S066939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL ALLEN AND CLEAMON JOHNSON

Defendants and Appellants.

APPELLANT'S REPLY BRIEF

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

HONORABLE CHARLES E. HORAN, Judge

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JURY INSTRUCTIONS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

CLAIMS[1]

I.

THE TRIAL COURT'S DISMISSAL OF A DELIBERATING JUROR WHO BELIEVED THE PROSECUTION FAILED TO PROVE ITS CASE REQUIRES REVERSAL

Appellant Cleamon Johnson demonstrated in his opening brief that the trial court: 1) improperly questioned the jurors in detail regarding their deliberations after it became apparent that there was no juror misconduct; and 2) erroneously dismissed a deliberating juror. Respondent rejects Johnson's arguments by paying remarkably short shrift to this Court's decision in *People v. Cleveland* (2001) 25 Cal.4th 466, which, as Johnson made clear in his opening brief, is indistinguishable from Johnson's case and compels reversal. (See AOB, pp. 45-49, 52, 55-62.)

Respondent's failure even to attempt to distinguish *Cleveland* is telling. In essence, respondent concedes that the dismissed juror was appropriately deliberating (see RB, at p. 262), but attempts to obscure the import of such a concession by raising a series of wholly meritless arguments. As will be shown below, respondent's efforts to salvage Johnson's conviction are unavailing.

Respondent argues that Johnson's contention that the trial court improperly questioned the jurors in an aggressive manner that was overly

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[1] In this reply, Appellant Johnson addresses specific contentions by respondent, but does not reply to arguments adequately addressed in his opening brief. The failure to address any particular argument, sub-argument, or allegation by respondent or to reassert any particular point made in the opening brief does not constitute a concession, abandonment, or waiver of the point (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects Johnson's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

broad and far from neutral is waived because of the lack of an objection to the "manner of the court's questioning at trial." (RB, at p. 259.) There is no waiver. Both defendants' counsel objected to the court undertaking any inquiry at all. (See 26 RT 5239, 5330.) These objections adequately preserve claims related to the court's questioning of the jurors. The two cases cited in support of waiver by respondent are inapposite. In neither case, unlike here, did counsel make any objection to the judge's questioning or comments. (*People v. Anderson* (1990) 52 Cal.3d 453, 468 ["any error in the court's pretrial disclosures was waived by counsel's apparently tactical failure to object"]; *People v. Corrigan* (1957) 48 Cal.2d 551, 556 ["no objection was made to the questions asked of the witness by the judge"].)

Respondent next argues that the trial court was well within its discretion to question all of the other jurors because the initial reports from the foreperson and Juror 4 indicated that Juror 11 had "reached a conclusion that the prosecution 'didn't have a case' as soon as the prosecution rested." (RB, at p. 256.) The facts, obtained during the court's initial inquiry, however, do not suggest that Juror 11 prejudged the case. Juror 11 may have made a comment during deliberations regarding the strength of the prosecution's case, but the evidence does not show that he "reached a conclusion" on how he intended to vote prior to deliberations.

It is not as if Juror 11 had made comments about the strength of the prosecution's case after the prosecution rested – or even prior to deliberations. Rather, it was reported by the foreperson on the fifth day of deliberations that during the second day of deliberations, Juror 11 remarked that, "when the prosecution rested, she didn't have a case." (26 RT 5314.) Juror 11 immediately followed this comment with the assurance that he had not made up his mind, that he was still undecided. (26 RT 5314, 5317.)

Indeed, the foreperson acknowledged that after the first round of voting, taken on the morning of the fifth day of deliberations, Juror 11 voted that he was undecided. (26 RT 5314.) When questioned further by the trial court, the foreperson conceded that Juror 11 was participating in the discussions. (26 RT 5337.) Juror 4 agreed that while Juror 11 tended to make pronouncements about the evidence to support his position that often were not based on logic, he had denied having made up his mind. (26 RT 5349.)

This Court has made clear that "a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478, quoting *People v. Ray* (1996) 13 Cal.4th 313, 343.) As Johnson discussed at length in his opening brief, there was nothing in the foreperson's comments that indicated any misconduct, and the trial court should have ceased further questioning of the jurors after questioning the foreperson. Indeed, after hearing from the foreperson and Juror 4, and two additional jurors, the court itself stated that it did not see any "gigantic problem" and that there was nothing it heard that "convince[d] [it] that there's been misconduct at this point." (26 RT 5379.) With reference to Juror 11's reported comments, the trial court merely noted that "People have made comments as jurors will do." (*Ibid.*)[2]

The two cases cited by respondent in no way support its position that

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[2] Respondent argues that the trial court had "ample ground" to continue its inquiry of the jurors after questioning the foreperson and Juror 4. While Johnson does contend there was no basis for further inquiry after questioning of the foreperson and Juror 4, his primary contention is that the court should have ceased its inquiry after the initial questioning of the foreperson. (AOB, at pp. 46-48.)

the inquiry taken by the trial court was appropriate in the absence of any evidence of misconduct. Neither case involves allegations of misconduct. Nor does either case involve, as here, the question of intrusive questioning into the substance of the jurors' deliberations. In *People v. Farnam* (2002) 28 Cal.4th 107, 141, this Court held that four jurors were questioned appropriately regarding their impartiality *at the request of the defense* after one of them was assaulted and robbed in the presence of the other three. On appeal, the issue was whether there should have been further inquiry not, as here, whether there should have been less of one. In *People v. Beeler* (1995) 9 Cal.4th 953, 989, this Court held that the trial court did not err in rejecting the defense request for further inquiry as to whether the death of a juror's father and the juror's need to go to the funeral had an impact on whether the verdict was coerced. This Court did note in *Beeler* that a more detailed inquiry by the court regarding the juror's state of mind would have been preferable, but stated that it was within the court's discretion to determine whether to conduct a hearing or detailed inquiry. (*Ibid.*)

Johnson does not disagree that a trial court has the discretion to make reasonable inquiries into claims of juror misconduct. The trial court, however, must do so with the awareness of the delicacy of inquiring into a juror's conduct during deliberations, and that "not every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478.) Moreover, the inquiry must cease when it becomes apparent "that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct . . . ." (*Ibid.*)

It should have been apparent to the trial judge after questioning the

jury foreman that there was no misconduct – that Juror 11 was participating in deliberations and that his isolated comment was not evidence that he had prejudged the case. Instead, as described in appellant's opening brief, the trial court launched into an inquiry that was unduly intrusive and made without any concern for the sanctity of juror deliberations.

Respondent does not attempt to argue that Juror 11 was not deliberating. Indeed, given the undisputed evidence that the juror was participating in deliberations by discussing the case and voting "undecided," respondent could not reasonably do so. Rather, respondent contends, with remarkable brevity, that Juror 11's one comment regarding the strength of the prosecution's case demonstrated that he committed "serious misconduct" by prejudging the case. (RB, at pp. 256, 262.) First, as a practical matter, it is unclear how one can be deliberating while having prejudged the case. Thus, in *People v. Cleveland*, the phrases "failure to deliberate" and "prejudging the case" were used together. (See *People v. Cleveland*, *supra*, 25 Cal.4th at pp. 469, 474.)

Moreover, as the two cases cited by respondent make clear, prejudging a case requires more than a brief comment during deliberations regarding the strength of the prosecution's case. (RB, at p. 256.) These cases, in great contrast to this case, involve a juror's active concealment of bias prior to the trial and during voir dire, and/or making comments to others during the course of the trial, prior to deliberations.

For example, in *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361, the juror in a medical malpractice case concealed the fact that he was a dentist, and had made several comments through the course of the trial that evidenced bias against the plaintiff. (*Id.* at pp. 363-365.) The appellate court held that:

> [A]t the time of his voir dire examination the juror in question entertained and concealed a substantial bias and prejudice against persons (including plaintiff) who would prosecute medical malpractice litigation. It appears that he retained this state of mind throughout the trial and was guilty of prejudging the issues on several occasions prior to the submission of the case to the jury as a whole for deliberation.

(*Id.* at p. 361)

The other case cited by respondent, *In re Hitchings* (1997) 6 Cal.4th 97, also involves the question of whether a juror concealed "relevant facts or [gave] false answers during the voir dire examination." (*Id.* at p. 111.) The juror in *Hitchings* worked in a bank which the victims, the defendant's family and police officers frequented. She concealed her knowledge about the case on voir dire, including the fact that she overheard and participated in conversations with co-workers at the bank before the trial, and expressed her opinions about the defendant's guilt and the punishment he should receive to a co-worker during the course of the trial. (*Id.* at pp. 115-118.)

Juror 11 did not conceal any bias or prior knowledge about the case. Nor did he make any inappropriate remarks to jurors or to anyone else prior to deliberations. His one comment – made during deliberations – that he did not believe the prosecutor had proved her case is hardly on a par with the cases relied upon by respondent or with other cases which have found juror bias and prejudgment of the case. For example, in *Deward v. Clough* (1966) 245 Cal.App.2d 439, a juror made a statement on the last day of trial to other jurors to the effect that: "I don't see why they don't open up the jury room now. We could bring in a verdict already." (*Id.* at p. 442.) The Court found that the juror had prejudged the case, thus committing

prejudicial misconduct. In doing so, the Court stressed the timing of the comment, that it occurred before the completion of oral argument and before the jury had been instructed. (*Id.* at pp. 443-444; see also *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1678-1679 [juror stated during trial that the trial was "ridiculous" and "a waste of time," and discussed a newspaper article about the case]; *People v. Daniels* (1991) 52 Cal.3d 815, 863-865 [juror appropriately removed where he discussed the case with non-jurors and expressed an opinion on the issue of guilt prior to deliberations]; *People v. Brown* (1976) 61 Cal.App.3d 476, 480 [during the first few days of trial, juror stated to another juror that the defendant was guilty, demonstrating "that he in fact prejudged the case by expressing a clear opinion of guilt before he had heard all the evidence"].)

Comments about the evidence made by jurors during deliberations are not subject to the same level of scrutiny. Thus, in *People v. Bradford* (1997) 15 Cal.4th 1229, 1352, "several jurors . . . stated their opinions or their intended vote very early in the deliberations, in an emphatic manner that offended or upset certain other jurors." This Court held that while such conduct was inadvisable, it "nevertheless did not constitute misconduct." The issue is whether the juror continues to deliberate after the improper remarks are made. (*People v. Cleveland*, 25 Cal.4th at p. 480 [citing *People v. Bradford, supra,* 15 Cal.4th at p. 1352]; see also *People v. Green* (1995) 31 Cal.App.4th 1001, 1014 [juror's statement that he knew defendant was guilty the moment he saw him was not misconduct; it came after the evidence had been taken, as the jurors were commencing deliberations, and could be interpreted as merely post-hoc boastfulness].)

Respondent has cited no case and Johnson has found none in which a juror was appropriately removed for commenting on the state of the

evidence during deliberations – as opposed to prior to the commencement of deliberations. Cases of misconduct for comments made during deliberations have involved bringing extraneous, prejudicial information into the jury room or making comments which demonstrate a pre-existing, but concealed bias.

Thus, in *People v. Nesler* (1997) 16 Cal.4th 561, while at a bar a juror overheard damaging information about the defendant's drug use and the defendant's role as a mother – both critical issues in the sanity phase of the defendant's trial. The juror failed to disclose that information to the court, and revealed the information to the other jurors during sanity phase deliberations in an attempt to persuade the other jurors of her views. In addition, the juror knew she should not discuss such information with other jurors and was reminded repeatedly by others not to do so. (*Id.* at pp. 579, 587.) This Court held that the juror's "repeated references to and use of the outside information during deliberations establish a substantial likelihood that her extraneous knowledge concerning defendant caused her to prejudge issues that arose during deliberations . . . ." (*Id.* at p. 583; see also *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 185, fn. 2 [in a trial for injuries suffered by trespassing youth, juror concealed fact that he had been sued on similar grounds and had "no sympathy for any trespasser . . . "]; *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 957-960 [juror prejudged case and concealed bias by disclosing extrajudicial information he received concerning disputed issues at trial, continuing to discuss the extraneous evidence despite requests from other jurors to stop, commenting during trial that the case was a "big farce," and refusing at times to participate in deliberations].)

As discussed in the opening brief, nothing described by the jurors

during the trial court's inquiry established that Juror 11 was either failing to deliberate or had prejudged the case. According to Juror 4, Juror 11 had said that he had been "waiting for the prosecuting attorney to . . . bring her case forward, and it never happened," (26 RT 5353), which shows that Juror 11 was not biased but was open to finding Johnson guilty had he found the evidence to be sufficient. (See also 26 RT 5390 [Juror 6 recalled a similar statement from an unidentified juror that "they were waiting for the best for the last and didn't hear it . . ."].) Indeed, far from prejudging the case, it appears from the statements of other jurors that Juror 11 was "involved in the deliberations" (26 RT 5367), and although perhaps a "bit less open minded . . . talks about the case . . . and he seems willing to listen." (26 RT 5411-5412.)

Juror 11 acknowledged making the comment during deliberations about not having been convinced of Johnson's guilt when the prosecution rested, but denied that he had made up his mind prior to the commencement of deliberations. (26 RT 5419.) This was confirmed by the other jurors who recalled the comment in question, and who characterized it as a remark made to illustrate that the prosecution did not meet its burden of proof, and not as evidence that Juror 11 prejudged the case midtrial or was refusing to deliberate. For example, Juror 6 stated that Juror 11 and another juror stated that they did not believe "anything was proven." (26 RT 5388-5389.) He described Juror 11's comment as one made in passing to the effect that "nothing has been proven beyond a reasonable doubt." (26 RT 5390.)

With the exception of Jurors 4 and 5 – the two jurors who secretly discussed Juror 11's conduct with each other – no other juror singled out Juror 11 as acting inappropriately, failing to deliberate or having prejudged the case. The trial court's inquiry revealed that there were several jurors

who had strong views about the evidence upon entering the jury room, but that they all participated meaningfully once deliberations began.

Juror 1 stated, without identifying juror 11, that three jurors had problems with the reliability of the prosecution's case (26 RT 5363) and two jurors made a remark at the beginning of deliberations that they did not believe that the prosecution had proven its case. (26 RT 5364.) Juror 1, however, identified only Juror 12 – not Juror 11 – as claiming to have made up his mind prior to deliberations. (26 RT 5366.) She also maintained that there were no jurors who failed to meaningfully deliberate (26 RT 5362), and that Juror 11 was "involved in the deliberations, I would say, for the most part." (26 RT 5364.) Juror 2, also without singling out Juror 11, stated that more than one of the jurors in explaining their preliminary vote stated that they felt as they left the courtroom that "the evidence was either sufficient or not sufficient to secure their conviction," but noted that this was only a "semi-conviction about guilt or innocence." (26 RT 5372, 5373.) Juror 2 also stated that it was Juror 12 who made the comment that "he was almost sold on the evidence at the presentation of evidence." (26 RT 5374.) Juror 2 made clear, however, that she did not hear anyone say they had already made up their minds and did not need to deliberate. (26 RT 5375-5376.) Juror 3 denied that any jurors began deliberations with a fixed opinion and claimed that everyone had taken part in deliberations. (26 RT 5383-5834.)

Juror 6 "sort of had a feeling" that Jurors 7 and 11 began deliberations by stating that they did not believe "that anything was proved to them." Juror 6 stated, however, that "it was more of a thing in passing," and that both jurors maintained after a preliminary vote that they were undecided as to the verdict. (RT 5388-5389) According to Juror 7, there

were "at least five" jurors who appeared to enter deliberations with their minds made up because of how they viewed the evidence. (RT 5395, 5397.)[3] Juror 8 stated that Jurors 6 and 12 were the two jurors who "said that they went in with certain things already happening in their head," but that while everything pointed in one direction, they wanted the opportunity to review the evidence in the jury room. (RT 5404, 5406.) Juror 9 stated, "I think that some of them had a rough idea of which direction they might go, but I don't think it was something that was set permanently that they wouldn't hear the others." (26 RT 5410.) Juror 10 believed that Juror 11 entered into deliberations having already decided the case, "but he recanted though in the end" and stated a willingness to be open minded. (26 RT 5415.) Lastly, Juror 12 admitted that he – not Juror 11 – said something like, "that I was pretty sure when I entered the jury room of what my decision would be, about 85 percent sure." (26 RT 5425.)

Thus, contrary to respondent's cursory argument, Juror 11 participated in deliberations and there is no credible evidence to establish that Juror 11 prejudged the case. It appears, as Juror 11 admits, that he made a comment during deliberations that he did not believe the prosecution had proven its case. (26 RT 5421.) As even the foreperson conceded, after Juror 11 made this comment he clarified that he had not made up his mind, (26 RT 5317), and had voted that he was "undecided" after a preliminary round of voting. (26 RT 5314.) According to Juror 4, Juror 11 expressed his views forcefully from the beginning, made "strong

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[3] Juror 7 did agree, in response to a leading question from the trial court, that two jurors said that they had their minds made up when deliberations began. (26 RT 5397-5398.) Juror 7 was unsure but believed that Juror 11 was one of the two who made this comment. (RT 5399-5400 ["I think it was him"].)

pronouncements" to support his opinion, but denied that he had his mind made up at the beginning of deliberations. (26 RT 5349-5350.) Juror 4 recalled that Juror 11 stated "that he was waiting for the prosecuting attorney to – to bring her case forward and it never happened." (26 RT 5353.) Juror 1 and Juror 6 noted that at least two jurors made such comments about the strength of the prosecution's case, but neither characterized the remarks as indicating that the jurors had decided the case prematurely. Juror 1 stated that two jurors, whom she could not identify, made the comment that "they didn't prove their case" during an early discussion about each of the juror's views. (26 RT 5364.) As noted above, Juror 1 did not believe these or any other jurors failed to deliberate meaningfully. The other juror who recalled this comment was Juror 6, who identified Jurors 7 and 11 as stating "in passing" that they did not think anything had been proven. (26 RT 5389.)

When the trial court inquired, not about this comment regarding the strength of the prosecution's case, but whether any juror stated that they had decided the case prior to deliberations, it was a different juror – Juror 12 – who was identified. (26 RT 5365-5366 [Juror 1: Juror 12 made such a remark]; 26 RT 5374 [Juror 2: Juror 12 made such a remark]; 26 RT 5404-5407 [Juror 8: Jurors 6 and 12 made such a remark]; but see 26 RT 5397-5400 [Juror 7 believes that Jurors 3 and 11 made this comment].) In fact, Juror 12 admits that he – not Juror 11 – made a comment about having made at least a tentative decision prior to the start of deliberations. (26 RT 5425.)

There is nothing to suggest that Juror 11 refused to deliberate or that he prejudged the case. Juror 11's comment at most demonstrates that he was thinking about the case prior to deliberations. As this Court recently

noted, however, there is no authority suggesting that "jurors must be directed not to think about the case except during deliberations" and "it would be entirely unrealistic to expect jurors not to think about the case during the trial . . . ." (*People v. Ledesma* (2006) 39 Cal.4th 641, 722-723, citing *United States v. Steele* (9th Cir.2002) 298 F.3d 906, 911 [noting that jurors who reached a verdict on Monday morning may have come "to a resolution during a weekend when they individually pondered the evidence"].) Indeed, "[i]t is unrealistic to assume that throughout a trial alert and intelligent jurors are not, in their own minds, sorting and weighing the evidence and considering the credibility of the witnesses thinking about the evidence in light of the legal principles given when they hear argument and instructions, and contemplating the issues" before deliberations. (*Perdue v. Hopper Truck Lines* (1963) 221 Cal.App.2d 604, 609.) Thus, "[a]lthough jurors are not supposed to form or express an opinion prior to the submission of the case to them [citation], it is understood they will be considering the evidence independently during the course of the trial." (*Vomaska v. City of San Diego* (1997) 55 Cal.App. 4th 905, 911 fn. 11, citing *Perdue v. Hopper Truck Lines*, *supra*, 221 Cal.App.2d at p. 609.)

Respondent also focuses on a second ground for Juror 11's excusal which is equally unavailing. Juror 11 stated, based on his life experience, that Hispanics would not falsify time cards. Respondent contends that this comment showed as a "demonstrable reality," (see *People v. Cleveland*, *supra*, 25 Cal.4th at p. 474) that Juror 11 had "seriously violated his oath and the court's instructions, and was unfit to serve on this case." (RB, at p. 266.)

Respondent cites no case, and Johnson is aware of none, in which this Court has found that a juror has committed misconduct to warrant his

or her removal for anything close to the conduct described here. Grounds for discharge do not exist where the juror merely "does not deliberate well" or "relies upon faulty logic or analysis" or "disagrees with the majority . . . as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted . . . ." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) Indeed, there have been several cases in which prejudicial juror misconduct was *not* found where the juror's comments were far more meaningful, and less tangential than those described here.

For example, in *People v. Pride* (1992) 3 Cal.4th 195, during penalty phase deliberations, a juror who was a cook at Vacaville prison offered his opinion that prisoners sentenced to life have a far greater opportunity to escape than those sentenced to death. This Court denied that these comments constituted misconduct, stating that misconduct does not occur "whenever the jury, though instructed to consider only the evidence before it, nonetheless discusses speculative, irrelevant, and/or erroneous facts or opinions." (*Id.* at pp. 267-268.) Indeed, it is expected that jurors "bring their individual backgrounds and experiences to bear on the deliberative process. (*Id.* at p. 268.)

Similarly, in *People v. Yeoman* (2004) 31 Cal.4th 93, 162, this Court rejected a claim of alleged juror misconduct involving a far more detrimental remark made during deliberations that the defendant might escape if given life without possibility of parole. This comment was characterized as a "crack," that was intended as "sarcasm or in jest." (*Ibid.*) As this Court held, "[w]hile the remark might literally be described as injecting an extraneous fact into the jury's deliberations, or as speculation about facts not in evidence, few verdicts would stand if held to such an

impossible standard." (*Id.* at p. 162, citing *People v. Pride, supra*, 3 Cal.4th at p. 268; *In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

Juror 11 made a brief comment that raised "speculative, irrelevant, and/or erroneous facts or opinions." (*People v. Pride, supra*, 3 Cal.4th at pp. 267-268) The remark appeared to be a sarcastic rejoinder to a question about the evidence. It did not constitute misconduct, and it is unlikely that it was taken seriously. As in *People v. Riel* (2000) 22 Cal.4th 1153, where a juror's statement during penalty phase deliberations, that if the jury voted for the death penalty the sentence would be commuted, was not deemed misconduct, the remark in this case "was merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations. Not all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct." (*Id.* at p. 1219.)

In *People v. Lewis* (2001) 26 Cal.4th 334, a juror made a comment trying to persuade another juror to vote for death during penalty phase jury deliberations that "he did not know if it would help her, but what had helped him make his decision was that [defendant] had been exposed to Jesus Christ and if that was in fact true [defendant] would have 'everlasting life' regardless of what happened to him." (*Id.* at p. 387.) This Court, in rejecting a claim of juror misconduct, held that the juror "did not improperly refer to an extraneous source – his personal religious beliefs or a code that mandated a particular course of conduct – to influence [another juror's] vote." (*Id.* at p. 390.) Similarly, Juror 11 did not refer to an extraneous source in referring to his experience with Hispanics in the working world. In neither instance did the juror consult with "material extraneous to the record," and in their remarks, "[they] merely shared [their]

personal view and did not purport to validate it as truth or impose [their] view on others." (*Id.* at p. 391.) Juror 11 did not hold himself out to be an expert on a technical matter, and his comment was exceedingly brief. (See *In re Lucas* (2004) 33 Cal.4th 682, 697.)

As the Court reiterated in *Lewis*:

> The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated.

(*Id.* at p. 389, quoting *People v. Riel, supra,* 22 Cal.4th at p. 1219 [Citations].)

This Court has noted that "jurors, without committing misconduct, may disagree during deliberations and may express themselves vigorously and even harshly." (*People v. Engleman* (2002) 28 Cal.4th 436, 446, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1255 ["[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means"].)

Even where the remarks reflect prejudice, this Court has not found grounds for dismissal. Thus, in *People v. Bradford, supra,* 15 Cal.4th 1229, "hostile jurors" made "emphatic statements," including a "prejudice remark" against the defendant during deliberations. This Court found that such remarks did not constitute misconduct, and that the trial court

appropriately reinstructed the jury, emphasizing their duties as jurors, and allowed them to continue their deliberations. (*Id.* at pp. 1349-1352.)

In contrast to the brief and tangential comment made by Juror 11 in Johnson's case, several jurors in *People v. Steele* (2002) 27 Cal.4th 1230, injected extraneous information into the deliberations based on their own experiences relevant to critical issues in the case. In *Steele*, the defense presented evidence regarding the nature and extent of the defendant's military training and Vietnam experience, as well as evidence concerning the validity of B.E.A.M. testing. (*Id.* at p. 1264.) Two jurors reported that there were "four men on the jury with experience in the military and Vietnam who 'drew upon their experience in the service and determined that the military records that we reviewed and heard testimony about did not show that Mr. Steele' either served in Vietnam at a time when he might have been exposed to combat (one juror) or 'served as a Seal and learned how to kill from the counterinsurgency schools because they had attended the same schools and did not learn how to kill in them' (the other juror)." (*Id.* at p. 1260.) In addition, the two jurors claimed that there were two other jurors "'with medical experience who told the rest of us that the criteria that the Doctor's [sic] used to establish the validity of the B.E.A.M. Test' was 'inadequate' based on 'what they have learned in their own experience in the medical field.'" (*Id.*) This Court determined that the jurors in *Steele* did not commit misconduct but merely used their background to analyze the evidence, which the Court held was appropriate. (*Id.* at pp. 1266-1267.)

This Court has repeatedly rejected claims of prejudicial misconduct for injecting extraneous information into the jury room, finding exposure to the information was not substantially likely to have influenced one or more

jurors. In these cases, the extraneous material was more credible, persuasive and relevant to the issues being decided than the remark made in this case. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 648-650 [juror who was a registered nurse explained and clarified various medical terms and definitions with regard to issues relevant to the defendant's guilt]; *In re Lucas, supra,* 33 Cal.4th 682 [juror stated he had experience with the type of drugs that defendant asserted he had taken, but that these drugs did not produce the effect on the juror that was claimed by defendant]; *People v. Ramos* (2004) 34 Cal.4th 494, 519-522 [juror told another juror during deliberations that he had read all the newspaper articles about the case that had come out]; *People v. Danks* (2004) 32 Cal.4th 269 [jurors read the Bible, discussed the case with their pastor, and shared Bible passages with fellow jurors]; *People v. Yeoman, supra,* 31 Cal.4th at pp. 158-162 [juror informed other jurors during guilt phase deliberations about the drug screening procedures at the Sacramento County jail; another juror who was a nurse explained to other jurors during penalty phase deliberations the term "sociopath" and how it might apply to the defendant; several jurors recounted personal experiences involving drugs]; *People v. Marshall* (1990) 50 Cal.3d 907 [juror with law enforcement background erroneously informed other jurors that lack of evidence did not mean that the defendant had no criminal record because juvenile records are sealed].)

Even assuming that Juror 11 had initially acted inappropriately with regard to his comment about Hispanics, there was nothing in the record to suggest that at the time of his excusal he was acting inappropriately or failing to heed the court's admonition not to speculate about extraneous matters, which was given on the fourth day of deliberations in response an inquiry from the jurors regarding another extraneous matter – reward

money. (26 RT 5276.) The trial court failed to determine whether Juror 11's comment on Hispanics was made prior to this admonition, and Juror 11 was never asked whether he was willing and able to follow the court's instructions.

Furthermore, the facts do not support a finding that Juror 11 decided a key credibility issue based on this so-called extraneous evidence, as respondent claims. (See RB, at pp. 257, 268.) The record establishes that Juror 11 made the comment about Hispanics in response to a discussion among the jurors regarding time cards and the credibility of prosecution witness Connor. As discussed in the opening brief, however, the time card issue was one of many areas in which witness Connor's credibility was called into question, and was quite insignificant in the overall context of the case. (AOB, at p. 69 & fn. 13.) It cannot, therefore, be concluded that the remark, "judged objectively, is inherently and substantially likely to have influenced the juror" or given the consideration of this material showed that the juror was "actually biased" against either party. (*In re Lucas*, *supra*, 33 Cal.4th at 696.)

The misconduct committed by jurors 4 and 5, as discussed in Claim II, was far more serious. Here, Juror 11 made the remarks in question during the course of deliberations and continued to deliberate and maintain he was undecided. Jurors 4 and 5 met secretly and discussed the case between themselves outside of the presence of the other jurors at a time when the jury was not deliberating. It is they who far more clearly violated the court's instructions and who should have been discharged.

II.

TWO JURORS WHO MET SECRETLY DURING A RECESS IN DELIBERATIONS COMMITTED PREJUDICIAL MISCONDUCT

After confiding in each other during a break that they were "having great difficulties with this case," Juror 4 and Juror 5 (the foreperson) met inside the jury room for at least ten minutes after the jury deliberations were concluded for the day. (26 RT 5283-5284, 5354.) Their discussion was first interrupted by another juror who asked them what they were doing. Juror 4 lied, and said they were only straightening up. (26 RT 5319.) The two jurors were subsequently interrupted by the bailiff. Only then did they ask to see the judge, but refused the bailiff's request to write their concerns on paper, and then left for the day. (26 RT 5285-5286.) The jury continued deliberations the following day, and there is no indication that the two jurors intended to inform the judge of their conversation. It was only after the judge, having been informed of their meeting by the bailiff, called them in for questioning that they revealed that they had met privately with each other and complained about another juror's conduct. (26 RT 5309-5311.)

Respondent concedes that the two jurors violated the court's instructions but contends that such misconduct was not prejudicial. (RB, at pp. 276-278.) Respondent argues that their actions in secretly meeting together after the jury had recessed to discuss the nature of the deliberations was merely a "technical violation" of the court's instructions. (RB, at p. 276.)

Respondent fails to acknowledge that once misconduct is established, there is a presumption of prejudice, that can only be rebutted "if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates

there is no reasonable probability of prejudice." (*In re Hamilton*, 20 Cal.4th at 295.) While the remarks made by Juror 11, as discussed in Claim I, cannot be characterized as misconduct, and certainly do not indicate any reasonable probability of prejudice, the same cannot be said for the conduct of Jurors 4 and 5. Their inappropriate discussions led to an overly intrusive inquiry by the trial court (see Claim I), that not only resulted in the removal of a deliberating juror, but also had a chilling effect on the subsequent guilt and penalty deliberations. Indeed, as discussed with regard to Claim III, the court's inquiry played a significant role in coercing the remaining holdout jurors to capitulate to the majority and reach a guilty verdict.

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III.

THE TRIAL COURT COERCED A VERDICT FROM A DEADLOCKED JURY

As both Johnson and Allen explained in detail in their opening briefs, after the jurors indicated they were deadlocked, the trial court made comments that were unduly coercive, particularly when viewed in the context of the earlier dismissal of a minority juror.

Respondent argues that appellants have waived any error by failing to object to the coercive comments. (RB, at pp. 284-285.) An objection to the court's comments is not required to preserve the issue for appeal. This Court has decided the issue of the propriety of a judge's comments to a deadlocked jury on the merits despite the lack of objection by counsel. (See, e.g., *People v. Sheldon* (1989) 48 Cal.3d 935, 958-960 [court rules on merits after noting no objection by counsel]; *People v. Sandoval* (1992) 4 Cal.4th 155, 194 [court rules on merits with no indication as to whether defense objected]; *People v. Price* (1991) 1 Cal.4th 324 [same]; *People v. Proctor* (1992) 4 Cal.4th 499, 539 [same]; see also *People v. Gill* (1997) 60 Cal.App.4th 743, 747-748 [court of appeal decides issue on merits with no indication as to whether defense objected]; cf. *People v. Hillhouse* (2002) 27 Cal.4th 469, 505 [no objection needed to preserve issue that court erred in instructing jury regarding readback of testimony].)

The cases cited by respondent in support of waiver do not involve a court's remarks to a deadlocked jury. *People v. Wright* (1990) 52 Cal.3d 367, 411, concerns the failure to object to a judge's hostile and disparaging remarks to defense counsel. *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567, also cited by respondent, likewise involves the failure to object to judicial misconduct, and in particular, to disparaging remarks to and

interference with defense counsel. The only case cited by respondent that appears even remotely to be on point is *People v. Neufer* (1994) 30 Cal.App.4th 244, 254, which held that the issue was waived because of counsel's failure to object. The court in that case relied, however, on Evidence Code section 353, which pertains to waiver for failure to object to the erroneous admission of evidence.

With regard to the merits, respondent disputes Johnson's and Allen's characterization of the record. (RB, at pp. 285-286.) The record speaks for itself. The trial court's hostility towards the jurors after the announcement of a deadlock leaps from the page. The fact that there may have been language in the instructions – given before deliberations – which implied that a verdict was not required, was not likely to have had an impact on the court's subsequent comments. This is true, particularly in light of what had occurred previously: a juror whom the other eleven jurors were aware was in a vocal minority leaning towards acquittal was dismissed after each of them had been aggressively questioned about his conduct and about the conduct and comments of other minority jurors, notably Juror 12. Given the manner in which this earlier inquiry occurred, the fact that the court attempted, as respondent notes, to assure the remaining jurors that Juror 11 was not discharged because he did not believe in the prosecution's case was not likely to assuage the concerns of the minority jurors who remained.

With regard to the court's request for a numerical division, Johnson is not arguing, as respondent suggests, that coercion stems from the fact that the court could glean that the 10-2 impasse was in favor of guilt. Rather, it is that the jurors must have known – from the previous proceedings involving the dismissal of Juror 11 – that the judge was aware that the count was 10-2 in favor of guilt when he ordered the jury to continue

deliberating. Under these circumstances, the order to continue deliberating undoubtedly sent a message to the two holdout jurors that they were expected to change their votes.

Finally, respondent argues that Johnson cannot establish prejudice since the jury only reported its inability to reach a unanimous verdict with regard to Allen, whose case they were deciding first. (RB, at p. 290.) However, if the jury was deadlocked as to Allen it must have been deadlocked as to Johnson since the prosecution's theory was that Johnson aided and abetted Allen. If the jury could not unanimously agree that Allen shot and killed the two men, it is reasonable to assume that it also could not agree that Johnson ordered Allen to shoot them.

Furthermore, before the dismissal of Juror 11, the jury had voted 9-3 for guilt with regard to both appellants. (26 RT 5363-5364.) With the removal of one of the minority jurors, the vote became 10-2. There is nothing to suggest that the two jurors were holding out for acquittal only with regard to Allen and not Johnson. Indeed, a review of the timing of the deliberations, as well as the nature of the readback requested, make clear that the jury was coerced equally with regard to both appellants; that once the Allen verdicts were dislodged, Johnson's verdicts quickly followed.

As respondent notes, the jury had been deliberating on Allen's counts for four hours and 46 minutes when they announced a deadlock. (RB, at p. 289; CT 837, 839-840.) They then asked for a readback of Jelk's entire testimony. (CT 842.) Jelks, as noted, was the central witness against Johnson. After the conclusion of the readback, the jury deliberated for an hour and fifteen minutes before reaching verdicts as to Allen. (CT 925-926.) The jury reached its verdicts as to Johnson soon thereafter. The only reasonable explanation for how Johnson's verdicts could be resolved so

quickly after Allen's is that the minority jurors' capitulation in response to the judge's coercive conduct was with regard to both defendants.

IV.

APPELLANT ESTABLISHED A PRIMA FACIE CASE THAT THE UNDERREPRESENTATION OF WOMEN ON THE GRAND JURY VIOLATED THE EQUAL PROTECTION CLAUSE

Johnson challenged the underrepresentation of women on the grand jury in a motion to dismiss the indictment pursuant to Penal Code section 995. After an evidentiary hearing, the motion was denied. Respondent argues that since Johnson failed to challenge the grand jury's composition by filing a writ, the claim fails absent a showing of prejudice.

Respondent relies on this Court's decision in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, which held that irregularities in pretrial proceedings may give rise to relief by pretrial writ and that a conviction after trial will not be reversed for such error without a showing of actual prejudice or the deprivation of a fair trial. It is true that this rule "applies with equal force in the grand jury context." (*People v. Towler* (1982) 31 Cal.3d 105, 123.) This Court has noted, however, that *Pompa-Ortiz* does not apply to *"any and all* irregularities" in pretrial proceedings. (*People v. Standish* (2002) 38 Cal.4th 858, 886 [emphasis in original].) And with regard to grand jury challenges, this Court has never held that *Pompa-Ortiz* applies to a claim of discrimination under the Equal Protection Clause. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 260-264; see also *People v. Brown* (1999) 75 Cal.App.4th 916.) Indeed, the cases respondent cites having to do with grand jury challenges do not involve violations of equal protection. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325 [denial of entire transcript of grand jury proceedings]; *People v. Laney* (1981) 115 Cal.App.3d 508, 513 [failure to present exculpatory evidence to grand

jury].)

Next, respondent concedes that the trial court used the wrong legal standard (*Duren v. Missouri* (1979) 439 U.S. 357 instead of *Castaneda v. Partida* (1977) 430 U.S. 482), but claims that nevertheless, Johnson failed to establish a prima facie case of discrimination. (RB, at pp. 65-66.)

Respondent denies that the evidence demonstrated a significant disparity between the population of women and the representation of women on the grand jury. Respondent argues that the average "absolute disparity" of the grand jury pool was 12%, which does not show "substantial underrepresentation." (RB, at p. 67.) However, this Court has only held that absolute disparity less than ten percent is insufficient to raise a prima facie case. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1156.) More significantly, the evidence before the trial court showed that in the last three years surveyed, which encompassed the year of the grand jury in Johnson's case, the absolute disparities were 16, 17 and 18 percent – percentages which have been held to be sufficient to establish discrimination. (See, e.g., *Whitus v. Georgia* (1967) 385 U.S. 545, 550 [disparity of 16% sufficient].)

Respondent does not seek to challenge Johnson's contentions with regard to the third prong of *Castaneda*, that the selection procedure is susceptible to abuse or is not neutral. Respondent states only that with regard to one grand jury, the applicants who volunteered, as opposed to those who were nominated by judges, was only 36 % women. Respondent ignores that for this same grand jury, the group of applicants nominated by judges was composed of less than 27% women.

In any event, as argued in the opening brief, the use of judges, rather than a random system, to evaluate and nominate applicants where the gender of applicants is known, plus the fact that women were significantly

underrepresented on the grand jury with no efforts made to correct the problem, provided sufficient evidence to establish a prima facie case. The trial court's application of an erroneous legal standard and its failure to find a prima facie case of an equal protection violation requires reversal.

V.

THE TRIAL COURT ERRONEOUSLY EXCUSED A PROSPECTIVE JUROR WHOSE VIEWS ABOUT THE DEATH PENALTY DID NOT IMPAIR HER ABILITY TO BE IMPARTIAL

Respondent defends the trial court's erroneous excusal of a prospective juror because of her views about the death penalty by distorting and disparaging the prospective juror's remarks. As argued in the opening brief, a review of the entire voir dire reveals that the juror changed and clarified her feelings about the death penalty in the week between filling out the questionnaire and appearing for voir dire. The trial court failed to credit the juror's remarks and unduly relied on the questionnaire in granting the prosecution's challenge for cause.

Contrary to respondent's characterization, the prospective juror's statements when questioned by the court were not equivocal or conflicting. First, it is not true that the juror "reaffirmed that she could not accept the responsibility of making this type of decision." (RB, at p. 303.) For this conclusion, respondent relies on the following exchange, made at the outset of voir dire:

> THE COURT: You have indicated in your questionnaire that you do not want the responsibility of making that decision and you said that you could not accept the responsibility that might cause the taking of someone's life. You do not want it on your conscience, et cetera. Is that a fair assessment of your position here?

PROSPECTIVE JUROR: Yes.

(12-1 RT 2937-2938.)

It is clear, however, from a review of the entire colloquy, that the juror was merely agreeing that this is what she had said in her questionnaire, not that it reflected her views at the time of voir dire. Immediately after this response, the juror clarified that she had changed her mind about rendering a death verdict. (See 12-1 RT 2938.)

Next, respondent contends that the juror initially claimed that she could impose death if the victim were a member of her family and only when the court pointed out that the victims in this case were not members of her family did she "alter her response," and indicate that she could render a death verdict in other cases as well. (RB, at p. 303.)

Again, a review of the record demonstrates that the juror did not alter her response but was attempting to explain to the court the evolution of her views. In response to the court's question as to what changed her mind, the juror stated that she first thought about a situation in which the victims were members of her family, and in such a situation, she asserted, "I thought that if it was my family members . . . that was killed . . . it would be no doubt in my mind if a family member was murdered for me to say: okay, I think they deserve the death penalty, if the circumstances – if they actually just gruesomely murdered somebody in my family." (12-1 RT 2939.) She then explained that once she determined that she could in good conscience impose death when a member of her own family had been killed, she realized she could do so where the victim was not a family member. (*Ibid.*)

Respondent next describes the juror's comments regarding predestiny as illogical. There is nothing illogical about it. The juror explained that she had previously been concerned that her actions in

imposing the death penalty would rest on her conscience. Because of a brush with a potentially dangerous situation over the prior weekend, however, she thought more about death and concluded that death is predestined. Although she was careful to stress that she would have no tendency to believe her vote did not matter because death is preordained (12-1 RT 2947-2948), her belief in predestiny made it easier to accept responsibility for the death penalty decision, since as she put it, "[h]ow you are going to die is how you are going to die. If I say: you have the death penalty. You are going to die, you are going to die regardless if I say it or somebody else says it." (12-1 RT 2941.)

As argued in the opening brief, the trial court failed to recognize that the prosecutor had the burden of establishing cause for excusal, and its determination that the juror's views would substantially impair the performance of her duties is not supported by the record.

VI.

THE TRIAL COURT PERMITTED THE PROSECUTION TO INFLAME THE JURY BY UNLEASHING EVIDENCE THAT DID NOTHING BUT HIGHLIGHT APPELLANT'S BAD CHARACTER AND CRIMINAL PROPENSITY

Respondent only briefly addresses Johnson's contention that the trial court erroneously allowed the introduction of statements that Johnson made in various contexts unrelated to this case, which showed Johnson was a bad person with a propensity to order his rivals killed. Respondent argues that the evidence was not admitted to show Johnson had a propensity to murder his enemies but to demonstrate his ability to do so. (RB, at pp. 136-137.) Particularly under the circumstances here, this is a distinction without a difference.

Courts have made clear that evidence of uncharged crimes and bad

conduct is inadmissible unless its relevance to legitimate issues in the case outweighs its inherent prejudice. This is particularly true with regard to gang evidence, which by its nature is highly inflammatory. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65; *People v. Thompson* (1980) 27 Cal.3d 303, 315, *disapproved on another ground People v. Williams* (1988) 44 Cal.3d 883, 907, n. 7; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449 (1997); *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240; *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653.)

Respondent contends that even though the gang-related issues in this case were not in dispute – namely, Johnson's role in the gang and his hatred of a rival gang – the evidence was still admissible. However, the fact that this inflammatory evidence was relevant only with regard to undisputed issues renders it lacking in probative value and therefore unduly prejudicial. (See AOB, at pp. 124-125.)

It is an abuse of discretion to admit inflammatory evidence that is offered to prove an undisputed issue. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194.) In *Avitia*, the trial court admitted evidence of gang graffiti in the defendant's bedroom to establish a link between the defendant and firearms that were used in the charged crimes. (*Ibid.*) The Court of Appeals held that, given the absence of a dispute that the weapons belonged to the defendant, the graffiti evidence lacked probative value and therefore "the only possible function of the gang evidence was to show [defendant's] criminal disposition." (*Id.* at p. 194; see also *People v. Cardenas* (1982) 31 Cal.3d 897, 903-905 [admission of evidence that witnesses and defendant were members of the same gang was an abuse of discretion where other evidence had amply established the witnesses and defendant were friends and lived in the same neighborhood]; *People v.*

Maestas (1993) 20 Cal.App.4th 1482, 1494-1495.)

Johnson argued in his opening brief that the statements introduced by the prosecution not only had no relevance to any disputed issues in the case but were misleading, taken out of context and remote in time, having been made well after the killings in this case. (AOB, at pp. 124-129.) Respondent ignores these contentions, and merely asserts that any error in admitting such evidence was harmless because of the relevance of gang evidence to what was indisputably a gang-related homicide, and because jury instructions properly limited the jury's consideration of the evidence. (RB, at pp. 152-155.)

First, the fact that *some* gang evidence was relevant to the issues in the case did not mean that the introduction of irrelevant and inflammatory gang evidence was therefore harmless. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342-345 [while evidence of gang membership of defendant was probative, erroneous admission of other elements of gang expert's testimony was nevertheless prejudicial]; see also *People v. Killebrew* (2002) 103 Cal.App.4th 644.)

Furthermore, as argued in the opening brief, the jury was never instructed that this evidence could not be used as evidence of Johnson's bad character or criminal propensity. While, as respondent states, the jury was informed that the jail note could only be considered as it "may bear upon, if at all, Defendant Johnson's membership and status within the 89 Family Bloods" (21 RT 4805), no similar instruction was given regarding the other character evidence. In any case, an instruction that told the jury that it could only consider such evidence with regard to Johnson's "status" in the gang provided no limitation at all, since the evidence was introduced to show Johnson's status in the gang as that of a feared gang leader with a

propensity for violence, who hated Crips and whose orders to harm or kill others would be carried out. Moreover, even the instruction regarding the jail note failed to inform the jury explicitly that it could not consider the evidence to prove that Johnson was a person of bad character or one who had a disposition to commit crimes. This is similar to the *Bojorquez* case where "the limiting instruction regarding gang evidence did not assure that its prejudice would be defused or deflected." (*People v. Bojorquez, supra*, 104 Cal.App.4th at p. 345.) In that case, as here, the instruction "was directed only to evidence that appellant and others were members of a gang. It did not address the profuse additional testimony about gangs." (*Ibid.*)

Respondent concedes that the bad character and propensity evidence was "powerful." (RB, at p. 137.) For the reasons stated in Johnson's opening brief, the admission of this inflammatory and misleading gang evidence was prejudicial.

VII.

A GANG EXPERT WAS PERMITTED TO PROVIDE OPINIONS THAT INVADED THE PROVINCE OF THE JURY

Johnson does not dispute the admissibility of gang testimony on issues that constitute appropriate bases of expert opinion, such as gang culture and habits. Here, however, the prosecution's expert offered inadmissible evidence under the guise of expert testimony to improperly bolster the prosecution's case. Detective Barling testified not only that gang members who cooperate with law enforcement are often the subject of retaliation – a permissible area of inquiry – but specifically stated that the fears of retribution to which the three key prosecution witnesses testified were genuine. (19 RT 4324-4325.)

Respondent contends that this was proper expert testimony because it

"assisted the jury in evaluating the reality of the fears expressed by Connor, Jelks, and James." (RB, at p. 121.) There is, however, a big difference between testifying that as a general matter, gang members who inform on other gang members have a reason to be fearful of retaliation, and testifying that the expressions of fear of retaliation of specific witnesses are legitimate. The former assists the jury in evaluating testimony. (See *People v. Ward* (2005) 36 Cal.4th 186, 211 ["A juror unfamiliar with the particulars of gang intimidation may well consider it abnormal for a witness not to want to testify against an individual who committed a violent crime against himself or a family member or friend. If an expert can shed light on such reluctance, the testimony is admissible"].) The latter, however, usurps the jury's function by providing an expert opinion as to whether the witnesses are telling the truth about their fears. (See *People v. Coffman* (2004) 34 Cal.4th 1, 82 ["The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful"].)

Unlike in *People v. Ward, supra,* 36 Cal.4th at p. 210, where the expert responded to hypothetical questions which this Court held fell within the "gang culture and habit evidence," the expert in Johnson's case responded to questions regarding the specific state of mind of the witnesses. (See also *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549-1551 [expert testimony proper where it did not embrace defendant's particular knowledge or his intent, but addressed the motives of jailhouse gang members in general].)

Respondent argues that Johnson's reliance on *People v. Killebrew*, *supra*, 103 Cal.App.4th 644, is misplaced because the detective in the present case did not testify about the "specific knowledge" or "specific intent" of the witnesses, and did not vouch for their credibility. (RB, at p. 122.) This is precisely what the expert did.

In *Killebrew*, the defendant was convicted of conspiracy to possess a handgun after members of his gang were involved in a drive-by shooting. The prosecution's theory was that the shooting would generate retaliation, which would have compelled the occupants of three vehicles to conspire to possess the gun that was recovered. The testimony of the prosecution's gang expert in *Killebrew* went beyond the proper limits of expert testimony, about the general expectation of retaliation and the likelihood that gang members traveling together would be aware whether others were armed. Rather, the expert opined about the state of mind of specific gang members, that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id.* at p. 652.) The appellate court in *Killebrew* distinguished between "expectations" of gang members generally, and the state of mind of particular gang members, noting that informing the jury "of [the expert's] belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact . . . were irrelevant." (*Id.* at p. 658.) As in *Killebrew*, testimony regarding the specific state of mind of individual gang members in this case was irrelevant and improper.

This Court has further explained the parameters of gang expert testimony in *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-950. In *Gonzalez*, the expert responded to hypothetical questions, stating that in his opinion if a member of a gang were called to testify against a fellow gang

member or a rival gang member, there would be intimidation of the witness by the gang. (*Id.* at p. 945.) Unlike the far more specific testimony in this case, no specific gang members or witnesses were named and the testimony was in the form of hypothetical questions. The expert in *Gonzalez* "was not asked, and did not testify about, any particular witness in this case. He merely provided expert testimony regarding the gangs in general." (*Id.* at p. 947.)

Accordingly, the expert testimony in *Gonzalez* was deemed admissible. This Court found the case distinguishable from *Killebrew* because the expert in *Gonzalez* "did not express an opinion about whether the particular witnesses of this case had been intimidated" and "merely answered hypothetical questions based on other evidence the prosecution presented. . . ." (*Id.* at p. 946.) As the Court noted, "Obviously, there is a difference between testifying about specific persons and about hypothetical persons." (*Id.* at p. 946, fn. 3.)

As detailed in the opening brief, the prosecution's gang expert in Johnson's case specifically testified that the three key prosecution witnesses – Connor, Jelks and James – feared retaliation from the gang and that their fears were genuine. (19 RT 4324-4325.) Unlike the expert in *Gonzalez*, this constituted expert testimony on the credibility of particular witnesses. (See *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 947.) And as the court of appeals has explained, "Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). '[T]he rationale for admitting [expert] opinion testimony is that it will assist the jury in reaching a conclusion called for by the case.'" (*Summers v. A .L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183.) But "when an expert's opinion amounts to

nothing more than an expression of his or her belief on how a case should be decided, it does not aid the jurors, it supplants them." (*Ibid.*) "There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses." (*Id.* at pp. 1182-1183.)

Detective Barling was also permitted to testify that weapons were stored in the pigeon coop at Johnson's residence (19 RT 4315), thus, corroborating the testimony of Freddie Jelks who testified that Johnson had retrieved the murder weapon from the coop and gave it to Allen. (16 RT 3544-3545, 3555.) There was nothing about the expert's conclusion that the guns were stored in the coop, however, that required any particular expertise. As pointed out in the opening brief, Barling's testimony was based on hearsay from other gang members and neighbors, not on personal knowledge. (19 RT 4280.) It should have been left to the jury, not a gang expert, to determine whether Jelks was telling the truth.

Respondent argues that the fact that guns would be stored in a pigeon coop is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (RB, at 119.) It is true that some expert testimony regarding the habits and culture of gangs might be relevant to this issue. For example, the expert in this case did, in fact, testify that gang members would keep guns in an easily accessible location. (19 RT 4314.) But this is far different from testimony, based on statements from others, that Johnson actually kept guns in a particular location – testimony that required no particular expertise but which, cloaked with the aura of expertise, again usurped the jury's factfinding function.

Respondent cites *People v. Duran* (2002) 97 Cal.App.4th 1448, for the proposition that an expert may rely on conversations with gang

members. (RB, at p. 119.) As the appellate court stated in *Duran*: "[e]xpert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions." (*Id.* at p. 1463 [citing *People v. Gardeley, supra*, 14 Cal.4th at p. 618.) Here, however, the problem is not so much that the expert relied on hearsay for his opinion that the guns were stored in the pigeon coop, but that his testimony does not fall within the ambit of expert opinion regardless of the basis for the opinion.

"Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]" (*People v. Torres* (1995) 37 Cal.App.4th 27, 453.) Thus, the purpose of expert testimony, to provide an opinion about a subject that is beyond common experience, dictates that the witness possess uncommon, specialized knowledge. Here, the expert opined that guns were stored in a pigeon coop. His conclusion – which was merely based on conversations he had with others who told him the guns were stored there – did not comprise any specialized knowledge.

Contrary to respondent's assertions, admission of Barling's testimony was not harmless. Given the serious credibility problems of the principle witnesses for the prosecution, expert testimony that bolstered their credibility and corroborated their testimony was highly prejudicial.

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VIII.

THE TRIAL COURT PERMITTED THE PROSECUTION TO INTRODUCE GRAPHIC EVIDENCE OF GANG VIOLENCE THAT WAS UNRELATED TO THE CHARGED OFFENSES

To establish that the inconsistencies in Carl Connor's testimony were due to his fear of retribution, the prosecution was permitted to ask Connor about his awareness of the murder of Nece Jones, who had been killed after she testified against a member of a gang friendly to Johnson's gang. As argued in the opening brief, this evidence was irrelevant and far more prejudicial than probative, given that Connor never claimed that he was afraid of testifying because of what happened to Nece Jones – indeed, he testified as an eyewitness in the Jones murder trial. In addition, the prosecutor's questions and Conner's testimony regarding Jones left the jury with a strong implication that Johnson was involved in her murder. (AOB, at pp. 149-150.)

Respondent contends that the objections raised by Johnson on appeal, other than relevance are waived because there were no other objections made at trial. (RB, at p. 94.) In the opening brief, Johnson argued that the evidence was more prejudicial than probative and constituted improper character evidence, and its admission violated Johnson's state law rights (Evid. Code §§ 352, 1101) and federal constitutional rights. (AOB, at pp. 152.) Johnson adequately preserved the issue for appeal.

Johnson's relevance objection at trial must be seen in the context of respondent's motion to present evidence of Nece Jone's murder pursuant to Evidence Code section 1101(b), which was filed and discussed the day before Connor's testimony. (13 RT 3179-3180; CT 726-728.) The prosecution's motion sought to introduce evidence of prior conduct

pursuant to Evidence Code section 1101(b), including evidence of Johnson's alleged directive to have Nece Jones killed. (CT 726-735.) The prosecution argued in the motion that this evidence was admissible, inter alia, to show "a common scheme or plan harbored by defendant Johnson to eliminate those identified as" having informed against the 89 Family. (CT 728.) The trial court's initial reaction, without ruling on the motion, was that it was unlikely that such evidence would be admissible at the guilt phase.[4] (13 RT 3181-3182.) Johnson's written response to the prosecution's motion (filed after Connor testified) objected to such evidence based on Evidence Code sections 352 and 1101. (CT 809-815.) Since it was understood by the court and the parties that the prosecution wanted evidence of the Jones murder to come in under section 1101(b), a relevance objection to the prosecution's questions to Connor regarding the murder can only be interpreted to mean that it was irrelevant other crimes evidence.

In *People v. Williams* (1988) 44 Cal.3d 883, 906-907, the defense made a relevancy objection to the admission of other crimes evidence. As the Court stated in *Williams*, "[w]hen, as here, the People have already made it clear that the evidence will show the commission of an uncharged crime, and the defendant objects on grounds that the People have not shown that the evidence is relevant to any issue in the case, the objection is sufficient to alert the court that admissibility must be determined under the criteria of Evidence Code sections 1101, subdivision (b)." (*People v. Williams, supra,* 44 Cal.3d at p. 906.) In *Williams*, it was apparent that an

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[4] As explained in the opening brief, the court ultimately denied respondent's motion, agreeing with the defense that this was inadmissible and highly prejudicial character evidence. (21 RT 4747.)

objection would have alerted the trial court that the parties were addressing the relevancy of other crimes evidence. Similarly, the trial court in Johnson's case was well aware that the parties were addressing other crimes evidence.

In *People v. Clark* (1992) 3 Cal.4th 41, 124, this Court held that although the defendant did not specifically mention Evidence Code section 1101 in objecting to admission of evidence, the trial court was sufficiently alerted to the issue of the admissibility of other crimes evidence by the objections actually made. In *Clark*, this Court noted that the trial court gave the jury a limiting instruction consistent with Evidence Code section 1101, subdivision (b). (*Ibid.*) That is clearly what happened here, where the court, after overruling the objection, gave the jury a limiting instruction that the jury should only consider the murder of Jones as it bore on the credibility of the witness. (15 RT 3384.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, a case cited by the prosecution in support of its request for admission of evidence of the Jones murder (CT 731-732), this Court held that the Evidence Code section 352 inquiry is an integral part of the analysis for determining the admissibility of other crimes evidence. (*Id.* at p. 404; see also *People v. Thompson* (1980) 27 Cal.3d 303, 318.) As part of its analysis of admissibility, therefore, the trial court necessarily considered whether the evidence was unduly prejudicial and relevant only to prove criminal disposition. Consequently, Johnson has also preserved the section 352 issues for the appeal. Furthermore, once it is determined that Johnson preserved the claim under Evidence Code 352, his federal due process claim regarding the unduly inflammatory and prejudicial nature of the evidence was similarly preserved. (See *People v. Partida* (2005) 37 Cal.4th 428, 437-439.)

On the merits, respondent claims, contrary to Johnson's assertion, that the testimony did not imply that Johnson – or his gang, the 89 Family – had any involvement in the Jones murder. The only relevance of the testimony, however, was that Connor was afraid to testify against Johnson because of his awareness that if he did so, Johnson's gang would seek similar retribution against him. While, as respondent notes, the record is unclear whether Connor answered the question whether he knew that Jones testified "against somebody who was part of the 89 Family," it is obvious that this is precisely why the Jones murder was brought up. (15 RT 3383-3384.)

The prosecution questioned Connor earlier regarding what happens to snitches "in your neighborhood," to which Connor stated "snitches get killed." (15 RT 3362-3363.) Connor was next asked about his familiarity with the 89 Family. (15 RT 3363.) Immediately prior to the questions regarding the Jones murder, after Connor denied any knowledge of Johnson's involvement in the carwash murders, he was asked questions about the 89 Family. (15 RT 3379-3382.) In addition, Detective Sanchez testified about her investigation of the Jones murder, which she initially characterized as "an unrelated murder in the neighborhood." (18 RT 3971, 3975.) There is no doubt that the jury would have believed that the Jones murder was inextricably linked to the 89 Family.

Finally, respondent contends that the limiting instruction was sufficient to cure any error. However, the instruction was undoubtedly ineffective given the avalanche of prejudicial evidence, including evidence of the Jones murder, which was used effectively by the prosecution to establish Johnson's alleged violent propensities. For the reasons discussed in the opening brief, the admission of this evidence was not harmless.

IX.

THE TRIAL COURT REFUSED TO LIMIT THE PROSECUTOR'S PERSISTENT EXPLOITATION OF APPELLANTS' MONIKERS

Johnson argued in the opening brief that at both the guilt and penalty phases of the trial the prosecutor committed misconduct by exploiting Johnson's gang moniker, "Big Evil," and that the trial court erroneously failed to limit the prosecutor's repeated emphasis on the moniker.

Respondent maintains that reference to the moniker was appropriate because identity was the key issue at trial. (RB, at p. 138, fn. 104.) While the issue of who, if anyone, ordered the shooting was a central issue, there was no question that when a witness referred to "Big Evil" they were referring to Johnson, and vice versa. As trial counsel put it, "[t]here is never going to be the defense here presenting to the jury when somebody is talking about Mr. Johnson that they are talking about somebody other than the gentleman right here in court who is the defendant in this case." (15 RT 3210-3211.) The moniker, thus, had no probative value.

In response to the defense motion to exclude reference to the moniker, the prosecutor merely argued that the moniker was admissible because: 1) it is the name the defendant used to identify himself; 2) it is a name by which witnesses know the defendant; and 3) it would be an unfair burden on witnesses to require them to refer to the defendant by their true names. (CT 667-669; 15 RT 3212-3213.) Thus, the prosecutor never asserted that the moniker had probative value; there was simply no question with regard to Johnson's gang membership or any other issue to which Johnson's moniker would be relevant.

Respondent argues that no objections were made to certain references by the prosecutor to Johnson's moniker, and therefore the

argument as to those references is waived on appeal. (RB, at pp. 146, 149, 150, 151, 342.) Johnson's in limine motion, which sought to exclude *all* references to Johnson's moniker was denied. (See CT 780.) Moreover, after the trial court's admonition to the prosecutor to avoid excessive use of the monikers for Johnson and Allen (15 RT 3217-3218), the trial court began overruling objections to the prosecutor's reference to them, rendering any further objections futile. (See, e.g., 17 RT 3883-3884; 18 RT 4042, 4974.) The issue was adequately preserved.

Respondent argues that any error was harmless under the *Watson* standard of prejudice. (RB, at p. 143.) Respondent relies on *People v. Brown* (1999) 31 Cal.4th 518, 551, which rejected Brown's contention that the *Chapman* harmless error test be applied because in that case the issue was the "mere admission of evidence that was not particularly inflammatory . . . ." As Johnson noted in his opening brief, *Brown* is distinguishable in many respects from this case. First, reference to Brown's nickname, "Bam" or "Bam Bam" was deemed sometimes necessary to render a witness's testimony understandable, but there was "no gratuitous use of, or reference to, the nickname." (*Ibid.*) In addition, the trial court in *Brown* "instructed the prosecution to minimize its use [of monikers] in order to reduce any prejudice," and, unlike here, the prosecutor apparently did so. (*Id.*) Also, while in *Brown*, the nickname "Bam," was considered to have "some negative connotations" associated with the sound of gun fire, *id.* at p. 548, it is hard to imagine a more inflammatory name than "Evil," particularly in a capital case. In any event, given the closeness of the case, the repeated use of gang monikers was prejudicial under any standard.

Respondent attempts to isolate the prosecutor's repeated use of Johnson's moniker throughout the trial by splitting the issue into two

separate arguments, guilt phase and penalty phase, and attempting to justify isolated references to the moniker. Thus, respondent's analysis ignores the pervasiveness of the gratuitous references to Johnson as "Big Evil" throughout the trial, culminating with the penalty phase closing argument in which the prosecutor concluded, "we are dealing with a man who has a moniker which is amazingly accurate in its descriptiveness." (37 RT 7465.) For the reasons stated in the opening brief, the prosecutor's use of Johnson's gang moniker was extremely inflammatory and prejudicial.

X.

THE TRIAL COURT ERRONEOUSLY PERMITTED A KEY WITNESS TO TESTIFY THAT APPELLANT SOUGHT TO HAVE HIM KILLED

As Johnson argued in his opening brief, Freddie Jelks, the key witness for the prosecution, was permitted to testify that Johnson had ordered that he be murdered for cooperating with the police. This evidence constituted bad character evidence and was irrelevant, cumulative and far more prejudicial than probative, and thus, its admission violated California Evidence Code sections 352 and 1101, and also violated Johnson's constitutional rights as described in the opening brief.

Respondent first states that the only objections to the evidence were on hearsay and relevance grounds, and therefore Johnson's arguments on other grounds have been waived. (RB, at pp. 98-99.) Johnson disputes that the objections were so limited. As discussed above, with regard to Claim VIII, a relevancy objection to what is clearly other crimes evidence is sufficient to alert the court that admissibility must be determined under the criteria of Evidence Code sections 1101(b) and 352. (See *People v. Williams, supra,* 44 Cal.3d at pp. 906-907.) Moreover, here counsel for both appellants objected repeatedly to this testimony based on relevance and

hearsay, and continued to object. At one point during this colloquy, the trial court sustained the objection specifically on Evidence Code section 352 grounds. (16 RT 3632-3634.) It was thus clear that when the court denied the earlier objections, it had in mind the criteria for Evidence Code section 352. In addition, the court gave the jury a limiting instruction that the evidence should only be considered as it may bear on the witness's credibility and for no other purpose, showing that the court was sufficiently alerted to the issue of the admissibility of other crimes evidence by the objections actually made. (See *People v. Clark, supra,* 3 Cal.4th at p. 124.) And, as Johnson's counsel ultimately argued: "Your Honor, I think that it's degenerating into a trial of character assassination of the defendant, rather than the facts related to what happened out there on 88th Street that day." (16 RT 3627.) As discussed above, Johnson's federal due process claim is also preserved. (See *People v. Partida, supra*, 37 Cal.4th at pp. 437-439.)

Jelk's testimony on direct examination inculpated Johnson, and as Johnson noted in his opening brief, there was no indication that his testimony – as opposed to his earlier cooperation with the police – was in any way affected by fear of retaliation. (AOB, at pp. 173-174.) Respondent disagrees, but can cite to nothing in Jelks' testimony that demonstrates any such fear. Instead, respondent merely relies on the prosecutor's closing argument, which references Jelks' coming into court in handcuffs, his body language and that he was "fearful for his safety, concerned and nervous." (RB, at p. 99 [quoting 24 RT 5123].)

Even assuming, as respondent argues, that Jelks' fear of retaliation was relevant to his credibility, the prosecutor adequately elicited evidence of this fear from Jelks without the need to delve into inflammatory evidence of unsubstantiated murder threats. Jelks testified that he was scared of

talking to the police because he would be considered a snitch. Jelks articulated that once it is known that someone talked to the police, they are considered "a dead man." (16 RT 3629.) He then testified that it was known in the neighborhood that he had done so. (16 RT 3631-3632.) There was no need for the additional uncorroborated, but nevertheless inflammatory and prejudicial testimony that followed, that Johnson had ordered that Jelks be killed on sight. (16 RT 3632-3634.)

As with Johnson's many other claims challenging the admission of highly inflammatory evidence in this case, respondent insists that any error was harmless because the jury was given an instruction that such evidence must only be considered for the limited purpose of explaining the credibility and demeanor of witnesses. However, the cumulative impact of the barrage of unsubstantiated and unreliable, but nevertheless graphic and disturbing evidence demonstrating Johnson's alleged violent propensities could not have been lost on the jury. Given the lack of credible evidence of Johnson's involvement in the murders, the pervasiveness of this evidence undoubtedly overwhelmed the jury and had an impact on their deliberations. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1230 [combined errors were "sufficiently severe and pervasive that it was reasonably probable that the errors affected the jury's deliberations to defendant's detriment"].)

XI.

THE INTRODUCTION OF PHOTOGRAPHS OF GANG MEMBERS WIELDING GUNS WAS OUTSIDE THE SCOPE OF PROPER REBUTTAL EVIDENCE

Johnson argued in his opening brief that the trial court erroneously permitted the introduction of extremely inflammatory photographs of Johnson's fellow gang members wielding firearms, evidence that was not proper rebuttal, had no probative value and was extremely prejudicial.

Respondent distorts the testimony of the defendant's gang expert, James Galipeau, in attempting to argue that the photographs constituted proper rebuttal. Respondent suggests that Galipeau implied that Crips were more likely than Bloods to wear black jackets, not only black Raiders jackets. It is, however, clear from a review of Galipeau's testimony that during direct examination Galipeau was referring only to Raiders jackets, and during cross-examination when asked whether there was a difference between the wearing of black jackets and black Raider jackets, plainly stated that it is the Raiders jacket that is associated with Crips, not black jackets generally.

The shooter had been identified by various witnesses as wearing a black windbreaker. (See 15 RT 3273-3275; 16 RT 3558.) One witness, Eula Wright, testified that the jacket was a black jacket that said "Raiders" on it. (17 RT 3875.) The defense, through their gang expert, James Galipeau, testified that black Raiders jackets – not simply black jackets – were worn by Crips. (23 RT 4944-4946.) On cross-examination, Mr. Galipeau testified that Bloods have been known to wear black windbreakers, but not black Raiders jackets. (23 RT 4953.) He further testified that he had never seen a Blood in a black Raiders jacket, but agreed that a black windbreaker could be worn by Crip or Blood. (23 RT 4954.) Galipeau was then asked about – and clearly articulated – the distinction between black jackets and black Raiders jacket: "If you wore a black Raiders jacket to a shooting, I think you would be identifying yourself as a Crip. You could possibly wear a black windbreaker to a shooting, and you are not identifying yourself as anybody but somebody who has a black windbreaker." (23 RT 4956.)

It was therefore error to permit the prosecution to introduce

photographs in rebuttal which showed members of Johnson's gang in black jackets that were not Raiders jackets since this was consistent with the defense expert's testimony.

Respondent further contends that any error in admitting the photographs was harmless. As did the trial court, respondent ignores the emotional impact photographs of gang members posing with guns and acting in an intimidating manner would have had on the jury.[5] (See *People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 345 ["Erroneous admission of gang-related evidence, particularly regarding criminal activities, has frequently been found to be reversible error, because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability"].) Together with the admission of other unreliable and irrelevant evidence described in Claims VI-X, the photographs led the jury to believe that Johnson was the leader of a frighteningly violent gang with a propensity to murder rivals and potential witnesses. In view of the closeness of the case and the inflammatory nature of the evidence, its admission was prejudicial under any standard.

XII.

THE TRIAL COURT UNDULY RESTRICTED APPELLANT'S ABILITY TO IMPEACH THE PROSECUTOR'S KEY WITNESSES

Johnson argued in his opening brief, that the trial court's erroneous restriction of his ability to cross-examine two key witnesses, Jelks and Adams, thwarted Johnson's ability to demonstrate the witnesses' bias and lack of credibility.

Respondent correctly notes that the trial court did not actually rule

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[5] Allen's opening brief describes in detail the content of the erroneously admitted photographs and accompanying testimony. (AAOB, at pp. 544-547.)

that the defense could not question Jelks about his pending murder charges or the fact that he only provided information to the police after he was threatened with murder charges. (RB, at p. 191.) Instead, the court ruled that any questions regarding the charges would open the door to evidence that Johnson was also a suspect for the same murder. (16 RT 3606-3607.) As argued in the opening brief, this had the effect of unreasonably restricting cross-examination.

Confrontation Clause questions arise where restrictions imposed by the trial court effectively "'emasculate the right of cross-examination itself.'" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19, quoting *Smith v. Illinois* (1968) 390 U.S. 129, 131.) Trial courts may impose "reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

Here, the restrictions were unreasonable. Defense counsel sought to elicit testimony about the circumstances surrounding Jelks' interrogation, including the fact that Jelks only cooperated with the police after he was threatened with murder charges, and testified against Johnson to obtain favorable treatment with regard to those charges.[6] The trial court ruled that if the defense asked Jelks about pending murder charges this would open

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[6] Johnson noted in the opening brief that on direct examination Jelks claimed to be testifying in order to effect change in the community and not to obtain favorable treatment. (AOB, at p. 192.) Respondent contends that the record does not support Johnson's assertion that Jelks maintained he was not concerned about the impact of his testimony on the potential charges against him. (RB, at p. 186, fn. 128.) Jelks, in fact, testified that no promises were made to him with regard to how his testimony would affect his case (16 RT 3627-3628) and he repeatedly resisted the notion that he gave information to the police to avoid being taken into custody. (16 RT 3716-3718.)

the door to evidence that Johnson was allegedly involved in the murder. The fact, however, that Johnson was implicated – by Jelks – in the murder for which Jelks was a suspect was not relevant to Jelks' motivation to provide information and testify with regard to the current case, but it was extremely prejudicial to Johnson. Whether or not Johnson had been implicated in another murder simply had no bearing on Jelks' credibility.

As argued in the opening brief, the conditions imposed by the trial court effectively prevented the defense from fully cross-examining Jelks, and allowed the prosecutor to argue that Jelks had no motive to fabricate his testimony. In addition, as Allen points out in his opening brief, Jelks' testimony that, in contrast to other gang members, he would not go on "missions" and kill anyone (see, e.g., 16 RT 3543, 3624-3627) went unchallenged by Johnson who was precluded from impeaching Jelks with the fact that he was charged in a gang-related murder. (AAOB, at pp. 205-214.) Such testimony, as well Jelks' testimony that he had no motive for testifying other than to tell the truth to "effect change in the community" would have been seriously undermined by evidence that he was subject to murder charges.

With regard to Adams, respondent argues that the trial court appropriately refused to allow cross examination as to the fact that Adams pleaded guilty to only one count in a fourteen count federal indictment. (RB, at pp. 202-203.) Respondent asserts that the additional counts were of marginal relevance, particularly since Adams' plea occurred before he was contacted about Johnson's case. However, Adams had not yet been sentenced on the federal crime at the time of his testimony. (19 RT 4422.) As trial counsel argued, the fact that Adams was charged with fourteen counts would demonstrate to the jury the magnitude of the punishment

Adams was initially facing and consequently, the significant degree of leniency Adams hoped to get for testifying against Johnson. (19 RT 4351.)

Respondent also contends the denial of Johnson's request to question Adams about whether he was dealing drugs at the time he purportedly visited the crime scene was a proper exercise of discretion. (RB, at p. 203.) Respondent fails to recognize that such evidence would have rendered Adams' testimony that he went to the scene highly dubious. As trial counsel asserted: "I think that the jury would believe that someone who is a drug dealer would not go up to the scene where there's a number of police officers and put himself up into that position at that time." (19 RT 4427.)

Finally, respondent challenges Johnson's contention that the trial court erroneously refused to allow the defense to question Adams with regard to his belief that Johnson had accused him of being involved in a murder. (19 RT 4402-4403.) Respondent argues that the claim is waived because counsel never attempted to offer such evidence. (RB, at p. 205.) However, as stated in the opening brief, the trial court ruled that such questioning would open the door to Adams testifying that he was aware of Johnson having committed other murders. (19 RT 4404-4405.) As with the court's ruling on the cross-examination of Jelks, while not actually restricting cross-examination, this ruling effectively did so by putting Johnson in the position of opening the door to the admission of extremely prejudicial testimony with regard to alleged other murders, despite the fact that such evidence had no relevance to the witness's credibility.

XIII.

THE TRIAL COURT ERRONEOUSLY PERMITTED A POLICE OFFICER TO VOUCH FOR THE CREDIBILITY OF A KEY PROSECUTION WITNESS

Johnson argued in his opening brief that Carl Connor's testimony was improperly bolstered by Detective Sanchez who testified that the information Connor provided her was "corroborated through other sources." (18 RT 3992.) Respondent erroneously claims the issue has been waived, that there is no error, and that any error is harmless.

When the prosecutor asked Detective Sanchez the following question: "With respect to the information that was provided to you by Mr. Connor, was that information corroborated through other sources?" counsel for both Johnson and Allen objected on the grounds of hearsay and as calling for a conclusion. (18 RT 3991-3992) The objections were overruled, and Detective Sanchez responded: "Yes." (18 RT 3992.)

"While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*People v. Williams,* supra, 44 Cal.3d at p. 906.) Clearly, the conclusion that was being called for was that Connor's information was corroborated, i.e., credible. The trial court was therefore sufficiently alerted as to this basis for which exclusion was sought.

Because the court had overruled objections based on hearsay and calling for a conclusion, any additional objection that the called-for testimony would constitute improper vouching would have been futile, and thus, this Court can review the error. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) In any event, in other cases, this Court has reviewed claims of

improper vouching on the merits in the absence of an objection. (See, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 727.)

On the merits, respondent argues that eliciting the detective's testimony that the information the witness provided was corroborated by other sources was proper and not akin to presenting the detective's opinion as to the witness's veracity. There is surely no difference between opinion testimony from a police officer that a witness's testimony was corroborated and that a witness's testimony was credible. Indeed, this Court has defined improper vouching as, inter alia, suggesting "that information not presented to the jury supports the witness's testimony." (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) Here, the prosecutor elicited testimony from an officer that a witness's testimony was supported by "other sources." This is improper because it informed the jury that a law enforcement official believed that Connor was credible given that, in her opinion, the information he gave had been corroborated.

Next, respondent argues that any error is harmless because the complained-of testimony consisted only of one question and answer. (RB, at pp. 170-171.) Respondent's citation to *People v. Melton*, *supra*, 44 Cal.3d at p. 745, is misplaced. In *Melton*, this Court noted, in finding the error to be harmless, that the witness answered only four questions. In that case, the witness was a defense investigator, not a police officer, and thus, his testimony regarding the credibility of another witness would not have nearly the force of the testimony in this case regardless of the number of questions asked and answered.

Detective Sanchez's testimony regarding Conner's credibility was aimed precisely at Conner's statements that were central to the prosecution's case. Sanchez testified that in her interview with Conner that

Conner identified Allen as having walked to Johnson's house to get a gun, and later walked back to Johnson's house and dropped off the gun. (18 RT 3981.) The tape recording of the interview was played for the jury. (18 RT 3982-3984.) Sanchez also testified regarding Conner's fear of Johnson, that Conner said he did not want to testify against Johnson because Johnson "has too many followers." (18 RT 3987.) Thus, Sanchez's testimony that Conner's statements had been corroborated provided an endorsement of Conner's credibility with regard to critical aspects of the prosecution's case, namely, Johnson's alleged involvement in the shooting and his alleged intimidation of witnesses.

Respondent is incorrect in claiming that the prosecutor did not exploit this testimony in closing argument. (RB, at p. 171, fn. 119.) The prosecutor stated that Conner was "pretty honest with Detective Sanchez." She used the precise words of the question posed to Sanchez in discussing Conner's credibility, arguing that his testimony that he was intimidated by Johnson was "corroborated . . . from other sources." (24 RT 5134.) The prosecutor also urged the jury to accept witnesses' testimony despite concerns about credibility as long as they had been "corroborated." (24 RT 5115, 5116.)

Because Conner had recanted his prior statement regarding Johnson's involvement, Sanchez's opinion that his earlier statements regarding Johnson's role in the murders were true, and that he legitimately feared Johnson, were critical to the prosecution's case. Sanchez's testimony regarding the corroboration of Conner's information, particularly when taken together with Detective Barling's improper testimony that Conner's fear of retaliation was genuine (see Claim VII), was highly prejudicial.

XIV.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

In his opening brief, Johnson challenged the consciousness-of-guilt instructions (CALJIC Nos. 2.03, 2.05, and 2.06) given at the guilt phase. Respondent disputes his arguments, relying on this Court's decisions rejecting similar claims. (RB, at pp. 229-235.) The issues are fully joined, and no further reply is necessary.

XV.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

In his opening brief, Johnson argued that the delivery of CALJIC No. 2.51 improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to Johnson to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. (Claim XV.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB, at pp. 235-237.) Accordingly, no reply is necessary.

XVI.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR AND RELIABLE SENTENCING DETERMINATION BY REFUSING TO GRANT A SEVERANCE DESPITE COAPPELLANT'S INTENT TO PRESENT A DEFENSE ANTAGONISTIC TO APPELLANT

Johnson argued in his opening brief that the trial court's failure to allow him to have a separate penalty trial was an abuse of discretion and violated his constitutional rights because of Allen's presentation of an antagonistic defense.

In response to *Allen's* claim that the failure to sever the trials was

prejudicial to Allen, respondent confirms that Allen's penalty phase case depended in large part on establishing that he acted under Johnson's domination and that Johnson was feared. (RB, at p. 314.) As Johnson's trial counsel argued, Johnson was essentially prosecuted "from both sides of the table," by the prosecutor and by Allen's counsel.

The fact that Allen's strategy was unsuccessful insofar as he also received the death penalty (RB, at p. 315) in no way defeats Johnson's claim. Because of the absence of written jury findings, there is no way of knowing whether the jury disbelieved Allen's defense or credited Allen's defense and believed that he was under the substantial domination of Johnson, but still decided that he deserved a death sentence in light of other aggravating factors. A determination that Johnson's dominance of Allen made Johnson not only more blameworthy than Allen, but also responsible for Allen's conduct would have been extremely aggravating evidence against Johnson even if it was not sufficiently mitigating to assist Allen.

Respondent cites *People v. Cummings* (1993) 4 Cal.4th 1233, 1287, for the proposition that severance is not compelled by inconsistent defenses where defendants may attempt to shift responsibility to the other. (RB, at p. 315.) In that case, however, the trial court "elected the dual jury procedure in recognition that some of that evidence would not be admissible against the nonspeaking defendant." (*Id.*) In addition, here, unlike in *Cummings*, the situation is not two defendants merely pointing the finger at each other. Rather, it is one defendant (Allen) who admitted committing the murders but presented evidence that he was under the control of the far more dangerous and domineering codefendant, while the other (Johnson) attempted to dispute any involvement in the shootings. Whether or not the jury believed that Allen was under the substantial domination of Johnson,

the fact that Allen conceded the truth of the prosecution's case with regard to the shooting undermined any consideration of lingering doubt and reinforced the prosecution's case against Johnson, that he was a violent and dangerous gang leader. (See *People v. Coffman* (2004) 34 Cal.4th 1, 41 (quoting *Ex parte Hardy* (Ala. 2000) 804 So.2d 298, 305 ["[t]o obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty"].)

Respondent attempts to downplay the testimony of Reverend Douglas, who testified on Allen's behalf as a gang expert, by contending that his testimony was essentially cumulative. (RB, at p. 315.) Douglas offered his "expert" opinion that Johnson was the shotcaller in the gang, and that Allen was under his domination. (33 RT 6695-6699, 6703.) He further testified with regard to Johnson's future dangerousness, opining that people can be shotcallers in prison and can continue to order "missions" from prison. (33 RT 6706-6709.) Douglas alluded to the Godfather and the Manson family in demonstrating how Allen was susceptible to domination. (33 RT 6709.) Douglas's testimony, which was introduced as mitigating evidence on Allen's behalf, could not have been admitted as aggravating evidence against Johnson if Johnson had been tried separately. Nevertheless, in a joint trial, this evidence undoubtedly added to the prosecution's case in aggravation and further undermined Johnson's penalty phase defense as evidenced not only by the prosecution's argument that Johnson's death was necessary in order to protect the community (37 RT 7425, 7435-7436), but by Allen's counsel's argument that "if Cleamon Johnson went to prison he could still call out orders." (37 RT 7519; see

also 37 RT 7523; 7495-7497 [Allen's counsel citing evidence elicited by the prosecution and by Allen to demonstrate that Johnson was a dominating shotcaller].)

Respondent argues that Douglas merely confirmed what Johnson's "tape-recorded telephone calls and note from behind bars had already demonstrated." (RB, at p. 316.) As Johnson has previously argued repeatedly, however, these statements were ambiguous and taken out of context. The characterization of Johnson as violent and dangerous was based on innuendo and evidence from unreliable witnesses. It was thus particularly damaging to Johnson's case that the alleged co-perpetrator corroborated the prosecutor's allegations of Johnson's dangerous and violent propensities.

Johnson argued in his opening brief that Allen's concession at the penalty phase that the shootings occurred as portrayed by the prosecution undermined any possibility of lingering doubt. Respondent disputes that Allen made such a concession, and argues that Allen's counsel "simply argued, based on the factual circumstances that the jury had found to be true beyond a reasonable doubt, that Allen's appropriate punishment was life without parole." (RB, at p. 316.) Respondent fails to grasp that Allen's entire penalty phase defense was based on the assumption that Allen committed the murders and that Johnson ordered him to do so – the precise theory presented by the prosecution at the guilt phase.

Beginning with Allen's counsel's opening statement at the penalty phase, the prosecution's theory of the murders is described as true, without qualification. Allen's counsel stated as fact that Johnson asked who of the gang members was going to shoot the two Crips, that Allen volunteered, and that Johnson went to the pigeon coop to retrieve a gun, gave it to Allen

and gave Allen instructions. (29 RT 5829-5830.) Counsel unequivocally stated that "Mr. Johnson dominated the two men. Mr. Johnson, you will find out from the evidence, a lot of evidence, dominated the activities of the 89 Family Bloods for the rest of 1991 through 1992, the beginning of 1993, sometimes from the streets, sometimes incarcerated." Allen's counsel further implied that Johnson dominated the gang when Allen killed Chester White, a murder for which the prosecution did not – and could not – implicate Johnson. (29 RT 5830-5831.)

In closing argument, Allen's counsel argued Johnson's domination of Allen with regard to the capital murders by unequivocally affirming the prosecution's case. This portion of the argument began with Allen's counsel saying: "And just let's look at what happened on the day of these murders." (37 RT 7498.) Allen's counsel argued that Johnson formed the intent to kill the two victims before Allen even arrived. (*Id.*) According to Allen's counsel, Johnson then asked who was going to do the killing, and after Allen volunteered, Johnson obtained the gun, gave it to Allen, told him what to do and sent him on his way. (37 RT 7498-99.) Thus, according to counsel, "we have here a case of the defendant [Allen] acting under substantial domination of another." (37 RT 7499.) Later, counsel argued that "there's no question Mr. Johnson dominated the gang." (37 RT 7519.) Finally, Allen's adoption of the prosecution's theory is made clear by his counsel's contention that "we know the exact circumstances of what happened in the front yard, as to what happened before and after this shooting was done." (37 RT 7501; see also 37 RT 7519-7520.)

Given the questionable credibility of prosecution witnesses at both phases of the trial, and the difficulties the jury had with the case during the guilt phase deliberations, there was certainly a compelling argument for

lingering doubt at the penalty phase, as well as a reason for the jury to doubt the prosecution's presentation of aggravating evidence. These arguments were completely eliminated by Allen's counsel's affirmation of the facts as testified to by the prosecution witnesses and his explicit acknowledgment that Allen did indeed commit the murders under Johnson's orders as the prosecution had described. Contrary to respondent's assertions, the failure to sever the penalty phase resulted in gross unfairness to Johnson and a violation of his constitutional rights.

XVII.

THE TRIAL COURT PERMITTED THE INTRODUCTION OF UNRELIABLE, INFLAMMATORY, AND MISLEADING EVIDENCE OF ALLEGED PRIOR UNADJUDICATED CRIMINAL ACTIVITY AT THE PENALTY PHASE

Johnson argued in his opening brief that the prosecution's reliance on unadjudicated aggravating evidence which purported to involve solicitations to commit murder violated his constitutional rights because there was insufficient evidence to establish that Johnson committed these crimes and the evidence that was introduced was misleading, unreliable and inflammatory.

With regard to the alleged solicitation of the murder of Detective Mathew, Johnson previously pointed out that the evidence merely established that Johnson, who was in custody, at most asked the person with whom he was talking on the phone to find out how much a rifle would cost so that at some point in the future he could shoot the officer. This interpretation is consistent with the trial judge's remarks, that "the closest he gets [to solicitation] is to ask somebody to go price out a gun or a scope for him." (28 RT 5737; see also 28 RT 5745-5746 ["When you are talking about arranging the means and manner of the killing, you know, by

obtaining a price on a gun, or what have you, you are well short"].)

Respondent argues that the evidence shows that Johnson actually asked the person on the phone to not only price the gun but to ask another person to get the gun. (RB, at p. 322.) To support this interpretation of the evidence, respondent cites Johnson as stating "Tell David I say get it." (CT IV Supp 2: 447.)

This interpretation is problematic for several reasons. As noted above, this is certainly not the conclusion drawn by the trial court, which found that, at most, Johnson was asking somebody to price a gun or a scope for him. (28 RT 5737, 5746.) Indeed, the two telephone conversations that allegedly comprise the solicitation are remarkably unclear, filled with slang and with several unintelligible words. In the first conversation, David is mentioned as someone who is going to "make sure [Johnson] get[s] some paper . . . ." (CT 949; People's Exhibit 52A; CT IV Supp. 2:443.) The subsequent reference, "Tell David I say get it,"could very well be referring back to getting "some paper." It could also simply be referring to having "David" get the price of the gun. This inference is plausible given it comes immediately after Johnson says "why don't you price one out for me." (CT IV Supp 2: 447.) It does not make sense for Johnson to ask to learn the price of a particular kind of gun, and in the next breath ask to have the gun obtained. A more reasonable interpretation is that David is a person who would have information about the price of the gun, and that it is the cost of the gun that is sought from David.

In addition, later in the conversation the other person on the phone states he does not know where David is, and Johnson then says that he should have "the yellow girl around the corner," who presumably has David's number, call David. Under the prosecution's theory, the person on

the phone is being asked to ask another person, "the yellow girl," to call David to obtain a gun so that when Johnson is released from prison he can use it to shoot the detective. Under this scenario, the connection of the person on the phone to an alleged solicitation is awfully tangential to be considered an aider and abettor to murder.

Evidence may only be admitted under factor (b) if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) Here, the taped conversation is simply too ambiguous to constitute sufficient evidence of a crime to be admissible under factor (b).

With regard to the alleged solicitation of the murder of Nece Jones, Johnson argued in the opening brief that the evidence was far too ambiguous to establish a solicitation. The purportedly incriminating solicitation consisted of Johnson stating to Reco Wilson: "you know them three smokers out there? Put a leash around their ass by any means necessary." (CT IV Supp. 2:440.) Four days later, Reco Wilson shot and killed Nece Jones, and the prosecutor contended, therefore, that Johnson's words constituted a directive to kill her. Respondent, as did the prosecutor, attempts to link the phone call to the killing despite the lack of any reliable evidence.

For example, respondent notes that Jones was a "smoker," (i.e., a person who smoked cocaine) and lived in the neighborhood. She had recently testified against Charles Lafayette, a member of the Swans, a gang friendly to Johnson's gang. According to respondent, she therefore must have been one of the three smokers referred to by Johnson. However, Jones is never mentioned in the purportedly incriminating call nor is there any reference in the call to the Lafayette case or to any other gang. The

substance of the conversation had to do with concerns that the police were searching for evidence that Johnson's gang was involved not merely in homicides but was a terrorist organization. There is nothing to suggest that Johnson was referring to the retrial of a murder case involving a separate gang.

Furthermore, it is never explained why, if Jones was being targeted because she was a testifying witness against a Swan, three smokers were identified, and the other two were left unharmed. The prosecutor contended that Jones and her two smoking companions, Clarissa Weathered and Old Man Berry, were the three "smokers," (27 RT 5607), but there is no logical explanation for lumping these two latter individuals with Jones if the prosecutor's interpretation is to be credited. As respondent admits, there was no evidence that Weathered and Berry were witnesses against Johnson's fellow gang members (RB, at p. 326), and there is nothing to suggest that they were providing information to the police or intended to testify against the gang. Indeed, Weathered, who was with Jones when Reco Wilson came upon them, was left unharmed when Jones was killed. (27 RT 5608-5609.)

As respondent points out, Jones testified against Lafayette, and was killed after Lafayette's jury deadlocked and she was ordered back to testify at the retrial. (RB, at p. 324.) While Jones very likely could have been killed because of her testimony in the Lafayette case, the evidence was not sufficient to establish that it was Johnson who ordered her to be killed.

Johnson further argued in his opening brief that even assuming evidence of the solicitation was admissible, additional evidence of two murders – the Jones murder and the murder to which Jones was to be a witness, should never have been introduced given their remote connection

to Johnson and the inflammatory nature of the evidence. Contrary to respondent's arguments, none of this evidence, which included testimony from police officers, eyewitnesses, and testimony of the victim's wounds from the coroner, was relevant or necessary to establish a solicitation. This gratuitous evidence greatly contributed to the prosecution's theme that Johnson was a dangerous, evil person responsible for countless violent, murderous acts.

XVIII.

THE TRIAL COURT PRECLUDED THE DEFENSE FROM INTRODUCING EVIDENCE TO CAST DOUBT ON THE RELIABILITY OF THE PROSECUTION'S CASE IN AGGRAVATION

Johnson argued in his opening brief that the trial court erroneously refused to permit Johnson to introduce third-party culpability evidence to support an alternate theory as to who killed Nece Jones. Respondent cites the well established standard for determining the admissibility of such evidence, i.e., whether it is "capable of raising a reasonable doubt of defendant's guilt," (*People v. Hall* (1986) 41 Cal.3d 826, 833) but argues that the evidence at issue here does not meet that standard. (RB, at p. 334.)

Respondent ignores the extremely weak evidence against Johnson with regard to soliciting the murder of Nece Jones. In *Holmes v. South Carolina* (2006) __ U.S. __, 126 S. Ct. 1727, the Supreme Court recently criticized South Carolina's application of a state rule regarding the admissibility of third party culpability evidence which focused on the strength of the evidence against the defendant but "called for little, if any, examination" of the weakness of the prosecution's case against the defendant. (*Id.* at p. 1734.) Here, the tenuous connection between Johnson and the Jones murder renders the third party evidence all the more relevant.

The third party in this case did not merely have an opportunity and motive, as respondent concedes (RB, at pp. 335-336), but he also had physically assaulted the victim the very same day she was killed, and then engaged in suspicious behavior after the killing. This amounted to "circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.) Accordingly, the evidence should have been admitted and the court's refusal to allow its admission requires reversal.

To the extent that the proffered evidence is deemed inadmissible under state law, the state evidentiary rule set forth above for the admission of third party culpability evidence is arbitrary and deprived Johnson of a meaningful defense in violation of the Sixth and Fourteenth Amendments. (See *Holmes v. South Carolina, supra,* 126 S. Ct. 1727.)

XIX.

THE TRIAL COURT RESTRICTED APPELLANT'S ABILITY TO PRESENT AND HAVE THE JURY CONSIDER MITIGATING EVIDENCE THAT WOULD HAVE HUMANIZED HIM

In the opening brief, Johnson argued that the trial court's restrictions on the presentation of mitigating evidence that would have shown Johnson's positive qualities, as reflected in how his family believed his son would be affected by his execution, violated Johnson's constitutional rights and requires reversal.

As this Court recently stated, the general rule is that "evidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. [Gregory Scott] Smith* (2005) 35 Cal.4th 334, 367.) Respondent contends that the trial court's exclusion of testimony from Johnson's family did not violate this

rule, and argues that the court correctly allowed Johnson to present evidence and argument that Johnson loved his son, that he did not want his son to become involved with gangs, and believed he could be a positive influence on his son. (RB, at p. 351.) Respondent fails to understand the importance of the evidence that the court excluded – Johnson's mother's belief that Johnson could make a difference in his son's life.

This is not a case like *People v. Vieira* (2005) 35 Cal.4th 264, 295, where this Court held that the trial court did not err in excluding the defendant's mother's testimony that her son's execution would "destroy me." (*Id.* at p. 295.) While it considered the question to be a close one, the Court held that such testimony "went beyond the expression of her desire that defendant be spared the death penalty, which would have been permissible character evidence, and spoke directly of the impact the execution would have on her." (*Ibid.*) Here, Johnson did not seek merely to present evidence about the impact Johnson's death would have on his family, but to show Johnson's redeeming qualities that rendered the death penalty inappropriate – his family members' belief that Johnson could help his son make better choices if his life were spared.

In *People v. [Gregory Calvin] Smith* (2003) 30 Cal.4th 581, the trial court precluded the defendant's former attorney from testifying regarding counsel's "opinion regarding the 'appropriateness of the death penalty . . . given the crime.' " (*Id.* at p. 632.) This Court agreed with the trial court's decision. In so ruling, this Court stated that "testimony that defendant deserves to live, provided by someone who had a significant relationship with him, is admissible, not because that opinion is itself important but because the testimony provides indirect evidence of the defendant's character." (*Id.* at p. 631.) In that case, the evidence was found to be

inadmissible by this Court because it did not "provide insight into the defendant's character." (*Id.*) Here, by contrast, evidence that a family member believed that the defendant's life – if spared – would have a positive impact on his son was relevant because it did provide such insight.

In *People v. [Gregory Scott] Smith*, *supra,* 35 Cal.4th 334, the trial court excluded testimony from Janice Foster, an educational therapist who saw petitioner when he was a teenager, that she did not want the defendant to be executed because he was a "young person in his mind" and it is "horrible when a child dies." (*Id.* at p. 366.) This Court held that the trial court erred: "Because Foster had such a significant relationship, and her opinion was based on a feature of defendant's character that she had personally observed, we conclude that her opinion was relevant and admissible." (*Id.* at p. 367.) The same can be said of Johnson's case. Because of the significant relationship between Johnson and his mother, her opinion that Johnson would be a positive influence on his son was based on a feature of Johnson's character and was thus relevant and admissible.

In *Smith*, this Court applied the *Chapman* harmless error test and found no prejudice in the erroneous exclusion of evidence because the therapist's opinion that the defendant should not be executed was deemed indirect evidence of his immature character, and she was able to present more direct testimony that he was immature. In Johnson's case, the excluded testimony – that Johnson's mother believed if his life was spared he could guide his son – was essentially the only evidence proffered by Johnson's mother to demonstrate Johnson's positive character.

As argued in the opening brief, the trial court's exclusion of this evidence violated Johnson's constitutional rights and requires reversal.

XX-XXIII.

CALIFORNIA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

The opening brief sets forth numerous bases on which California's death penalty statute violates the federal constitution, while acknowledging that this Court has already rejected these claims of error. (AOB, at pp. 274-348.) Respondent simply relies on this Court's prior decisions without adding new arguments. (RB, at pp. 352-357.) Accordingly, the issues are joined and no reply is necessary.

XXIV.

THE TRIAL COURT ERRED BY REFUSING SEVERAL REQUESTED DEFENSE JURY INSTRUCTIONS

In his opening brief, Johnson argued that the trial court should properly have delivered several requested instructions at the penalty phase of trial. (AOB, at pp. 349-356.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB, at pp. 355-357.) Accordingly, no reply is necessary.

XXV.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

In his opening brief, Johnson argued California's sentencing procedures violate international law and fundamental precepts of international human rights. (AOB, at pp. 357362.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB, at p. 357.) Accordingly, no reply is necessary.

XXVI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Contrary to respondent's assertion (RB, p. 358), defendant was not afforded a fair trial. The cumulative effect of the many errors committed at both phases of Johnson's trial require reversal, even if each error individually does not.

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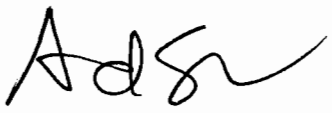
CONCLUSION

For all of the reasons stated above and in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: December 19, 2006

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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(CAL. RULES OF COURT, RULE 36(B)(2))

I, Andrew Love, am the Assistant State Public Defender assigned to represent appellant, Cleamon Johnson, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 20,027 words in length excluding the tables and certificates.

Dated: December 19, 2006

Andrew Love

DECLARATION OF SERVICE BY MAIL

Re: People v. Allen and Johnson

No. BA105846-02
(Cal. Supreme Ct. No. S066939)

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF ON APPEAL

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each said envelope was then, on December 22, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2006, at San Francisco, California.

Glenice Fuller

DECLARANT