coconspirators appellant McClain and Bowen were together thirteen months prior to the Halloween murders and that they had access to weapons. The prosecutor argued that the prior bad act was relevant to show that Bowen and appellant McClain had a relationship, in order to establish the existence of a conspiracy. The prosecutor also stated: "More importantly, because they were together committing criminal activity the relevance and probative value is that it would show that Mr. McClain would enter into a conspiracy with somebody with whom he is familiar and somebody who he knows would do activities that are not within the bounds of the law." (22RT 2165.) In response to the prosecutor's argument that it would be difficult to show that appellant McClain knew the other defendants, appellant McClain's attorney offered to stipulate that appellant McClain knew Bowen. (22RT 2166.) The trial court responded, "I think he really said access to the guns." (22RT 2168.) The court found the prior bad act admissible and stated, "It may be prejudicial, but not unduly so under 352." (22RT 2169.)

Later that day, appellant McClain's counsel asked the trial court to reconsider its ruling on the admissibility of the uncharged offense because both the uncharged offense and the Price shooting occurred at the Community Arms. The trial court ruled that the uncharged offense was admissible to show accessibility to guns, but that the prosecution was not to introduce evidence that the incident occurred at the Community Arms. (22RT 2205-2209.)

B. The Prior Uncharged Act Was Admissible Under Evidence Code Section 1101, subdivision (b)

On appeal, the trial court's determination of this issue is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) In reviewing the trial court's ruling, this Court considers the facts before the

trial court at the time of its ruling. (*People v. Welch* (1999) 20 Cal.4th 701, 739.)

Evidence of a person's prior uncharged act is admissible to prove motive, intent, knowledge, identity, or other facts that are not related to a person's disposition to commit such crimes. (Evid. Code, § 1101, subd. (b); *People v. Kipp, supra*, 18 Cal.4th at p. 369.)[57] Other crimes evidence is relevant and material when it concerns an ultimate fact or an element of the charged offenses. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.) Here, appellants were charged with conspiracy to commit murder. (3CT 641.) Specific intent to agree or conspire to commit an offense was an element of the conspiracy charge. (*People v. Morante, supra*, 20 Cal.4th at p. 416 ["A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy."].) These elements may be established by circumstantial evidence. They may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. (*People v. Bogan, supra,* 152 Cal.App.4th at p. 1074.) Even though appellant McClain would have been

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[57] Evidence Code section 1101, subdivision (b) provides:

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

willing to stipulate that he knew Bowen, the stipulation did not come close to circumstantial evidence of specific intent that the prosecution sought to have admitted to prove the conspiracy charge.

Evidence admissible to show intent requires the least similarity to the charged crimes. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) In this case, evidence that appellant McClain and Bowen had been arrested together for possession of weapons was relevant and material in proving appellant McClain's intent to agree to commit murder. Appellant McClain's prior arrest with Bowen was evidence of their relationship and activities, which was circumstantial evidence establishing intent. (See *People v. Bogan, supra,* 152 Cal.App.4th at p. 1074.)

Appellant McClain largely focuses on arguing that the other crimes evidence was not admissible to prove identity. (AMOB 128-138.) But identity was not the only basis of admissibility that the prosecution proffered. The prosecution also argued that the evidence was admissible to prove the conspiracy. (See 5CT 1252-1257; see also 42RT 4344-4345 [jury instructed that other crimes admitted for limited purpose of showing that the existence of a conspiracy and that a defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged].) Furthermore, the prosecution argued at the hearing on the motion that the prior bad act was relevant to show that Bowen and appellant McClain had a relationship that included criminal activity, in order to establish the existence of a conspiracy. (22RT 2165.) The uncharged offense evidence was admissible under Evidence Code section 1101(b).

C. The Trial Court Properly Admitted the Prior Bad Act Under Evidence Code Section 352

Pursuant to Evidence Code section 352, the court may exercise its discretion to exclude evidence if its probative value is outweighed by a

danger of undue prejudice. (Evid. Code, § 352.) The trial court's ruling is entitled to deference. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) This Court has explained:

> [A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."

(*People v. Karis* (1988) 46 Cal.3d 612, 638.)

"The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp, supra*, 18 Cal.4th at p. 371.) Additionally, the factors affecting the prejudicial effect of the uncharged act include whether the uncharged act is stronger or more inflammatory than the evidence of the charged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.) Appellant McClain concedes that possession of a firearm was not as inflammatory as the charged offenses. (AMOB 141-142.) The amount of time between the uncharged offense and the charged offense (13 months) also did not demonstrate that the uncharged offense evidence was particularly prejudicial. Appellant McClain recognizes that the time elapsed was less than the time elapsed in *Ewoldt*. (AMOB 142.)

Appellant McClain asserts that the trial court was operating under an erroneous belief that its discretion to exclude the evidence under Evidence Code section 352 had been abrogated. He claims that the trial court cited the effect of Proposition 115 on its 352 analysis. (AMOB 142, citing 22RT 2169 and 22RT 2208.) But the trial court made no such statement. Rather,

the trial court simply indicated that it had been following the guidelines of the federal court, because of Proposition 115. In a separate sentence, the trial court then stated that the evidence was admissible. The court then finally stated that the evidence was not unduly prejudicial under Evidence Code section 352. (22RT 2169.) It is evident that the trial judge was aware of his discretion to exclude the evidence under Evidence Code section 352.

Appellant McClain also asserts that the trial court "acknowledged prejudice." (AMOB 142.) However, he takes the trial court's statement out of context, and the statement was no acknowledgment of prejudice under 352. The trial court made a point of stating: "But the jurist that said that all evidence is prejudicial is the Honorable Ron George." (22RT 2169.) The trial court then stated regarding the uncharged offense evidence: "It may be prejudicial, but not unduly so under 352." (22RT 2169.)

Furthermore, the trial court limited any prejudicial impact of the uncharged crimes by instructing the jury with CALJIC No. 2.50 that such evidence could not be considered to prove that a defendant was a person of bad character or that he had a disposition to commit crime. (42RT 4344; CT 1510; *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

D. In Any Event, Any Error Was Harmless

In any event, any error in admitting the uncharged offense evidence was harmless error under *People v. Watson, supra*, 46 Cal.2d 818. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) The evidence against appellant McClain was strong. (See Argument V., *ante*.)

Appellant McClain contends that the admission of the evidence violated his due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 and that the evidence injected unreliability into his capital trial and sentencing procedures. (AMOB 144, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100

S.Ct. 2227, 65 L.Ed.2d 175] and *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) The admission of the evidence under Evidence Code section 1101(b) is "a garden-variety evidentiary issue under state law" that did not implicate defendant's constitutional rights. (See *People v. Abilez* (2007) 41 Cal.4th 472, 503.) *Woodson* invalidated a law that provided a mandatory penalty of death for all first degree murders. Appellant McClain fails to explain how that case has any relevance to the instant case. (*People v. Prince, supra,* 40 Cal.4th at p. 1217, fn. 4.)

XIV. THE JURY WAS PROPERLY GIVEN CALJIC NO. 2.03

Appellant Holmes contends that the trial court violated his due process right to a fair trial by giving CALJIC No. 2.03.[58] He argues that the instruction is an improper pinpoint instruction and permits the jury to consider any willfully false or deliberately misleading statement as a circumstance tending to show a consciousness of guilt. (AHOB 199-203)

This Court has repeatedly rejected the criticisms of CALJIC No. 2.03 that appellant Holmes raises. (*People v. Richardson* (2008) 43 Cal.4th 959, 1019; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532.) Appellant Holmes has not presented any new argument or authority which this Court has not already considered and rejected on this issue. Therefore, appellant

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[58] The trial court instructed the jury:

> If you find that before this trial defendant made a willfully false or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(42RT 4337; 6CT 1493.)

Holmes's contention should be rejected and there is no need to revisit established authority.

Appellant Holmes contends that there was insufficient basis to give CALJIC No. 2.03 as to him. (AHOB 205-206.) He, however, appears to concede that there was sufficient evidence to give the instruction as to appellants McClain and Newborn. (AHOB 204.) CALJIC No. 2.03 applied to appellant Holmes only if the jury found that he had made a willfully false or deliberately misleading statement concerning the instant crimes. If the jury did not find that appellant Holmes had made such statements, it would have disregarded CALJIC No. 2.03 as to appellant Holmes. (See 6CT 1581 [CALJIC No. 17.31]; *People v. Richardson, supra*, 43 Cal.4th at p. 1020.)

Moreover, any instructional error was mitigated by language contained in CALJIC No. 2.03, which instructs such a statement was insufficient by itself to prove guilt, and its weight and significance, if any were matters for the jury's consideration. (*People v. Valdez, supra,* 32 Cal.4th at pp. 138-139; see CT 1493.) The evidence against appellant Holmes was strong. (See Argument V., *ante*.) Under the circumstances, reversal is not warranted. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1225.)

XV. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 2.06

Appellant McClain contends that the trial court deprived him of his right to present a defense, due process of law, confrontation, and a fair trial by failing to tailor CALJIC No. 2.06. (AMOB 249-261.) Appellant Holmes contends that the trial court deprived him of his due process right to a fair trial by giving CALJIC No. 2.06 because there was insufficient evidence to support a consciousness of guilt instruction as to him. (AHOB 204-206.) Respondent submits that the trial court properly declined to modify CALJIC No. 2.06.

A. Relevant Facts and Proceedings

The prosecutor requested CALJIC No. 2.06 (Efforts to Suppress Evidence) because there was evidence that appellant McClain cut his hair days after the offenses and that appellant Newborn disposed of a gun at Terranius Pitts's. (41RT 4293.) The defense objected. (41RT 4294.) The trial court allowed the instruction. (41RT 4294.) The trial court instructed the jury as follows:

> If you find that a defendant attempted to suppress evidence against himself or herself in any manner, such as by the intimidation of a witness, by an offer to compensate a witness, by destroying evidence, by concealing evidence, by cutting hair, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(42RT 4337; see 6CT 1494.)

B. Appellant McClain Forfeited His Argument That the Trial Court Should Have Sua Sponte Modified CALJIC No. 2.06; in Any Event, the Trial Court Was Not Required to Sua Sponte Modify CALJIC No. 2.06

Appellant McClain first contends that the trial court failed to first determine whether there was an evidentiary basis for the conduct listed in CALJIC No. 2.06 and to appropriately modify the instruction. He, however, concedes that the jury was entitled to determine whether cutting his hair was evidence of consciousness of guilt. (AMOB 250, fn. 98.) Appellant McClain never argued that CALJIC No. 2.06 should have modified to delete these examples. Respondent submits that because appellant McClain never requested any modifications to CALJIC No. 2.06, his claim fails. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142-1143 [if the defendant believed that a standard instruction should have been modified, he was obligated to request it].)

C. The Trial Court Properly Gave CALJIC No. 2.06

In reviewing claims of instructional errors, the reviewing court looks to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) The instructions are interpreted so as to support the judgment if they are reasonably susceptible to such an interpretation. The jury is presumed to understand and correlate all instructions given. (*People v. Guerra, supra,* 37 Cal.4th at p. 1148.) A federal due process violation occurs if there is a reasonable likelihood that the jury misunderstood and misapplied the instruction such that the error so infected the entire trial as to violate due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385].)

Here, the prosecution explained to the trial court that CALJIC No. 2.06 was relevant in two ways:

> We want [CALJIC No. 2.06] because Mr. McClain cut his hair, which is destroying evidence; and we want [CALJIC No. 2.06] because Mr. Newborn got rid of a gun at Terranius' if they believe De Sean Holmes's testimony. That is why we want 2.06, and that is one to which defense counsel objects.

(41RT 4293.) Indeed, evidence was presented at trial that appellant McClain changed his appearance by cutting his hair. Witnesses testified that one of the perpetrators had long hair, such as appellant McClain's before he cut it. (2CT 453-454; 31 RT 3235; 35RT 3794-3795; 71RT 7086.) DeSean Holmes testified that appellant Newborn told him that they had taken a gun to Terannius's house and disassembled it there. (30RT 3099.) Accordingly, the evidence was sufficient to give the instruction. (*People v. Wilson* (2005) 36 Cal.4th 309, 330.)

Appellant McClain argues that CALJIC No. 2.06 was unfairly partisan and argumentative because it specifically referred to the evidence that he had cut his hair after the offenses, permitted the jury to draw irrational permissive inferences about his guilt, and lowered the prosecutor's burden. (AMOB 251-261.) This Court has rejected similar arguments.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to CALJIC No. 2.06 that it specifically referred to evidence that could be interpreted as a consciousness of guilt. Additionally, courts have consistently held that a jury could infer from a change of appearance that there was a consciousness of guilt. (See e.g., *People v. Echevarria* (1992) 11 Cal.App.4th 444, 452 [defendant shaved distinctive beard and mustache and cut hair]; *People v. Huston* (1989) 210 Cal.App.3d 192, 218 [defendant shaved distinctive mustache].) Moreover, CALJIC No. 2.06 insured that the jury would not convict appellant McClain solely on the fact that he cut his hair. CALJIC No. 2.06 expressly instructs that such conduct was insufficient by itself to prove guilt, and its weight and significance, if any, were matters for the jury's consideration. (42RT 4337.)

Appellant McClain concedes that this Court has repeatedly rejected the assertion that CALJIC No. 2.06 lowers the prosecutor's burden of proof. (AMOB 259; see *People v. Wilson*, *supra*, 36 Cal.4th at p. 330.) Appellant McClain has not presented any new argument or authority that this Court has not already considered and rejected on this issue. Therefore, appellant McClain's contention should be rejected and there is no need to revisit established precedent.

Appellant Holmes contends that there was insufficient basis to give CALJIC No. 2.06 as to him. (AHOB 205-206.) He, however, appears to concede that there was sufficient evidence to give the instruction as to appellants McClain and Newborn. (AHOB 204.) CALJIC No. 2.06

applied to appellant Holmes only if the jury found that he had attempted to suppress evidence against himself in any manner. If the jury did not find that appellant Holmes had attempted to suppress evidence against himself, it would have disregarded CALJIC No. 2.06 as to appellant Holmes. (See 6CT 1581 [CALJIC No. 17.31]; *People v. Richardson, supra*, 43 Cal.4th at p. 1020.)

D. In Any Event, Any Instructional Error Was Harmless

Any instructional error was mitigated by language contained in CALJIC No. 2.06, which instructs such conduct was insufficient by itself to prove guilt, and its weight and significance, if any, were matters for the jury's consideration. (*People v. Valdez, supra,* 32 Cal.4th at pp. 138-139; see CT 1494.) As previously argued, if the jury did not find that appellants had suppressed evidence against them, it would have disregarded CALJIC No. 2.06. (*People v. Richardson, supra*, 43 Cal.4th at p. 1020.) The evidence against appellants Holmes and McClain was strong. (See Argument V., *ante*.) Under the circumstances, reversal is not warranted. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1225.)

XVI. THE TRIAL COURT PROPERLY INSTRUCTED ON OTHER CRIMES

Appellant McClain contends that the trial court gave erroneous instructions regarding other crimes (i.e., CALJIC Nos. 2.50, 2.50.1 and 2.50.2). Specifically, he contends that these instructions lessened the prosecutor's burden and permitted the jury to find him guilty of the charged offenses by relying on facts found only by a preponderance of the evidence. (AMOB at 261-277.) Respondent submits that the trial court properly instructed on other crimes.

Appellant McClain objected to CALJIC No. 2.50. The prosecution argued that CALJIC No. 2.50 was appropriate, as were "the following two

instructions," apparently referring to CALJIC Nos. 2.50.1 and 2.50.2. (41RT 4305.) The trial court overruled the objection. (41RT 4306.)

The trial court instructed the jury, in relevant part:

> Evidence has been introduced for the purpose of showing that a defendant committed a crime other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.
>
> The existence of a conspiracy.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(42RT 4344-4345; see 6CT 1510 [CALJIC No. 2.50].)

> Within the meaning of the preceding instruction, the other crime purportedly committed by the defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose until you are satisfied that a particular defendant committed the other crime.
>
> The prosecution has the burden of proving these facts by a preponderance of the evidence.

(42RT 4345; see 6CT 1511 [CALJIC No. 2.50.1].)

> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

(42RT 4345-4346; 6CT 1512 [CALJIC No. 2.50.2].)

In *People v. Lindberg* (2008) 45 Cal.4th 1, 33-36, this Court rejected the same claim that appellant McClain now makes. This Court held that there was no reasonable likelihood that the above instructions as a whole led the jury to believe that the prosecution was not required to prove all elements of the charged offense and the special circumstance beyond a reasonable doubt. (*Id.* at p. 35.) This Court explained that CALJIC No. 2.50, as given in *Lindberg* and in the instant case, expressly prohibited jurors from considering other crimes evidence as "pro[of] that defendant is a person of bad character or that he has a disposition to commit crimes." (*Ibid.*; see 6CT 1510.) CALJIC No. 2.50 further instructed jurors to weigh the other crimes evidence "in the same manner as you do all other evidence in the case" and were "not permitted to consider this evidence for any other purpose." (*People v. Lindberg, supra*, 45 Cal.4th at p. 35; see 6CT 1510.)

In arguing that the instructions lessened the prosecutor's burden of proof, appellant McClain primarily relies on a Ninth Circuit decision in *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812. (AMOB 263-267.) The Ninth Circuit has subsequently overruled *Gibson*. (*Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855.)

Appellant McClain also contends that the instructions confused the jury by failing to specify which "other crimes" it could consider and which charges the other crimes evidence applied to. (AMOB 268-272.) He has forfeited this claim on appeal by failing to request clarifying instruction on this point. (41RT 4305; *People v. Valdez, supra*, 32 Cal.4th at p. 113 [a defendant "may not . . . 'complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete.'")

Appellant McClain cites to *People v. Rollo* (1977) 20 Cal.3d 109, 123, footnote 6. In *Rollo*, this Court found instructional error because the trial court gave a limiting instruction that evidence of uncharged crimes could be considered in determining whether the defendant had the intent and knowledge necessary to commit the charged offense, even though no uncharged crimes evidence had been admitted for those purposes. (*Id.* at pp. 115, 122.) This Court held that the trial court erred by providing an instruction that had no apparent application to the facts of the case and might have misled the jury. (*Id.* at p. 123.) This Court noted:

> in any case in which the court has properly admitted both a prior felony conviction of the defendant for the purpose of impeachment and "other crimes" evidence on a substantive issue, the cautionary instruction on the latter point *should* identify the evidence to which it relates."

(*Ibid.*, italics added.) This recommendation contained in footnote six of *Rollo* did not create a sua sponte duty to clarify a limiting jury instruction. And, this Court has repeatedly held that there is no sua sponte duty to clarify jury instructions. (See *Valdez, supra*, 32 Cal.4th at p. 113 [citing Supreme Court cases].)

Here, there was no confusion that the challenged instructions applied to evidence of crimes appellant McClain committed with Bowen. Although appellant McClain argues the instruction could have applied to his four prior convictions, it is not reasonably likely any juror would have interpreted the instructions to allow that. The trial court expressly instructed the jury to consider prior convictions only for the purpose of assessing credibility:

> The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impairs a witness' believability. It is one of the circumstances that you

> may take into consideration in weighing the testimony of the witness.

(42RT 4343-4344 [CALJIC NO. 2.23].) There was no reasonable likelihood that the jury considered appellant McClain's prior convictions as coming within CALJIC No. 2.50.

In any event, any error in failing to sua sponte modify the instructions was harmless under any standard. The prosecutor's argument was that the other crimes evidence demonstrated that appellant McClain could not be believed. The prosecutor never argued that the prior felony convictions could be used in consideration of the Price attempted murder. He never suggested that the prior felony convictions would have a tendency to prove either the conspiracy or that appellant McClain had the knowledge or possessed the knowledge or the means that might have been useful or necessary for the commission of the crime charged. Finally, the evidence against appellant McClain was strong. (See Argument V., *ante*.)

XVII. CALJIC NO. 2.51 PROPERLY STATES THE LAW

Appellant McClain contends that CALJIC No. 2.51 erroneously permits the jury to find guilt based upon motive alone. (AMOB 277-284.) Respondent submits that CALJIC No. 2.51 properly states the law.

The trial court gave CALJIC No. 2.51 as follows:

> Motive is not an element of the crime of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it entitled.

(42RT 4346; see 6CT 1513.)

In *People v. Snow* (2003) 30 Cal.4th 43, 97-98, this Court rejected this claim. This Court explained:

If the challenged instruction somehow suggested that motive alone was sufficient to establish guilt, defendant's point might have merit. But, in fact, the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish all the elements of murder.

(*Ibid.*) Accordingly, based upon settled law, this claim is meritless.

XVIII. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NOS. 1.00, 2.01, 2.51, AND 2.52

Appellant Holmes contends that the trial court violated his due process right to a fair trial by instructing the jury in terms of guilt and "innocence" in CALJIC Nos. 1.00, 2.01, 2.51, and 2.52. (AHOB 196-198.) Respondent submits that the jury was properly instructed with CALJIC Nos. 1.00. 2.01, 2.51, and 2.52.

The trial court gave the following relevant jury instructions:

Ladies and gentlemen of the jury:

You have heard all the evidence and the arguments of the attorneys, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A fact is something proved directly or circumstantially by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the people and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences.

(42RT 4330-4331; see 6CT 1484-1485 [CALJIC No. 1.00].)

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(42RT 4334-4335; 6CT 1491[CALJIC No. 2.01].)

Motive is not an element of the crime of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may

> tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it entitled.

(42RT 4346; see 6CT 1513 [CALJIC No. 2.51].)

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(42RT 4346-4347; see 6CT 1514 [CALJIC No. 2.52].)

The jurors would not have believed the defendants bore the burden to prove their innocence. Taking all the instructions together, as required, the jurors would instead have understood that while the issue before them was the defendants' guilt or innocence, convictions could be returned only if the prosecution had proved the defendants' guilt beyond a reasonable doubt. (*People v. Snow, supra,* 30 Cal.4th at p. 97.) "There was no reasonable likelihood of misunderstanding, the challenged instructions did not deprive the defendant of a fair trial or a reliable penalty determination." (*Ibid.*) In *People v. Kelly* (2007) 42 Cal.4th 763, 792, this Court held that each of these instructions are "unobjectionable" when, as here, "it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof." Accordingly, this claim fails.

XIX. THE JURY INSTRUCTIONS AS TO THE SPECIAL-CIRCUMSTANCE FINDINGS WERE CORRECT

Appellants McClain and Newborn contend that erroneous instructions were given as to the special-circumstance allegations, depriving them of due process and fair trial rights in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (AMOB 285-311; ANOB 207-213.) Respondent submits that the jury instructions as to

the special-circumstance findings were correct and that there was sufficient evidence to support the special-circumstance findings.

The trial court instructed the jury with CALJIC No. 8.80.1 (1993 Revision) as follows:

> If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances is true or not true: that a defendant committed one or more murders in addition to first-degree murder and a murder was committed while lying in wait.
>
> The People have the burden of proving the truth of such a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of murder in the first degree.
>
> You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your findings as to the one or more upon which you do agree.
>
> In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.
>
> You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

(42RT 4375-4376; see 6CT 1564-1565.)

Appellants McClain and Newborn contend that the trial court erred in failing to instruct the jury that a finding of capital eligibility entails at a

minimum that the defendant was "a major participant" in the homicidal conduct, and harbored a mental state of either reckless indifference to human life or intent to kill as to the victims. (AMOB 285-288; ANOB 209-210, citing *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127].) The trial court instructed on the necessity of finding that an aider and abettor entertained an intent to kill; no more was required. Only for a felony-murder special circumstance (§ 190.2, subd. (a)(17)) is a jury required to find that a defendant acted with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded induced, solicited, requested or assisted in the commission of the felony which resulted in the death of a human being. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 & fn. 16; CALJIC No. 8.80.1 (1993 Revision).) Since this was not a felony-murder case, the trial court properly omitted these inapplicable and irrelevant portions of the standardized jury instruction.

PENALTY PHASE

XX. GUILT PHASE ERRORS WERE NOT PREJUDICIAL TO THE PENALTY PHASE

Appellant Holmes contends that the guilt phase errors must be deemed prejudicial on the penalty phase. (AHOB 207-210.) Respondent submits that the guilt phase errors were not prejudicial to the penalty phase.

The jury that found appellants guilty could not agree on the penalty and a mistrial was declared. (7CT 1863, 1888.) The penalty was retried, before a new jury, and it returned a verdict of death. (8CT 2228-2230, 2234-2236, 2240-2242, 2290-2291.) Thus, contrary to appellant Holmes's assertion, any errors that occurred in the guilt phase as to the admission of evidence or instructions could not possibly have affected the penalty jury, which heard a different set of evidence and were given different instructions. Accordingly, appellant Holmes's claim should be rejected.

XXI. THE TRIAL COURT PROPERLY DECLINED TO SEVER APPELLANTS' PENALTY PHASE RETRIAL

Appellants Newborn and Holmes contend that the trial court erroneously refused to sever their penalty phase retrial. (ANOB 239-265; AHOB 241-259.) Appellant McClain contends that the trial court's refusal to sever his penalty phase retrial from his codefendants deprived him of due process, individualized sentencing, and a reliable penalty determination. (AMOB 425-440.) Respondent submits that the trial court properly declined to sever appellants' penalty phase retrial.

A. The Denial of the Motions to Sever Made by Appellants Newborn and Holmes

Appellant Holmes moved to sever his penalty phase retrial from the other codefendants. His motion was based upon the argument that his Eighth Amendment right to individualized sentencing would be violated by a joint penalty phase trial because the jury would consider aggravating evidence admissible only against his codefendants, and appellant McClain's prior and anticipated conduct at trial would be inflammatory and prejudicial as to appellant Holmes. (7CT 1928-1942.) The prosecution opposed the motion to sever. (7CT 1946-1951.) At a pretrial hearing for the penalty phase retrial on March 21, 1996, appellant Newborn also moved to sever. (60RT 5777.) The following colloquy occurred:

> One thing is to get away from Mr. Mc Clain. I don't want to go to trial with Mr. Mc Clain and, if I do, I don't want them reading the testimony that he gave during this case. And I think we have a very good argument that we, "we" Newborn and Holmes, should not be saddled with the obscenities and the profanities that Mr. Mc Clain used during the first trial --
>
> The Court: I agree with that.
>
> [Counsel for appellant Newborn]: -- and with his confession about the intent to kill with premeditation and deliberation.

> The Court: And then they shouldn't be saddled with your client's loudmouth remarks last week.[59]
>
> They are all together. They told the Court this and the jury, they're P-9's, they're damn proud of it.
>
> They won't be severed. I don't find any rationale for that argument at all. I am not mad at you. I am not happy with their attitude. They are not going to run this Court. I am going to run this trial.

(60RT 5777-5778.)

On April 9, 1996, appellant McClain's request to represent himself was granted. Prior to granting the request, the trial court indicated that it intended to appoint Richard Leonard as standby counsel. (60RT 5817, 5824.) Mr. Leonard was not prepared to proceed with trial, and counsel for appellants Newborn and Holmes objected to any continuance of the case. (60RT 5826.) They again asked for severance. Appellant Newborn's counsel incorporated by reference the description of appellant McClain's conduct contained in the prosecution's pleadings in support of appellant McClain's request to represent himself. Appellant Holmes incorporated by reference the entire trial transcript. (60RT 5826-5827; see 7CT 1957-1961.) The prosecution opposed severance, noting the statutory and legislative preference for a joint trial. The prosecutor argued that good cause to continue the trial for one defendant is also good cause to continue the trial for all defendants. The prosecutor pointed out that the penalty phase retrial required the prosecution to demonstrate to the jury the facts and circumstances surrounding the murders. He stated, "To even give skeletal outline it is going to take at least a dozen witnesses." (60RT 5829.) The prosecutor also emphasized that the witnesses testifying about victim

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[59] The trial court was apparently referring to an incident at a pretrial hearing in which appellant Newborn made a gesture at one of the prosecutors and said, "Fuck you. Suck my dick." (60RT 5769.)

impact had already testified once, would have to testify again for the retrial, and would have to testify even more times if severance were granted. Finally, the prosecutor argued that there was evidence of other violent acts of the defendants, for which judicial economy favored a single penalty phase retrial. (60RT 5830.) The trial court stated, "The court indicated I won't sever the case. I think I indicated that earlier. But if you want to renew that motion, my tentative ruling is I will not sever based on what we talked about earlier." (60RT 5835.)

Appellant Holmes indicates that during pretrial motions, defense counsel moved again for severance. (See AHOB 245.) It appears, however, that defense counsel merely made reference to previous severance motions, without actually moving for severance. (65RT 6323-6324; see 8CT 2125.) Similarly, appellant Holmes notes that "the severance issue was raised and argued in the motion for new trial that preceded sentencing . . . ." (AHOB 263, citing 76RT 7567.) However, this proceeding does not appear to be particularly relevant to the instant issue as it was appellant McClain's motion for new trial in which he argued that the trial court erred in failing to sever his trial from his codefendants because he was prejudiced by appellant Holmes's reaction to the jury's guilty verdict. (See 9CT 2327; 76RT 7567-7568.)

During the Evidence Code section 402 hearing regarding the admissibility of evidence that appellant McClain threatened violence against courtroom deputies, appellants Holmes and Newborn moved for severance, or in the alternative, to sanitize the evidence. (73RT 7312.) The trial court denied severance, but agreed to sanitize the threats. (73RT 7315.) The jury was instructed that the evidence was admitted against appellant McClain and was not to be considered as an aggravating factor against appellants Newborn and Holmes. (73RT 7347.)

Prior to closing argument, the prosecution moved to present a rebuttal closing argument. (8CT 2246-2250.) The trial court indicated that it would likely grant the motion because of appellant McClain's pro per status and anticipated difficulty in presenting argument. (74RT 7351-7352.) Appellant Newborn objected to the procedure, moved for severance or alternatively that appellant McClain's pro per status be revoked, and moved for a mistrial. (74RT 7352, 7354.) The trial court denied the prosecution's request and denied the motion for mistrial. (74RT 7356.)

B. The Trial Court Properly Denied Appellants Holmes's and Newborn's Motions To Sever The Penalty Phase Retrial

In light of the statutory preference for joint trials (see § 1098), severance remains largely within the trial court's discretion. A reviewing court may reverse a conviction when, because of consolidation, gross unfairness has deprived the defendant of a fair trial. (*People v. Ervin, supra*, 22 Cal.4th at p. 69.) The constitutional requirement of individualized sentencing in capital cases does not require separate penalty trials or separate juries at the penalty phase for codefendants. (*People v. Taylor, supra,* 26 Cal.4th at pp. 1173-1174.)

Appellants Newborn and Holmes essentially argue that the trial court should have severed their penalty phase retrial from appellant McClain's because of his trial antics. In *People v. Lewis and Oliver, supra,* 39 Cal.4th at pages 997-998, this Court rejected a claim that the trial court erred in denying a motion to sever a case based in part on outbursts in the courtroom. This Court noted: "We question defendants' apparent assumption that they could mandate severance through their own misconduct." (*Id.* at p. 998.)

In support of their argument, appellants Newborn and Holmes only cite to a federal trial court's decision – *United States v. Green* (D. Mass.

2004) 324 F.Supp.2d 311. (See AHOB 257-258; ANOB 264.) The decision of the lower federal trial court is not binding upon this Court. (*People v. Zapien, supra,* 4 Cal.4th at p. 989.) Additionally, federal appellate courts have rejected the claim that severance was necessary based on a codefendant's courtroom antics. (See e.g., *United States v. DeCologero* (1st Cir. 2008) 530 F.3d 36, 54-55; *United States v. West* (4th Cir. 1989) 877 F.2d 281, 288; *United States v. Mazza* (1st Cir. 1986) 792 F.2d 1210, 1224.) As a federal appellate court observed:

> Allowing their outbursts to result in a severance would therefore have enabled them to subvert the legal process by obtaining through their misconduct what they were unable to obtain through their motions. Whether or not this was their intention, it would certainly have been the result, and the effect would only be only to encourage future misconduct by defendants. "If such conduct by a codefendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so."

(*United States v. West, supra,* 877 F.2d at p. 288, quoting *United States v. Aviles* (2d Cir. 1960) 274 F.2d 179, 193.)

As previously set forth, this case was a classic situation in favor of a joint trial, given that appellants were charged with common crimes involving common events and victims. (See Argument I.A.1., *ante.*) There is nothing in the record indicating that the jurors failed to assess independently the appropriateness of the death penalty for appellants, or engaged in improper comparative evaluations of the defendants. Appellants Newborn and Holmes fail to point to any instance in which the jury held appellant McClain's trial antics against them.[60] They fail to meet

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[60] The prosecution's points and authorities supporting appellant McClain's motion for self representation and appointment of standby (continued...)

their burden of showing gross unfairness that deprived them of a fair trial. (See *People v. Ervin, supra*, 22 Cal.4th at p. 69.)

Moreover, the jury was told to "decide separately the question of the penalty as to each of the defendants," the same instruction given in the *Ervin* case. (*People v. Ervin, supra*, 22 Cal.4th at p. 95.) The jury was instructed that appellant McClain's statements were not evidence. (See 74RT 7354.) The jury was also given limiting instructions that certain evidence could only be considered against a particular defendant. (See e.g., 70RT 7016; 73RT 7347.) The instructions were adequate to ensure individual consideration of penalty as to each defendant and to prevent any prejudicial effect on appellants Holmes and Newborn. In the absence of a showing that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant, there was no abuse of discretion in failing to sever the trial or order separate penalty phase juries. (*People v. Taylor, supra*, 26 Cal.4th at p. 1174.)

C. Appellant McClain's Claim is Forfeited by His Failure to Make a Motion to Sever

Although appellant McClain claims the trial court's failure to sever his case from his codefendants at his penalty retrial deprived him of his constitutional rights (AMOB 425-440), he never made a motion to sever at the penalty retrial. A defendant must make a motion to sever his or her

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(...continued)
counsel recognized that appellant "McClain has occasionally, demonstrated deliberate, serious, and obstructionist misconduct." (7CT 1966.) The prosecution recognized that appellant McClain: (1) could abide by rules of procedure and courtroom protocol, such that his request to represent himself should be granted, and (2) would not abide by rules of procedure and courtroom protocol, such that standby counsel should be appointed. (7CT 1962.) The prosecutor described at the hearing on standby counsel that "for 90 to 95 percent of the time [appellant McClain] has behaved in a civilized and appropriate manner." (60RT 5828.)

case from codefendants in order to raise the point on appeal. (*People v. Champion*, *supra*, 9 Cal.4th at p. 906; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048.) Here, appellant McClain made no motion, and therefore his claim is forfeited.

Appellant McClain did request a mistrial and severance during the initial penalty phase trial (53RT 5236), and the trial court denied the motion for a mistrial, thereby making the motion to sever moot. But this previous request to sever was insufficient to preserve the point for retrial and insufficient to alert the trial court at the penalty retrial that McClain wanted severance. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 68 [defendant forfeited claim by failing to renew motion to sever after alleged conflicts arose]; *People v. Holt*, *supra*, 15 Cal.4th at pp. 666-667.) Moreover, even if the prior request were sufficient to alert the court, appellant McClain's claim would still be forfeited since the trial court never actually denied appellant McClain's motion for a severance, and appellant McClain failed to press for a ruling. (*People v. Danielson* (1992) 3 Cal.4th 691, 728-729, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In any event, any request for a severance would have properly been denied. Again, in light of the statutory preference for joint trial, the issue was largely a matter of the trial court's discretion. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 69.) And this Court has previously recognized that a single jury may preside over the individualized penalty determinations of jointly tried defendants. (*Ibid.*; accord, *People v. Taylor*, *supra*, 26 Cal.4th at p. 1173.) Of course, all of the victim impact evidence and the evidence relating to the circumstances of the murders in this case related to all appellants equally. And the trial court instructed the jury to "decide separately the question of the penalty as to each of the defendants." (8CT 2227.)

Moreover, appellant McClain's complaints of prejudice fail. In part, appellant McClain complains that appellant Newborn acted as a second prosecutor by arguing the gang graffiti had been written by either appellant McClain or appellant Holmes. (AMOB 434.) Officer Lopez, the only witness who testified about the graffiti, said repeatedly he did not know who wrote it. (66RT 6468-6469, 6471-6472.) And while appellant Newborn's counsel argued that it was unlikely that the person whose name was in the middle wrote the graffiti, he acknowledged that no one knew who had written the graffiti. (74RT 7465-7466.) The graffiti was also an extremely minor part of the evidence, especially since appellants' gang membership was otherwise established. (66RT 6456-6457.) The argument of appellant Newborn's counsel did not require severance.

Appellant McClain also contends severance was needed because the prosecutor was going to introduce different evidence of aggravation for each appellant and because each appellant was going to offer a different mitigation theory (AMOB 435-436), but as noted above, this Court has previously approved joint penalty trials despite these generic concerns. As in *Ervin*, "[t]he record in the present case . . . fails to show that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting instructions." (*People v. Ervin*, *supra*, 22 Cal.4th at p. 69.)

Appellant McClain also asserts the evidence of appellant Newborn's violence against women was "inherently inflammatory" and there was a danger that the jury might impute that evidence against all appellants. (AMOB 439.) Compared to the evidence that appellants had murdered three children on Halloween, appellant Newborn's violence against women was relatively tame. In any event, there is no reason to think the jury would consider such acts against appellants McClain or Holmes when they had nothing to do with the offenses.

Thus, the trial court would have acted within its discretion in denying a motion to sever. Moreover, appellant McClain has failed to show "gross unfairness" such that the failure to sever prejudiced him. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 69.) Accordingly, his claim should be rejected.

XXII. THE TRIAL COURT PROPERLY REQUIRED APPELLANTS TO WEAR STUN BELTS

Appellants contend that it was erroneous for the trial court to require them to wear stun belts at the penalty phase retrial and to disclose to the jury that they were wearing stun belts. (ANOB 213-238; AMOB 312-342; AHOB 219-232.) Respondent submits that the trial court properly required appellants to wear stun belts and did not improperly inform the jury.

Appellant McClain also contends the trial court erred in admitting the evidence of his threat to Deputy Browning. (AMOB 343-354.) But the trial court acted within its discretion to admit the evidence.

A. Relevant Facts and Proceedings

1. Use of Stun Belts

As the court clerk read the jury's guilty verdicts on December 22, 1995, appellant Holmes stated: "Fuck you, you motherfuckers. P-9 rules." (45RT 4752.) Appellant Newborn's counsel indicated that during the reading of the verdicts, appellant Holmes "uttered a string of profanities and expletives directed specifically and directly to members of the jury which related to their inferior intellect, lack of family values, deviate heritage and sexual perversion." (6CT 1707; see 45RT 4785-4786.) Appellant McClain also used a "hand gesture with the middle finger of the right hand visible to the jury" that was directed to the jury as it returned the verdicts. (45RT 4783-4785; see 45RT 4787-4788; 6CT 1707.)

Prior to the penalty phase trial, on January 11, 1996, appellants were given a form entitled "Remote Electronically Activated Control Technology Subject Notification Form."[61] The trial court stated, in relevant part:

> Mr. McClain, Mr. Holmes, and Mr. Newborn, you were given the Remote Electronically Activated Control Technology Subject Notification form on the activation of the control belt, is that correct?
>
> The security is done by the security people involved, that is, the bailiffs. Based on some activity, they have requested that you do this and a document was given to you and you didn't want to sign it. I am going to read it for the record. It says what the belt does.

(46RT 4798-4799; see 7CT 1792.) Appellants refused to sign the form. (46RT 4798-4800.) The following discussion occurred:

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[61] The form stated:

> I _____ am aware that I am being required to wear an Electronic Immobilization Belt. I am aware that the Belt when activated is capable of delivering an impulse of 50,000 volts. The result of which may be an instant and complete immobilization of my body.
>
> I am aware the Belt could be remotely activated in the following or similar circumstances:
>
> I attempt escape.
>
> I make sudden or hostile movements.
>
> I tamper with the belt.
>
> Failure by me to comply with verbal commands.
>
> Any overt act of aggression or communication with persons in my immediate vicinity.
>
> I understand the above information and or acknowledge being advised of the same.

(6CT 1723.) The form provides for signatures by the subject of the REACT belt and the escorting deputy. (6CT 1723.)

The Court: And as I said before, that this is the court where you are being tried and this court and my staff have always extended a great courtesy to you and dignity. I expect you to do the same, all of you. And if it comes to pass that that is unacceptable, then maybe we can do something else.

Deft. McClain: I want to say nobody tripping, but now all of a sudden, we get those belts. That is like a slap in my face. After all, I have been sitting here and I ain't done nothing hostile and none of that shit and still get that.

The Court: Remember that security is done by the sheriffs and if they perceive things that jeopardize your safety or injury to you or them or any staff member, that is what the law provides. So we will review this for later on.

(46RT 4800.) The first penalty phase trial began on January 22, 1996. (7CT 1829.)

The jury was unable to reach a penalty verdict. The trial court declared a mistrial on February 9, 1996. (7CT 1863, 1888.) At a hearing at which the prosecution indicated that it intended to retry the penalty phase as to appellants, the following colloquy occurred:

[The prosecutor]: I have spoken with [appellant McClain's counsel], and I believe the Court is aware that it is the People's position that we do wish to retry the penalty phase on the three defendants, and so I think it is a good idea to have [appellants Holmes's and Newborn's attorneys] here to alert them of that fact also.[62]

(Defendants laughing.)

The Court: I agree.

As comical as it is, gentlemen, we will have to see what the trial brings. All right?

Let's proceed. Take them out of here.

Defendant Newborn: Fuck you.

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[62] At that hearing, counsel for appellant McClain appeared specially for counsel for appellants Holmes and Newborn.

[The prosecutor]: May the record please reflect that Mr. Newborn has --

Defendant Newborn: Fuck you. Suck my dick.

(The defendants exited the courtroom.)

[The prosecutor]: -- has given me the finger and directed the words "fuck you" to me?

The Court: Which is not unusual for McClain.

[Appellant McClain's counsel]: Mr. McClain did not say that, your Honor. Mr. McClain was the modicum of --

[The prosecutor]: Restraint.

[Appellant McClain's counsel]: Yes, restraint.

[The prosecutor]: That was Mr. Newborn.

The Court: We will have to probably use the restraints again.

For the record, the defendant was facing the Court when he said, "fuck you," and was also giving a P-9 sign.

I want that on the record.

(60RT 5769-5770.) Appellants apparently wore the stun belts during the penalty phase retrial, but the stun belts were not activated at anytime during the trial.

2. Appellant McClain's Threat to Deputy Browning

Toward the conclusion of the penalty retrial, the trial court was informed that appellant McClain had threatened the bailiffs on the previous day. The trial court held a hearing pursuant to Evidence Code section 402, in which Deputy Browning testified that appellant McClain threatened to kill him while stun belts were being placed on appellants in the holding cell. (73RT 7296, 7298-7310.) Appellant Newborn renewed his motion to sever. Appellant Holmes also moved to sever, or in the alternative, that the statements be sanitized. (73RT 7311-7312.) The trial court denied the severance motion, but agreed to sanitize the statement. (73RT 7315, 7328-7329.)

The following evidence was introduced at trial. On October 16, 1996, Los Angeles County Sheriff's Deputy Robert Browning was assigned the security of the court personnel and transportation of inmates to and from the holding cell to the courtroom of the trial court. (73RT 7331.) Every morning when the defendants arrived, the deputies placed electronic devices on the defendants. (73RT 7332.) Deputy Browning ordered appellant Holmes out of the cell and placed the device on him. He walked to the court and was seated next to his counsel. Appellant McClain was then ordered out of the holding cell. (73RT 7333.) Two deputies, Deputy David Admire and Deputy Les Tranberg, placed the belt on him. He said, "Why is my belt warm?" (73RT 7334.) Deputy Browning responded, "Why do you think? We just tested it." (73RT 7334.) Appellant McClain asked why the belts were tested. Deputy Browning said, "Well, it's because of the Sheriff's Department policy. Every morning before court we test them to make sure that they work." (73RT 7335.) Appellant McClain then stepped back into the cell to retrieve a shirt that he was going to wear for court. (73RT 7335.) Deputy Browning then ordered appellant Newborn out of the cell. Appellant Newborn said that his belt was cold. Appellant McClain said, "If you do one of us, you'll have to do us all." (73RT 7336.) Deputy Browning asked, "What?" Appellant Newborn, who was directly in front of Deputy Browning, repeated appellant McClain's statement and added, "If you push one button, then you better push all three, because you know what I'm going to do." (73RT 7336.) Appellant McClain then said, "Don't get within two feet of me or I'll kill you, and I'll have weapons this time." (73RT 7336.)

Prior to Deputy Browning's testimony, the prosecution stated: "we are offering this testimony against defendant McClain only, not against defendants Newborn or Holmes." (73RT 7331.) At the beginning of Deputy Browning's testimony, the following colloquy occurred:

[Appellant Holmes's attorney]: Your Honor, I was wondering if the Court can instruct the jury that they should not use the electronic device against any of the clients; it is just basically a procedure the sheriff's use in these types of cases.

The Court: The court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to assure tranquility in the court, security for everyone. It does not mean that they are guilty or not guilty.

(73RT 7332.)

The jury was later instructed:

You have heard evidence introduced for the purpose of showing defendant McClain has committed a criminal act which involved express or implied use of force or violence or a threat of force or violence.

Before you consider the evidence as an aggravating circumstance against Mr. McClain, you must be convinced beyond a reasonable doubt that Mr. McClain did in fact commit such criminal act. It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation.

This evidence is not to be considered as aggravating factors against defendants Newborn or Holmes.

(73RT 7347.) The jury was instructed that "evidence has been introduced for the purpose of showing that the defendant Herbert McClain has committed" "terrorist threats, in violation of section 422, upon the person of Deputy Robert Browning on October the 16th 1996." (75RT 7509-7510.)

The jury was also instructed with CALJIC No. 9.94 which provided:

Every person who willfully threatens to a commit crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which threat on its face and under the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat

and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, is guilty of a violation of section 422 of the Penal Code, a crime.

In order to prove such crime, each of the following elements must be proved:

1. A person willfully threatened to commit a crime which, if committed, would result in death or great bodily injury to another person.

2. The person who made the threat did so with the specific intent that the statement be taken as a threat.

3. The threatening statement on its face and under the circumstances in which it was made was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and

4. The threatening statement caused the other person reasonably to be in sustained fear for his own safety.

It is immaterial whether the person who made the threat actually intended to carry it out.

(75RT 7515-7516; see 8CT 2184-2185.)

B. The Trial Court Properly Required Appellants To Wear Stun Belts

Appellants' claim that the trial court erred in forcing them to wear the security belts is forfeited by their failure to object. A defendant cannot complain about security restraints for the first time on appeal. (*People v. Cleveland, supra*, 32 Cal.4th at p. 740; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) Appellants did not sign the form provided by the court because they did not agree to the terms of belt, and appellant McClain called them a "slap in the face." (46RT 4798-4800.) But these acts were not sufficiently specific to put the court on notice that appellants were objecting to the use of the belts, or that their use was unjustified. Indeed, none of appellants' counsel made any objections. Therefore, appellants' claim is forfeited. In any event, the trial court did not abuse its discretion.

In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, this Court held that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. Such a manifest need arises "only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained.'" (*People v. Hill* (1998) 17 Cal.4th 800, 841.) While "no formal hearing is necessary to fulfill the mandate of *Duran*, the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney." (*People v. Cox* (1991) 53 Cal.3d 618, 651-652, overruled on other grounds, *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

A trial court's decision to use stun belts is reviewed for abuse of discretion. (*People v. Mar* (2002) 28 Cal.4th 1201, 1217.) A trial court abuses its discretion when its decision exceeds the bounds of reason, all of the circumstances being considered. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Appellant Holmes argues that the trial court delegated its decision of whether to use a stun belt to courtroom staff and appellant Newborn contends that the trial court at least "initially delegated the decision to use stun belts to the sheriff." (ANOB 226; AHOB 229.) The trial court abuses its discretion if it abdicates its decision-making authority to security personnel or law enforcement. The record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that there existed a manifest need to place the defendant in restraints. (*People v. Mar, supra*, 28 Cal.4th at p. 1218.)

Although the trial court in the instant case had stated that the security was "done by the sheriffs," it appears that the trial court independently

decided to grant the sheriff's request to use stun belts based on appellants' conduct when the guilty verdicts were read. (See 46RT 4798-4799; see also 58RT 5627-5628.) The record corroborates this interpretation of the trial court's statements. The trial court later stated that it had ordered stun belts based upon appellants' past activities and conduct. (60RT 5815 ["You will be wearing a belt, and that is because of past activities."]; 73RT 7314 ["The belts, I made the decision on that based on their conduct. They don't make that decision; I make that decision."]; 74RT 7420 ["And you are wearing a belt because you have acted up in this courtroom."].)

Here, the trial court did not have a formal hearing regarding the manifest need for restraints. The record, nevertheless, demonstrates that there existed a manifest need to place restraints on appellants during the penalty phase retrial. Considering all the circumstances, the trial court did not abuse its discretion in ordering stun belts. The trial court was understandably concerned about courtroom security given that the jury had found all three appellants guilty of the charges with special-circumstance findings in a gang-related capital case. (See *People v. Cleveland, supra,* 32 Cal.4th at p. 740.) Appellants' conduct during the courtroom proceedings did not alleviate the trial court's concerns. While witnesses were testifying, appellants accused them of lying. They accused the prosecutor of lying, during the prosecution's rebuttal argument. Appellant McClain used profanity and complained about the judicial process during his guilt phase testimony. (See e.g., 25RT 2545; 37RT 4039-4040, 4052-4053; 44RT 4677; 45RT 4752; 46RT 4798-4799; 48RT 4959; 53RT 5269; 54RT 5448-5449; 54RT 5455; 56RT 5518-5520; 60RT 5769-5770.) After appellant Holmes's and McClain's conduct during the rendering of the guilty verdicts, the trial court made arrangements for the jurors to meet at a location and be brought together to the courtroom. (See 58RT 5627-5628 [trial court explaining the appropriateness of having the jurors meet at a

location and then be brought to the courtroom together and denying the motion for mistrial based on the jurors being treated in a different manner after the finding of guilt and special circumstances].)

The prosecution had also filed a "Statement in Aggravation" on July 18, 1994, which listed appellants' prior convictions and other criminal activity involving force or violence. (4CT 869-876.) On October 2, 1995, the prosecution filed an "Amended Statement in Aggravation," listing additional criminal activity. (5CT 1223-1224.) On January 8, 1996, the prosecution filed a "Supplemental Statement in Aggravation," which described that appellant Newborn had hit another inmate on April 12, 1995 while in custody, and appellant McClain possessed a shank and tried to attack another inmate on June 19, 1995. (6CT 1716-1717.) These documents were also exhibits to appellant McClain's "Motion to Strike Notice Pursuant to P.C. 190.3 (Death Penalty), and Notice of Additional Evidence to be Presented at Penalty Phase (190.3 P.C.)," filed on January 11, 1996, and the trial court had reviewed the motion before it ordered the use of stun belts. (7CT 1724-1791; see 46RT 4798, 4800.)

Appellants assert that the non-conforming conduct consisted of verbal outbursts. (ANOB 226; AMOB 324-325; AHOB 229-230.) Appellants are correct that this Court has noted that stun belts may not be properly used to deter a defendant from making verbal outbursts that may be detrimental to the defendant's own case. (*People v. Mar, supra*, 28 Cal.4th at p. 1223, fn. 6.) But they fail to consider all of the circumstances in the instant case. While the trial court noted that the stun belts had a "tempering" effect (73RT 7314), the stun belts were not merely used to deter appellants from making verbal outbursts. There was a manifest need to restrain appellants based upon appellants' prior criminal activity, gang membership, the current convictions, their outbursts in the courtroom setting, appellant McClain's recent possession of a shank and attack on

another inmate in jail, appellant Newborn's recent attack on another inmate while in custody, and the security concerns inherent in a three-defendant capital trial. The trial court acted within its discretion.

The trial court did not have the benefit of this Court's decision in *People v. Mar*, which was decided five years after judgment was rendered in this case. This Court noted that prior to its decision in *Mar*, some courts suggested that the use of a stun belt was the least restrictive security measure. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) The *Mar* court identified ways in which wearing a stun belt might impair a defendant's participation in the case even if he or she did not testify. The *Mar* court observed that the use of a belt "in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*Ibid.*) Even so, there is no indication in the instant record that any impairment of this kind occurred here. Here, appellant McClain represented himself. He did not testify during the penalty retrial. His standby counsel made no suggestion that the belt would interfere with appellant McClain's ability to participate in the trial. Appellant McClain stated during his closing argument that without the belt his argument would have been more "boisterous." It is hard to imagine how much more "boisterous" appellant McClain could have been, let alone that such argument would have been proper conduct in the courtroom. Even after that statement, he continued to testify during his closing argument despite warnings from the trial court. He also used profanity during his closing argument. (See 74RT 7419-7428, 7432, 7435-7441.) As a matter of fact, appellant McClain indicated quite clearly that the stun belt had no impairment of the kind that concerned the *Mar* Court. Appellant McClain stated:

> First I get found guilty for some shit I didn't do, then you want me to come in here and sit down and act like some dignified person. You got the monster fucked up.
>
> I ain't coming in here, sitting here like I don't care, because I do care about my life. I didn't do shit and I'm not going to sit here and act like I did do shit. You want me to sit down and act like I am accepting it, and I am not accepting it.

(74RT 7432.)

Appellant McClain argues that the use of stun belts violated his Eighth Amendment. (AMOB 324-325.) His reliance upon the Eighth Amendment is misplaced. This Court and the United States Supreme Court have never found an Eighth Amendment violation predicated on a theory of purely psychological harm. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . ." (*Louisiana ex rel. Francis v. Resweber* (1947) 329 U.S. 459, 464 [67 S.Ct. 374, 91 L.Ed. 422].)

Appellant McClain also contends that the use of the stun belt violated the United Nation's Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (AMOB 324-325 [citing art. 2, 10, 11, 15 & 16].) The United States Senate ratified the Convention Against Torture with a number of reservations, interpretive understandings, and declarations. The instrument of ratification was deposited with the United Nations. Of relevance, "the United States considered itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." (136 Cong. Rec. S174876-01; 1465 U.N.T.S. 85.) Because the use of stun belts did not constitute cruel or unusual punishment prohibited by the Fifth, Eighth, and

Fourteenth Amendments, it also did not violate the Convention Against Torture.

Likewise, appellant McClain's argument that the use of the stun belt violated the First Amendment, is meritless. (AMOB 324-325.) On this record, appellant McClain cannot demonstrate that the use of stun belts violated any constitutionally protected speech. He cites to no authority supporting his claim, and it should be rejected. And, as previously discussed, he exercised his right to free speech without apparent restraint during his argument to the jury at the penalty phase retrial.

C. The Trial Court Properly Admitted Evidence That Appellant McClain Threatened Sheriffs' Deputies

Appellant McClain contends that the trial court improperly admitted the evidence of his threat. (AMOB 343-354.) Respondent submits that the trial court properly admitted evidence that appellant McClain threatened sheriff's deputies pursuant to section 190.3, subdivision (b). Appellant contends that the prosecution did not give timely notice of the aggravating circumstance. (AMOB 350-351.) Appellant McClain has forfeited this objection. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1163.) In any event, timely notice was given. The prosecutor must give a capital defendant notice of aggravating evidence it may seek to offer during the penalty phase. (§ 190.3.) This Court has interpreted section 190.3 to require that the prosecution provide notice "before the cause is called for trial or as soon thereafter as the prosecution learns of the existence of the evidence." (*People v. Salcido* (2008) 44 Cal.4th 93, 157.) Here, notice was timely because it was given one day after appellant McClain threatened the sheriff's deputies. (*People v. Caro* (1988) 46 Cal.3d 1035, 1059, overruled on other grounds, *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29.) Appellant McClain contends that he was never offered any additional time or resources to prepare a defense. (AMOB 350-351.) However, he neither

requested a continuance nor indicated that a continuance was necessary. (See *People v. Pinholster, supra,* 1 Cal.4th at p. 958 [where there is no claim that late notice has impaired preparation of the defense at the penalty trial and there has been no request for a continuance, there "can normally be no prejudice flowing from the late notice"]; *People v. Carrera* (1989) 49 Cal.3d 291, 334 ["the appropriate remedy for a violation would ordinarily be to grant a continuance as necessary to allow defendant to develop a response"].)

Appellant McClain asserts that there is no record that the prosecution made a motion to introduce evidence of his threat to Deputy Browning, and that therefore it appears that the trial court made the decision to hold a hearing and introduce the evidence sua sponte. He asserts that the trial court failed to maintain impartiality. (AMOB 315, fn. 119, 343-353.) His assertion is unsupported by the record.

The Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge. (*In re Murchinson* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].) To succeed on a judicial bias claim, however, a defendant must "overcome a presumption of honesty and integrity in those serving as adjudicators." (*Winthrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].) While the courtroom deputies may have first reported to the trial court about the threat, the record indicates that the prosecution had moved for the Evidence Code section 402 hearing and had requested admission of the threat evidence. (See 73RT 7296 ["I am going to have a 402 motion. . ."], 7298 [appellant Newborn's attorney joking that the prosecutor would withdraw the request to introduce the deputy's testimony], 7300 [People call Deputy Browning at the 402 hearing], 7310 [appellant Newborn's attorney requesting the prosecution to give an offer of proof "as to what he wants and directed against whom."], 7331 [prosecution offering Deputy Browning's testimony against appellant

McClain].) Appellant McClain fails to overcome this presumption of honesty and integrity.

Appellant McClain also contends that the trial court erroneously admitted the incident as evidence of a criminal threat even though the trial court had stated that the deputies were not concerned for their safety, an element of the crime of criminal threat. (AMOB 349-350.) Although the trial court had said that the deputy was not gravely concerned about safety and that deputies received threats on a daily basis (73RT 7316-7317), Deputy Browning's testimony at the 402 hearing indicates that the element of sustained fear of safety was not absent. He testified that after being threatened, he wrote a report. In part of the report, he requested additional personnel in the courtroom. (73RT 7306.) He later added:

> Like I say, there is a second half of the report; but most of that dealt with the security that we need to heighten because of the people that were going to be in the court, as well as one other. Because of the prior history of the three defendants that are in the court now and because of the prior acts of violence, we heightened our security so that it would not happen again and the court personnel that are here would not be endangered or possibly killed.

(73RT 7309.) Here, appellant McClain's statement caused Deputy Browning reasonably to be in sustained fear for his safety, indicated by his request for additional sheriff's personnel to be present in the courtroom to prevent court personnel from being endangered or killed.

Appellant McClain claims that when Deputy Amire was asked whether he felt any fear, the deputy did not acknowledge having felt any fear at all. (AMOB 349, citing 73 RT 7344.) Deputy Amire's feeling of fear, however, was irrelevant as to whether Deputy Browning felt any sustained fear for his safety, particularly since Deputy Amire had not heard appellant McClain state, "I will kill you." (See 73RT 7343-7344.)

Appellant McClain argues that at the time of his threat, he was unable to carry it out. (AMOB 349.) Section 422, however does not require an immediate ability to carry out the threat. (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679.) The cases cited by appellant McClain are inapposite because they do not hold that section 422 requires an immediate ability to carry out the threat. (See *People v. Boyd* (1985) 38 Cal.3d 762, 777 [crime of inciting a riot, in violation of § 404.6]; *People v. Phillips* (1985) 41 Cal.3d 29, 73 & fn. 26 [conspiracy, in violation of § 182].)

In any event, the jury was still required to first determine whether it was satisfied beyond a reasonable doubt that appellant McClain had made a criminal threat, as defined by section 422. The jury was specifically instructed:

> Before a juror may consider any such criminal activities as aggravating circumstances in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as aggravating circumstances.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. . . . . If the juror is not so convinced, the juror must not consider that evidence for any purpose.

(75RT 7510-7511.) Moreover, even if Deputy Browning felt no fear, appellant McClain still attempted to commit criminal threats, and a crime involving the attempted use of force or violence is still an aggravating circumstances. (See 75RT 7502; *People v. Toledo* (2001) 26 Cal.4th 221, 230-231 [discussing attempt to commit criminal threat].)

D. Appellants Forfeited Their Claim That The Trial Court Improperly Disclosed That They Were Wearing Stun Belts; In Any Event, The Claim Is Meritless

Appellants contend that the trial court improperly admitted evidence that disclosed they were wearing stun belts during testimony that appellant McClain threatened deputies. (AMOB 325-327; ANOB 227-229; AHOB 231.) Appellants Holmes and Newborn concede that no objection was made on relevance, prejudice, and due process grounds to preclude any testimony as to the surrounding circumstances of appellant McClain's threat. (ANOB 228; AHOB 231.) Appellant Holmes argued that the threat had a prejudicial effect on him, and moved for severance or that the statement be sanitized. (73RT 7312.) Contrary to appellant McClain's assertion (see AMOB 315), such an argument was neither a specific nor timely objection to the testimony regarding the surrounding circumstances of appellant McClain's threat. Appellants McClain and Newborn suggest that section 1044, which relates to the trial court's duty to control the proceedings, creates an exception to the contemporaneous objection rule. (ANOB 228 [citing *People v. Sturm* (2006) 37 Cal.4th 1218, 1241]; AMOB 327.) Section 1044 does not create such an exception. And *People v. Sturm*, a case about judicial misconduct, and its discussion regarding section 1044 in that context, are inapposite. Accordingly, appellants have forfeited this claim on appeal by failing to raise the specific objection in the trial court. (*People v. Wilson, supra,* 36 Cal.4th at p. 357.)

Furthermore, it was not readily apparent that the trial court disclosed to the jury that appellants were wearing stun belts. Rather, the evidence was that the deputies placed electronic devices on appellants that were for security purposes. (73RT 7332.) At most, the jury was informed that these electronic devices were some type of belt. (73RT 7334-7336; 74RT 7420.)

The jury was never informed that appellants wore stun belts and never saw the stun belts. (See ANOB 229.) There was no message conveyed to the jury that appellants were so dangerous to require unique force to control them.

E. Appellant McClain's Right to Confront Witnesses Was Not Violated

Appellant McClain contends that his right to confront witnesses was violated because the trial court erred by admitting evidence regarding two statements attributed to appellant Newborn, whom appellant McClain was not permitted to cross-examine. Specifically, Deputy Browning testified that appellant Newborn, who was directly in front of Deputy Browning, repeated appellant McClain's statement and added, "If you push one button, then you better push all three, because you know what I'm going to do." (73RT 7336.) Appellant McClain has forfeited this claim.

Here, appellant McClain did not object to Deputy Browning's testimony on the basis of the right to confront witnesses. (See 73RT 7336.) Moreover, when appellant Newborn asserted his Fifth Amendment right against self-incrimination, appellant McClain argued that he was unable to present a defense on the aggravating circumstance, but did not argue that his right to confront witnesses had been violated. (See 73RT 7324.) Accordingly, appellant McClain has forfeited the instant claim for failure to raise a specific and timely objection. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1044.)

Even assuming appellant McClain has not forfeited his confrontation clause claim, it is meritless. The Sixth Amendment of the United States Constitution, extended to the states by the Fourteenth Amendment, grants a criminal defendant the right to confront and cross-examine witnesses against him. (See *Pointer v. Texas, supra,* 380 U.S. at pp. 404, 406-407.) It is questionable whether Deputy Browning's testimony that appellant

Newborn repeated appellant McClain's statement, without actually stating what words were uttered, could be categorized as a testimonial statement of appellant Newborn that incriminated appellant McClain. At most, the statements were against appellant's Newborn interest, but did not implicate appellant McClain. Accordingly, appellant Newborn was not a witness who appellant McClain was entitled to confront.

F. In Any Event, Any Error Was Harmless

This Court has not determined whether the improper use of a stun belt is subject to the *Watson* or *Chapman* prejudicial error standards. (*People v. Mar, supra*, 28 Cal.4th at p. 1225, fn. 7.) "Even a jury's brief observations of physical restraints generally have been found nonprejudicial." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213.) Here, there is no evidence the jury saw the stun belts and the jury was never expressly told that appellants wore stun belts. Deputy Browning did not testify that the security device was placed on appellants because they had been convicted of murder. Moreover, the jury was instructed that the security devices were not evidence of appellants' guilt. (73RT 7332.) This Court has also recognized that "the risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined." (*People v. Slaughter, supra,* 27 Cal.4th at p. 1214.)

Any error was particularly harmless as to appellants Holmes and Newborn because the jury was instructed by the trial court and told by the prosecutor that the evidence of appellant McClain's threat was to only be considered against appellant McClain.[63] Absent evidence to the contrary, this Court should presume that the jury complied with the instructions. (*People v. Roldan* (2005) 35 Cal.4th 646, 743, disapproved on other grounds, *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

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[63] Appellants did not object to the jury instructions.

Appellant Newborn argues that the prosecutor later capitalized on the improper implication of violence from the stun belts when questioning Deputy Browning (juxtaposing the security device being placed and appellants' convictions for murder) and in arguing that among appellant Newborn's enemies in jail will be correctional officers. (ANOB 234-235.) This argument is based upon speculation. The jury already was aware that appellants were convicted of murder. Furthermore, any implication of violence from the vague reference to the stun belts was overshadowed by the evidence of appellant Newborn's prior criminal activity involving violence or threats while in youth authority, batteries upon four girlfriends, assault against Jernigan, and his resistance to arrest by police officers. Similarly, the vague reference to the stun belts paled in comparison to the evidence of appellant McClain's prior criminal activity involving violence or threats, including robberies and a threat against witness Joseph Petelle. Under any standard, the jury's penalty phase verdict was unaffected by the disclosure that appellants were wearing electronic security devices.

XXIII. THE TRIAL COURT PROPERLY ADMITTED THE VIDEOTAPE OF APPELLANT HOLMES'S OUTBURST

Appellants contend that the trial court erred in admitting, at the penalty phase retrial, the videotape of appellant Holmes's profane outburst after the prior jury rendered its guilt phase verdict. (ANOB 290-297; AMOB 415-422; AHOB 212-218.) Respondent submits that the trial court properly admitted the videotape of appellant Holmes's outburst.

A. Relevant Facts and Proceedings

The jury returned its guilt verdicts. The clerk first read the verdicts as to appellant Newborn. (45RT 4734.) The clerk then read the verdicts as to appellant McClain. (45RT 4743.) Finally, as the clerk read the verdicts as to appellant Holmes, appellant Holmes interjected: "Fuck you, you

motherfuckers. P-9 rules." (45RT 4752.) The outburst was recorded on a videotape. (See 8CT 2115.)

At the penalty phase retrial, the prosecution moved to introduce the videotape evidence of appellant Holmes's reaction to the guilt phase verdicts. In its motion, the prosecution argued that appellant Holmes's remorseless courtroom behavior was a relevant circumstance for sentencing. (8CT 2115-2117.) Appellant Holmes filed an opposition to the motion. (8CT 2121-2124.)

At a hearing on the motion, the prosecution argued that the first part of the videotape was admissible to rebut anticipated mitigating evidence of remorse. The prosecution argued that the second part of the videotape was admissible as a circumstance of the crime because appellant Holmes had elicited through appellant McClain's cross-examination that appellant Holmes was not a member of P-9. (65RT 6328-6329.) The prosecutor stated: "This outburst and display by Mr. Holmes demonstrates his P-9 gang that retaliated for the earlier killing of Fernando Hodges, which is the heart and soul of the People's theory of the case and is thus a legitimate factor as a circumstance of the crime." (65RT 6329.) The defense argued that it was not an aggravating circumstance and that a lack of remorse was not an aggravating factor. Appellant Holmes's attorney argued that his client never denied P-9 membership. (65RT 6329-6330.) The trial court allowed the prosecution to introduce the videotape into evidence, stating:

> I think that it has, under 352, great impact.
>
> I think that the defendants are all members of the P-9's, as established by the evidence. They continue to do that.
>
> I think the thrust of the statement, "Fuck you, you motherfuckers," really has no impact other than taking it in the totality of the situation. When the verdict comes in, they found Mr. Holmes guilty, they are saying the jury finds you guilty of murder in the first degree, and then you almost encompass or adopt that by saying, "P-9 rules."

(65RT 6336.) The trial court continued:

> That is highly probative. It may be prejudicial; I think everybody is prejudiced, and the Court warned all the defendants and the People here, you are members of a gang, you are joined together, no severance is going to be allowed.
>
> The jury found that you were guilty. And I think the gesture and the graffiti is highly relevant and probative. It may be prejudicial, but it is outweighed by the fact that you talk about the names of the three defendants.
>
> * * * *
>
> The adoption of making those statements that they are P-9's is significant to the Court. I think, like the Polly Klass case, when the man says everything, the Court considered it, although it is at sentencing.[64]
>
> This is a sentencing by the jury. I will allow those two pieces of evidence . . . .

(65RT 6336-6337.)

The videotape was played to the jury. (65RT 6411-6412; Peo. Exh. 117 [videotape].) Pursuant to its request, the jury saw the videotape again during deliberations. (8CT 2283; 75RT 7550.)

B. The Trial Court Properly Admitted the Videotape of Appellant Holmes's Outburst

Respondent submits that the trial court properly admitted the videotape of appellant Holmes's in-court outburst that "P-9 rules" because it was relevant to the circumstances of the crimes. Under section 190.3, factor (a), the trier of fact may consider, in aggravation, evidence relevant to "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ." (§ 190.3.) "The 'circumstances of the crime' as used in section 190.3, factor (a), 'does not mean merely the immediate temporal

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[64] The trial court was apparently referring to the trial of Richard Allen Davis. (See *People v. Davis* (2009) 46 Cal.4th 539, 620.)

and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime.'" (*People v. Blair* (2005) 36 Cal.4th 686, 749.)

In *Blair*, the defendant was convicted of first degree murder of his neighbor by the administration of cyanide poison. (*People v. Blair*, *supra*, 36 Cal.4th at p. 697.) During the penalty phase, the trial court admitted as a circumstance of the crime, the testimony of his former chemistry instructor that the defendant had conducted an experiment with cyanide in one of her classes two years before the crime. (*Id.* at p. 747.) In objecting to the chemistry instructor's testimony, the defendant offered to stipulate that he knew the effects of cyanide and that he knew some of the chemical reactions involving cyanide. (*Ibid.*) This Court held that the trial court properly admitted the testimony, reasoning that the instructor's testimony was relevant:

> because it tended to demonstrate that defendant was peculiarly interested in cyanide and familiar with its dangerous properties. As such, it established both that defendant could have been the individual who placed the cyanide in the gin bottle given to [the victims], and that defendant was aware that inserting cyanide into the gin bottle could cause the deaths.

(*Id.* at p. 749.) Such evidence came within the set of facts that materially, morally, or logically surrounded the crime. (*Ibid.*)

Blair is indistinguishable from the instant case. Here, the videotape demonstrated that appellant Holmes was a P-9 gang member, which was particularly relevant in the gang-motivated crimes. (See, e.g., 68 RT 6754 [immediately before the gunshots, someone said, "Now Blood."].) The videotape of appellant Holmes announcing that "P-9 rules," came within the set of facts that "materially, morally, or logically" surrounded the crimes. It was admissible as a circumstance of the offenses under factor (a) of section 190.3.

Furthermore, the trial court did not abuse its discretion in determining that the probative value was not substantially outweighed by prejudice. (Evid. Code, § 352.) As the trial court recognized, gang evidence was highly relevant in the instant crimes. (See 65RT 6336-6337.) It was the prosecution's theory that the crimes were gang-related. Although gang evidence was admitted, most of it was not as powerful and direct as appellant Holmes's claim that "P-9 rules."

Appellants argue that the videotape was inadmissible as evidence of appellant Holmes's lack of remorse. (AHOB 216; AMOB 418; ANOB 294.) It does not appear that the trial court admitted the videotape based on appellant Holmes's lack of remorse and this Court need not decide whether the videotape was admissible on this basis because the videotape was admissible as a circumstance of the crime. (See *People v. Horning* (2004) 34 Cal.4th 871, 898 [holding that it did not matter whether the trial court admitted evidence as a statement of a party or a declaration against interest because the ruling was "correct on at least one legal theory."].)

C. In Any Event, Any Error Was Harmless

"Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a 'reasonable possibility it affected the verdict.'" (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) The admission of the evidence was "a garden-variety evidentiary issue under state law" that did not implicate defendant's constitutional rights. (See *People v. Abilez, supra,* 41 Cal.4th at p. 503.) Here, any error in admitting the videotape was harmless in light of the other gang evidence admitted, and all of the other aggravating evidence introduced on the issue of penalty.

Appellants argue that the prosecutor intended the jury to view the outburst as indicative of a violent gang mentality where jurors were threatened. (AHOB 218; AMOB 420; ANOB 296.) Although the prosecution initially characterized the outburst as a threat during opening

statement (see 65RT 6411), the prosecution did not characterize it as a threat afterwards. And appellant Holmes's counsel pointed out during his closing argument that appellant Holmes's outburst could not be viewed as a threat and that the prosecution no longer called it a threat. Appellant Holmes's counsel also explained that appellant Holmes was justifiably angry and offended because of the unwarranted guilty verdict. (See 74RT 7457-7458.) It is unlikely the jury would have viewed the outburst as a threat against jurors.

Appellants argue that they were prejudiced by the admission of the videotape because the prosecutor argued that the videotape demonstrated the future dangerousness of all three defendants. (AHOB 218; AMOB 419; ANOB 295 [citing 74RT 7377-7378].) The record cited by appellants does not support their argument. On the contrary, the prosecutor used the videotape to illustrate that the crimes were gang-motivated. The prosecutor argued that the P-9 gang members were "intent on retaliation for the death of a fellow P-9," and then played the videotape. (74RT 7377-7378.) The prosecutor then stated: "P-9. I won't repeat the deleted expletives uttered by Mr. Holmes, but it's all about P-9." (74RT 7378.)

Appellants Holmes and McClain argue that they were denied a reliable determination of their penalties guaranteed by the Eighth Amendment, citing *Woodson v. North Carolina, supra,* 428 U.S. at p. 305. (AHOB 218; AMOB 422.) *Woodson* invalidated a law that provided a mandatory penalty of death for all first degree murders. Appellants fail to explain how this case has any relevance to the instant case. (*People v. Prince, supra,* 40 Cal.4th at p. 1217, fn. 4.)

XXIV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE HOLDING CELL GRAFFITI

Appellant Newborn contends that the trial court erroneously admitted, at the penalty phase retrial, evidence of the holding cell graffiti. (ANOB

280-290.) Appellant McClain and Holmes join this argument (AMOB 68; AHOB 76.) Respondent submits that the trial court properly admitted the evidence.

A. Relevant Facts and Proceedings

During the course of the trial, graffiti was found in the holding cell of the courtroom. The prosecution moved to admit evidence of the holding cell graffiti, arguing that it constituted an implied threat to use violence and manifested a lack of remorse. (8CT 2103-2106.)

At the hearing on the motion, the prosecutor described the graffiti, which was photographed and enlarged:

> the first photograph displays a P-9, the word "monsta" on top of it. Within the P is the words Parke Street and within the 9 is nine lives.
>
> * * * *
>
> Below that, . . . we see the picture P-9 -- the words P-9. Next to it is "Blood gang" and beneath is the word "Boom 1," "Sunday shoes 1 and Monsta Herb 1," which we would demonstrate through other evidence -- and I think it was presented during the course of the first trial -- that these are the nicknames of the defendants.
>
> Beneath these words are the words "anybody killa," K-I-L-L-A, sheriff, spelled S-H-I-R-E-F-F, police and again the word "killa," spelled the same way as I mentioned earlier. Sheriff and police are crossed off, which we will bring in a gang expert to testify means that these are intended targets of whoever put the graffiti on the wall.

(65RT 6320.) At the hearing, the prosecutor added:

> The other thing, which I don't think was mentioned in the motion, a different argument or additional argument would be this is also an admission of murder. The fact they have written "anybody killa" indicates that they are killers. Obviously they are killers, it was proven, and this is an admission now by these defendants that they are killers.

(65RT 6321.) The defense opposed the motion, pointing out that there were "a thousand other writings on that wall." (65RT 6321.) The defense also argued that the author of the graffiti was unknown and may have not been related to the instant case and that the evidence should be excluded under Evidence Code section 352 as tending to confuse the issues and the jury. (65RT 6322-6324.) Appellant Newborn's attorney moved for severance in the alternative, stating, ". . . and you have a piece of evidence like this that the People want to taint all three defendants with, I think it is a real problem." (65RT 6323.) The prosecution pointed out that an admonition to the jury that the evidence could not be considered an aggravating factor unless the jury concluded beyond a reasonable doubt that the defendant to whom the graffiti was attributed had participated in some way in putting the information on the wall. (65RT 6327.)

The trial court ruled that the graffiti was admissible. The trial court stated, "I think it has under 352, great impact. [¶] I think that the defendants are all members of the P-9's, as established by the evidence. They continue to do that." (65RT 6336.) The trial court also said:

> That is highly probative. It may be prejudicial; I think everybody is prejudiced, and the Court warned all the defendants and the people here, you are members of a gang, you are joined together, no severance is going to be allowed.
>
> The jury found that you were guilty. And I think the gesture and the graffiti is highly relevant and probative. It may be prejudicial, but it is outweighed by the fact that you talk about the names of the three defendants.
>
> The court knows by its experience that the bailiffs, every day, look at the holding cell. The bailiffs look at it and clear that tank. It is searched.
>
> If they do not know that, I will tell them it is searched before and after they leave. Other relevance of graffiti is not material to this case.
>
> The adoption of making those statements that they are P-9's is significant to the Court. I think, like the Polly Klass

> case, when the man says everything, the Court considered it, although it is at sentencing.
>
> This is a sentencing by the jury. I will allow those two pieces of evidence [the videotape of appellant Holmes's outburst and the graffiti] . . . .

(65RT 6336-6337.)

At trial, Officer Lopez was also shown a photograph of graffiti. The graffiti had P-9, Boom, Sunday Shoes, and Monsta Herb 1. There were the words "Anybody Killa," and beneath it, "sheriff" was crossed out, "police" was crossed out, and "killa." (66RT 6464-6465.) Boom was appellant Holmes's nickname. (66RT 6463.) Sunday Shoes was appellant Newborn's name "on the streets." (66RT 6464.) Officer Lopez had never heard of the moniker or nickname Monsta Herb 1. (66RT 6464.) Of course, appellant McClain's first name is Herbert. Crossing out sheriff and police signified murder. (66RT 6465.) The graffiti was on the wall of a holding cell, where appellants had been held, that was adjacent to the courtroom. (64RT 6471.) Officer Lopez did not know who wrote the graffiti, but he believed that because the graffiti had appellants' names on it, appellants were more than likely to have been possible individuals to have put up the graffiti. (66RT 6471, 6475.)

B. The Trial Court Properly Admitted Evidence of the Holding Cell Graffiti

Respondent submits that the trial court properly admitted the evidence of the holding cell graffiti because it was relevant to the circumstances of the crimes. (§ 190.3.) Here, the cell graffiti demonstrated that appellants were P-9 gang members, which was particularly relevant in the gang-motivated crimes. As the trial prosecutor noted, the "heart and soul of the People's theory of the case" was that the P-9 gang retaliated for Hodges's murder. (65RT 6329.) It was admissible as relevant to the circumstances

of the offenses under factor (a) of section 190.3. (*People v. Blair, supra,* 36 Cal.4th at p. 749.)

In any event, any error was harmless in light of the other gang evidence admitted, and all of the other aggravating evidence introduced at the penalty phase. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.)

XXV. THE TRIAL COURT PROPERLY EXCLUDED THE DISPOSITIONS OF CODEFENDANTS BOWEN AND BAILEY

Appellants contend that the trial court erred at the penalty phase retrial in excluding the favorable dispositions granted to codefendants Bowen and Bailey. (ANOB 298-303; AMOB 408-414; AHOB 233-240, 291-294.) Respondent submits that the trial court acted within its discretion in excluding the dispositions of codefendants Bowen and Bailey.

Prior to the penalty retrial, the prosecutor filed a written motion seeking exclusion of any evidence of the negotiated dispositions of codefendants Bailey and Bowen. (8CT 2089-2091.) When brought up in court, appellants made no objections. (65RT 6338.) The trial court granted the prosecutor's motion. (65RT 6338.)

Contrary to appellants' assertions, the issue was not raised again at a later point during the trial. Rather, appellant McClain later sought to subpoena Bowen and Bailey to testify as to lingering doubt (see 71RT 7101-7102; 72RT 7190-7192), but he did not ask to have evidence of their dispositions admitted. His claim that Bowen and Bailey should have been allowed to testify is addressed below. (Argument XXVI, *post.*)

Appellant McClain did move for a new trial on the ground that the evidence of the codefendants' dispositions had been improperly excluded. (9CT 2324.) Appellants Holmes and Newborn joined in the motion. (76RT 7565.) The trial court rejected the claim, finding the evidence had been properly excluded. (76RT 7567.)

Trial courts retain discretion at the penalty phase to exclude defense evidence mitigation as irrelevant or unduly prejudicial. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 116.) Here, the trial court acted within its discretion in excluding the evidence.

This Court has repeatedly held that evidence of a codefendant's disposition is not relevant to a defendant's sentencing determination. (*People. v. Turner* (1994) 8 Cal.4th 137, 206; *People v. Mincey*, *supra*, 2 Cal.4th at pp. 479-480; *People v. Carrera*, *supra*, 49 Cal.3d at p. 343; *People v. Belmontes* (1988) 45 Cal.3d 744, 810-813, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; see *People v. Bemore* (2000) 22 Cal.4th 809, 857 ["sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation"].)

Appellants claim such evidence is constitutionally compelled, citing *Getsy v. Mitchell* (6th Cir. 2006) 456 F.3d 575, which reversed a death sentence for a defendant-triggerman because it was not proportional with the life sentence received by the person who hired the defendant. (AMOB 409; AHOB 234.) But that decision has since been vacated, and the defendant's death sentence affirmed by the Court of Appeals en banc. (*Getsy v. Mitchell* (6th Cir. 2007) 495 F.3d 295 (en banc).) On rehearing, the court found that the Eighth Amendment does not require either comparative proportionality or consistent sentences among separately tried coconspirators. (*Id.* at p. 305.)

Appellants claim that Bowen and Bailey were alleged to have been equally culpable or even more culpable than appellants. (AMOB 411; ANOB 300.) Therefore, they contend that the prosecutor committed misconduct by arguing that death was the "only" appropriate punishment for the crime and by concealing relevant information about their codefendants' dispositions. (ANOB 300-301, AHOB 237-238, and AMOB

412, all citing *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133] [conviction was reversed where prosecutor argued jury should consider defendant's future dangerousness, but evidence of defendant's ineligibility for parole was excluded].)

But there is no evidence that Bowen and Bailey were equally culpable with appellants. Rather, the prosecutor asserted that Bowen and Bailey had denied being present at the shooting scene. (72RT 7190.) Also, the evidence connecting Bowen and Bailey to the offenses "differed substantially from the evidence" of appellants' guilt. (8CT 2090.) Since appellants were present at the scene, their active involvement in the murders made them more culpable than Bowen and Bailey.

Moreover, even if Bowen and Bailey were equally culpable for the murders, there is nothing to indicate that they were equally deserving of a death sentence based on their record and character. Indeed, it is for precisely these reasons that the evidence of the dispositions was properly excluded: no rational comparisons can be made because there is simply no evidence regarding Bowen and Bailey as to either the offenses or their backgrounds and admitting such evidence would have raised collateral issues about such comparisons. Accordingly, the trial court acted within its discretion in excluding the disposition evidence.

Moreover, any error was harmless because there was no reasonable possibility appellants would have received a better result had the evidence of the codefendants' dispositions been admitted. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) First, there is nothing in the record that indicates what the codefendants' dispositions were. Although appellants assert their codefendants' dispositions were "favorable," there is nothing to indicate they were given inappropriately lighter dispositions, when consideration is given for the fact that codefendants did not go to trial. Moreover, the mere facts of their dispositions would have had little

meaning to a jury since they were not presented with the evidence of Bowen and Bailey's participation in the crimes. The jury would have had nothing from which to judge whether their disposition was lighter than appellants' in terms of their relative culpability since they had no or little evidence of Bowen and Bailey's culpability. Therefore, any error in excluding this evidence was harmless.

XXVI. THE TRIAL COURT PROPERLY RULED ON THE PRESENTATION OF EVIDENCE RELATING TO LINGERING DOUBT

Appellants contend that the trial court made erroneous evidentiary rulings at the penalty phase retrial regarding the presentation of evidence relating to lingering doubt. (ANOB 304-309; AMOB 368-407; AHOB 260-274.) Respondent submits that the trial court acted within its discretion in ruling on evidence relating to lingering doubt.

Appellants Newborn and Holmes complain that the trial court excluded evidence on lingering doubt, but they do not identify any evidence they sought to admit, which was excluded. (ANOB 304-309; AHOB 260-271.) Thus, they have failed to identify any part of the record supporting their claim. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error"].) Moreover, they do not assert that the trial court excluded any evidence that they sought to admit. (Evid. Code, § 354 [in order to preserve claim that trial court erroneously excluded evidence, defendant must make an offer of proof].) Accordingly, their claims must be rejected. As to appellant McClain, his claim has no merit as demonstrated below.

A. Factual background

Prior to the penalty retrial, appellant McClain said his defense was going to be lingering doubt. (64RT 6314.) Appellant Holmes's counsel said he intended to show lingering doubt by asking Pina about his testimony. (64RT 6315.) The prosecutor asserted that lingering doubt was a defense, and therefore appellant Holmes could call Pina during the defense case to establish lingering doubt. (64RT 6316.)

During opening statements, appellant Newborn's counsel said part of his evidence would be related to lingering doubt. (65RT 6377.) The court recessed the jury briefly to advise counsel that it wanted briefing on the issue of lingering doubt, but said that counsel could mention it in opening statements. (65RT 6378-6386.) Appellant Newborn's counsel addressed lingering doubt further (65RT 6388), and appellant Holmes's counsel also raised it in opening statements (65RT 6403). Appellant Holmes's counsel asserted that Pina had identified appellant Holmes, and the jury needed to determine whether they believed him sufficiently to impose death. (65RT 6405.) In response to a prosecution objection that counsel was misstating the law, the trial court stated:

> Again the jury is admonished that the defendants have been found guilty, all the special circumstances were found to be true. You cannot get around that. You are not to even consider that. [¶] Your only consideration is if this defense lawyer or somebody else brings up lingering doubt, somewhere between beyond a reasonable doubt and some conclusive thing, this gap; and that is what lingering doubt will be. That is what they will try and present.

(65RT 6405.)

The prosecution filed a brief arguing that the defense should not be allowed to present lingering doubt evidence. (8CT 2134-2136.) Appellant

Holmes filed a motion to present lingering doubt evidence, specifically by examining Pina on the reliability of his identification. (8CT 2141-2147.)

Appellant McClain later made a motion for the appointment of an expert on witness identification. (8CT 2050-2055.) The trial court denied the motion as follows:

> I don't find in this case that identity is an issue at this time in a case where you have been found guilty of three counts of murder, all the special circumstances were true, five counts of attempt murder. [¶] We are in the penalty phase and the court is not even sure about lingering doubt. The court has read the cases that counsel have given me. I am not even sure that the prosecution has to put much forward on that. [¶] Since you opened the door a little bit and I told Mr. Jones in his opening statement I would allow some, I am hung out to dry here. Same thing with you, Mr. Nishi. [¶] . . . [¶] I don't find identity is an issue in this. I am not going to do it. [¶] The court has had little or no luck with identification experts. I find that they testify to some things that they have done in laboratories and it has no relevance to people in the street under duress, excitement or things involving your identity. So I am not going to allow it.

(69RT 6852-6853.)

Appellant McClain also sought to subpoena Bowen and Bailey. (71RT 7101-7102.) The court told appellant McClain, assisted by his stand-by counsel, to put it in a motion. (71RT 7102.) The next day, the prosecutor said, as to appellant McClain's request to have Bowen and Bailey testify, that "in all the discovery and all the interviews with Mr. Bowen and Mr. Bailey, they have consistently denied being present at the shooting scene or having any involvement in the shooting, so I don't know how they can say that Mr. McClain was not at the shooting scene." (72RT 7190.) Appellant McClain responded:

> In reference to that, whatever part they played, for whatever -- for the deal that they took, whatever role they played in that, they would be familiar with anything that happened that night and would be able to say if I was there or

> not, if they seen me at any time during the night. So whatever little information they would have would be to my benefit. [¶] . . . [¶] Wherever they was at that night, I feel that that would lead -- that would help me in my lingering doubt case, that wherever they were at that night, if they took a deal admitting anything to do with this case they would have some type of knowledge since they pled guilty to a lesser charge or whatever. [¶] . . . [¶] I believe they have some information that could help me in defense.

(72RT 7190-7191.) The prosecutor responded:

> I believe they were *West* pleas and that even through their plea they never admitted guilt. It is just a finding of guilt as a result of their plea. [¶] Mr. McClain is indicating that based on that guilty plea alone they can help him out, and that is not a sufficient representation.

(72RT 7191.) The court said, "It goes again to lingering doubt, which this court has repeatedly said I have not made a decision." (72RT 7191.) The court said it would consider appellant McClain's request. (72RT 7191-7192.) The court later ruled that appellant McClain could not call Bowen and Bailey based on Evidence Code 352:

> It is a 352 matter. This is not a matter for this jury to hear, I don't think, about lingering doubt. You have been found guilty. This is not the guilt phase in the first trial. This only would go to one possible phase from your motion, to further prove your innocence. You are not going to prove your innocence to this jury. This jury is not going to rule on your guilt or innocence.

(72RT 7255.)

In closing argument, the prosecutor argued in part, "We have given them the opportunity to present evidence to show that they weren't there, but no such evidence has been presented." (74RT 7371.) Appellant McClain objected that "I wasn't given the opportunity." (74RT 7371.) Appellant Holmes's counsel objected that the defense had no burden, and the prosecutor acknowledged, "they have no burden, but they have the opportunity." (74RT 7372.) The prosecutor said the trial court would

instruct the jury that it had to accept the verdicts from the guilt phase. (74RT 7372-7373.)

Appellant McClain argued lingering doubt was his defense. (74RT 7425.) He argued there was lingering doubt because he had not committed the murders. (74RT 7425.)

Appellant Holmes's counsel argued that even though the jury had to accept the guilt verdicts, "that does not mean that you're precluded from going back and looking at the facts to determine whether or not you have a lingering doubt . . . ." (74RT 7442.) Counsel argued, "When we get to that point where we have to determine whether a person lives or dies, we impose another standard, and that's the lingering doubt –" (74RT 7443.) The prosecutor's objection that counsel had misstated the law was sustained, but there was no admonition. (74RT 7443.) Appellant's Holmes's counsel continued: "if you have a lingering doubt, that factor may be enough for you to return a verdict of life without the possibility of parole." (74RT 7443.)

Appellant Holmes's counsel argued that Pina's conflicting accounts should be considered as lingering doubt evidence. (74RT 7444.) He reviewed discrepancies in Pina's statements and asked, "Do you have enough confidence in his ability to recollect so that you could vote death for someone?" (74RT 7452.) The prosecutor objected that counsel was misstating the jury's duty, and noted that the conviction was not based entirely on Pina's testimony. (74RT 7452.) The court said, "Lingering doubt -- your argument is lingering doubt as to a particular witness. The trial had many witnesses, circumstantial evidence. They didn't hear that. They had a mini trial of just some witnesses. You can argue only that point. That is all they heard." (74RT 7452.) Counsel continued arguing as to Mir Pina, "that his identification, that manner of the identification, the reasonableness of that identification and the strength of the identification

leaves any reasonable person with some lingering doubt as to whether or not Mr. Pina truly did see Karl Holmes running from the scene." (74RT 7455.) Counsel asked the jury to remember lingering doubt in carrying out its duties. (74RT 7457.)

Appellant Newborn's counsel argued that lingering doubt was a factor that the jury should consider. (74RT 7472.)

After arguments, and outside the presence of the jury, appellant Holmes's counsel objected to the trial court's comments on lingering doubt. (75RT 7490.) The court said it was not personally convinced the lingering doubt was admissible, but said, "I have allowed it." (75RT 7491.)

In instructing the jury, the trial court said the jury had to accept the verdicts rendered by the jury in the guilt phase, but that it could consider lingering doubt. (8CT 2171-2172.) The court said, "Lingering doubt as to guilt may be considered as a factor in mitigation. A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the mind of a juror a reasonable doubt." (8CT 2172; 75RT 7505.)

During deliberations, the jury asked if it could see the testimony or evidence from the prior trial, and court said the jury could not. (75RT 7545.) The jury also asked, "If so, was there any other eyewitness testimony or independent investigation?" (75RT 7545.) The court said that Mr. Pina's identification was only part of the evidence presented, that other evidence had been presented, but that the jury should not speculate on what other evidence had been presented. (75RT 7546.) The court then reread its special instruction on the guilt verdicts and lingering doubt. (75RT 7546-7548; see 8CT 2171-2172.)

In his motion for new trial, appellant McClain claimed error for excluding evidence of lingering doubt. (9CT 2331-2333.) The court rejected the claim, but noted that none of appellants offered any evidence that they "were anywhere else other than at the murder scene at the time of

the murders" and that the court might have allowed such evidence had there been a request to admit it. (76RT 7572.)

B. The Trial Court Acted within Its Discretion in Excluding Appellant McClain's Lingering Doubt Evidence

A defendant has no federal constitutional right to present evidence of lingering doubt at the penalty phase. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155] (plur. opn. of White, J.); *id.* at pp. 187-188 (conc. opn. of O'Connor, J.); see *Penry v. Lynaugh* (1989) 492 U.S. 302, 320 [109 S.Ct. 2934, 106 L.Ed.2d 256] [noting majority in *Franklin* concluded "residual doubt" is not a "constitutionally mandated mitigating factor"]; accord, *People v. Hamilton*, *supra*, 45 Cal.4th at p. 911; *People v. Stitely* (2005) 35 Cal.4th 514, 566.) The jury in a capital proceeding is allowed consider any aspect of the defendant's character or record and any circumstances of the offense. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] (plur. opn. of Burger, C.J.); *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304 (plur. opn.); *People v. Zapien*, *supra*, 4 Cal.4th at pp. 988-989.) But evidence of lingering doubts is not related to evidence of character, record, or a circumstance of the offense. (*Franklin v. Lynaugh*, *supra*, at p. 174; see *Oregon v. Guzek* (2006) 546 U.S. 517, 524, 526 [126 S.Ct. 1226, 163 L.Ed.2d 1112] [evidence at sentencing traditionally relates to how, not whether, defendant committed crime].)

Similarly, it appears there is no state constitutional right to present lingering doubt evidence. (*People v. Cox*, *supra*, 53 Cal.3d at p. 675; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1261, fn. 3 (dis. opn. of Mosk, J.) [noting that there was no state or federal constitutional right to present lingering doubt evidence, citing *Franklin v. Lynaugh* and *Cox*].) There is also no constitutional right to instructions on lingering doubt in the

penalty phase. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272; *People v. Sanchez* (1995) 12 Cal.4th 1, 77, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

In *People v. Gay* (2008) 42 Cal.4th 1195, 1221, however, this Court held that lingering doubt evidence is admissible at a penalty retrial as relevant to the circumstances of the offense under section 190.3. (Accord, *People v. Hamilton*, *supra*, 45 Cal.4th at p. 911.) However, "[t]he evidence must not be unreliable [citation], incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication [citations]." (*Id.* at p. 912; cf. AMOB 390-391 [asserting trial court lacked discretion to exclude evidence under Evidence Code section 352].) The trial court's decision on the admissibility of lingering doubt evidence is reviewed for an abuse of discretion. (*People v. Hamilton*, *supra*, at p. 916; *People v. Gay*, *supra*, at p. 1223.)

The Court reversed the death penalty in *People v. Gay* where the trial court's exclusion of lingering doubt evidence, combined with its erroneous instructions, was prejudicial. In that penalty retrial, the defense said it would present lingering doubt as a defense in its opening statement, and presented some evidence to that effect. (*People v. Gay*, *supra*, 42 Cal.4th at p. 1215.) But the trial court, acting under the understanding that lingering doubt evidence was inadmissible, admonished the jury to disregard the defense opening statements that it would hear evidence that Gay was innocent, and instructed the jury that it had been "conclusively proven" that Gay personally committed the murder. (*Ibid.*) The prosecution introduced essentially all of the evidence it had introduced at the original guilt phase, showing that Gay had shot the victim, almost exclusively through eyewitness testimony. (Compare *id.* at pp. 1201-1207 with *People v. Cummings* (1993) 4 Cal.4th 1233, 1257-1264, 1267.) But the trial court excluded defense testimony on lingering doubt as follows: (1)

four out-of-court statements by Gay's codefendant that he alone had committed the murder; (2) four eyewitnesses who would have testified to their observations, which were consistent with the codefendant shooting the victim rather than Gay; and (3) two experts on eyewitnesses and crime and accident reconstruction respectively. (*People v. Gay*, *supra*, at pp. 1214-1216.) Moreover, Gay would have personally testified if the excluded evidence had been admitted to corroborate his testimony. (*Id.* at pp. 1216-1217.) This Court found the trial court erred in excluding the evidence, which was relevant to showing Gay was not the shooter in the murder. (*Id.* at pp. 1223-1224.) That error, combined with the trial court's erroneous instruction, which was repeatedly emphasized by the prosecution in closing, was prejudicial. (*Id.* at p. 1227; cf. *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 912-916 [trial court properly excluded evidence regarding other suspect and expert testimony that murderers who disfigure their victims tend to know their victims].)

Here, the trial court acted within its discretion to exclude appellant McClain's proffered evidence from Bowen and Bailey. Appellant McClain's offer of proof made it clear that he was speculating on what their testimony would be. He assumed that they were present at the scene and were "familiar with anything that happened that night" based solely on the fact that they had pleaded guilty to some offenses in connection with the Halloween murders. Appellant McClain did not assert any knowledge, even through a police interview of the codefendants, that this was true. (72RT 7190-7191.) The mere fact that they pleaded guilty to some offense was insufficient to support an inference that they were aware of everything that occurred, especially when the prosecutor asserted, without contradiction, that Bowen and Bailey had steadfastly refused to admit any involvement, and that they pleaded guilty because they wanted a favorable plea bargain. Under these circumstances, the trial court could properly

conclude that appellant McClain's offer of proof was speculative and excludable under Evidence Code section 352. (72RT 7255.) Although the trial court also said that it was finding that appellant McClain could not prove his innocence, suggesting it was also finding that lingering doubt evidence was inadmissible, the court's ruling under Evidence Code section 352 was nevertheless proper. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 972 [trial court's ruling may be upheld if it is correct based on any applicable theory of law, even if court stated wrong reason].)

Similarly, the trial court acted within its discretion in excluding any testimony from an eyewitness expert. Unlike *Gay* where the prosecution's guilt case rested largely on eyewitness testimony that was all presented at the penalty retrial, the prosecution's case for guilt against appellant McClain only rested partially on eyewitness testimony, and the prosecution did not present any of its evidence showing guilt at the penalty phase retrial. (Cf. AMOB 383 [asserting that Pina's testimony was central to prosecution's case because prosecution did not call witnesses to admissions].) The prosecution's case for guilt against appellant McClain relied in part on Pina's eyewitness identification, but that evidence was introduced at the penalty phase retrial by appellant Holmes, not the prosecution. (71RT 7118-7120.) At the guilt phase, the prosecution also relied on evidence of appellant McClain's failure to report to Thomas, appellant McClain's flight from the area, and appellant McClain's admissions to Stevens, Welcome, Tate, and Carpenter—none of which was introduced at the penalty retrial. Similarly, at the guilt phase, the prosecution showed that appellant McClain was guilty of the attempted murder of Price by presenting Price's eyewitness testimony, but the prosecution elected not to call Price for the penalty retrial. Under these circumstances, an expert on eyewitness testimony would have had little probative value, since the only eyewitness who testified at the penalty

phase retrial was Pina, who was thoroughly cross-examined to raise doubts about his identification. It may have been relevant to Pina's testimony, but in the larger scheme it would have done little to show any doubt about appellant McClain's guilt because his guilt rested largely on evidence that the retrial jury was never presented with.

Appellant McClain suggests, for the first time on appeal, that the trial court should have distributed transcripts of Dr. Pezdek's guilt phase testimony. (AMOB 383, fn. 135.) This claim is forfeited by appellant McClain's failure to make the request at trial. (Evid. Code, § 354; *People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Appellant McClain also cursorily asserts that the trial court erred in denying the jury's request to review the other guilt phase evidence. (AMOB 392.) This claim is similarly forfeited by appellant McClain's failure to object at trial, as well as his failure to adequately raise it on appeal. (*People v. Benavides* (2005) 35 Cal.4th 69, 114 [failure to object to trial court's response to jury question forfeits any claim of error regarding response]; *In re S.C.*, *supra*, 138 Cal.App.4th at p. 408 [failure to adequately raise claim on appeal forfeits claim].)

Finally, appellant McClain's equal protection argument has no merit. (AMOB 394-396.) The rule that was applied to appellant McClain—Evidence Code section 352—applied equally to the other appellants and applies equally to defendants in other cases. There was no unequal treatment.

C. The Prosecutor's Argument Was Proper

Appellants Holmes and McClain also claim that the prosecutor committed misconduct in argument before the court and during closing argument. (AHOB 271-274; AMOB 397-401.)

First, appellant McClain asserts that the prosecutor committed misconduct in informing the court that Bowen and Bailey had not admitted

guilt. (AMOB 397-399.) This claim is forfeited by the failure to object. (*People v. Brown, supra*, 31 Cal.4th at p. 553.) But even assuming the claim were preserved and that Bowen's and Bailey's no contest pleas—entered to take advantage of a favorable plea bargain—are an admission of guilt, there is no reasonable likelihood the trial court understood the prosecutor's statement as appellant McClain suggests. (*People v. Harrison, supra*, 35 Cal.4th at p. 244.) The trial court was aware that Bowen and Bailey had entered into negotiated dispositions. (See 8CT 2090.) And the prosecutor asserted that Bowen and Bailey denied presence and participation "in all the discovery and all the interviews . . . ." (72RT 7190.) The prosecutor was asserting that their prior statements, rather than their pleas, were more probative of their possible testimony. There is no reasonable likelihood the trial court was confused or misled by the prosecutor's statements when taken as a whole.

Noting the prosecutor argued the jury had to accept the guilt verdicts (74RT 7372), appellant Holmes claims the prosecutor committed misconduct by arguing the jury had to "assume the worst about the circumstances of the offence . . . ." (AHOB 272; see AHOB 271-273.) Again, the claim is forfeited by the failure to object. (*People v. Brown, supra*, 31 Cal.4th at p. 553.) There is also, again, no reasonable likelihood the jury understood the comments as appellant Holmes suggests. (*People v. Harrison, supra*, 35 Cal.4th at p. 244.) By arguing the jury had to accept the verdicts, the prosecutor was arguing that the jury should accept the fact that there was evidence sufficient to show appellants were guilty beyond a reasonable doubt and reject the defense of lingering doubt. (See *People v. Medina* (1995) 11 Cal.4th 694, 743 ["the prosecutor is entitled to remind the penalty phase jury that it is not to redetermine guilt, which is to be presumed as a matter of law because the trier of fact had so found in the guilt phase"].) Accordingly, no misconduct occurred.

Appellant McClain also claims the prosecutor committed misconduct by arguing appellants had failed to present lingering doubt evidence and by exploiting the absence of evidence. (AMOB 399-401.) Of course, the prosecutor has the right to express his views on the evidence, even if flawed:

> "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citation.] . . ." [Citations.]

(*People v. Valencia* (2008) 43 Cal.4th 268, 284.)

Here, the prosecutor could properly argue that no lingering doubt evidence had been presented because the evidence that had been presented (74RT 7371), the contradictory accounts by Pina and the absence of calls to police at the time of the Blake Street shooting, was weak. It was not misconduct to characterize this as the failure to present lingering doubt since it did little to impeach the overall evidence of appellants' guilt.

Similarly, the prosecutor properly argued that appellants had the opportunity to present such evidence. Regardless of the trial court's comments about lingering doubt at various times during the retrial proceedings, the trial court never ruled that *all* lingering doubt evidence was inadmissible. And, as noted above, the court allowed appellants to introduce some lingering doubt evidence. Since the trial court properly found that appellant McClain's additional evidence offered to show lingering doubt was inadmissible, the prosecutor's argument was similarly proper. The jury would have understood the prosecutor's argument to mean that appellants had failed to take advantage of the opportunity to present *admissible* lingering doubt evidence, since appellants had no right to present lingering doubt evidence that was unreliable, incompetent,

irrelevant, or lacked probative value. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 912.) Indeed, appellant McClain's argument is essentially that the prosecutor's statements compounded the trial court's error, but there was simply no error to compound. His claim should be rejected.

D. The Instruction on Lingering Doubt Was Proper

Appellant McClain also asserts that the trial court's instruction on lingering doubt was erroneous, but he makes this assertion on the basis that evidence was improperly excluded. (AMOB 401-403.) As shown above, the trial court did not improperly exclude any evidence. Therefore, his claim of instructional error fails.

Appellant McClain also asserts the instruction was "ambiguous," but he does not explain why. (AMOB 401-402.) His claim should be rejected because he has failed to adequately raise it. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408 [failure to adequately raise claim on appeal forfeits claim].) Moreover, he forfeited any claim by failing to request clarification or amplification of the instruction. (*People v. Valdez, supra*, 32 Cal.4th at p. 113.) Accordingly, his claims should be rejected.

E. Any Alleged Error Was Harmless

Like other penalty phase evidence, any error in excluding lingering doubt evidence is harmless if there is no reasonable possibility the defendant would have received a better result had the erroneously excluded evidence been admitted. (*People v. Gay*, *supra*, 42 Cal.4th at p. 1223; see *People v. Hamilton, supra,* 45 Cal.4th at p. 912.) Here, there is no reasonable possibility that appellant McClain would have received a better result if his proffered evidence had been admitted, or had any alleged misconduct not occurred.

The aggravating evidence admitted against appellant McClain, in addition to the brutal Halloween murders, was substantial: 1989 grand theft

auto conviction; 1989 robbery of Flores; 1989 possession of a firearm by a felon; 1990 robberies of Rowe and Cook; 1990 conviction for possession of firearm by a felon; 1992 possession of firearm by a felon; 1995 attack on an inmate; and his 1996 threat to a bailiff. In comparison, he offered little mitigating evidence, and that which was offered was weak.

The probative value of the offered evidence was also low. There is nothing to suggest Bowen and Bailey would have offered evidence favorable to appellant McClain on the issue of his guilt, much less that it would have made a difference to the penalty jury. And expert testimony on eyewitness testimony would have offered little support for appellant McClain's mitigation case since the jury was aware that Pina's testimony was not the only evidence showing appellant McClain's guilt.

Unlike *Gay*, the evidence excluded here did not involve four confessions by another and four eyewitnesses, which absolved the defendant. Also unlike *Gay*, the trial court did not erroneously instruct the jury that appellant McClain's guilt had been "conclusively proven." Rather, the trial court properly instructed the jury that appellants had been found guilty beyond a reasonable doubt and that it had to accept that. (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1238 [court's rulings and prosecutor's argument, which reminded penalty retrial jury it was not there to redetermine guilt and that guilt was "conclusively presumed" as a matter of law, were proper]; *People v. Montiel* (1993) 5 Cal.4th 877, 911-912 [prosecutor properly reminded jury that defendant had already been found guilty, only issue left was penalty, and therefore jury would not hear all previously presented guilt evidence]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1236 [prosecutor properly argued that "the jury should not 'speculate' on such matters as why the prior jurors found premeditation when 'you don't know the evidence they heard'"].) Indeed, when the prosecutor said in opening statement that the defendants' participation had

been "conclusively proven," the trial court admonished the jury that it agreed with defense counsel that it had not been "conclusively proven." (65RT 6359-6360.) Any error in this case did not rise to the level that occurred in *Gay*. Rather, any error in this case was harmless.

XXVII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT LOUISE JERNIGAN BELIEVED THAT APPELLANT NEWBORN KILLED HER SON

Appellant Newborn contends that the trial court erroneously admitted evidence that Louise Jernigan believed that he killed her son. (ANOB 266-278.) Respondent submits that the trial court properly admitted the evidence.

A. Factual background

During an Evidence Code section 402 hearing prior to the first penalty phase, Louise Jernigan testified that while she was at a beauty store, appellant Newborn threatened her with a gun and said she had accused him of killing her son. (48RT 4940.) Appellant Newborn's counsel objected to her testimony, arguing there was insufficient evidence of violence or a threat of violence and that appellant Newborn should not "be prejudiced by some hearsay allegation that, in effect, charges him with another homicide." (50RT 5043.) The prosecutor responded to the latter complaint by saying the evidence was relevant to the circumstances of the offense. (50RT 5043.) Also, appellant Newborn's conduct in light of Jernigan's belief—harassment of her despite her obvious grief—was relevant. (50RT 5043-5044.) The trial court overruled the objection. (50RT 5050.) At the first penalty phase, she testified that appellant pointed a gun at her and she said, "I appreciate it if you stop going around here killing all the boys" and "the reason why you killed my son is because you were afraid of my son." (53RT 5379.)

At the retrial, Jernigan was again called to testify. When asked about what happened, she said, "He came, he came in, put a gun to my side, my right side. He want to shoot me because he knew that I know that he killed my son Keith." (68RT 6769.) The prosecutor asked that the jury be instructed that "it goes to state of mind of this witness only." (68RT 6769.) The trial court told the jury, "In other words, it doesn't go to the truth of the matter, it's her state of mind, what she's thinking as this process is going on. [¶] Do you understand? That's what it's being offered for at this time. It may change." (68RT 6769-6770.)

Jernigan testified that after appellant Newborn escorted her outside with a gun pointed at her, she "[a]sked him why was he going around killing everybody['s] son. Can't he talk to them instead of shooting people." (68RT 6772.) On cross-examination, she was asked what she said to appellant Newborn and she repeated this testimony. (68RT 6783, 6790.)

Appellant Newborn called Officer Tracey Ibarra to testify about Jernigan's report to the police. (72RT 7193-7194.) On cross-examination, Officer Ibarra said the Jernigan had reported appellant Newborn's statements as: "Fuck you. You accused me of killing your son, and we're going to get you, too." (72RT 7198.)

Appellant Newborn also called Helen Edwards, a family friend, to testify that when appellant Newborn came into the beauty store, Jernigan said, "You killed my son." (72RT 7244.) Appellant Newborn said, "She thinks I killed her son," and Edwards responded, "You didn't so don't worry about it." (72RT 7244.) Edwards testified that Jernigan followed appellant Newborn out of the store, and she kept saying "You killed my son." (72RT 7245.)

On cross-examination, Edwards admitted she did not know Jernigan or Jernigan's son, but testified that she told appellant Newborn, "You didn't

do it" because it was "obvious" that he had not. (72RT 7248.) She admitted, however, that she knew nothing about the facts of the murder or whether appellant Newborn had committed it. (72RT 7248.) Despite her description of the incident, Edwards claimed she had no idea why Jernigan got mad with appellant Newborn. (72RT 7249.)

In closing argument, the prosecutor argued that the incident with Jernigan showed criminal threats. He argued that even Edwards's testimony consistently showed that Jernigan accused appellant Newborn of killing her son, but that appellant Newborn treated her with contempt. (74RT 7391.) Appellant Newborn's counsel argued that the incident did not occur as Jernigan had described it. He claimed that the prosecution had presented her testimony to bring in the "empty, baseless, groundless," "unsupported, undocumented, unverified and untrue" allegation that appellant Newborn had something to do with the murder of Jernigan's son. (74RT 7477-7478.)

B. The Trial Court Acted Within Its Discretion in Admitting the Evidence

Criminal threats requires: (1) willfully threatening a crime that would result in great bodily injury or death; (2) with the specific intent that the threat be taken as a threat; (3) a threat that is, on its face and under the circumstances, so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and immediate prospect of execution; (4) the threat actually caused the victim to be in sustained fear for safety; and (5) the fear was reasonable. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) A reviewing court must examine the threat under the circumstances in which it was made. (*People v. Felix* (2001) 92 Cal.App.4th 905, 914.) A victim's knowledge of a defendant's prior conduct is relevant to show actual sustained fear. (*People v. Allen* (1995)

33 Cal.App.4th 1149, 1156; *People v. Garrett* (1994) 30 Cal.App.4th 962, 966-968.)

Here, the trial court acted within its discretion in finding the evidence of Jernigan's statements to appellant Newborn were relevant to show Jernigan's state of mind. Her belief that appellant Newborn had committed murder was relevant to whether she was in fear when he threatened her and pulled a gun on her. Moreover, where other violent activity is admitted in the penalty phase, the circumstances of that activity are relevant. (*People v. Ashmus* (1991) 54 Cal.3d 140, 187; see *People v. Price*, *supra*, 1 Cal.4th at p. 479.) Appellant Newborn's willingness to threaten a mother, who was emotionally upset from the death of her son, reflected on his own callousness in committing the offense.

Moreover, Jernigan's statements to appellant Newborn were relevant to his state of mind. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 40, p. 722 ["A statement by the declarant may be admitted if it tends to show the mental state or attitude of the person who heard or read it"].) The evidence showed that the reason appellant Newborn threatened Jernigan was because she had been saying that he had killed her son. Thus, her statement reflected on appellant Newborn's motive for the threat. Moreover, his knowledge of her mental state, and his subsequent acts taken with that knowledge, reflected on his own specific intent that his actions and statements be taken as a threat.

Also, the prosecutor never tried to show that appellant Newborn was guilty of the murder, either through questioning or in argument. Rather, he asked the trial court for the limiting instruction as to Jernigan's belief, and he only touched on the incident briefly in closing. While he asked Edwards about her knowledge of the murder, he was simply clarifying that her statement that appellant Newborn had nothing to do with the murder was

based on her friendship with him, not based on any knowledge of the murder.

Accordingly, there was no abuse of discretion by the trial court. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1140.)

C. Any Alleged Error Was Harmless

Any alleged error was harmless because there was no reasonable possibility appellant Newborn would have received a better result had the evidence of Jernigan's belief been excluded. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) The trial court gave a limiting instruction, and the jury is presumed to have followed that instruction. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1005.) There was no evidence or argument suggesting that Jernigan had any specific knowledge about appellant Newborn's participation in her son's murder. And appellant Newborn's reaction—threats made in response to such accusations—suggested that he was protesting his own innocence of the crime. Also, appellant Newborn's counsel noted that the allegation of his participation was "empty, baseless, groundless," "unsupported, undocumented, unverified and untrue." (74RT 7477-7478.) Indeed, defense counsel must not have believed that Jernigan's belief was unduly prejudicial since he elicited it twice on cross-examination. (68RT 6783, 6790.) Also, the murder of Jernigan's son was not among the criminal acts listed for the jury to consider, and the jury was instructed that it could not consider any criminal acts other than those listed as aggravating factors. (75RT 7507-7510.)

And in terms of the aggravating evidence of appellant Newborn's other crimes, which included battery on Khaton, battery on Machado, battery on Anderson, two batteries on Keaton, three cohabitant beatings on Bright, resisting arrest, resisting/obstructing officers, and battery on Douglas, the incident of criminal threats was a minor portion of the overall evidence. When the evidence of the other aggravating acts was combined

with the evidence of the circumstances of the Halloween murders, including the impact on the victims, the case in aggravation was strong. By contrast, appellant Newborn's evidence of his difficult upbringing had little mitigating effect. Therefore, any error was harmless.

XXVIII. THE TRIAL COURT PROPERLY SUSTAINED AN OBJECTION TO DEFENSE COUNSEL'S ARGUMENT ON THE JURY'S EXERCISE OF MERCY

Appellant Newborn contends that the trial court erroneously restricted defense counsel's jury argument regarding the exercise of mercy. (ANOB 310-320.) Respondent submits that the trial court properly sustained the prosecutor's objection and did not improperly restrict defense counsel's argument.

A. Factual Background

In the prosecutor's closing argument, he noted that the jury might hear an argument about mercy, but argued the defense had failed to show any lingering doubt. (74RT 7371.)

In his closing argument, appellant Newborn's trial counsel read from CALJIC No. 8.88. (74RT 7466.) He then focused on factor (k) of CALJIC No. 8.85, which he read as stating,

> "You may consider any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death whether or not related to the offense for which he is on trial."

(74RT 7466-7467.) Counsel said the point he was trying to make was that it was "not a matter" of counting factors or keeping score. (74RT 7467.) Counsel went through various possible scenarios:

> If you were to have a situation where the factors in mitigation totally outweighed the factors in aggravation, you could vote life without parole. If you had a situation where the factors in

mitigation were even, not in number, but following that instruction, you could vote life without parole. If you had a situation where the mitigating factors in your opinion were very small compared to the factors in aggravation, small in the qualitative sense, not quantitative, you could still vote life without parole. *And the last one is if you had only factors in aggravation and little, if any, factors in mitigation, something as little and simple as mercy, you could still vote life without parole.*

(74RT 7467, italics added.)

The prosecutor objected, "That is a misstatement of the law" and the trial court sustained. (74RT 7467.) The following colloquy occurred:

The Court: You can argue it another way, Mr. Jones.

Mr. Jones: I'm sorry, your honor?

The Court: You can argue it.

Mr. Jones: Is it overruled?

The Court: Yes.

Mr. Myers: I thought it was sustained.

The Court: It was sustained, but you can argue it another way.

Mr. Jones: I have reference to factor (k) which says, "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any other sympathetic or other aspect of the defendant's character."

That is what I am trying to say. And I am asking you to consider all of these things, including everything that everybody has said, *including mercy; because mercy is twice blessed.* That is an old saying and I hope you don't find it corny –

Mr. Myers: I will object because it is not a circumstance of the crime, nor is it a character of the defendant, therefore it is not a mitigating factor.

The Court: I don't think he is arguing mitigation. He is explaining what mercy was in his argument.

Overruled.

Mr. Jones: It is twice blessed. It is blessed by the person receiving it, but it is also blessed by the -- a blessing to the person who gives it.

And let's start with some of those things.

(74RT 7468, italics added.)

Later, appellant Newborn's counsel argued that he wanted "To point out one reason for *showing mercy* in this case, one reason for choosing life without parole, one reason as to Lorenzo Newborn." (74RT 7472, italics added.) He then argued the evidence failed to connect appellant Newborn to the crimes. (74RT 7472-7473.)

Counsel later noted the evidence of appellant Newborn's poor performance in school, and argued, "I ask you to *show him some mercy* because of the low self-esteem that must have developed as a result of those things, because of all of the things that I mentioned to you, the ridicule that he must have been subjected to." (74RT 7485, italics added.)

In instructing the jury, the trial court told the jury that in determining the penalty it could consider the factors of: "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (75RT 7503.) The court also told the jury it was to be guided by the aggravating and mitigating circumstances, and that the jury was "[f]ree to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (75RT 7539-7540.) The court also told the jury that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (75RT 7541.)

B. The Trial Court's Ruling Was Proper, And Defense Counsel Was Able to Argue Mercy

A trial court has "great latitude" in limiting the scope of closing arguments at the penalty phase. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1184.) A trial court has discretion to limit closing argument to ensure that jurors do not render a verdict based on emotional responses that are unrelated to the evidence:

> "The right to present closing argument at the penalty phase of a capital trial, while broad in scope, 'is not unbounded ... ; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark.'" [Citation.] Juror determinations may not be the product of "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase," or "extraneous emotional factors." [Citation.]

(*People v. Harris*, *supra*, 37 Cal.4th at p. 355.)

The trial court properly sustained the objection to the one portion of defense counsel's argument because his argument was the equivalent of arguing a "pure mercy" instruction. In *People v. Lewis* (2001) 26 Cal.4th 334, 393, this Court held that a trial court properly declined to give an instruction which stated, "'[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant.'" The Court noted that a penalty jury is supposed to ignore emotional responses unconnected to the evidence in aggravation and mitigation. The Court held that a "pure mercy" instruction was improper because the unadorned use of the term "mercy" implied "'an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances.'" (*Ibid.*, accord, *People v. Panah*, *supra*, 35 Cal.4th at p. 497; *People v. McPeters* (1992) 2 Cal.4th 1148, 1195; see *People v.*

Clark (1992) 3 Cal.4th 41, 163-164 [prosecutor properly argued jury should not be swayed by mercy because jury did not have unbridled discretion].)

Here, the argument of appellant Newborn's counsel crossed the line from arguing mercy based on mitigating circumstances into arguing that mercy alone, untethered to any evidence, was a proper basis for reaching a verdict of life without parole. But as this Court explained in *Lewis*, a exercise of mercy, unconnected to the evidence and the relevant criteria, would make the penalty determination arbitrary and capricious. Therefore, the trial court acted within its discretion to sustain the objection and ask counsel to "argue it another way."

Moreover, the court did not restrict counsel's ability to properly argue mercy. Rather, as shown above, counsel brought up mercy three other times. Each of those times, counsel raised mercy in contexts that were sufficiently tied to the mitigating circumstances that the references were not objectionable. Therefore, there was no abuse of discretion.

C. Any Alleged Error Was Harmless

Any alleged error was harmless because there was no reasonable possibility appellant Newborn would have received a better result had the trial court overruled the prosecutor's objection. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) Although the trial court sustained the prosecutor's objection, the jury was not admonished to disregard counsel's argument. Moreover, appellant Newborn's counsel specifically argued mercy, and argued the jury should show mercy in considering appellant Newborn's background, lingering doubt, and "any other circumstance which extenuates the gravity of the crime." (74RT 7468, 7472, 7485.) And the prosecutor never argued that the jury was not allowed to consider the evidence with mercy. (See *People v. Wader* (1993) 5 Cal.4th 610, 663 [no error in failing to give mercy instruction where prosecutor did not argue that it should not consider sympathy or mercy].)

Although the jury instructions did not expressly discuss mercy, they implicitly did so by allowing the jury to consider "any other circumstance" that extenuated the gravity of the crime and "any sympathetic" aspect of the defendant's character or record. (75RT 7503; CALJIC No. 8.85 [factor (k)]; 8CT 2169-2170.) The jury was also free to assign "whatever moral or sympathetic value" it deemed appropriate to all of the relevant factors. (75RT 7539-7540; CALJIC No. 8.88; 8CT 2226-2227.) This Court has held that "[t]hese two instructions adequately inform the jury that it may exercise mercy, even though the word 'mercy' is not specifically mentioned or defined." (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1090; accord, *People v. Bolin*, *supra*, 18 Cal.4th at p. 344.)

Also, the jury was told that the *only* way it could imposed death was if the aggravating circumstances were so substantial in comparison with the mitigating circumstances that death was warranted. By contrast, all the other scenarios outlined by appellant Newborn's counsel would have meant that life without parole was the proper sentence. Thus, the jury would have understood that it could review the evidence with mercy.

But the evidence in this case—the Halloween murders as well as appellant Newborn's numerous convictions and acts of violence—warranted a sentence of death. In light of the evidence, the instructions, and the arguments as a whole, any error was harmless.

XXIX. SECTIONS 190.2 AND 190.3 ARE CONSTITUTIONAL

Appellant Newborn contends that sections 190.2 and 190.3 are unconstitutional because they fail to require the jury to find the existence of aggravating factors unanimously and beyond a reasonable doubt as a prerequisite to the imposition of the death penalty. Appellant Newborn also argues that California's capital sentencing statute is unconstitutionally overbroad. Specifically, he contends that the expansion of the lying in wait special circumstance violates the Fifth and Eighth Amendment

requirements for clarity and specificity. (ANOB 320-322, citing *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

As this Court stated in *People v. Smith* (2003) 30 Cal.4th 581, 641:

> California's death penalty law adequately narrows the class of death-eligible defendants. [Citations.] Failure to require written findings, unanimity as to aggravating circumstances or findings beyond a reasonable doubt (except for other crimes),... does not invalidate the death penalty.

This Court has also specifically rejected the claim that the lying in wait special circumstance was invalid as overbroad and failed to sufficiently narrow a class of persons eligible for death. (*People v. Nakahara, supra,* 30 Cal.4th at p. 721.) Finally, *Ring v. Arizona, supra*, 536 U.S. 584 and *Apprendi v. New Jersey, supra*, 530 U.S. 466, do not affect California's death penalty law. (*People v. Gray* (2005) 37 Cal.4th 168, 237.) Sections 190.2 and 190.3 do not violate the Fifth, Sixth, Eighth, or Fourteenth Amendment of the United States Constitution.

XXX. APPELLANT MCCLAIN WAS NOT DEPRIVED HIS RIGHT TO COUNSEL AT HIS PENALTY PHASE RETRIAL

Appellant McClain contends that the trial court deprived him of the right to counsel at this penalty phase retrial based on a variety of alleged errors. Specifically, he claims that: (1) the trial court erred in denying attorney Harris's request for a continuance; (2) the trial court erred in denying his motion to substitute counsel without a hearing; and (3) his waiver of his right to counsel was not knowing, voluntary, or intelligent. (AMOB 289-311.) Respondent submits none of appellant McClain's claims have merit.

A. Factual Background

On March 15, 1996, the prosecution announced its intention to retry the penalty. (60RT 5769.) The case was continued to March 21, 1996, as day 41 of 60. (60RT 5770; 7CT 1909.)

On March 21, 1996, appellant Newborn's counsel asked for a continuance for additional time to prepare and because of other pending matters. (60RT 5773-5774.) Appellant McClain's counsel, attorney Harris, joined. (60RT 5774.) The court found there was not good cause for a continuance and denied the request. (60RT 5775.) The court asked for a date, and the prosecution said it would be ready whenever the court set the trial. (60RT 5778.) The court commented that, "Miss Harris was going to have some time to drop her blood pressure from the last trial, which I probably raised." (60RT 5778.)

Appellant Newborn's counsel made a motion to be relieved, which appellant Holmes's counsel joined. (60RT 5778.) Attorney Harris immediately followed by saying, "Your Honor, the court has mentioned my health; and I am very serious when I say this: I can't try this case, judge. I literally cannot do it." (60RT 5778-5779.) The court said it sympathized and it would do everything it could to help counsel. (60RT 5779.) The case was continued to March 25, 1996, as 45 of 60. (60RT 5781; 7CT 1911.)

On March 25, 1996, attorney Harris filed a motion to continue, asserting that she was "physically and mentally exhausted" and that her physician recommended that she not proceed with jury trials for the next 60 days. (7CT 1918-1920.) She attached a letter from her physician, recommending that she refrain from trial work for the next 60 days as a result of high blood pressure and severe headaches. (7CT 1923.)

Attorney Harris separately filed a declaration of her physician in support of the continuance. In it, her physician noted that attorney Harris suffered from high blood pressure and hypertension, and her family had a history of both. She concluded that "Ms. Harris must immediately discontinue trial practice" and that the failure to do so would "lead to extremely serious and life threatening consequences." (7CT 1913-1915.)

In court on March 25, 1996, Ms. Abraham stood in for attorney Harris in representing appellant McClain. (60RT 5782.) The court noted:

> This court was aware that Miss Harris was, at the end of this trial, going to take some time off because of her high blood pressure and received some information from her doctors.
>
> This is the second declaration I have. Miss Harris, who has done probably ten or 11 cases on death and has had a miraculous record in defending clients, according to her doctors and her own declaration is in pretty tough shape; and this court was aware of that after the trial was over. We tried to give some time so she could get the blood pressure down so she would not be bothered with a stroke.

(60RT 5783.) The court continued:

> So the question is do we relieve Miss Harris. And based on the declaration of Miss Harris and her doctors the court is going to relieve Miss Harris; and I will grant the continuance for good cause.

(60RT 5783-5784.)

The court said it needed a date and a lawyer. As to a lawyer, Ms. Abraham had recommended Mr. Leonard, and the court said it would allow the presiding judge to make that appointment. The court continued the proceedings to March 27, 1996, as day 47 of 60, to allow that to occur. (60RT 5783-5787; 7CT 1924.)

On March 27, 1996, the court noted that Mr. Leonard had been appointed that day to represent appellant McClain. (60RT 5788.) When appellant McClain was asked how he felt about the appointment, he said,

"Yes, I discussed with him the fact I wanted to represent myself and I wanted to go pro per." (60RT 5791.) The court said appellant McClain should file a motion, including points and authorities on whether the court could grant it in a death penalty case with "some of the behavior that we have had." (60RT 5791.) The court agreed to hear that motion in ten days. (60RT 5792.) The court said,

> I am not going to give you any advice because you have one of the best defense lawyers in the country here and you know what's going on here. You are fighting for your very life. You may have other thoughts about it now, but I want you to think about it. We can also have Mr. Leonard as standby counsel for a while.
>
> But you are in a position now where you are facing the possibility of going into eternity without any counsel. You may be able to do that, but you've heard me say this in court, very few lawyers in my opinion should even be handling death penalty cases.

(60RT 5792.) The court said it did not think appellant McClain was qualified based on the nature of the case. (60RT 5793.) The court continued:

> I am not trying to embarrass you. I said I will not advise you at this time, but look at the *Faretta* warnings.
>
> My God in heaven, if you want to get out of your cell a little bit, if you behave yourself we can do some other things, but why wander around to face eternity maybe when you have competent counsel.

(60RT 5793.) The court continued the case to April 5, 1996, as day 56 of 60. (60RT 5796; 7CT 1926.)

On April 5, 1996, appellant McClain filed a "Motion to Represent Self In Pro Per or to Appoint New Counsel." (7CT 1943-1945.) Appellant McClain gave notice that he would "move and hereby does move for an order of this court to act as his own counsel . . . pro se, or in the alternative to appoint new counsel." (7CT 1943-1944.) His points and authorities

cited both *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] and *People v. Marsden* (1970) 2 Cal.3d 118. (7CT 1945.) The prosecution filed points and authorities on appellant McClain's motion for self representation. (7CT 1956-1967.)

In court, the trial court said, "I received Mr. McClain's, it appears to be, motion with some points and authorities to act as his own counsel." The court asked appellant McClain if he had met with Mr. Leonard, and appellant McClain said he had. The court asked, "Do you have any motions, any other motions, on this today?" Appellant Holmes's counsel said he had a motion for severance. (60RT 5799.)

Appellant Newborn's counsel said the prosecution should be excluded, "similar to a *Marsden* situation," and that their briefing should be stricken. (60RT 5799.) The court said, "At this point he is entitled to be here because we are talking about whether there is an appointment only." (60RT 5799-5800.) The prosecutor said, "A *Faretta* motion is not a *Marsden* motion" and "[t]he People are supposed to be in court during a *Faretta* motion, not a *Marsden* motion." (60RT 5800.)

The court asked Mr. Leonard if he had anything to add. Mr. Leonard said, "My client just, in his motion, would like to go on and represent himself." He added that appellant McClain wanted Mr. Leonard appointed as advisory counsel. (60RT 5800.) The court continued the matter to allow the parties to investigate whether appellant McClain had had any acts of violence toward deputy sheriffs and whether any law would prohibit such a person from representing himself. (60RT 5801.) The court continued the matter to April 9, 1996, day 60 of 60. (60RT 5802.)

On April 9, 1996, appellant McClain filed a Petition to Proceed in Propria Persona. (7CT 1976-1980.) That day, the court noted it had received the petition. (60RT 5813.) The court said, "That means that you

want to represent yourself; is that correct?," and appellant McClain said, "Yes." (60RT 5813.)

The court orally reviewed the admonitions contained in petition with appellant McClain. (60RT 5813-5823.) The court said that if it allowed appellant McClain to represent himself, the court would appoint Mr. Leonard as standby counsel. (60RT 5817.) Mr. Leonard said appellant McClain wanted advisory counsel, the court asked, "Is that what your request is?," and appellant McClain said, "Yes." (60RT 5817.) The court said it was satisfied with the "pro per waivers," and asked, "Is that what you want to do?" (60RT 5823.) Appellant McClain said, "Yes." (60RT 5823.) The court granted appellant McClain's request:

> Anyway, the court grants the defendant the right to act as his own counsel.
>
> The court feels that I have gone over the warnings appropriately with you, and you have given me another written motion which I have read. So I will combine that with the decision.

(60RT 5824.)

Appellant McClain said he needed a week to get ready for trial. (60RT 5825.) The court found good cause to continue the case based on Mr. Leonard's need for additional time to prepare. (60RT 5826, 5832.) The court continued the case to June 28, 1996. (60RT 5833, 5836.)

Mr. Leonard filed a motion to continue. (7CT 2002-2003.) On June 28, 1996, appellant McClain personally waived time, and the court continued the case to August 12, 1996, as day 0 of 20. (60RT 5853, 5860.)

On August 12, 1996, the court said it intended to begin jury selection the next day. (61RT 5864.) The next day, a panel of prospective jurors was sworn in. (61RT 5871.)

B. The Trial Court Did Not Improperly Deny Any Request for a Continuance

First, appellant McClain contends the trial court erred in denying attorney Harris's request for a continuance. (AMOB 296-302.) But the trial court did not deny the request. Rather, attorney Harris was properly discharged as counsel and a continuance was granted.

A continuance will be granted only upon a showing of good cause, and it is within the trial court's broad discretion to determine whether good cause exists. (§ 1050, subd. (e); *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037; *People v. Frye*, *supra*, 18 Cal.4th at p. 1013.) In evaluating a motion to continue, California courts weigh the benefit of a continuance to the moving party against the burden of a continuance to the witnesses and court. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 840.)

"The trial court need not grant further continuances if it reasonably concludes that it must remove appointed counsel 'to "prevent substantial impairment of court proceedings" [citation] . . . .' [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1124.) A trial court's decision to deny a continuance request is reviewed under the abuse-of-discretion standard. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1037.)

Appellant McClain's case is similar to *People v. Mungia*, *supra*, 44 Cal.4th 1101. There, a deputy public defender, Isaacs, was appointed to represent the defendant; a second deputy was later appointed. (*Id.* at p. 1113.) Isaacs suffered a heart attack and was hospitalized. (*Id.* at p. 1114.) On March 26, 1996, a motion was made to continue the case to an undetermined date, and the supervising attorney making motion said that it was "unlikely" that attorney Isaacs would return to trial work but asked for a month to assess the attorney's condition. The trial court trailed the matter, eventually to April 5, 1996. At that time, the defendant's second

attorney explained that she was not prepared because she had focused her efforts solely on the penalty phase. (*Id.* at pp. 1114-1115.) A supervising attorney said that Isaacs would be out for an additional three months at which point, Isaacs might be able to return trial work but it was also possible Isaacs might never be able to return to work. (*Id.* at p. 1115.) The court trailed the case to April 12, 1996, at which time a new deputy public defender was assigned but said he would need nine months to a year to prepare. The court relieved the public defender and appointed private counsel, continuing the case to May 3, 1996, as day 0 of 60. (*Id.* at pp. 1115-1116.)

On appeal, the defendant complained that the trial court erred in denying a continuance. (*People v. Mungia, supra*, 44 Cal.4th at p. 1117.) The Court rejected the claim, noting that the motion had been granted and that, on March 26, 1996, the court vacated the trial date. And when the public defender was relieved, the court granted new counsel time to prepare; the trial did not begin until January 13, 1997. But the defendant contended the trial court should have granted the one-month continuance to assess Isaacs's situation, rather than trail the matter until new counsel was appointed on April 12. (*Id.* at pp. 1117-1118.) This Court found no abuse of discretion, noting the trial court could reasonably conclude there was "little to indicate that the issue of Isaacs's fitness to try the case would be resolved in the near future." (*Id.* at p. 1119.) Moreover, the Court found no prejudice, noting that a month after March 26, Isaacs's condition was no closer to being resolved. The Court also found no abuse of discretion in relieving the public defender given that Isaacs was physically incapacitated and there was no indication that he would ever be able to retry the case and the newly assigned deputy needed at least nine months to prepare. (*Id.* at p. 1122.)

As in *Mungia*, the trial court did not deny attorney Harris's request for a continuance. Rather, the court discharged her as counsel because it concluded that she would be unable to try the case. Attorney Harris clearly stated, "I can't try this case, judge. I literally cannot do it." (60RT 5779.) Also, her physician essentially said that attorney Harris had to "immediately discontinue trial practice" or she might suffer a stroke. (7CT 1913-1915.) While the ability of Isaacs to return to trial in *Mungia* was somewhat equivocal, there was no issue here: attorney Harris would never be able to try the case.

To the extent appellant McClain is asserting the trial court should have granted a continuance to assess whether attorney Harris would be able to return, there was no abuse of discretion. There was no request from appellant McClain, attorney Harris, or Ms. Abraham to continue for that purpose. Rather, attorney Harris's continuance request asked for no date in particular, and the subsequent declaration filed from her physician made it clear she would never be able to try the case. As in *Mungia*, the trial court could reasonably elect to discharge attorney Harris based on the conclusion that she would not be able to try the case.

Moreover, upon discharging attorney Harris, the court said, "I will *grant* the continuance for good cause." (60RT 5784, italics added.) In effect, the court trailed the case to the last day for trial until the issue of appellant McClain's representation was finally resolved. Then, however, the court granted advisory counsel's request for an 80-day continuance to June 28. The court later granted another 45-day continuance to August 12, and trial started the day after that. Thus, there was no denial of a continuance.

Also, *Morris v. Slappy* (1983) 461 U.S. 1 [103 S.Ct. 1610, 75 L.Ed.2d 610] is not helpful to appellant McClain. (Cf. AMOB 298-299.) In *Morris v. Slappy*, *supra*, at page 5, the defendant's first deputy public

defender was hospitalized before trial and was replaced by another deputy public defender. The replacement attorney prepared for trial, and trial began. (*Id.* at pp. 5-8.) During the third day of trial, the defendant made statements that arguably constituted a request for a continuance to allow his prior counsel to represent him. (*Id.* at pp. 12-13.) The United States Supreme Court found the denial of the request "abundantly justified" since, given the lateness of the request, the trial court could reasonably conclude the request was simply a "transparent ploy for delay." (*Id.* at p. 13.)

Unlike the defendant in *Morris v. Slappy*, neither appellant McClain nor anyone else requested additional time to allow attorney Harris to return. Indeed, such a request would have been futile because the declaration from her physician made it clear that attorney Harris could *never* return. Accordingly, there was no abuse of discretion.

In any event, appellant McClain cannot show any prejudice. The denial of a continuance does not require the reversal of a conviction in the absence of a showing of prejudice. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Thus, a defendant must demonstrate there is a reasonable probability the outcome of the trial would have been more favorable to him if the continuance had been granted. (*People v. Hawkins* (1995) 10 Cal.4th 920, 945, overruled on other grounds in *People v. Blakely* (2000) 23 Cal.4th 82, 89; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Appellant McClain claims the denial of the 60-day request resulted in a delay of almost six months. (AMOB 296-298.)[65] But appellant McClain does not show how *additional* time to prepare, i.e., *more* than 60 days, prejudiced him. There is no assertion that any delay damaged his

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[65] Although attorney Harris's original doctor's note said that she could not work for 60 days, attorney Harris's actual request did not specify 60 days or any amount of time. Moreover, the later continuances amounted to 125 days, just over four months.

ability to defend his case. Thus, appellant McClain's claim also fails for lack of prejudice.

C. The Trial Court Did Not Err in Failing to Hold a *Marsden* Hearing

Second, appellant McClain claims the trial court erred in denying his motion to substitute counsel without a hearing. (AMOB 302-306.) But the trial court had no duty to hold a hearing because appellant McClain made clear that he wanted to represent himself, and his request for substitution of counsel was only made in the alternative.

"'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.]'" (*People v. Fierro*, *supra*, 1 Cal.4th at p. 204; accord, *People v. Smith*, *supra*, 30 Cal.4th at p. 604; *People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) However, "[a] request for self-representation does not trigger a duty to conduct a *Marsden* inquiry [citation] or to suggest substitution of counsel as an alternative. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 854-855.)

Here, the gist of appellant McClain's motion was that he wanted to represent himself. This is what he first asked for. (60RT 5791 ["Yes, I discussed with him the fact I wanted to represent myself and I wanted to go pro per"].) In his written motion, appellant McClain asked "for an order of this court to act as his own counsel . . . pro se, *or in the alternative* to appoint new counsel." (7CT 1943-1944, italics added.) Thus, by its very terms, appellant McClain's motion only wanted the appointment of new counsel if his request for self-representation was denied. In court, the trial court characterized appellant McClain's motion as a motion "to act as his own counsel" (60RT 5799), the prosecutor said it was "not a *Marsden*

motion" (60RT 5800), and Mr. Leonard said appellant McClain "would like to go on and represent himself" (60RT 5800). After these repeated characterizations of appellant McClain's motion as one for self-representation, appellant McClain never said that his principal request was to substitute counsel. Rather, appellant McClain personally filled out a petition to represent himself and filed it. (7CT 1976-1980.) The court said, "That means that you want to represent yourself; is that correct?," and appellant McClain said, "Yes." (60RT 5813.)

In light of all these circumstances, appellant McClain made clear that he wanted self-representation, and that he only wanted to substitute counsel if his request for self-representation was denied. (See *People v. Clark*, *supra*, 3 Cal.4th at p. 105 [gist of defendant's request was for self-representation, not substitution of counsel].) Moreover, appellant McClain had no cause to believe Mr. Leonard, who had just been appointed, was incompetent. (See *People v. Frierson* (1991) 53 Cal.3d 730, 741 [where defendant requested self-representation and expressed dissatisfaction with counsel, no motion to substitute had been made].) Indeed, to the extent appellant McClain made a *Marsden* motion in his initial written pleading, he abandoned it by his statements to the court and his subsequent filing of the petition to represent himself. (See *People v. Vera* (2004) 122 Cal.App.4th 970, 981-982 [motion for substitution of counsel may be abandoned by post-motion conduct].) Accordingly, the trial court had no duty to hold a *Marsden* hearing, and no error occurred.

D. The Trial Court Adequately Advised Appellant McClain of the Dangers of Self-Representation

Third, appellant McClain claims his waiver of his right to counsel was not knowing, voluntary, or intelligent. (AMOB 306-309.) But the trial court adequately advised appellant McClain such that his waiver was knowing and intelligent.

This Court recently outlined the parameters of advising a defendant of the dangers of self-representation:

> A criminal defendant has a right, under the Sixth Amendment to the federal Constitution, to conduct his own defense, provided that he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. [Citations.] A defendant seeking to represent himself 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation].' [Citation.] 'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' [Citation.] Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' [Citations.]" [Citation.] Thus, "[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." [Citations.]

(*People v. Burgener* (2009) 46 Cal.4th 231, 240-241; accord, *Faretta v. California*, *supra*, 422 U.S. at pp. 835-836.) This Court "independently examine[s] the entire record to determine whether the defendant knowingly and intelligently waived the right to counsel. [Citation.]" (*People v. Burgener*, *supra*, at p. 241.)

For instance, in *People v. Bloom* (1989) 48 Cal.3d 1194, 1225, the defendant was made sufficiently aware of the dangers and disadvantages of self-representation where the trial court gave few specific warnings, but advised the defendant he was making "an enormous mistake," and noted the prosecutor would be a skilled opponent. In *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1012, overruled on another point in *People v. Doolin*, *supra*, 45 Cal.4th at page 421, footnote 22, the trial court adequately advised the defendant of the dangers of self-representation by informing him that that prosecutor was experienced, lack of legal training was a disadvantage, and self-representation was almost always unwise.

Here, when appellant McClain first mentioned representing himself, the trial court noted that he was "fighting for his life," and he was already represented by "one of the best lawyers in the country." (60RT 5792.) After appellant McClain filed his petition, the trial court gave extensive admonishments to appellant McClain: he had a right to a speedy and public trial; the other counsel and codefendants would be joining him; there might be a motion from them to continue; he had a right to subpoena witnesses and records; he had the rights to confrontation and cross-examination; he had the right to call witnesses and ask questions; he would be wearing a belt because of past activities and his movements would be limited; he had the right to testify and the right not to be compelled to testify; he had the right to have a court appointed lawyer; he would conduct his own defense without the aid of a lawyer; the court could deny a future request to relinquish self-representation and have a lawyer appointed; if the court appointed a lawyer, an experienced trial lawyer would be assigned to represent him; he would have to follow the rules of evidence and criminal procedure; he had to respect the court and misconduct could be a basis for revoking self-representation; if an attorney took over his case as a result of misconduct, that attorney might be disadvantaged, but he would not be able to claim that as an issue on appeal; misconduct could also be a basis for revoking or limiting his pro per privileges; pro per status did not immunize him from discipline in the jails; he would be making motions, selecting a jury, giving opening statements, cross-examining witnesses, making objections, preparing jury instructions, and giving closing argument; his movements might be restricted; he was facing a possible death sentence; and his claim of incompetence of counsel for the penalty phase would be waived for appeal. (60RT 5814-5824.) The trial court repeatedly asked appellant McClain if he understood these rights, and appellant McClain said that he did. (60RT 5814-5824.) These advisements echoed those on

the form, which was initialed and signed by appellant McClain. (7CT 1976-1980.) The form also advised appellant McClain that the case against him would be handled by a deputy district attorney who was experienced and highly specialized in trials, and that appellant McClain would not be entitled to any special consideration or assistance during the trial. (7CT 1978.) The court also advised appellant McClain not to represent himself and instead be represented by an attorney. (60RT 5819; 7CT 1978.) Appellant McClain agreed that it was his personal desire that he "be granted permission by the court to proceed in propria persona to act as [his] own lawyer" and he understood he was "giving up the right to be represented by a lawyer appointed by the court." (60RT 5817.)

Thus, the record as a whole demonstrates that appellant McClain understood the disadvantages of self-representation, including the risks and complexities of this case. (*People v. Burgener*, *supra*, 46 Cal.4th at p. 241.) The trial court gave extensive admonitions on the duties, responsibilities, and risks involved with self-representation. Indeed, the warnings were more extensive than in *Bloom* or *Kirkpatrick*. And appellant McClain personally and continually affirmed that he understood the dangers. Under these circumstances, appellant McClain knowingly and intelligently waived his Sixth Amendment right to the assistance of counsel. Accordingly, appellant McClain's claim should be rejected.

XXXI. THE TRIAL JUDGE PROPERLY ASKED AND ALLOWED QUESTIONS TO BE ASKED OF CLARENCE JONES

Appellant McClain contends that the trial court erred in: (1) eliciting character evidence from Clarence Jones that appellant McClain had chosen not to present; (2) allowing the prosecutor to impeach Jones on recross-examination; and (3) forcing Jones to appear in jail clothes and shackles. (AMOB 355-368.) Respondent submits that the trial court's actions were proper.

A. Factual Background

Deputy Boghosian testified about appellant McClain's June 19, 1995 attack on another inmate in county jail. (68RT 6648-6655.) Under where appellant McClain's hands had been, the deputies found a jail-made stabbing device. (68RT 6655-6656, 6658-6659.)

Appellant McClain later asked for Clarence Jones to be removed from county jail to testify. When asked the substance of the testimony, appellant McClain said, "Just my demeanor in jail, the type of person I am in jail, like pertaining to the jailhouse sticking and all that, testify what type of person I am since he's known me and all that." (72RT 7189.)

The next day, appellant McClain called Jones to testify. (73RT 7272.) Appellant McClain began, "Mr. Jones, I called you today to get a better understanding from your point of view on the tiers. [¶] Do you remember when an incident occurred involving a shank or some type of an assault on the tier in 3100?" Jones answered, "Yes." Jones testified he never saw a weapon in anyone's hand. (73RT 7272.) Appellant McClain asked, "Would it be uncommon, particularly in a racial incident, for someone else to throw a weapon out on the tier?," and the prosecutor objected on grounds of speculation and lack of foundation. (73RT 7272-7273.) The following colloquy occurred:

> The Court: Are you housed in county jail at this time?
>
> The witness: Yeah.
>
> The Court: How long have you been there?
>
> The witness: I've been there about almost a year.
>
> The Court: Have you been there before?
>
> The witness: Yes.
>
> The Court: And so you've seen incidents like this before?
>
> The witness: Yes.
>
> The Court: You know what a shank is?

The witness: Yes.

The Court: You know how they make a shank?

The witness: Yeah.

The Court: The gentleman is an expert in, I guess, what you are asking.

Q. by Defendant McClain: So would it be unusual, say, for one race person to be involved in an altercation with a person of another race and somebody would take it upon themselves to throw some type of weapon as an aid to that person?

A. (Nods head up and down.)

Defendant McClain: No further questions.

(73RT 7273.)

On cross-examination, Jones clarified that he had not been present when appellant McClain had been wrestled to the ground and deputies found a shank under his hand. (73RT 7274.) Jones denied being in an altercation himself with deputies and said, "The Sheriff jumped on me and whipped me." (73RT 7275.) When asked if the deputies took him to the ground during that incident, Jones responded, "The incident -- you mean when the police jumped on me for nothing?" (73RT 7275.)

Jones admitted he had been sentenced to 28 years in state prison for carjacking. (73RT 7276.) When asked if he had also been convicted of robbery in the same case, Jones responded, "Am I on trial or what?," and "I take the Fifth." (73RT 7276.) The court admonished Jones that the prosecutor had a right to impeach him, and told the prosecutor "Just a couple more questions," and "Let's get on with it." (73RT 7276.)

Jones admitted he had been convicted of robbery, carjacking, and grand theft of an automobile. (73RT 7277.) When asked if he had been convicted of robbery in 1987, Jones at first did not respond, and then responded, "Whew." (73RT 7277.)

When asked how he knew appellant McClain, Jones said, "Been knowing him." When asked how long he had known him, Jones said ten or twenty years. Jones said he met appellant McClain "In and out of Y.A., on the streets." (73RT 7277.) Jones clarified that he knew appellant McClain when they were both housed at the Youth Authority, which was a custodial facility for juveniles who commit felonies. (73RT 7278.) Jones said that after he got out of the Youth Authority, he kept in contact with appellant McClain. (73RT 7278.)

Jones admitted he was convicted of felon in possession of a firearm in 1986, and in 1987 he was convicted of robbery and sentenced to state prison. (73RT 7278.)

On redirect, the following colloquy occurred:

By Defendant McClain:

Q. Mr. Jones, I brought you here to give the jury a better -- another point of view of exactly what goes on on the tier, not for you to be put on trial, right?

A. Right.

Q. Just so you don't feel uncomfortable, I just want to pass that to you.

A. Yeah.

Defendant McClain: No further questions.

The Court: Do you want to say anything back?

The witness: I just want to say, you know, that I've been knowing this guy for quite a long time and as far as, you know, my opinion of him, he's a good guy and he's not what these people claim that he is. And I feel, you know, further down life's road that his innocence will be proven, that he is really innocent of the crime he is being, you know, placed up under, you know.

The Court: Mr. Myers, do you want to ask any questions?

The witness: I am not finished, your honor.

The Court: I don't want you to testify. I asked if you wanted to answer Mr. McClain.

The witness: I got one more thing to say.

The Court: Go ahead and say it. It's okay.

The witness: And I just wanted to say this to the jury, that he's a young black man and there is a racial war going on in these courtrooms; and these white boys, white Caucasian guys that's got, you know, high-publicity cases, they don't file the death penalty against them and all. I don't think it's fair, you know, for the young brother, you know, to be found guilty on a D.P.

(73RT 7279-7280.)

On recross-examination, the prosecutor asked, "The case on which you were convicted, didn't you break a glass bottle, stick it to somebody's neck and then take his property?" Jones responded, "They got me confused," and "No, I didn't." Appellant McClain objected that the prosecutor's question was "outside the scope," and the trial court said, "You brought him here. He is giving a character reference for you. The court let him answer your questions." Appellant McClain said, "He had a chance to ask that question." (73RT 7280.)

The prosecutor asked if he had been convicted, and Jones said he had, but only because he had been forced to represent himself because his counsel was not representing him "right." (73RT 7281.)[66] Jones agreed that a victim testified that his property was taken from him by someone holding a broken bottle to his neck, but when asked if the victim identified Jones, Jones said, "He wasn't really sure." (73RT 7281.) When asked if he was convicted based on the evidence, Jones responded, "Not just by the evidence, by what goes on up there in them courts, a black man representing himself." (73RT 7281-7282.)

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[66] The trial court later admonished the jury that no one is ever forced to go to trial without counsel. (73RT 7294-7295.)

Jones said he had been treated unfairly every time he had been through the court system. (73RT 7282.) Although he did not admit convictions, he said he had been treated unfairly when: receiving a concurrent sentence for receiving stolen property in 1981; sentenced to state prison for robbery in 1987; granted probation for vandalism in 1992; and arrested for battery and possessing a controlled substance in 1995. (73RT 7282-7283.)

The prosecutor also asked, "And while you were waiting for trial in the case on which you were convicted, didn't you have outbursts towards the court, the deputies and you had to be shackled?" Jones said, "No." When asked if he had been shackled, he said, "For no reason, yes." (73RT 7283.)

The prosecutor asked the trial court to admonish the jury that Jones's shackling did not reflect on appellant McClain. (73RT 7284.) As appellant McClain was calling his next witness, the trial court said, "The jury is admonished the fact he is shackled and brought here with deputies has no reflection on Mr. McClain." (73RT 7285.)

In closing argument, the prosecutor argued that appellant McClain's questions showed a pattern of denial, "Which was most brilliantly illustrated by the witness that he called, Mr. Jones . . . ." (74RT 7394.) The prosecutor also argued that life without parole for appellants was "just home away from home." (74RT 7401.) The prosecutor continued, "You saw Mr. McClain's witness, Mr. Jones. These are the types of people with whom Mr. McClain chooses to associate himself while in custody, killers, robbers." (74RT 7402.)

B. The Trial Court's Question to Jones was Proper

Appellant McClain first contends the trial court erroneously elicited character evidence from Jones and failed to act impartially when it invited Jones to respond to appellant McClain's question. (AMOB 360.) His

claim is forfeited by the failure to object, and, in any event, the trial court acted within its discretion.

While a trial court may not assume the role of the prosecutor, "[a] trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.]" (*People v. Cook*, *supra*, 39 Cal.4th at p. 597; Evid. Code, § 775; accord, *People v. Guerra*, *supra*, 37 Cal.4th at p. 1125.) "The court's questioning must be '"temperate, nonargumentative, and scrupulously fair"' [citation], and it must not convey to the jury the court's opinion of the witness's credibility. [Citation.]" (*People v. Cook*, *supra*, at p. 597.)

Complaints about a trial court's questioning must be objected to at trial in order to preserve the claim for appeal. (*People v. Cook*, *supra*, 39 Cal.4th at p. 598; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1125.) Appellant McClain did not object to the trial court's inquiry as to whether Jones wanted to respond to appellant McClain's comments on redirect. Therefore, appellant McClain's claim of error is forfeited.

Moreover, the trial court's questioning was proper. The court asked a single question, which was brief and nonargumentative and was apparently prompted by the witness's reaction to appellant McClain's statement. The court's question did not ask for Jones to provide character evidence. And Jones's response was relevant to his own bias and reflected on his credibility in testifying. Indeed, if anything, the trial court went out of its way to assist appellant McClain by asking Jones a series of questions that laid the foundation for Jones's testimony. (See 73RT 7273.) The trial court acted within its discretion in asking a single additional question and letting Jones respond to appellant McClain's statements. (See *People v. Cook*, *supra*, 39 Cal.4th at p. 598; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1125.)

C. The Trial Court Properly Allowed the Prosecutor's Questions during Recross-Examination

Appellant McClain next contends that the trial court erred in permitting the prosecutor's questions on recross-examination. (AMOB 360.) Again, the trial court acted within its discretion.

In general, cross-examination is limited to the scope of direct examination, in addition to challenging the witness's accuracy, recollection, knowledge or credibility. (Evid. Code, § 773, subd. (a); *People v. Butler* (1967) 65 Cal.2d 569, 575, overruled on other grounds in *People v. Tufunga* (1999) 21 Cal.4th 935, 956.) However, a party should be given reasonable latitude in cross-examination. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1139; *People v. Murphy* (1963) 59 Cal.2d 818, 830-831.) A trial court has "wide discretion" in controlling the ultimate scope of cross-examination. (*People v. Lancaster* (2007) 41 Cal.4th 50, 102; *People v. Murphy*, *supra*, at p. 830.)

Here, the prosecutor's questions about Jones's shackles, his underlying criminal conviction, and the dispositions of Jones's other cases were not asked to impeach the character of Jones. (73RT 7280-7283.) Rather, the questions were relevant to Jones's assertion that there was a "racial war" going on in the courts that led to Black men being treated unfairly. The prosecutor's questions attempted to show that Jones's convictions, shackles, and sentences were the result of Jones's own misconduct, not the result of unfair racism. Further, the prosecutor bolstered this understanding in closing argument by referring to Mr. Jones's testimony as reflecting a pattern of denial. As such, the questions were within the scope of Jones's additional testimony prompted by the redirect examination and the trial court's inquiry. Therefore, no error occurred.

Moreover, even if the prosecutor's questions were merely impeachment and/or were beyond the scope of redirect, the trial court acted

within its discretion to allow the questions. A trial court has discretion to allow a party to reopen cross-examination. (*People v. Tafoya* (2007) 42 Cal.4th 147, 175-176.) Although Jones did not testify on direct as a character witness, the prosecutor was properly allowed to inquire as to Jones's relationship with appellant McClain since their friendship was relevant to bias. Further, Jones volunteered on redirect that appellant McClain was a "good guy" and was innocent of the charged crimes. Given this additional testimony, the trial court could properly conclude that the prosecutor should be allowed to further impeach Jones. Therefore, the prosecutor could properly elicit additional evidence of Jones's prior felony convictions. (Evid. Code, §788; *People v. Castro* (1985) 38 Cal.3d 301.) Moreover, questions about the circumstances of the robbery, as well as misconduct in court were relevant to Jones's willingness to engage in deceit. (*People v. Mickle* (1991) 54 Cal.3d 140, 168 [evidence that witness had threatened other witnesses, which showed willingness to harm others and subvert truth-finding process, was admissible to impeach].) Accordingly, no error occurred.[67]

D. Appellant McClain Forfeited Any Error as to Shackling Jones

Finally, appellant McClain contends that the trial court erred in forcing Jones to appear in jail clothes and shackles. (AMOB 360.)[68] Neither a criminal defendant nor a defense witness should be made to

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[67] To the extent appellant McClain claims that the trial court failed to exercise its discretion under Evidence Code section 352 (see AMOB 363), his claim is forfeited by his failure to object on that ground below. (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1122-1123; *People v. Smithey*, *supra*, 20 Cal.4th at p. 965.)

[68] The record does not reflect that Jones was wearing jail clothing, although this seems likely since he was an inmate in county jail and had been convicted and sentenced to state prison.

appear in court as a witness in shackles unless there is showing of manifest need for such restraints. (*People v. Allen* (1986) 42 Cal.3d 1222, 1261; *People v. Duran, supra*, 16 Cal.3d at pp. 288, fn. 4, 290-291.)

But shackling must be objected to or the issue is forfeited on appeal. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 95; *People v. Walker* (1988) 47 Cal.3d 605, 629.) Here, appellant McClain never objected to Jones appearing in shackles or jail clothes. Therefore, his claim is forfeited.

E. Any Alleged Error Was Harmless

Any alleged error was harmless because there was no reasonable possibility appellant McClain would have received a better result had Jones's testimony ended after appellant McClain's redirect examination. (See *People v. Hamilton, supra,* 45 Cal.4th at p. 912.)

Jones's responses to the prosecutor's questions on recross-examination were no more damaging than his testimony on cross-examination. There, Jones was reluctant to acknowledge his numerous prior convictions, he admitted a long-term friendship with appellant McClain, and he acknowledged he was not present during appellant McClain's attack on another inmate. Since Jones was not present during appellant McClain's attack, the probative value of his direct testimony—just that another inmate could have thrown the shank—was extremely low. As a whole, Jones had little credibility and little to offer as help to appellant McClain, even before appellant McClain's redirect. When viewed in light of the aggravating evidence against appellant McClain—his convictions and other criminal conduct combined with the cruel circumstances of the Halloween murders—any error was harmless.

Contrary to appellant McClain's assertion (AMOB 360), the prosecutor did not argue that Jones's association showed appellant McClain's future dangerousness. Rather, the prosecutor argued that punishment of life without parole would not be significant enough because

it would allow appellant McClain to continue to associate with his colleagues in crime. (74RT 7401-7402.) Thus, any error was minimized by the prosecutor's brief and proper comments on Jones's testimony.

Nor did the shackling of Jones prejudice appellant McClain. "[A]lthough the limitation on physical restraints applies to defense witnesses as well as defendants, 'the prejudicial effect of shackling defense witnesses is less consequential since "the shackled witness . . . [does] not directly affect the presumption of innocence."' [Citation.]" (*People v. Allen*, *supra*, 42 Cal.3d at pp. 1264-1265; *People v. Duran*, *supra*, 16 Cal.3d at p. 288, fn. 4.) Moreover, the trial court here specifically admonished the jury not to infer anything about appellant McClain from Jones's shackles. (73RT 7285.) In light of these circumstances as well as the above, any error in having Jones testify in shackles was harmless.

XXXII. APPELLANT MCCLAIN'S CONVICTION FOR ATTEMPTED MURDER WAS RELIABLE

Appellant McClain contends that his death sentence rested on largely on his conviction for the attempted murder of Price, which was unreliable because the evidence was insufficient, severance from the Halloween murders was improperly denied, and the trial court improperly limited the cross-examination of Price. (AMOB 422-424.) But as shown above (Arguments II., V., VII., *ante*), appellant McClain's underlying claims attacking his attempted murder conviction all fail. Thus, the conviction was reliable, and no error occurred.

Moreover, even if appellant McClain's conviction was unreliable, there is no reasonable possibility that he would have received a better result at the penalty phase retrial if the conviction had been excluded in light of the heinous nature of the Halloween murders, appellant McClain's numerous prior convictions or acts of violence (1989 grand theft of an automobile, 1989 robbery of Flores, 1990 robbery of Rowe and Cook, 1995

attack on an inmate, in-court threat to a witness, in-court threat to the bailiff, and possession of a firearm in 1989, 1990, and 1992), and the weak nature of his mitigating evidence. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) Therefore, any alleged error was harmless.

XXXIII. THE JURY WAS PROPERLY INSTRUCTED ON ITS SENTENCING DISCRETION

Appellant McClain contends that CALJIC No. 8.88, defining the scope of the jury's sentencing discretion and the nature of its deliberative process, violated his constitutional rights. Specifically, he contends: (1) the use of the phrase "so substantial" was impermissibly vague; (2) the instruction erroneously instructed the jury to determine whether death was "warranted," rather than "appropriate"; (3) the instruction failed to inform the jury that it should impose a sentence of life without parole if the mitigating circumstances outweighed the aggravating circumstances; and (4) the instruction failed to inform the jury that no one had the burden of proof. (AMOB 440-452.) Appellant Holmes joins this argument. (AHOB 76.)

CALJIC No. 8.88 is proper. (*People v. Arias* (1996) 13 Cal.4th 92, 170-171.) Appellants' specific claims have been repeatedly rejected. (See, e.g., *People v. Watson* (2008) 43 Cal.4th 652, 702 [all claims]; *People v. Chatman*, *supra*, 38 Cal.4th at p. 409 [claims (1) and (3)]; *People v. Moon* (2005) 37 Cal.4th 1, 42-44 [all claims].) As in those cases, appellants' claims should be rejected.

XXXIV. THE TRIAL COURT PROPERLY DEFINED THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant McClain contends that the trial court erroneously failed to define life without the possibility of parole, which "means that defendant will not be released." (AMOB 455; see AMOB 452-458.) Appellant Holmes joins this argument. (AHOB 76.)

As this Court has held, however, "a trial court does not have a sua sponte duty to define 'life without the possibility of parole' because the term has a plain meaning that does not require further explanation." (*People v. Watson*, *supra*, 43 Cal.4th at p. 700; accord, *People v. Holt*, *supra*, 15 Cal.4th at p. 688.) Moreover, appellants' proposed instruction would be erroneous because the gubernatorial powers of pardon and commutation leave open the possibility that a capital defendant *will* be released. (See *People v. Watson*, *supra*, at pp. 699-700 [instruction that life without parole means that defendant will never be considered for parole is erroneous]; *People v. Holt*, *supra*, at p. 689 [instruction that life without parole means defendant can never be released on parole is erroneous].) Accordingly, appellants' claim should be rejected.

XXXV. THE DEATH PENALTY IS CONSTITUTIONAL AND DOES NOT VIOLATE INTERNATIONAL LAW

Appellant McClain contends that California's death penalty statute and procedures violate the United States Constitution and international law. Specifically, appellant McClain contends the death penalty is unconstitutional, claiming: (1) section 190.3 as applied is arbitrary and capricious; (2) there should be a requirement that a unanimous jury find, beyond a reasonable doubt, that one or more aggravating factors existed; (3) there should be a requirement that the jury find, beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors and that death is the appropriate penalty; (4) there should be a requirement that the jury make findings by a preponderance of evidence; (5) there should be a requirement that the jury render written findings on the aggravating factors; (6) comparative (inter-case) proportionality review should be required; (7) the use of unadjudicated criminal activity is impermissible, and even if allowed, must be found true beyond a reasonable doubt by a unanimous jury; (8) the use of the adjectives "extreme" and "substantial"

acted as barriers to consideration of mitigation; (9) the jury should have been instructed that the list of mitigating factors are relevant solely as "potential mitigators"; (10) the failure to delete inapplicable sentencing factors was error; (11) the sentencing scheme violates equal protection by denying capital defendants some procedural safeguards that are given to non-capital defendants; (12) the death penalty violates the International Covenant of Civil and Political Rights; and (13) the death penalty violates the Eighth Amendment. (AMOB 458-523.) Appellant Holmes joins this argument (AHOB 76) and argues portions of it separately (AHOB 280-294).

This Court has rejected each of appellants' claims: (1) "Consideration of the factors in aggravation outlined by section 190.3 does not invite arbitrary or capricious sentencing" (*People v. Smith* (2007) 40 Cal.4th 483, 525, citation omitted); (2) there is no requirement that a unanimous jury find an aggravating factor true, nor is there a requirement that the jury find aggravating factors (except for other crimes) true beyond a reasonable doubt (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926); (3) there is no requirement that the jury find, beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors and that death is the appropriate penalty (*People v. Medina*, *supra*, 11 Cal.4th at p. 782); (4) except for other crimes evidence, where proof beyond a reasonable doubt is required, there is no requirement that the jury make findings by a preponderance of evidence (*People v. Holt*, *supra*, 15 Cal.4th at pp. 682-684); (5) there is no requirement that the jury render written findings on the aggravating factors (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926); (6) comparative (inter-case) proportionality review is not required (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 927); (7) the use of unadjudicated criminal activity is constitutional (*People v. Watson*, *supra*, 43 Cal.4th at p. 701), and there is no requirement that such activity be found true beyond a

reasonable doubt by a *unanimous* jury (*People v. Huggins*, *supra*, 38 Cal.4th at p. 239); (8) the use of the adjectives "extreme" and "substantial" do not act as barriers to consideration of mitigation (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 927); (9) there is no requirement that the jury be instructed that the list of mitigating factors are relevant solely as "potential mitigators" (*People v. Smith*, *supra*, 40 Cal.4th at p. 527); (10) the trial court was not required to delete inapplicable sentencing factors (*People v. Watson*, *supra*, 43 Cal.4th at p. 701); (11) the sentencing scheme does not violate equal protection by denying capital defendants some procedural safeguards that are given to non-capital defendants because the two classes of defendants are not similarly situated (*People v. Watson*, *supra*, 43 Cal.4th at p. 701); (12) the death penalty does not violate the International Covenant of Civil and Political Rights (*People v. Perry* (2006) 38 Cal.4th 302, 322); and (13) California's death penalty does not violate the Eighth Amendment (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 927). Accordingly, appellants' claims should be rejected.

XXXVI. EVIDENCE OF APPELLANT HOLMES'S ILLEGAL POSSESSION OF A FIREARM WAS PROPERLY ADMITTED

Appellant Holmes contends that his juvenile adjudication for firearm possession was improperly admitted. (AHOB 275-279.) Respondent submits that the trial court acted within its discretion to admit evidence of the unlawful possession.

A. Factual background

Prior to trial, the prosecution filed a Statement in Aggravation, that listed an intent to introduce in the penalty phase evidence of appellant Holmes's unlawful possession of a firearm (§ 12031) in August 3, 1990. (4CT 874-875.) Prior to the penalty phase, appellant Holmes's counsel moved to exclude the evidence because appellant Holmes was a juvenile at the time, the incident was remote, and the incident did not "rise to the level

of violence or threat of violence." (50RT 5072.) Counsel said appellant Holmes had been found with a weapon when he was 15; appellant Holmes said he had previously been robbed by a gang member, said the gang member would rob him again if he saw appellant Holmes, and thus he basically had the weapon for protection. (50RT 5072.) The prosecutor argued counsel's objections went to the weight and not the admissibility of the evidence, and he noted appellant Holmes had been found to have personally used a weapon in the Halloween murders. (50RT 5073.) The trial court denied appellant Holmes's motion. (50RT 5076.)

At the penalty retrial, Pasadena Officer Tory Riley testified that, on August 3, 1990, at approximately 8 p.m., she and her partner were working at a carnival at Jackie Robinson Park. (68RT 6796.) The officers were notified that a man was seen with a gun. The officers saw the handle of a gun protruding from appellant Holmes's right pants pocket and arrested him. They recovered a loaded blue steel revolver. (68RT 6797-6798; see also 53RT 5258-5263 [Officer Riley's testimony at first penalty trial].)

B. The Trial Court Acted within Its Discretion to Admit the Evidence

Section 190.3, subdivision (b), allows the jury to consider evidence of a defendant's criminal activity that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." But a "'trial court has no discretion to exclude such incidents under Evidence Code section 352 on the ground they are substantially more prejudicial than probative at the penalty phase. . . .' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1017.) Similarly, a trial court has no discretion to exclude such evidence as remote. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 186.) Otherwise, a trial court's ruling on the admissibility of evidence of prior criminal activity is reviewed for an abuse of discretion. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 991.)

This Court has held that a jury could infer an implied threat of violence from weapons possession under a variety of non-custodial scenarios: defendant illegally possessed a concealed firearm that was loaded, cocked, and available for surprise use (*People v. Dykes* (2009) 46 Cal.4th 731, 775-777); defendant failed to remove his hand from the loaded weapon kept hidden in his jacket while he was attempting to avoid arrest (*People v. Smithey*, *supra*, 20 Cal.4th at p. 992); defendant illegally possessed, in his home, sawed-off firearms and silencer materials, which had the obvious purpose of harming humans (*People v. Quartermain* (1997) 16 Cal.4th 600, 631); defendant armed himself after escape, presumably in an effort to assist in continued flight (*People v. Jackson*, *supra*, 13 Cal.4th at pp. 1235-1236); and defendant picked up a knife while committing a burglary, presumably to use it against anyone who might interfere (*People v. Clair* (1992) 2 Cal.4th 629, 676).

In *People v. Michaels* (2002) 28 Cal.4th 486, 535-536, this Court upheld the introduction of three incidents of weapons possession: illegal possession of a double-edged dagger with a seven-inch blade and a butcher knife with an eight-inch blade; illegal possession of concealed knives; and illegal possession of a concealed handgun, which was found in a glove box. The Court found the "[d]efendant's possession . . . show[ed] an implied intention to put the weapons to unlawful use." (*Id.* at p. 536.) The knives were the type used for criminal purposes, and the victim of the capital crime (committed many months later) had been killed by a similar knife. The gun had been used to rob a man the day before the defendant was found in possession of it. The Court found sufficient evidence of an implied threat of violence based on "the criminal character of defendant's possession of knives and firearms, and the evidence of defendant's use of those or similar weapons to commit crimes . . . ." (*Ibid.*) The Court noted the defendant was free to present evidence that the possession "was for the

purpose of self-protection, or the protection of someone else, not for criminal violence. [Citation.]" (*Ibid.*)

Here, as in *Michaels*, appellant Holmes's illegal possession of a handgun was properly admitted as an implied threat of violence. First, as in *Michaels*, appellant Holmes's possession was criminal, violating the statute (among others) prohibiting the carrying of a loaded firearm in public. (§ 12031.) Moreover, such handguns are often carried in public to commit crimes, and appellant Holmes was carrying the gun openly at a public gathering. And there was evidence that a handgun was used in this case, and appellant Holmes was found to have personally used a firearm in the commission of the Halloween murders. Thus, as in *Michaels*, the criminal nature of the possession, combined with appellant Holmes's use of similar weapons to commit the crimes in this case, was sufficient to support an inference of an implied threat of violence. Appellant Holmes had the opportunity to present evidence that his possession was for a purpose other than criminal violence, but he elected not to do so. Accordingly, the trial court acted within its discretion in admitting evidence of appellant Holmes's illegal possession of a firearm.

C. Any Alleged Error Was Harmless

Any alleged error was harmless because there was no reasonable possibility appellant Holmes would have received a better result had the trial court excluded the evidence of his firearm possession at the penalty phase retrial. (*People v. Hamilton, supra,* 45 Cal.4th at p. 912.) The evidence of appellant Holmes's gun possession was not overly important. The prosecution mentioned the incident in opening statements and closing argument, but placed little emphasis on the incident (65RT 6371; 74RT 7386, 7397), especially in light of the lengthy statement and argument as a whole (65RT 6354-6372; 74RT 7368-7416). Indeed, as the prosecutor argued, the Halloween murders alone warranted a death sentence. (74RT

7386.) Moreover, the mitigating evidence—the difficulty appellant Holmes experienced after his mother died when he was a teenager—was hardly mitigating in the context of his guilt, and personal use of a firearm, for the murder of three young boys. In the overall context of the evidence, any error in admitting the evidence was therefore harmless.

XXXVII. APPELLANT HOLMES'S CONTENTION THAT THE PROSECUTORS HAVE UNCONSTITUTIONAL UNBOUNDED DISCRETION TO CHARGE THE DEATH PENALTY IS MERITLESS

Appellant Holmes contends that the prosecutors have unconstitutional unbounded discretion to charge the death penalty. (AHOB 295-296.) This Court has repeatedly rejected this argument and should do so again here. (See, e.g., *People v. Cornwell* (2005) 37 Cal.4th 50, 105, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Boyette* (2002) 29 Cal.4th 381, 467; *People v. Weaver* (2001) 26 Cal.4th 876, 992.)

XXXVIII. THERE WAS NO CUMULATIVE ERROR

Appellants McClain and Holmes contend that there was cumulative error. (AMOB 523-526; AHOB 297-301.) Respondent disagrees because there was no error, and, to the extent there was error, appellants have failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box*, *supra*, 23 Cal.4th at p. 1214.) The record shows appellants received a fair trial.

Appellants all note the length of jury deliberations in arguing prejudice. The jury deliberated for half a day after being instructed (8CT

2275), and then deliberated for five full days (8CT 2277-2281). The next day, the jury said it reached a verdict as to one defendant in the morning, and then reached verdicts on the rest that afternoon. (8CT 2284.) Given that there was a great deal of evidence presented, and three defendants in this case, the length of deliberations may simply indicate that the jury carefully deliberated, not that it was a close case. (See *People v. Jurado* (2006) 38 Cal.4th 72, 134 [five days of penalty deliberations strongly implied that "jurors arrived at their death verdict only after a full and careful review of the relevant evidence and of the legitimate arguments for and against the death penalty"]; *People v. Carpenter* (1997) 15 Cal.4th 312, 422 [penalty deliberations that lasted less than 24 hours over 7 days suggested jury conscientiously performed its duty].) Appellants' claims of cumulative error should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgments be affirmed.

Dated: December 21, 2009

Respectfully submitted,

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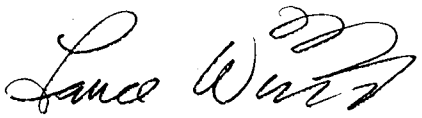
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 111,247 words.

Dated: December 21, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Karl Holmes, Herbert McClain and Lorenzo Newborn**
No.: **S058734**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 23, 2009, I served the attached **CAPITAL CASE - RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 23, 2009, at Los Angeles, California.

M. Louie
Declarant

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