No. _____

IN THE

Supreme Court of the United States

TIMOTHY MCGHEE,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

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FILED

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY JOSEPH MCGHEE,

Petitioner-Appellant,

v.

KEVIN CHAPPELL, Warden,

Respondent-Appellee.

No. 17-56688

D.C. No.
2:12-cv-03578-JAK-E
Central District of California,
Los Angeles

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

FILED

MAY 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY JOSEPH MCGHEE, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden, Respondent-Appellee.	No. 17-56688 D.C. No. 2:12-cv-03578-JAK-E Central District of California, Los Angeles ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed August 1, 2017, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); see also Miller-El v. Cockrell, 537 U.S. 322 (2003); Slack v. McDaniel, 529 U.S. 473 (2000); Lozada v. Deeds, 498 U.S. 430 (1991); Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977).

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IT IS ORDERED that the Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order on counsel for Petitioner and counsel for Respondent.

DATED: _____, 2017.

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the First Amended Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which any objections have been made. The Court accepts and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the First Amended Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: _____, 2017.

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On April 25, 2012, Petitioner, who then was proceeding pro se with assistance from the California Appellate Project, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody," accompanied by an attached memorandum ("Pet. Mem."). See Pet. Mem.,

p. 3, n.1. Petitioner concurrently filed a "Motion to Stay and Hold in Abeyance Federal Proceedings Pending Exhaustion of Federal Claims in State Court" ("Motion to Stay"). The Motion to Stay sought an order holding this action in abeyance because certain grounds for relief therein assertedly were unexhausted (Motion to Stay, p. 5).

On August 29, 2012, Respondent filed an "Answer to the Petition for Writ of Habeas Corpus and Response to Petitioner's Motion to Stay, etc." (the "Answer"). The Answer asserted that the Motion to Stay should be denied because all the claims then were exhausted, and that the Petition should be dismissed because the claims allegedly were untimely. See Answer, pp. 1, 4-11.[1] On March 4, 2013, Petitioner filed a reply to the Answer.

On March 15, 2013, the Court issued an order: (1) denying the Motion to Stay as moot; (2) denying without prejudice Respondent's request to dismiss the Petition as untimely; and (3) ordering Respondent to file a Supplemental Answer addressing the merits of the claims alleged in the Petition. See "Order Re Motion to Stay, Statute of Limitations Issues, and Further Briefing" (Docket. No. 31). On March 27, 2013, the Court appointed the Federal Public Defender's Office to represent Petitioner. See Minute Order (Docket No. 33).

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[1] Respondent concurrently lodged documents. Herein, the Court refers to these documents, as well as other documents lodged by Respondent on September 11, 2013, and March 21, 2017, as "Respondent's Lodgments."

On April 17, 2013, Petitioner filed a "Motion for Leave to File Amended Petition, etc." ("Motion to Amend"), unaccompanied by a proposed amended petition. See Motion to Amend (Docket No. 38). On April 19, 2013, the Magistrate Judge denied the Motion to Amend. On June 26, 2013, the District Judge denied Petitioner's "Motion for Review of the April 19, 2013 Order of United States Magistrate Judge re Leave to Amend." See Docket Nos. 41, 49.

On September 11, 2013, Respondent filed a Supplemental Answer addressing the merits of the claims alleged in the Petition.[2] On December 12, 2013, Petitioner filed a Supplemental Reply.

Meanwhile, on November 14, 2013, Petitioner filed a "Renewed Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Renewed Motion to Amend"), and lodged a proposed amended petition containing new evidence and exhibits. Petitioner advised that he intended to move for a stay of this action pending exhaustion of his state court remedies if the Court granted leave to amend the Petition to add the new evidence. On December 12, 2013, Respondent filed an opposition to the Renewed Motion to Amend.

On January 9, 2014, the Court ordered the parties to address the propriety of a stay as it related to the Renewed Motion to Amend. See Docket No. 78. On January 30, 2014, in accordance with the Court's

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[2] Respondent concurrently lodged documents, including the Clerk's Transcript ("C.T.") and Reporter's Transcript ("R.T."). Respondent also lodged under seal the Reporter's Transcript of a July 21, 2008 hearing.

order, Petitioner filed a "Motion to Stay Federal Habeas Action, etc." ("Renewed Motion to Stay"). On March 7, 2014, Respondent filed a response in which Respondent indicated that he did not oppose a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 538 U.S. 1042 (2003). On March 11, 2014, Petitioner filed a "Report on the Status of the State Court Exhaustion Proceeding," advising that Petitioner had filed a habeas petition and supporting exhibits with the Los Angeles County Superior Court on February 6, 2014. On March 19, 2014, Petitioner filed a "Notice of New Case Law, etc." in support of the Renewed Motion to Stay.

On April 1, 2014, the Court issued an order: (1) denying without prejudice the Renewed Motion to Amend; and (2) granting the Renewed Motion to Stay the proceedings under Kelly v. Small, so that Petitioner could exhaust claims not presented in the Petition and later move to amend the Petition to include the newly-exhausted claims. See "Order Re Renewed Motion for Leave to Amend and [Renewed] Motion to Stay" (Docket No. 86). The Court declined to decide whether any future amendment to include newly-exhausted claims would be appropriate (id.).

On February 17, 2017, Petitioner filed an unopposed "Application to Lift Stay of Proceedings Imposed Pursuant to Kelly v. Small" ("Application to Lift Stay"). Petitioner also filed a "Notice of Motion and Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Post-Stay Motion to Amend"), and lodged a proposed amended petition with supporting exhibits, some of which were filed under seal. See Docket Nos. 90-93. On February 23, 2017, the

Magistrate Judge granted the Application to Lift Stay.

On March 21, 2017, Respondent filed a response to the Post-Stay Motion to Amend, which indicated that Respondent did not oppose the motion. Respondent concurrently lodged multiple documents with the response. On March 22, 2017, the Magistrate Judge granted the Post-Stay Motion to Amend.

On March 22, 2017, Petitioner filed the operative "Amended Petition for Writ of Habeas Corpus" ("First Amended Petition" or "FAP"), which had been lodged with the Post-Stay Motion to Amend. The First Amended Petition references the exhibits Petitioner lodged with the Post-Stay Motion to Amend ("FAP Exh."). On April 19, 2017, Respondent filed an Answer ("FAP Answer"). On May 3, 2017, Petitioner filed a Reply.

BACKGROUND

A jury found Petitioner guilty of one count of conspiracy to commit assault, one count of conspiracy to commit vandalism, three counts of resisting executive officers in the performance of their duties, and two counts of assault by means likely to produce great bodily injury (FAP, p. 8; Respondent's Lodgment 1, p. 2; C.T. 288-92, 295-97).[3] These convictions arose out of Petitioner's participation in a jail riot in which multiple inmates threw multiple objects at their jailers. See Respondent's Lodgment 1, pp. 3-6. The trial court

[3] The jury found Petitioner not guilty of one count of assault on Deputy Gordon McMullen. See C.T. 293-94.

sentenced Petitioner to 75 years to life (Respondent's Lodgment 1, p. 2; C.T. 322-27; R.T. 3306-10).

On June 23, 2010, the California Court of Appeal affirmed in a reasoned decision (Respondent's Lodgment 1). On October 13, 2010, the California Supreme Court summarily denied review (Respondent's Lodgment 3).

On October 19, 2011, Petitioner constructively filed a habeas petition with the Los Angeles County Superior Court, alleging claims similar to those asserted herein. Compare FAP with Respondent's Lodgment 4.[4] On December 7, 2011, the Superior Court denied the petition in a reasoned decision (Respondent's Lodgment 5). The Superior Court indicated that many of Petitioner's claims had been raised and rejected on direct appeal. See Respondent's Lodgment 5, pp. 2-3 (citing, inter alia, In re Waltreus, 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9 (1965) ("Waltreus") (an issue raised and rejected on appeal may not be asserted in a subsequent state habeas petition) and In re Clark, 5 Cal. 4th 750, 765-66, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) ("Clark") (absent justification, successive and/or untimely habeas petitions will be summarily denied)). The Superior Court observed that "[m]any of the arguments made . . . are nearly, word for word, the same arguments raised in the direct appeal"). See id. at 3. The Superior Court found that Petitioner had not shown prejudice with respect to the ineffective assistance of counsel claim. See id. at 3-

[4] Petitioner's first round of state habeas petitions were filed without counsel and without the evidence that Petitioner's public defenders since have presented.

5 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

On March 21, 2012, Petitioner constructively filed a habeas petition with the California Court of Appeal, alleging claims similar to those asserted herein (Respondent's Lodgment 6). On April 12, 2012, the California Court of Appeal issued a brief but reasoned decision (Respondent's Lodgment 6). The Court of Appeal denied some claims with citations to Clark, Waltreus, and Hagan v. Superior Court, 57 Cal. 2d 767, 769-71, 22 Cal. Rptr. 206 (1962) (court may refuse to consider repetitious applications). The Court of Appeal denied Petitioner's ineffective assistance of counsel claim with citations to, inter alia, Strickland v. Washington, 466 U.S. 668 (1984) (Respondent's Lodgment 6).

On May 9, 2012, Petitioner constructively filed a habeas petition with the California Supreme Court, alleging claims similar to Grounds One, Five and the cumulative error claim raised herein (Respondent's Lodgment 8). On August 15, 2012, the California Supreme Court denied the petition without comment (Respondent's Lodgment 9).

On February 6, 2014, Petitioner filed a habeas petition with the Los Angeles County Superior Court, presenting his expanded claim of ineffective assistance of trial counsel (asserted as Ground One herein) and an updated cumulative error claim similar to Ground Six herein. See Respondent's Lodgment 20, pp. 466-509. On March 28, 2014, the Superior Court denied the petition in a reasoned decision. See id. at 511-27.

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On April 23, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Court of Appeal, presenting Grounds One and Six asserted herein (Respondent's Lodgments 15-17). On August 27, 2014, the Court of Appeal summarily denied the petition as procedurally barred. See Respondent's Lodgment 20, p. 549 (copy of order citing In re Reno, 55 Cal. 4th 428, 452, 460-61, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012) (habeas petitioner challenging final criminal judgment must prosecute case without unreasonable delay)).

On September 19, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Supreme Court, presenting Grounds One and Six asserted herein (Respondent's Lodgments 18-20). On January 18, 2017, after informal briefing, the California Supreme Court denied the petition "on the merits," citing Harrington v. Richter, 562 U.S. 86, 99-100 (2011), and Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (Respondent's Lodgments 21-23).

SUMMARY OF TRIAL EVIDENCE

In January of 2005, Petitioner was housed in the 3300 A-Row ("A-Row") of the Men's Central Jail (R.T. 647, 744). A-Row inmates are subject to high security measures, including being handcuffed before leaving their cells and being handcuffed when escorted to and from their cells (R.T. 640). Deputy Raul Ibarra had worked on A-Row for just under a year as of January of 2005 (R.T. 642-43). Ibarra testified that he had been trained to identify who stands out as a "ring leader" in a group (R.T. 643). Based on his training and contact with the inmates on A-Row (including Petitioner), Ibarra

opined that Petitioner was the ring leader, or "shot caller" (R.T. 644-46, 696). Inmates must ask the shot caller for permission to do such things as go on passes or use the phone (R.T. 644, 725). Ibarra had heard inmates on the row screaming out that they were going on a pass and Petitioner responding with a "yes" or a "no" (R.T. 645).

The Removal of Inmate Gonzalez from A-Row

Around 4:00 p.m. on January 7, 2005, Ibarra observed inmate Rodolfo Gonzalez intoxicated in Gonzalez' cell, and Ibarra spoke with his partners (Deputies Taylor, Orosco, and Argueta) regarding a plan to remove Gonzalez from the cell (R.T. 651-54, 684). As a ruse to cause Gonzalez to leave the row voluntarily, the deputies planned to tell Gonzalez he had an attorney pass (R.T. 654-55, 692). Ibarra announced over the loud speaker to the entire module that Gonzalez had an attorney pass and that he had five minutes to get ready (R.T. 655-56, 694). Ibarra and Argueta then went to Gonzalez' cell, with Taylor behind and Orosco manning the gates (R.T. 656-57, 699). Without offering any resistance, Gonzalez submitted to being handcuffed and he walked (staggered) out of his cell and toward the gate, escorted by the deputies (R.T. 657-59, 727). When Gonzalez reached Petitioner's cell, however, Petitioner said to Gonzalez, "Hey, I didn't give you permission to go on this pass, what are you doing?" (R.T. 659-60, 697, 699-700). Gonzalez replied, "I'm sorry," and started walking back to his cell (R.T. 660, 700). Ibarra yanked Gonzalez by the handcuffs to get Gonzalez off balance, and told Gonzalez he was going to walk off the row (R.T. 660, 701). Gonzalez struggled "a little bit," but Ibarra and Argueta each grabbed Gonzalez by an arm and started

dragging Gonzalez backward from the row (R.T. 660-61, 701-03).

Ibarra testified that, as the deputies removed Gonzalez, Petitioner screamed "Dale gas la juras," meaning, to assault the deputies with whatever liquids the inmates had at their disposal (R.T. 661-62, 703, 707). Inmates including Petitioner, Francisco Morales, and Gerardo Reyes, then pelted all four deputies on the row with oranges, apples, and liquids (such as urine or bleach) R.T. 662-64, 704, 707, 731-32). Gonzalez dropped to the floor and began kicking the deputies (R.T. 665, 704-05, 709). Ibarra sprayed Gonzalez in the face with "O.C. spray" to cause Gonzalez to comply, and removed him from the row (R.T. 665-66, 709-10).

Ibarra testified that he later went into "the pipe chase" behind Petitioner's cell, where Ibarra heard Petitioner telling Reyes that, if they jumped on the sinks in their cells, they could break the sinks and use the porcelain to throw at deputies (R.T. 668-72, 720-22, 734). Reyes reportedly "agreed" (R.T. 672, 734). Ibarra stayed in the pipe chase a few seconds, and then, as he started to walk off, he heard what sounded like glass or porcelain hitting the ground and breaking (R.T. 672-75, 722). Inmates then started throwing porcelain at the deputies (R.T. 675-79). Ibarra saw Petitioner, Francisco Morales and Reyes throwing porcelain (R.T. 679).

The Fire on A-Row

Deputy Joseph Morales (referred to herein as "Deputy Morales" to avoid any confusion with inmates Francisco Morales and Erick Morales)

testified that he and his partner, Deputy Gordon McMullen, came to the gate of A-Row around 10:00 p.m. that day. Deputy Morales testified that the inmates (including Petitioner, Reyes, Francisco Morales, Tafoya, Trujillo and Cortez) immediately began throwing objects, including porcelain from their sinks, at Deputy Morales and the other deputies (R.T. 737-45, 1210-11, 1220, 1227; see also R.T. 2139-45, 2183-86 (McMullen similarly testifying in rebuttal)).[5] Later, when Deputies Morales and McMullen used a water hose to put out a fire on A-Row from an adjacent row (C-Row), the inmates (including Petitioner) "constantly" "bombarded" the deputies with porcelain (R.T. 1212, 1215-16, 1226, 1228-31; see also R.T. 2146-57, 2160-62, 2187-95, 2205 (McMullen similarly testifying)). Deputy Morales saw Reyes throw a piece of porcelain that hit McMullen in the hand (R.T. 1214, 1217-18, 1230; see also R.T. 2157-58, 2195-96, 2202 (McMullen testifying that he was hit in the hand with porcelain).[6] Deputy Morales said that numerous pieces of porcelain were thrown at him and McMullen as they tried to put out a fire on A-Row, and that a piece of porcelain larger than a golf ball "whizzed" by him, coming within a half inch of hitting him in the eye (R.T. 765-69; see also R.T. 2158, 2163, 2204-05 (McMullen testifying regarding the piece of porcelain that almost hit Deputy Morales)). Neither Deputy Morales nor Deputy McMullen saw which of the inmates throwing porcelain threw that particular piece (R.T. 765-66, 2158-59). Deputy Morales and McMullen left the row when

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[5] Deputy Morales later clarified that Cortez was not in his regular cell but rather was in the shower during the incident (R.T. 1202-03, 1207, 1232; see also FAP Exh. 17 (diagram of row)). The showers did not have sinks (R.T. 1232).

[6] As noted above, the jury found Petitioner not guilty of assaulting Deputy McMullen (C.T. 293-94).

it became too dangerous to stay (R.T. 765).

The Extraction of Inmates from A-Row

Sergeant Thomas Wilson testified that he started his shift at 10 p.m. that day and, after briefing and preparation, led an approximately 15-person emergency response team and a four-person extraction team into A-Row to quell the riot (R.T. 932-34, 970-71). Both teams immediately were pummeled with pieces of porcelain (R.T. 934-35, 972). Some of the pieces "nearly struck" the cameraman, Deputy Alfredo Alvarez, while he was filming (R.T. 935; see also R.T. 921-23 (Deputy Alvarez testifying that he videotaped the "riot suppression")). Two or three inmates, including Petitioner and Reyes, were the main aggressors (R.T. 936-37).

Sergeant Wilson testified that, in an effort to suppress the resistance, two of the deputies involved in the extraction fired pepper ball guns into the cells from where the porcelain was being thrown (R.T. 938, 973-75; see also R.T. 1238-46 (Deputy John Coleman testifying regarding firing a pepper ball gun at cells where the inmates were not complying (including Petitioner's cell))). Another deputy or two were spraying from a large fire extinguisher-sized canister of pepper spray primarily at cells 6-8 (Reyes', Petitioner's and Trujillo's cells; see FAP Exh. 17) (R.T. 942-45, 973-74). Reyes eventually gave up and came out of his cell as commanded (R.T. 942-43). Petitioner did not give up despite being commanded to do so. More than 30 pepper balls were fired into Petitioner's cell, and five or more bursts from the canisters were also sent into his cell (R.T.

944, 975-76). Trujillo had to be taken from his cell because he was overcome by pepper spray and pepper ball powder (R.T. 946-47). Meanwhile, after slamming his mattress against the bars of his cell and yelling profanities, Petitioner went to the back of his cell, where he used his mattress as a shield (R.T. 947-48, 980-81). The team removed the rest of the inmates on A-Row and then returned to Petitioner's cell and extracted Petitioner (R.T. 948-49, 974; see also R.T. 1250-58 (Deputy Hector Beltran testifying Petitioner resisted until handcuffed forcibly)). A videotape of these events was played for the jury (R.T. 938-51, 976-77, 981-83).

The Defense

Gonzalez testified that he was housed on A-Row on January 7, 2005, and had been drinking that day (R.T. 1274-75). Gonzalez heard his name called out over the loud speaker for a visit or "pass," but he did not hear the type of pass (R.T. 1275-76). Gonzalez readied himself to leave his cell, and Deputy Ibarra supposedly came alone to the cell and cuffed Gonzalez from the front with handcuffs and a waist chain (R.T. 1276-77, 1297-98). Ibarra walked away from the cell and toward the gate (R.T. 1298-99). Gonzalez' cell door was opened and Gonzalez walked out onto A-Row where he saw Ibarra standing in front of Petitioner's cell talking to Petitioner (R.T. 1278, 1300-02, 1307-08). Gonzalez heard Ibarra say, "He's not refusing," but could not hear Petitioner (R.T. 1278, 1304, 1307).

Gonzalez walked toward Ibarra and asked what type of pass he had (R.T. 1277-78, 1302-04). Gonzalez stopped walking at or near

Petitioner's cell (R.T. 1284, 1302). When Ibarra said the visit was for an attorney, Gonzalez refused to go because Gonzalez was in jail for a parole or probation violation, had already been found in violation, and did not have an attorney (R.T. 1278-81, 1284, 1306-08, 1315-18, 1334-36, 1342). Gonzalez supposedly was afraid of what might happen because Gonzalez had been involved in a riot against officers at a different facility and he feared retaliation (R.T. 1279-80, 1312-14). Specifically, Gonzalez feared the deputies would take him outside and toss him around, slap him, "ruffle" him up, or talk down to him (R.T. 1281). Gonzalez denied asking Petitioner for permission to go on the pass (R.T. 1285-86).

Gonzalez turned to walk back to his cell and felt Deputy Ibarra grab him by the neck in a choke hold and take him to the ground (R.T. 1281-82, 1284-85, 1318-19). Gonzalez struggled, kicked, and fought to free himself, while Ibarra told Gonzalez to stop resisting and punched, kicked, and did "everything he could do" to regain control (R.T. 1285-86, 1320-21). Ibarra grabbed Gonzalez by the neck and single-handedly dragged Gonzalez from the row, where Ibarra and other deputies beat Gonzalez, hitting him 20 to 30 times and kicking him, as they tried to subdue him and as Gonzalez fought to defend himself (R.T. 1286-91, 1321, 1327-31, 1337-41). Gonzalez was maced until he passed out (R.T. 1291-93, 1327, 1337). Gonzalez claimed he had no bruises from the supposed beating because he has a dark complexion (R.T. 1340-41). Gonzalez agreed he had received no medical treatment,

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but denied having refused medical treatment (id.).[7] Gonzalez testified that, as he was being dragged from the row, he heard other inmates (including Petitioner) screaming (R.T. 1321-22, 1331-32, 1348).

The day after the incident, Gonzalez gave a statement saying he did not recall what had happened during the incident (R.T. 1344-45, 1349). Gonzalez admitted that the first time he came forward with a purported memory of details concerning what supposedly had happened during the incident was two days before Petitioner's trial (R.T. 1323-24, 1345-49). Gonzalez also admitted that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed (R.T. 1333-34).

Petitioner testified that he had problems with his jailers from the first day he arrived on A-Row in 2003 (R.T. 1530-36). When he was being processed, a deputy reportedly threatened Petitioner and took Petitioner down a hallway where the deputy and others beat Petitioner (R.T. 1531-33). Petitioner also testified concerning other beatings (R.T. 1534, 1536). Petitioner agreed that he "always" was the victim in these run-ins with his jailers (R.T. 1592-93). Petitioner denied being a shot caller on his row, denied other inmates ever asked his

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[7] Deputy Richard Thompsen testified in rebuttal that he and a nurse addressed Gonzalez' medical needs after Gonzalez was removed from A-Row (R.T. 2252-55). Gonzalez had redness on his face, neck, and upper torso indicative of exposure to pepper spray (R.T. 2256). Thompsen observed no other injuries (e.g., bruises or cuts), but did not recall if he looked under Gonzalez' clothing for injuries (R.T. 2257, 2260). Gonzalez reported no problems other than exposure to pepper spray (R.T. 2257-58). Gonzalez refused any treatment (R.T. 2259).

permission to leave their cells, and denied he told Gonzalez that Gonzalez did not have Petitioner's permission to leave the row on the day of the riot (R.T. 1536-37, 1539, 1695).

Regarding the riot, Petitioner testified that he watched Deputy Ibarra handcuff Gonzalez and walk away from Gonzalez' cell (R.T. 1542-44). According to Petitioner, there were no other deputies then on the row (R.T. 1543). Petitioner could see that Gonzalez was drunk from how Gonzalez was walking (R.T. 1544-46). Petitioner called Ibarra to Petitioner's cell and told Ibarra that Gonzalez was in no condition to walk down the escalator, and that Ibarra would get himself in trouble if Ibarra walked a drunken inmate past the sergeant's office (R.T. 1546-49, 1691-96).

Petitioner described the events leading up to Gonzalez' removal from the row in a manner consistent with Gonzalez' testimony (i.e., Gonzalez refused to leave and turned to go back to his cell; Ibarra grabbed Gonzalez by the neck and pulled Gonzalez back; Ibarra and Gonzalez ended up on the floor; Ibarra hit and kicked Gonzalez and got Gonzalez back into a choke hold; Ibarra dragged Gonzalez from the row) (R.T. 1549-57, 1700, 1849-50).

Petitioner said that he and other inmates yelled at Ibarra and then at the deputies who were beating Gonzalez in the "sally port area" (R.T. 1552-53, 1557-58). Petitioner admitted that he told Ibarra to "get off" Gonzalez, and Petitioner admitted he threw a milk carton and an apple at Ibarra, but Petitioner denied telling others to throw things (R.T. 1553-55). Petitioner claimed the inmate response

had been a spontaneous reaction to seeing Gonzalez being beaten (R.T. 1555). Petitioner threw from his cell everything from within his cell that was capable of being thrown (R.T. 1558).

Petitioner testified that "shortly after" Gonzalez was removed from A-Row, Deputy Yzabal told the men on the row through the loud speaker that the deputies were going to drag the inmates out and "fuck [the inmates] up" (R.T. 1559). These threats continued over the loud speaker "for awhile" (R.T. 1561-62, 1825-26).[8] Another deputy (Argueta) sprayed the cells from the front with a "big ole" canister of mace saying, "How do you like that? That's just the beginning. There's more to come," while another deputy sprayed mace into the cells through the vents from the pipe chase behind the cells (R.T. 1560-62, 1567-68, 1707, 1716-17, 1805-07).[9] Petitioner and others then began to kick their sinks and break the porcelain (R.T. 1562-63, 1567, 1706, 1718-19). Petitioner denied telling others to break their sinks, and said his sink was not the first sink broken (R.T. 1564,

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[8] Deputy Mark Yzabal testified in rebuttal that he did not issue any threats over the loud speaker to the inmates and that, in fact, he did not even use the loud speaker that day (R.T. 2265-66, 2273-74). Deputy Yzabal went to the hallway outside A-Row and observed inmates (including Petitioner) throwing porcelain at the sally port and front door (R.T. 2267-69, 2270, 2275). Petitioner and Reyes were throwing porcelain in unison and yelling, "Fuck the jura, fuck the police" (R.T. 2269, 2275-76).

[9] Deputy McMullen testified in rebuttal that, when he came on his shift at 10 p.m. on the night of the riot, there had been no sergeant's authorization to activate emergency response measures (R.T. 2130). McMullen said that the deputies are not issued canister-sized pepper spray. Such canisters are locked up and brought in only when emergency response teams are deployed (R.T. 2133-35, 2177).

1705-10).

Petitioner admitted he threw porcelain (R.T. 1568, 1715-16, 1725-26). Other inmates threw porcelain too, but Petitioner claimed the throwing was chaotic and not coordinated (R.T. 1568-69, 1708, 1722-23). Petitioner denied throwing anything when deputies (Morales and McMullen) later tried to put out a fire on A-Row (R.T. 1567-69, 1723-26). Petitioner heard others throwing porcelain at that time (R.T. 1570). Petitioner claimed he did not throw porcelain in the direction of the deputies until he saw that an extraction team was going to come in and remove inmates from the row. Petitioner admitted he then was trying to prevent the team from coming in, supposedly because he was scared (R.T. 1573-75, 1596-97, 1715, 1725-28, 1735, 1738-39, 1813-23, 1855; see also R.T. 1696-97 (Petitioner admitting he threw approximately 10 pieces of porcelain at the deputies)). Petitioner claimed he stopped throwing porcelain when he knew the team was on the row because he supposedly did not want to hit one of the members of the team (R.T. 1575, 1739-40, 1753, 1757-61, 1818; but see R.T. 1745-50, 1758, 1761 (Petitioner admitting that the video of the incident showed him throwing porcelain directly at the deputies and hitting/clearing the shields the deputies were holding)).

Petitioner claimed he did not submit when the team reached his cell because he was being shot with pepper balls and sprayed with mace or pepper spray (R.T. 1576-77, 1742-57, 1762-66, 1808, 1824-28, 1837). Petitioner claimed he was afraid he would be beaten (R.T. 1673-74, 1803-04). Petitioner admitted that the video depicted 16 other inmates being led peacefully in handcuffs from their cells, but

Petitioner said he did not see any of them walking by because Petitioner was behind his mattress and blinded by mace (R.T. 1835-37).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Petitioner's trial counsel assertedly rendered ineffective assistance by allegedly failing to investigate and present a defense (FAP, Ground One, pp. 18-41);

2. The trial court assertedly denied Petitioner his right to self-representation (FAP, Ground Two, pp. 41-47);

3. The trial court assertedly violated Petitioner's right to due process and right to a fair and speedy trial by denying his motion to dismiss based on the delay in charging Petitioner (FAP, Ground Three, pp. 47-52);

4. The prosecutor assertedly engaged in vindictive prosecution (FAP, Ground Five, pp. 55-60);

5. The trial court assertedly violated Petitioner's constitutional rights by using a juvenile adjudication as a "strike" under California's Three Strikes Law (FAP, Ground Four, pp. 52-55); and

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6. Cumulative error assertedly denied Petitioner due process and a fair trial (FAP, Ground Six, pp. 61-64).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 565 U.S. 34, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation

omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that

those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards to a particular claim, the Court usually looks to the last reasoned state court decision regarding that claim. See DeWeaver v. Runnels, 556 F.3d 995, 997 (9th Cir.), cert. denied, 558 U.S. 868 (2009); Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION[10]

I. Petitioner is Not Entitled to Federal Habeas Relief on His Claim of Ineffective Assistance of Counsel.

Petitioner contends that his trial counsel rendered ineffective assistance by allegedly failing to: (1) interview or present any inmate witnesses other than Petitioner and Rodolfo Gonzalez; or (2) investigate and present evidence regarding the general conditions in the Los Angeles County Men's Central Jail where Petitioner was housed (FAP, Ground One, pp. 23-41; Reply, pp. 4-19).

The Los Angeles County Superior Court issued the last reasoned decision denying Petitioner's ineffective assistance of counsel claim on the merits. The Superior Court considered the evidence submitted by Petitioner in detail and determined that Petitioner had not shown he was prejudiced by counsel's alleged omissions. See Respondent's

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[10] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein. Respondent contends Petitioner's claims are untimely. See FAP Answer, p. 1. The Court assumes, arguendo, the timeliness of Petitioner's claims. See Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001), cert. denied, 535 U.S. 950 (2002) (court may deny on the merits an untimely claim that fails as a matter of law).

Lodgment 20, pp. 521-26. For the reasons discussed below, this determination was not unreasonable. See 28 U.S.C. § 2254(d).

A. Background

In February of 2003, Petitioner was arrested and charged with capital murder. Pending trial, Petitioner was housed in the Los Angeles County Men's Central Jail. There, On January 7, 2005, the riot occurred. Petitioner's capital trial began in September of 2007. See Respondent's Lodgment 1, p. 2.

On November 14, 2007, after the guilt phase of the capital murder trial had ended in a guilty verdict and the penalty phase had ended in a mistrial, the Los Angeles District Attorney filed a felony complaint charging Petitioner with crimes associated with the January 7, 2005 jail riot. In March of 2008, Petitioner was held to answer the riot charges. See Respondent's Lodgment 1, pp. 2-3; R.T. 6, 22; C.T. 123-24. Petitioner represented himself for the first few months of the proceedings (R.T. 22-24). On February 21, 2008, after representation for a brief time by another attorney, Petitioner's trial counsel in the capital case began representing Petitioner in the riot case (R.T. 22-24; see also FAP, p. 23).

The date originally set for trial in the riot case was June 30, 2008, but Petitioner's counsel sought and obtained two continuances until July 21, 2008 (FAP, p. 24; see also C.T. 138-43, 168). Counsel then requested a third continuance, claiming that counsel still needed more time to locate and interview 21 potential defense witnesses

before counsel could announce ready (see C.T. 176-77 (motion); R.T. A-5 - A-6). The presiding judge (who also presided over the capital case) denied the motion (R.T. A-6 - A-9). The judge reasoned, inter alia, that counsel had known about the jail riot for a long time (because the riot had been identified as one of the aggravating factors in the capital case), and the prosecutor had put counsel on notice of the prosecution's intent to file charges concerning the jail riot even before the guilt phase of the capital case began (id.).

On the same day, the presiding judge transferred the riot case to another judge for trial, and Petitioner's counsel renewed his motion for a continuance (R.T. A-7, A-9, 2-3). The trial judge denied the renewed motion, after confirming that nothing had changed during the brief time that had passed following the previous denial (R.T. 3-4, 28, 30).

Petitioner also then requested a Marsden hearing (R.T. 13).[11] At the Marsden hearing, Petitioner complained of counsel's performance representing Plaintiff in his capital case and suggested that communications had broken down (R.T. 15-16). Petitioner also argued that counsel should be replaced because counsel allegedly had "assumed a defeatist position" in the riot case – doing "nothing" to prepare a defense (R.T. 17-19).

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[11] See People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970) (establishing standards governing requests for substitution of counsel).

Petitioner's counsel reported that he had told Petitioner "there is no defense to what you see on the [video]tape [of the jail incident]," but had discussed with Petitioner "what would be a defense" (R.T. 21). Counsel said he had identified potential witnesses and provided a list of those witnesses to the defense investigator prior to trial (when Petitioner was proceeding pro se, and again in February of 2008 when counsel started representing Petitioner in the present case) (R.T. 20-22, 24-25).[12] The investigator reportedly made arrangements to see certain potential witnesses in prison, but "[t]hat was not done" (R.T. 25).

Counsel also said that in June of 2008 the investigator reported to counsel that he could not locate "other" potential witnesses because the investigator did not have the witnesses' dates of birth. See R.T. 24, 26-27; see also C.T. 177 (counsel stating in motion for continuance filed on July 17, 2008, that the information the defense was provided included the witnesses' jail booking numbers and housing locations, but not "any other personal information, such as date of birth"); C.T. 174 (declaration of prosecutor filed on July 14, 2008, stating that the defense had been provided in discovery with a computer printout listing the name, cell location, and booking number

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[12] The defense investigator reportedly had been looking for these witnesses since 2006. During a chambers conference in Petitioner's capital case on December 5, 2006, the defense investigator stated that he had been attempting to find other inmates involved in the jail riot based on identifying information Petitioner had provided. See FAP Exh. 11, pp. 43-44. The witnesses were relevant to the capital case because the prosecution presented evidence of Petitioner's participation in the riot during the penalty phase of the capital case. See R.T. 21.

of every inmate witness (discovery bates stamped 91-94) (filed as FAP Exh. 18)); but see FAP Exh. 6(A) (June 8, 2008, memorandum from the investigator to the California Department of Corrections ("CDC") which includes the dates of birth for each of 20 witnesses, a return fax stamp dated June 11, 2008, and the locations for 16 witnesses).[13] Counsel explained that he did not replace the investigator because counsel had faith in the investigator's ability to find witnesses based on previously having worked with the investigator (R.T. 25). The investigator supposedly just needed more time (R.T. 26).

The court asked what efforts the investigator had made since June and also asked whether counsel had told the investigator to report to counsel what the investigator was doing (R.T. 26-27). Counsel responded that he had given the investigator a list and had inquired of the investigator, but the investigator "threw [the list] back at [counsel] and said I don't have a date of birth" (R.T. 27). The court continued, "So what you're telling me is the investigator did make an attempt to find these people, he just couldn't find them?" and counsel answered, "That's correct." (id.).

The court denied Petitioner's request to substitute counsel and declined to overturn the denial of a continuance (R.T. 30). The court told Petitioner:

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[13] While the defense investigator evidently had located 16 of the 20 witnesses by June 11, 2008 (FAP Exh. 6(A)), when and how the investigator actually shared with counsel the information obtained from the CDC is uncertain. See FAP Exh. 6, ¶¶ 7-8; FAP Exh. 19, ¶ 7 (generally stating that copies of Exhibits 6(A) and 7 were found in counsel's trial file after trial, without indicating when those exhibits were given to counsel).

> [T]here was nothing to stop you or your attorney from asking for another investigator if you were unhappy with the job the investigator was doing during the five months since the preliminary hearing. But I can't fault [trial counsel] for that. And this is a Marsden motion, and I'm not going to revisit the motion to continue.

(R.T. 30).

Petitioner then asked, "Can I make a motion to represent myself pro per?" (R.T. 30). The court said that Petitioner could do so, but "without any further continuances" (id.). Petitioner immediately asked for a 30-day continuance (id.). The court responded, "I've got a jury outside the door here, so I won't let you go pro per on that basis. ¶ So if you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied" (R.T. 31). Petitioner advised the court that he wanted time to subpoena information so that he could locate witnesses and thought he could obtain "at least . . . a couple [witness] statements" in 30 days (id.). The trial court expressed doubt that Petitioner would be able to subpoena witnesses, given counsel's representations during the Marsden hearing that the defense investigator had not been able to locate witnesses (R.T. 32 ("You assumed that [the witnesses are] in custody, but [the investigator] hasn't been able to find them. And [the investigator] would know if they were a custody status.")). Petitioner requested "some inquiry," and the court asked whether the investigator was there to support Petitioner's Marsden motion (R.T. 32). The investigator was not

present (see FAP Exh. 6, ¶ 9). The court concluded:

> [Counsel] has indicated to me that this investigator was sent out on the case and given a list. That's [counsel's] responsibility, he did that. Okay. You haven't given me another reason to remove [counsel] as the lawyer. You only requested pro per status so that you can get a continuance which I've denied. And the Marsden motion is denied.

(R.T. 33).

B. Additional Evidence Presented on Habeas Review

Petitioner presents the following additional evidence in connection with Grounds One and Six:

Declaration of Daniel Hines dated June 17, 2013 (FAP Exh. 1), which states in part:

> In January of 2005, Hines was housed a few cells away from Petitioner in the A-Row (¶ 1). Hines remembers seeing an inmate he knew as "Sleepy" being escorted to the attorney room by deputies and, when Sleepy refused to go, Hines saw one of the deputies push Sleepy into a wall, and deputies then dragged Sleepy down the tier (¶ 2). Hines and others yelled at the deputies to put Sleepy back into his cell (¶ 2). Someone threw something at the deputies and things escalated (¶ 2). "We just went crazy when we saw how Sleepy

was being treated" (¶ 2). What happened was "completely spontaneous." Hines never heard anyone "command" the inmates to break their sinks, and Petitioner was not a "shot caller" and did not order anybody to do anything (¶ 3).

The deputies left the tier and later came back to each cell on the tier and asked the inmates one by one if they were ready to come out and, if the inmate said no, he was shot with pepper balls (¶ 4). Hines was shot with pepper balls approximately 56 times before he was dragged from his cell (¶ 4). Hines saw Petitioner afterward, and Petitioner's face was red and swollen (¶ 5).

A day or so after the incident, each inmate was brought individually into a room with a sergeant and "about two other officers" (¶ 6).[14] When Hines was asked about what he saw, he "essentially" was told what he was supposed to say (i.e., "You didn't see nothing, right? You know what's going to happen if you say you did") (¶ 6). Hines agreed because he was afraid he would get beaten up if he disagreed (¶ 6).

Hines "thinks" he was out of prison in 2007 and 2008 (before and during Petitioner's trial), had regular contact with his parole officer through which he could have been contacted, and Hines would have testified on Petitioner's

[14] Hines does not state he was present when other inmates were brought to this room (¶ 6).

behalf (¶ 7).

Declaration of Erick Morales dated July 23, 2013 (FAP Exh. 2), which states in part:

> In 2005, Morales was in jail on the same tier as Petitioner (¶ 1). Morales had known Petitioner for the two years they were on the tier together (¶ 1). In January of 2005, Morales saw deputies bringing a prisoner to a visit with "a chokehold [sic] around the prisoners [sic] neck" (¶ 2). "The inmates became upset and started yelling and throwing things at the deputies. This was spontaneous. No one person started it. [Petitioner] didn't start it or tell anyone else what to do. Whatever we did, we did on our own. There wasn't a shot caller on our tier." (¶ 3).
>
> In 2007 and 2008, Morales was in prison and "it would have been easy to find [him]" (¶ 4). Morales would have testified on Petitioner's behalf (¶ 5).

Declaration of Gerardo Reyes dated July 7, 2013 (FAP Exh. 3), which states in part:

> In January of 2005, Reyes was housed in the cell next to Petitioner (¶ 1). Reyes remembered a time when deputies (including Deputy Orosco) came to the tier to bring Gonzalez out of his cell, one deputy telling Gonzalez he had an attorney visit (¶ 2). Reyes thought the deputies were lying

because of what Reyes had heard about Gonzalez' prior problems with deputies (i.e., Gonzalez was involved in a riot at another jail during which deputies may have been injured) (¶ 3). Reyes thought the deputies were trying to retaliate (¶ 3). Some other inmates and Reyes asked the deputies where they were really taking Gonzalez. (¶ 4). "We said we knew he wasn't going to an attorney visit." (¶ 4).

When Gonzalez tried to go back to his cell, the deputies grabbed Gonzalez and dragged him out of the tier, cuffed, and not resisting (¶ 4). Reyes was upset about how the deputies handled the situation because they "lied about where they were taking him, then they dragged him out," so Reyes threw an apple at the deputies (¶ 5). Other inmates started throwing things too (¶ 5). Reyes believes he was the first to break his sink, using a knob within a sock to break the sink (¶ 5). Petitioner did not make any agreement with Reyes to break their sinks; Reyes just decided to break his sink (¶ 5).

"[Petitioner] was not a shot caller. He didn't start the incident, lead it, or tell anyone what to do during it. [Petitioner] did not tell me to break my sink or to do anything else. In jail, if a deputy messes with any one of the inmates, the rest are going to jump in to help the inmate. That's just what we do." (¶ 6). The deputies seemed to dislike Petitioner (¶ 8).

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In 2007 and 2008, Reyes was incarcerated and "would have been easy to find" (¶ 9). Reyes would have testified in Petitioner's defense (¶ 9).

Declaration of Timothy Trujillo dated June 25, 2013 (FAP Exh. 4), stating in part:

In January of 2005, Trujillo was housed in the cell adjacent to Petitioner (¶ 1). Trujillo "participated in an incident (cell extraction) that occurred which stem [sic] from sheriffs deputies physically assaulting and using excessive force on a man whom [sic] at the time was unable to defend himself because he was handcuffed" (¶ 2). When he saw the "assault," Trujillo wanted the deputies to stop, so he began to throw personal property (bars of soap, a container of grease, food items) (¶ 3). "Out of anger and protest I even began breaking things in my cell such as my sink, desk, and light fixture" (¶ 4). "Not at any time ever did [Petitioner] or anyone . . . tell or order anyone on the row to participate in the incident[,] nor was anyone told to break and/or cause damage to anything in their cell. [Petitioner] was just a regular guy like everyone else on the row[,] he did not possess any leadership over anyone" (¶ 5). When the deputies came back to do the cell extraction, Trujillo was shot with pepper balls and was beaten (¶ 6).

Trujillo does not indicate where he was in 2007 and 2008, and does not state whether he would have testified in Petitioner's

defense.[15]

Declaration of Jay Reddix dated August 21, 2013 (FAP Exh. 5), which states in part:

> In January of 2005, Reddix was housed on the same row as Petitioner (¶ 1). Reddix recalls "a cell extraction" that occurred around that time (¶ 1). Reddix was lying on his bed when he heard a commotion, stood up and looked out to see two deputies dragging another inmate down the tier (¶ 2). The inmate was handcuffed and being poked with the deputies' sticks as they dragged him (¶ 2). Reddix watched the inmate fall and saw the deputies continue to drag the inmate off the tier, beating the inmate all the way out of the tier (¶ 2). Reddix heard other inmates yelling at the deputies to stop and inmates started throwing things (¶ 3).
>
> A few hours later, there was a cell extraction where the deputies first asked the inmates to volunteer to come out (¶ 4). The deputies were in full riot gear, wearing masks and holding shields, so Reddix did not want to come out (¶ 4). Based on his prior experience of being beaten by deputies in jail, Reddix felt certain if he did come out he would be beaten (¶ 4).

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[15] To establish prejudice caused by the failure to call a witness, Petitioner must provide evidence, inter alia, that the witness would have testified at trial if called upon. See, e.g., United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir.), cert. denied, 488 U.S. 910 (1988).

Nobody volunteered to leave their cells, so the deputies began shooting gas balls into each cell, including Reddix's cell, and Reddix then volunteered to leave his cell (¶ 5). Reddix crawled out of his cell backwards and was picked up and dragged off the tier (¶ 5).

Reddix did not hear any of the inmates tell anyone else to break their sinks or to throw things at the deputies (¶ 6). In Reddix's opinion, the deputies started the incident (¶ 6). Reddix was able to communicate with all of the other inmates on the tier (¶ 7). If there was a shot caller, Reddix would have known (¶ 7). There was no shot caller and Petitioner was not a shot caller (¶ 7).

In 2007 and 2008, Reddix was in prison and "would have been easy to find" (¶ 8). Reddix would have testified in Petitioner's defense (¶ 8).

Declaration of Robert Royce dated August 29, 2013 (FAP Exh. 6), which states in part:

Royce was appointed as the defense investigator in both Petitioner's capital case and in the case involving the jail incident (¶ 2). Petitioner gave Royce 7-10 names of inmates he thought had the best view of the incident at the jail (¶ 5). Royce was able to locate the names of other potential witnesses from reports of the incident that the sheriff's deputies wrote (¶ 5). Royce planned to locate as many

witnesses as possible, then go interview them (¶ 5). To visit witnesses still held in county jail, Royce needed Petitioner's attorney to obtain a court order (¶ 6). To visit witnesses who had been transferred to prison, Royce needed a written request from the attorney and a travel order if the prison was located outside of Los Angeles County (¶ 6). Royce told Petitioner's counsel "more than once" what he needed to visit witnesses, "but nothing ever came of it" (¶ 7).

Royce located many of the potential witnesses by contacting the California Department of Corrections in June of 2008 (¶ 7 & Exhibit A to the Declaration (copy of CDC correspondence wherein Royce provided the inmates' names and dates of birth, and the CDC provided locations and CDC numbers for 16 inmates)). Although Royce was busy with his practice, he had the time and was willing to travel and interview witnesses for Petitioner's case (¶ 8). The only reason why witnesses were not interviewed was because counsel never gave Royce the necessary authorizations (¶ 8). Royce told Petitioner's counsel about the witnesses Royce had located, and Royce does not know why counsel failed to authorize Royce to interview the witnesses (¶ 8).

Royce was not in court on the day Petitioner's trial commenced (¶ 9). Royce only interviewed one inmate (Gonzalez) for Petitioner's jail incident case, and did so shortly before Gonzalez testified (¶ 10).

Royce was "ready" to investigate "potential impeachment material" on the deputies involved in the incident, but counsel "did not pursue this avenue of investigation" (¶ 11).

"Memo" from Robert Royce to Clay Jacke dated June 8, 2008 (FAP Exh. 7) (which has not been authenticated) states:

The police reports from the incident listed 18 witnesses with "old addresses" that Royce had checked. Royce located "possible" addresses for 13 of the witnesses and would be following up to make contact at the addresses to interview those witnesses. Royce located five witnesses housed in the Los Angeles County Jail (for which he would need a letter from counsel to access).[16] Royce found civil rights cases filed against eight of the deputies alleged to have been involved in the incident. See id.

"Order for Additional Funds For Investigator, etc." filed June 9, 2008 (FAP Exh. 8), authorizing 50 additional investigative hours for Petitioner's case. Petitioner's counsel concurrently filed a declaration requesting those funds for "locating, interviewing and subpoenaing witnesses." See id.

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[16] Four of these five witnesses were identified as being in CDC custody as of June 11, 2008. Compare FAP Exs. 6(A) & 7.

"Declaration and Order Re Fees for All Court Appointments" dated September 9, 2008, by Petitioner's counsel (FAP Exh. 9), stating in part that counsel had studied "reports and video" and interviewed Petitioner prior to Petitioner's trial. See id.

"Incident Report" dated January 8, 2005 (FAP Exh. 10), listing 20 inmate "suspects" (other than Petitioner) including names, dates of birth, residential addresses, and booking numbers. See id.

Partial Transcripts from Petitioner's Capital Case dated December 5, 2006 and October 26, 2008 (FAP Exhs. 11 and 13) (filed under seal in this case).

Minute Order from Petitioner's Capital Case dated October 25, 2007 (FAP Exh. 12), containing the jury's guilty verdict. See id.

Minute Order from Petitioner's Capital Case dated November 9, 2007 (FAP Exh. 14), wherein the trial court declared a mistrial as to the penalty phase of trial proceedings. See id.

"Felony Complaint for Arrest Warrant" dated November 24, 2007 (FAP Exh. 15), for the charges arising from the jail riot. See id.

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"Notice to court of defendant renouncing pro-per status and request for counsel" filed on January 8, 2008 (FAP Exh. 16), filed in the riot case. See id.

"3300 A-Row diagram (FAP Exh. 17), identifying the inmates in cells as follows: A-3 Francisco Morales, A-4 Rudy Tafoya, A-5 Erick Morales, A-6 Gerardo Reyes, A-7 Petitioner, A-8 Timothy Trujillo, A-10 Daniel Hines, A-11 Daniel Valenzuela, and A-19 Walter Cortez. See id.

"Housing Location Inquiry" as of November 27, 2007 (FAP Exh. 18) (bates stamped 91-94), listing inmates for Module 3300, including their booking numbers and cell locations. See id.

Declaration of Rebecca Dobkin dated November 12, 2013 (FAP Exh. 19), wherein Petitioner's federal habeas counsel's investigator states that she reviewed the trial files from Petitioner's counsel and from Robert Royce, and that copies of FAP Exhibits 6(A), 7, 10, and 18, were found in the trial file of Petitioner's trial counsel, and copies of FAP Exhibits 6(A) and 7 were found in Royce's file. See id.

"Annual Report on Conditions Inside Los Angeles County Jail, 2008-2009, dated May 5, 2010 (FAP Exh. 20), which discusses "deputy abuse" and retaliation. See id.

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"Declaration of Tom Parker in Support of Plaintiffs' Motion for Class Certification" filed in *Rosas and Goodwin v. Baca*, C.D. Cal. Case No. CV 12-428-DDP, dated February 23, 2012 (FAP Exh. 21), concerning allegations of abuse and excessive force in the Los Angeles County jails. See id.

"Report of the Citizens' Commission on Jail Violence" dated September 2012 (FAP Exh. 22), concerning allegations of "unreasonable violence" by deputies in Los Angeles County jails. See id.

C. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

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Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have

been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 105.

D. The Superior Court Reasonably Determined that Petitioner's Claim of Ineffective Assistance Fails for Want of Prejudice.

Petitioner alleges that counsel's investigation was deficient because counsel assertedly: (1) failed to interview any potential inmate witnesses prior to trial (FAP, Ground One, pp. 24-25, 29-36); and (2) failed to investigate the general conditions of the Los Angeles County Men's Central Jail (FAP, Ground One, pp. 36-41).

Assuming, arguendo, that counsel's performance was unreasonable, Petitioner has failed to prove any Strickland prejudice resulting therefrom. See Strickland, 466 U.S. at 697. Petitioner was convicted of conspiracy to commit assault and vandalism, three counts of resisting an executive officer, and assault by means likely to produce great bodily injury on Deputy Morales and on Deputy Alvarez (C.T. 288-96). The trial evidence compellingly established Petitioner's guilt

as to all of these charges. Petitioner suggests that the verdicts might have been different if counsel had presented the other inmate witnesses' testimony and evidence of deputy-on-inmate abuse at the jail. However, as the Superior Court reasonably determined, and as discussed below, such evidence would not have produced a substantial likelihood of a different trial outcome.

For the conspiracy charges, the prosecution needed only to show that two or more persons agreed to commit vandalism or assault, and took one overt act to further the conspiracy. See C.T. 254-63 (jury instructions). "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." People v. Morante, 20 Cal. 4th 403, 416, 84 Cal. Rptr. 2d 665, 975 P.2d 1071 (1999) (citations omitted). "The elements of a conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.'" People v. Vu, 143 Cal. App. 4th 1009, 1024-25, 49 Cal. Rptr. 3d 765 (2006) (citations omitted). "To prove an agreement, it is not necessary to establish that the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." Id. at 1025 (citation omitted).

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At Petitioner's trial, the evidence included deputies' testimony regarding what Petitioner and others said and did, a videotape showing what Petitioner and others did, and Petitioner's own incriminating testimony. Petitioner admitted that more than one inmate (including Petitioner) intentionally broke their sinks and threw pieces of porcelain and other items at the deputies (constituting five of the alleged overt acts for conspiracy to commit assault and both of the alleged overt acts for conspiracy to commit vandalism) (R.T. 1567, 1573, 1706, 1715-16, 1718-19, 1722, 1725-28, 1747-50, 1758, 1838-39; see C.T. 262-63, 288-90 (conspiracy jury instructions and related verdicts)).

The inmate declarations Petitioner now submits allege that, contrary to prosecution evidence, Petitioner did not order anyone to throw anything, break sinks or take any other action during the riot, and each declaration denies that Petitioner was a "shot caller" for the row (FAP Exhs. 1-5). Hines and Erick Morales state that the inmates became upset and threw things at deputies as a spontaneous reaction to the manner in which Gonzalez was removed (FAP Exh. 1, ¶ 2-3; FAP Exh. 2, ¶ 3). Reyes states that he was the first to break his sink and that Petitioner did not make any agreement with him to break sinks (FAP Exh. 3, ¶ 5).

It was reasonable for the Superior Court to conclude that the inmates' potential testimony would not have produced a substantial likelihood of a different trial outcome. The inmate testimony would have supported the prosecution evidence that multiple inmates broke their sinks within a short time frame (see FAP Exh. 3, ¶ 5 (Reyes

admitting he broke his sink); FAP Exh. 4, ¶ 4 (Trujillo admitting that he broke his sink)). The inmate testimony also could have supported the logical inference that the inmates were acting in concert and by agreement during the riot. Moreover, Petitioner need not have specifically directed the other inmates to break their sinks or throw things at the deputies to be found guilty of conspiracy. In fact, while finding Petitioner guilty of conspiracy, the jury found "not true" the overt act allegation that Petitioner urged another inmate to break his sink. For the remainder of the charges (i.e., resisting executive officers and assault by means likely to produce great bodily injury), the inmates' testimony would have been largely if not entirely cumulative of the evidence adduced at trial concerning the officers' use of force.

Furthermore, in some respects, the inmates' testimony actually would have undercut Petitioner's defense and would have supported rather than impugned the jury's verdicts. For example, Petitioner was convicted of resisting executive officers (Deputies Ibarra, Argueta, Orosco, and Taylor), the deputies who removed Gonzalez from A-Row. See C.T. 291 (verdict); R.T. 656-57 (Deputy Ibarra testifying regarding who removed Gonzalez from the row); but see R.T. 1276-77, 1281-91, 1297-98, 1318-21, 1327-31, 1337-41, 1549-57, 1700, 1849-50 (Gonzalez and then Petitioner testifying that it was only Deputy Ibarra who removed Gonzalez from the row). A person may be found guilty of resisting executive officers in two separate ways: "The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her

duty." People v. Smith, 57 Cal. 4th 232, 240, 159 Cal. Rptr. 3d 57, 303 P.3d 368 (2013) (citation omitted). A defendant cannot be convicted of an offense against an officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time the offense against the officer was committed. Id. at 241 (citations omitted). Here, Petitioner's admission that he intentionally threw things directly at Deputy Ibarra to "interfere" with Ibarra as Ibarra attempted to remove Gonzalez from the row supported this charge (R.T. 1839-40). The inmate declarations reinforce the fact that inmates threw things at the deputies to try to prevent the removal of Gonzalez from the row. See FAP Exh. 1, ¶ 2 (Hines stating that the inmates yelled to have Gonzalez put back in his cell and threw things at the deputies); FAP Exh. 2, ¶ 3 (Erick Morales stating that the inmates yelled and threw things); FAP Exh. 3, ¶¶ 4-5 (Reyes stating that inmates asked questions challenging Gonzalez' removal and threw things at the deputies); FAP Exh. 4, ¶ 3 (Trujillo stating that he threw things because he wanted the deputies to stop the "assault" on Gonzalez); FAP Exh. 5, ¶ 3 (Reddix stating that he heard inmates yelling at the deputies to stop what they were doing to Gonzalez and that inmates threw things).

The jury had before it ample evidence of the deputies' use of force in dealing with the inmates on A-Row during the riot. As noted above, Deputy Ibarra admitted that Gonzalez' removal involved dragging and pepper spraying Gonzalez (R.T. 665-66, 709-10). Gonzalez testified that he struggled and fought with Ibarra, who had him by the neck and dragged him from the row in front of the other inmates, and that he then was beaten by Ibarra and other deputies and maced into

submission (R.T. 1286-93, 1321, 1327-31, 1337-41). Petitioner testified that Gonzalez was beaten in the sally port area (R.T. 1552-53, 1557-58). When the extraction team later came onto A-Row, two deputies were firing pepper ball guns into the cells from where the porcelain was being thrown, and one or two deputies were spraying pepper spray near those cells (R.T. 938, 942-45, 973-75). The deputies admittedly fired more than 30 pepper balls into Petitioner's cell, and sprayed five or more bursts of pepper spray from the canister into his cell when Petitioner refused to comply with their commands (R.T. 944, 975-76). The videotape showed, and Deputy Morales confirmed, that the extraction team used "a lot" of pepper spray and pepper balls to remove inmates from their cells (R.T. 778, 786-87). However, the videotape also showed that 16 of the inmates on the row walked out peacefully in handcuffs during the extraction (R.T. 1836). The other inmates' testimony would not have added anything significantly material to all of this trial evidence regarding the deputies' use of force. None of the inmates were present when Petitioner was removed from his cell, so they could not have testified competently regarding the circumstances under which Petitioner purported to have acted in self-defense at that time.

The inmate testimony would have undermined Petitioner's defense at trial in several additional respects. Contrary to Petitioner's and Gonzalez' purportedly emphatic trial testimony that Deputy Ibarra was the only deputy to remove Gonzalez from the row, all of the other inmate witnesses now agree that more than one deputy removed Gonzalez from A-row. See FAP Exh. 1, ¶ 2 (Hines referring to "deputies" removing Gonzalez from the row); FAP Exh. 2, ¶ 2 (same for Erick

Morales); FAP Exh. 3, ¶ 2 (same for Reyes); FAP Exh. 4, ¶¶ 2-3 (same for Trujillo); FAP Exh. 5, ¶ 2 (same for Reddix). Contrary to Petitioner's trial testimony that the deputies threatened over the loud speaker to "fuck [the inmates] up" right after Gonzalez was removed from A-Row, none of the other inmate witnesses now state that the deputies ever threatened the inmates over the loud speaker. See FAP Exhs. 1-5.

Finally, as the Superior Court reasonably emphasized, the other inmates' testimony would have been vulnerable to effective impeachment for bias, given these inmates' own participation in the riot and the fact that the proffered testimony of each is "so similar in content and language" (despite the inmates' differing vantage points) as to raise "the specter of whether the statements offered by the inmates were specifically designed for achieving a certain outcome or result in the litigation" (Respondent's Lodgment 20, pp. 523-25). Each inmate's testimony also would have been impeached by Gonzalez' trial admission that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed.

In sum, the Court finds no substantial, reasonable likelihood of a different verdict had the jury been presented with the inmates'

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testimony.[17] As discussed above, such testimony is largely cumulative of the trial evidence concerning the force used by the deputies during the riot, impeaches the defense witnesses' testimony in some respects, does not materially mitigate Petitioner's own incriminating admissions, and actually supports certain aspects of the prosecution's case. Additionally, as the Superior Court correctly observed, the inmate testimony would have been vulnerable to effective impeachment. See Respondent's Lodgment 20, pp. 523-25. Finally, the inmate testimony would not have undermined the compelling strength of the prosecution's evidence.

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[17] Nor does the Court find any prejudice from counsel's alleged failure to investigate the reported history of deputy-on-inmate abuse at the jail. Petitioner has provided reports post-dating Petitioner's conviction that generally concern allegations of physical abuse and excessive force in the Los Angeles County jails (FAP Exhs. 20-22). Petitioner claims these reports chronicle a long history of deputy-on-inmate violence based on "numerous publicly available reports," which counsel supposedly could have probed for leads on evidence to lend credibility to the defense that Petitioner feared physical abuse at the hands of his jailers (FAP, p. 37). Petitioner has not identified specific evidence within these reports existing at the time of Petitioner's trial that counsel could or should have unearthed. See FAP, p. 37 & n. 4. Petitioner's vague and speculative allegations that there existed unidentified evidence counsel should have presented do not establish Strickland prejudice. See Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (no Strickland prejudice where petitioner did "nothing more than speculate that if interviewed, [a potential witness] might have given information helpful to [petitioner]"); see also Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), cert. denied, 559 U.S. 995 (2010) (speculation insufficient to show Strickland prejudice); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991) (petitioner cannot satisfy Strickland standard by "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"). In any event, there is no substantial, reasonable likelihood that general evidence of deputy-on-inmate abuse in the county jail system would have altered the result of Petitioner's trial.

The Superior Court's rejection of Petitioner's ineffective assistance claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground One.

II. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that the Trial Court Unconstitutionally Denied Petitioner's Request for Self-Representation.

Petitioner challenges the trial court's denial of Petitioner's request for self-representation, which Petitioner made immediately after the court denied Petitioner's Marsden motion on the eve of trial. See FAP, Ground Two, pp. 41-47; Reply, pp. 19-26. The California Court of Appeal issued the last reasoned decision rejecting this claim, ruling that the trial court did not abuse its discretion by denying Petitioner's request. See People v. McGhee, 2010 WL 2510095, at *6-7 (Cal. App. June 23, 2010).[18] The Court of Appeal stated, inter alia, that "[Petitioner's] request for self-representation brought on the eve of trial appears to be a ploy to obtain a continuance." Id. at *7 (citations omitted).

A. Governing Legal Standards

Under Faretta v. California, 422 U.S. 806, 820-21 (1975), a criminal defendant is constitutionally entitled to waive his or her

[18] Respondent's Lodgment 1, which purports to be this decision of the Court of Appeal, is missing several pages.

Sixth Amendment right to counsel and to represent himself or herself at trial. See also Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir.), cert. denied, 521 U.S. 1111 (1997) (Faretta rule is clearly established by United States Supreme Court for purposes of 28 U.S.C. section 2254(d)). Under Ninth Circuit law, a Faretta request must be: (1) knowing and intelligent; (2) unequivocal;[19] (3) timely; and (4) not asserted for purposes of delay. Hirschfield v. Payne, 420 F.3d 922, 926 (9th Cir. 2005); United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991).

In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, 546 U.S. 860 (2005), the Ninth Circuit recognized that, although no United States Supreme Court case has directly addressed the timing of a request for self-representation, Faretta itself incorporated a timing element. Id. at 1060. The Ninth Circuit read Faretta to "require a court to grant a Faretta request when the request occurs 'weeks before trial.'" Id. at 1061. However, the Ninth Circuit ruled that, "[b]ecause the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." Id. (footnote omitted). The Marshall Court held that, because the petitioner's request for self-

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[19] This Court assumes, arguendo, that Petitioner made an unequivocal Faretta request. But see Jackson v. Ylst, 921 F.2d 882, 888-89 (9th Cir. 1990) (request for self-representation that was an "impulsive response to the trial court's denial of [defendant's] request for substitute counsel" deemed equivocal); Young v. Knipp, 2013 WL 2154158, at *8 (C.D. Cal. May 15, 2013) (Faretta request coupled with request for 30-day continuance deemed equivocal).

representation on the morning of trial "fell well inside the 'weeks before trial' standard for timeliness established by Faretta," the state court's finding of untimeliness "clearly comport[ed] with Supreme Court precedent." Id.

B. Analysis

Petitioner made his request for self-representation on July 21, 2008, the day the case was assigned for trial after two previous continuances of the trial date. Because Petitioner's request came well within the "weeks before trial" standard set forth in Faretta, the trial court's rejection of Petitioner's Faretta request was not an objectively unreasonable application of Faretta. See Marshall v. Taylor, 395 F.3d at 1061; see also Burton v. Davis, 816 F.3d 1132, 1141-42 (9th Cir. 2016) (where defendant made request three days before jury was empaneled, Faretta did not "clearly entitle" defendant to habeas relief for denial of request); Stenson v. Lambert, 504 F.3d 873, 884-85 (9th Cir. 2007), cert. denied, 555 U.S. 908 (2008) (because there was no Supreme Court holding that request for self-representation made on eve of trial was timely, denial of request did not violate Faretta and was not objectively unreasonable under AEDPA); Ake v. Biter, 2013 WL 1515859, *12 (C.D. Cal. Feb. 6, 2013), adopted, 2013 WL 1511745 (C.D. Cal. Apr. 11, 2013) (request on the day set for trial and the day before jury selection began untimely; denial comported with Faretta); see generally Williams v. Taylor, 529 U.S. 362, 412 (2000) ("[AEDPA] restricts the source of clearly established law to [the Supreme] Court's jurisprudence").

Furthermore, Petitioner made his request for self-representation after the presiding judge denied trial counsel's request for a continuance and after the trial judge denied Petitioner's Marsden motion. See FAP, pp. 45-46; R.T. A5-A7, A-11, 3-4, 13-31. With his request for self-representation, Petitioner concurrently made another request for a trial continuance (R.T. 30-31). On this record, it was not unreasonable for the Court of Appeal to find that Petitioner made the Faretta motion as a ploy for the purpose of delay. See Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982) (if a defendant accompanies a Faretta motion with a request for continuance, this may be considered evidence of purpose to delay); see also Hirschfield v. Payne, 420 F.3d at 927 (state court finding that Faretta request was made for the purpose of delay was not unreasonable where the request came the day before the start of trial, was accompanied by a request for continuance, and the defendant previously had made requests to substitute counsel).[20]

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[20] Petitioner argues that the trial court (and the Court of Appeal) denied the Faretta request in reliance on Petitioner's failure to give a sufficient "reason to remove Mr. Jacke as the lawyer" (Reply, p. 20 (quoting R.T. 33); Reply, p. 21 (quoting People v. McGhee, 2010 WL 2510095, at *7)). The record belies this argument. The trial court denied the Faretta request because Petitioner was requesting another continuance on the eve of trial. See R.T. 31 ("[I]f you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied."); R.T. 33 ("You only requested pro per status so that you can get a continuance which I've denied."). The trial court's discussion of Petitioner's reasons for removing counsel concerned Petitioner's Marsden motion. See R.T. 33. Similarly, the Court of Appeal found no abuse of discretion in denying the Faretta request because, under the totality of circumstances, Petitioner's request appeared "to be a ploy to obtain a continuance." See People v. McGhee, 2010 WL 2510095, at *6-7.

Petitioner's citations of Buhl v. Cooksey, 233 F.3d 783, 794 (3d Cir. 2000) ("Buhl"), Moore v. Haviland, 531 F.3d 393 (6th Cir. 2008), cert. denied, 558 U.S. 933 (2009) ("Moore"), and Jones v. Norman, 633 F.3d 661, 664 (8th Cir. 2011) ("Jones") (see Reply, p. 20) do not alter the Court's conclusion. In Buhl, the Third Circuit found timely a Faretta request that was filed several weeks before trial was scheduled to begin. Because a timely request had been made, Third Circuit precedent required the trial court to inquire concerning the defendant's reasons for the request to aid the court in determining if the request was voluntary, knowing, and intelligent. Id. at 794-97. In Petitioner's case, there was no Faretta request made weeks before trial, and it is clear from the record that the trial court understood that Petitioner's supposed reason for making the Faretta request was to obtain a continuance to conduct discovery that had not been done – the same reason for which counsel had requested and been denied a continuance. See R.T. A-6 - A-8, 19-32; C.T. 176-77 (motion to continue). In Moore, the Sixth Circuit found a Faretta violation where the trial court did not rule on the Faretta request at all. Moore, 531 F.3d at 402-03. In Jones, the Eighth Circuit found a Faretta violation where the trial court had applied too high a standard in determining whether the Faretta request was knowing and voluntary. Jones, 633 F.3d at 666-67. None of these out of circuit decisions apply in Petitioner's circumstance.

Petitioner faults the trial court for not inquiring of the defense investigator concerning the status of discovery. See FAP, p. 45; R.T. 32. The defense had not made the investigator available for the hearing, and the trial court was entitled to rely on the

representations of Petitioner's counsel concerning the status of the investigation. Under the circumstances, Faretta does not clearly require the inquiry for which Petitioner argues. See Faretta, 422 U.S. at 835.

Petitioner also argues that he made his Faretta request at the first available opportunity after he realized his counsel had not prepared desired witnesses. No United States Supreme Court law clearly establishes that an eve of trial Faretta motion is timely under such circumstances. Moreover, contrary to Petitioner's argument, he actually did have prior opportunities to make a Faretta request in essentially the same factual circumstances. There were pretrial conferences on April 22, 2008, and June 4, 2008, and the case was called for trial on June 30, 2008 (C.T. 136-38, 142). On June 30, 2008, Petitioner was present with another attorney appearing on behalf of his trial counsel who was engaged in another trial (C.T. 142). The trial court then continued the trial date to July 14, 2008, because, inter alia, defense counsel supposedly needed time to locate and interview witnesses (C.T. 139-40, 142). Thus, on the June 30, 2008 trial date, Petitioner was on notice that desired witnesses had not been interviewed. Yet, Petitioner did not make any Faretta request at that time (C.T. 142-43).

Defense counsel then filed a motion to dismiss for want of prosecution and discriminatory prosecution on July 11, 2008, in which counsel declared, "The defendant has informed me and I believe him when he says witnesses are impossible to find. The defense investigator has been unable to locate several of the witnesses. . . .

The police reports did not record the residence addresses of the inmates. The reports merely indicate that they resided at the county jail. This makes it impossible to find witnesses" (C.T. 144-57). When the case returned for trial on July 14, 2008, Petitioner again was present with a substitute attorney appearing because trial counsel was still engaged in another trial (C.T. 168). Once again, Petitioner was on notice that desired witnesses had not been interviewed. Furthermore, Petitioner was on notice that counsel purportedly believed that it would be impossible to find the witnesses. Yet, Petitioner still did not make any Faretta request at the July 14, 2008 hearing (C.T. 168). Instead, he waited until after the Superior Court's July 21 denials of two 11th hour requests for a third continuance before invoking Faretta in the apparent (and ultimately vain) hope of reversing these continuance denials.

Petitioner has failed to demonstrate that the Court of Appeal's rejection of his Faretta claim was contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Therefore, Petitioner is not entitled to federal habeas relief on Ground Two.

III. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that He Was Denied a Fair Trial By the Delay in Charging Him.

Petitioner claims that he was denied his due process right to a fair trial by the delay between the jail riot and the filing of the charges. See FAP, Ground Three, pp. 47-52 (erroneously referring to

this claim as a "speedy trial" claim); Reply, pp. 26-29.[21] The Court of Appeal issued the last reasoned decision denying this claim, finding that Petitioner had not shown prejudice from the delay. See People v. McGhee, 2010 WL 2510095 at *7-8. In reviewing this claim, the Court is limited to the record that was before the Court of Appeal at the time of its decision. See Ryan v. Gonzalez, 568 U.S. 57, 68 (2013) (review "is limited to the record that was before the state court that adjudicated the claim on the merits") (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)).[22]

A. Background

Three days before the scheduled trial date, Petitioner filed a motion to dismiss the charges for want of prosecution (pre-indictment delay) and for assertedly discriminatory prosecution (C.T. 144-57).

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[21] The Sixth Amendment right to a speedy trial attaches only at the time of arrest, indictment, or other official accusation. See United States v. Marion, 404 U.S. 307, 321 (1971) ("Marion") (holding that the Sixth Amendment speedy trial provision is not implicated until formal charges are filed or defendant suffers actual restraint on liberty); see also Doggett v. United States, 505 U.S. 647, 654 (1992); United States v. MacDonald, 456 U.S. 1, 6-7 (1982); United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Pre-charge delay (i.e., delay prior to arrest or the filing of formal charges) does not implicate the Sixth Amendment right to a speedy trial. United States v. Lovasco, 431 U.S. 783, 788-89 (1977); Marion, 404 U.S. at 321-23.

[22] Petitioner did not submit any additional evidence to the California Supreme Court before the Supreme Court summarily denied review in 2010 (Respondent's Lodgments 2 and 3). If Petitioner had done so, such additional evidence could be considered in reviewing this claim. See Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

Petitioner alleged that the prosecutor waited until November 13, 2007 to file any felony complaint for crimes arising from the January 5, 2005 incident, and then charged only Petitioner (C.T. 146). Petitioner argued that the prosecution sought to have the jail riot case precede the retrial on the penalty phase of Petitioner's capital case. Yet, as Petitioner conceded, the prosecution had announced before the beginning of the guilt phase of the capital trial that the state would file jail riot charges against Petitioner (C.T. 147). Petitioner also alleged that the prosecution had "tendered" an "unofficial/off the record settlement" in the capital case prior to the start of the penalty phase (C.T. 148). Petitioner alleged that the settlement assertedly discussed would have given him life without parole in the capital case, and "the riot case would be included in some way," in return for Petitioner's waiver of appeal (C.T. 148). Petitioner alleged that the delay in filing the charges in the jail riot case caused the loss of potential defense witnesses, the fading of memory, and the destruction of physical evidence (C.T. 147, 149, 151). Petitioner further alleged that the prosecution brought the jail riot charges in "bad faith" to try to "coerce" a plea in the capital case and to avoid a trial on the penalty phase of the capital case (C.T. 148). Petitioner argued that this conduct effectively deprived him of his due process right under the federal constitution (C.T. 149-50 (citing United States v. Ross, 123 F.3d 1181 (9th Cir. 1997)).

The prosecution opposed the motion, arguing that the decision to file the present charges preceded the murder trial and was unrelated to Petitioner's rejection of any alleged plea offers in the capital

case (C.T. 170-71; see also C.T. 173-74). The prosecutor stated that, in preparing for the capital case, he had discovered the videotape of the jail riot showing Petitioner throwing porcelain at the officers. The prosecutor claimed that, because he then was busy preparing for the murder trial and the statute of limitations on the potential riot charges was not yet close to expiring, the prosecutor had opted to wait to proceed on the riot charges (C.T. 170-71; R.T. A-4 - A-5). The prosecutor said that he had charged only Petitioner in the jail riot case because, as a "special unit" prosecutor, he did not have any responsibility or jurisdiction over the others who had been involved in the jail riot (R.T. A-4).

The presiding judge denied Petitioner's motion, characterizing the video evidence against Petitioner as "very compelling," and finding that there was no vindictiveness by the prosecution and no material prejudice as a result of the delay in filing (R.T. A-5). As previously indicated, the Court of Appeal later ruled that Petitioner had failed to show prejudice resulting from the pre-charge delay.

B. Governing Legal Standards

The Due Process Clause provides a criminal defendant with some protection against delay between the commission of an offense and the initiation of a prosecution. United States v. Lovasco, 431 U.S. at 788-89; Marion, 404 U.S. at 322. However, a claim that pre-charge delay denied a defendant due process requires, inter alia, proof of "actual, non-speculative prejudice [to the defense] from the delay, meaning proof that demonstrates exactly how the loss of evidence or

witnesses was prejudicial." United States v. Barken, 412 F.3d 1131, 1134 (9th Cir. 2005) (citations and internal quotations omitted). "Once prejudice is sufficiently proved, the court then undertakes the task of balancing the length of the delay against the reason for the delay." United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992); see also United States v. Lovasco, 431 U.S. at 789-90.

"A defendant claiming preindictment delay carries a 'heavy burden' of showing actual prejudice that is 'definite and not speculative.'" United States v. Ross, 123 F.3d 1181, 1185 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998) (citations omitted). "Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." United States v. Manning, 56 F.3d at 1194; see also United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007), cert. denied, 555 U.S. 865 (2008) (burden is one that is "rarely met"); see generally Marion, 404 U.S. at 325-26 (a defendant's reliance solely on the "real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost," is not in itself enough to demonstrate actual prejudice).

C. Analysis

The Court of Appeal reasonably determined that Petitioner failed to carry his burden to prove prejudice from the pre-charge delay. Petitioner asserts that he was prejudiced from the delay because he was unable to find and present any inmate witnesses other than Gonzalez. By the time he was charged, the witnesses reportedly had

either been released from jail or transferred to various state prisons. See FAP, pp. 50-51. Petitioner also asserts that one witness, Walter Cortez, had died by the time Petitioner was charged (FAP, p. 51). Petitioner suggests that these witnesses could have testified to events not captured on the videotape, and could have corroborated the defense testimony (FAP, pp. 51-52). Petitioner asserts that, by delaying bringing the charges, the prosecution intentionally gained a tactical advantage (FAP, p. 50).

However, Petitioner presented no competent evidence to the Court of Appeal regarding the identities of the other inmates who supposedly could have testified (other than the deceased Walter Cortez), the substance of their potential testimony, or when the other inmates were released or transferred from the jail. See Respondent's Lodgment 12, pp. 65-77; Respondent's Lodgment 14, pp. 17-20. Petitioner thus failed to furnish definite, nonspeculative proof that the charging delay actually impaired Petitioner's ability to defend himself. See United States v. Manning, 56 F.3d at 1194; see also United States v. Butz, 982 F.2d 1378, 1380 (9th Cir.), cert. denied, 510 U.S. 891 (1993) (assertions that a key witness had died, witnesses had dimmed memories, and that the defendant did not secure witnesses because of the belief no charges were forthcoming, were too speculative to demonstrate actual prejudice).

At trial, Petitioner testified at length and in detail concerning what he claimed transpired on the day of the jail riot (R.T. 1539-78, 1596-97, 1687-1841, 1846-55, 2104-2124). Petitioner's memory of the incident did not appear to have been impaired by the passage of time.

Petitioner said he was testifying based on his memory of how events actually happened rather than from the videotape (R.T. 2105-06).[23]

As for the potential witnesses never called by the trial defense, the Court of Appeal reasonably found from Petitioner's failure to identify the witnesses (other than the deceased Walter Cortez) and Petitioner's failure to delineate the substance of the witnesses' purported testimony that Petitioner had offered only speculation that these witnesses could have provided any evidence that would have been valuable to Petitioner.[24] People v. McGhee, 2010 WL 2510095 at *8. As the Court of Appeal reasonably concluded, Petitioner's speculation did not meet Petitioner's heavy burden to show prejudice from a pre-indictment delay. United States v. Butz, 982 F.2d at 1380; United States v. Huntley, 976 F.2d at 1290.[25]

Petitioner suggests that the Court of Appeal was required to evaluate prejudice in light of the applicable statute of limitations. See Reply, pp. 27-28 (quoting Marion, 404 U.S. at 326). Marion does

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[23] Gonzalez' purported memory appeared similarly unimpaired by the passage of time (R.T. 1279, 1281-82, 1285-86, 1292-93, 1320-21, 1327-28, 1337, 1340, 1343).

[24] Again, in reviewing the reasonableness of the Court of Appeal's denial of this claim, only the evidence that was then before the Court of Appeal may be considered. The inmate declarations submitted years later may not be considered in this review.

[25] Because the Court of Appeal reasonably determined that Petitioner failed to demonstrate prejudice to the Court of Appeal, this federal Court need not and does not balance "the length of the delay against the reason for the delay." See United States v. Huntley, 976 F.2d at 1290.

not so hold. To the contrary, Marion states that "in light of the applicable statute of limitations," "possibilities" of prejudice inherent in any extended delay do not demonstrate actual prejudice. See Marion, 404 U.S. at 326 (emphasis added). "There is [] no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitations already perform that function." Id. at 323 (quoting Toussie v. United States, 397 U.S. 112, 114 (1970). Here, the statute of limitations had not run, and Petitioner did not demonstrate actual prejudice.

The Court of Appeal's rejection of Petitioner's due process claim regarding pre-charging delay was not contrary to, or an unreasonable application of, any clearly established Federal law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground Three.

IV. Petitioner's Claim of Vindictive Prosecution Does Not Merit Federal Habeas Relief.

Petitioner contends that the prosecutor engaged in vindictive prosecution by bringing the charges in the jail riot case after Petitioner assertedly refused to accept a plea offer and waive his appellate rights in the capital case. See FAP, Ground Five, pp. 55-60; Reply, pp. 32-38. Petitioner alleges that the prosecution's decision violated due process and, by virtue of the pre-charge delay, his right to present a defense. Id.

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Petitioner raised this claim (among numerous other claims) in Petitioner's first round of habeas petitions filed in the state courts in 2011-12. See Respondent's Lodgment 4, pp. 54-57; Respondent's Lodgment 6, pp. 56-59; Respondent's Lodgment 8, pp. 26-30. The Superior Court and the Court of Appeal issued reasoned decisions denying the petitions, stating that the petitions reiterated issues raised on direct appeal and that Petitioner had failed to demonstrate ineffective assistance of counsel (Respondent's Lodgments 5 and 6).[26] Neither decision specifically mentioned Petitioner's vindictive prosecution claim (id.). The California Supreme Court denied Petitioner's habeas petition summarily (Respondent's Lodgment 9). Petitioner had not raised his vindictive prosecution claim on direct appeal, and the Court of Appeal's reasoned decision on direct appeal had not addressed such a claim. See Respondent's Lodgments 1-3, 12, 14. Therefore, there is no reasoned state court decision specifically discussing Petitioner's vindictive prosecution claim, Ground Five herein.

Petitioner argues that no state court ever reached the merits of Ground Five and this Court should review the claim de novo. See FAP, pp. 55-56; Reply, pp. 32-34. Respondent argues, inter alia, that the Court of Appeal's reasoned decision did not invoke any procedural bar as to Ground Five and this Court should review the denial of the claim under 28 U.S.C. section 2254(d). See FAP Answer, pp. 9-11, 34-35. Although the issue is not free from doubt, it appears that section 2254(d) should apply to the review of this claim.

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[26] Respondent's Lodgment 6 consists of several disparate documents.

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . ." Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1096 (2013). This "strong" presumption may be rebutted only in "unusual circumstances." Id., 133 S. Ct. at 1096-99. Even so, where the state court failed to address a federal claim as a result of "sheer inadvertence," the claim has not been adjudicated on the merits. Id., 133 S. Ct. at 1097.

In seeking de novo review of Ground Five, Petitioner theorizes that the Court of Appeal erroneously believed that its own previous opinion on Petitioner's direct appeal had discussed and denied Ground Five, even though Petitioner never raised Ground Five on direct appeal. Petitioner further theorizes that the California Supreme Court then adopted as its own basis for denying Ground Five the manifestly erroneous belief Petitioner imputes to the Court of Appeal. And, according to Petitioner, the California Supreme Court made this egregious error even though Petitioner expressly had told the Supreme Court in the habeas petition filed therein that claims in that petition had not been made on direct appeal (Respondent's Lodged Document 8 at pp. 5-6).

Petitioner's arguments for de novo review of Ground Five should be rejected. Nothing (including possible factual error in the

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Superior Court's previous habeas decision[27]) sufficiently rebuts the "strong" presumption that the Court of Appeal adjudicated Ground Five on the merits, albeit without any specific discussion. See Smith v. Oregon Bd. of Parole and Post-Prison Supervision, 736 F.3d 857, 860-61 (9th Cir. 2013) (applying presumption to cursory state court order).

Moreover, assuming arguendo the Court of Appeal did not adjudicate Ground Five on the merits and instead based its denial on the theorized mischaracterization of its own ruling on direct appeal, this federal Court should not presume that the California Supreme Court embraced the Court of Appeal's manifestly erroneous reasoning. Although a federal habeas court usually "looks through" a California Supreme Court's summary denial to presume the Supreme Court adopted the rationale of the lower court, such presumption may be refuted by "strong evidence." See Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) ("Kernan"). In Kernan, the United States Supreme Court deemed the "look through" presumption "amply refuted" in circumstances where it would have been absurd for the California Supreme Court to have adopted the rationale of the lower court. Id. at 1606. In the present case, the California Supreme Court's adoption of the rationale Petitioner theorizes would have been no less absurd. As in Kernan, the California Supreme Court's denial here "quite obviously rested upon some different ground. . . . Containing no statement to the

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[27] Of course, the Superior Court's decision is not the decision under review with respect to Ground Five. See Barker v. Fleming, 423 F.3d 1085, 1092-93 (9th Cir. 2005), cert. denied, 547 U.S. 1138 (2006) (federal habeas court ordinarily reviews only the most recent state court reasoned decision on a petitioner's claim).

contrary, the Supreme Court of California's summary denial of [the petitioner's] petition was therefore on the merits. Harrington v. Richter, 562 U.S. 86, 99 . . . (2011)." Id.; see, e.g., Ortega v. Cate, 2016 WL 3514118, at *7-8 (C.D. Cal. May 20, 2016), adopted, 2016 WL 3511540 (C.D. Cal. June 27, 2016) ("look through" presumption refuted where lower court's decision was obviously wrong).

More than negligible uncertainty attends the above analysis, however. In particular, it is exceedingly difficult under existing case law to determine the precise point at which the California Supreme Court's theoretical adoption of incorrect lower court reasoning transitions along an improbability continuum from mere error to error sufficiently absurd to refute the "look through" presumption. Therefore, notwithstanding the above analysis, and out of an abundance of caution, the Court will first discuss the merits of Ground Five as if this Court's review were de novo.

A. Background

Prior to trial, when Petitioner's counsel filed the motion to dismiss the charges for want of prosecution and discriminatory prosecution (discussed above), counsel also filed a motion to recuse the Los Angeles County District Attorney as the prosecuting agency (C.T. 158-66). Petitioner alleged that the prosecution initially decided not to file a case regarding the jail riot, and further alleged that:

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> This new case was filed because the prosecution suffered a hung jury in the special circumstances death case against Mr. McGhee and because of the perceived infirmities with the guilty verdicts. The [capital] trial took place well after the riot, and before the filing of the jailhouse riot complaint. Before the start of the penalty phase, the People entered into discussion with the defense that if [Mr. McGhee] were to accept the sentence of life without the possibility of parole in the death case and waive any appeal rights, the People would resolve the jail riot case (which had not been filed yet). The People indicated that if the proposal were to be turned down, the jailhouse case would be filed. The two cases were linked. One was being used as "leverage" for a disposition in the other.
>
> Mr. McGhee was charged in bad faith. ¶ The People seem upset because Mr. McGhee will not waive his rights to trial on the penalty phase and appeal of the guilty verdict. . . .

(C.T. 161).

At the hearing on the motions, Petitioner's counsel argued that Petitioner had been singled out for prosecution (R.T. A-1, A-3 - A-4). As summarized above, the prosecutor explained that Petitioner was the only inmate over which the prosecutor had jurisdiction, and reminded the Court that the prosecutor had said before the murder trial began that the prosecutor would be filing charges regarding the jail riot (R.T. A-4 - A-5). The presiding judge denied the motion to recuse the

prosecutor, finding no vindictiveness, and transferred the case to another department for trial (R.T. A-5, A-11).

As part of the later Marsden hearing before the trial court, Petitioner again discussed the prosecution's decision to charge him for the jail riot, claiming: "I was told I was offered life without parole on the condition that I waive all my rights to appeal. It was also communicated to me that if I did not accept this offer, I would be charged on a three strikes case stemming from the jailhouse incident that occurred two years and ten months before the offer. I refused to be bullied or blackmailed into a deal simply because I wished to exercise my right to appeal" (R.T. 17). Plaintiff claimed that, out of 20 or more alleged participants in the jail riot, he was the only person charged (R.T. 17). Petitioner also alleged that prejudice resulted from the prosecution for the jail riot, because a conviction for the jail riot assertedly would be used as an aggravating factor in the penalty phase of his death penalty case (R.T. 18-19).

Petitioner's trial counsel complained that the trial on the jail riot had been set in "a rush," claiming that, when counsel initially reported needing time to interview witnesses, the presiding judge had set the case for trial (R.T. 20-21). Petitioner's counsel conceded that the prosecution's alleged offer in the capital case of life without parole in exchange for a waiver of appeal had occurred before the beginning of the first penalty phase of the capital case, rather than after the first penalty phase jury hung (R.T. 21). Counsel also acknowledged that the prosecutor in the capital case had put on the

record before the start of the capital trial that the prosecution would be filing charges for the jail riot (R.T. 21).

B. Governing Legal Standards

A vindictive prosecution can violate a defendant's Fifth Amendment right to due process. United States v. Goodwin, 457 U.S. 368, 372 (1982). "For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his [or her] protected statutory or constitutional rights is 'patently unconstitutional.'" Id. at 372 n.4 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). "To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." Nunes v. Ramirez-Palmer, 485 F.3d 432, 441 (9th Cir.), cert. denied, 552 U.S. 962 (2007) (quotations and citations omitted). Otherwise, the decision whether to prosecute rests within the prosecution's discretion. See Bordenckircher v. Hayes, 434 U.S. at 364 ("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion") (footnote omitted). "Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir.), cert. denied, 516 U.S. 814 (1995) (citations and internal quotations omitted).

C. Analysis

Petitioner has presented no direct evidence of actual vindictiveness, and the Court's review of the record had disclosed no such evidence.[28] In the absence of direct evidence of actual vindictiveness, a petitioner may establish a prima facie case only by submitting objective evidence of an appearance of vindictiveness. See United States v. Montoya, 45 F.3d at 1299. "[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982) (citation omitted).

The record also fails to demonstrate any appearance of vindictiveness. The record reflects that the prosecutor formed the intent to bring jail riot charges against Petitioner, and put Petitioner on notice of this intent, even before Petitioner's capital trial began. The fact, if it is a fact, that the state did not bring criminal charges against any other participant in the jail riot does not alter this conclusion. Apart from all other considerations, the state's reasonable belief that Petitioner's command to Gonzalez

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[28] The Court has reviewed all of the papers on file, including the October 26, 2008 transcript from Petitioner's capital case that has been filed under seal as FAP Exh. 13. This exhibit contains a sealed bench discussion regarding a possible plea offer that the prosecution ultimately decided not to extend to Petitioner. FAP, Exh. 13 at 58-59. The Court discerns no evidence of actual vindictiveness from any of the papers on file.

had precipitated the riot, as well as the state's reasonable, related belief that Petitioner had been the "shot caller," provided manifestly rational bases for singling out Petitioner for prosecution.

Moreover, the Ninth Circuit has "sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including waiving appeal." United States v. Kent, 649 F.3d 906, 914 (9th Cir.), cert. denied, 565 U.S. 924 (2011) ("Kent") (citations omitted). Even if the prosecutor in Petitioner's case had threatened Petitioner with filing the jail riot charges if Petitioner did not plead in the capital case, the prosecutor permissibly could make good on such a threat without giving rise to an appearance of vindictiveness. "As a matter of law, the filing of additional charges to make good on a plea bargaining threat . . . will not establish requisite the punitive motive." Id.; see also Bordenkircher v. Hayes, 434 U.S. at 364 ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights," doing so legitimately "encourages the negotiation of pleas") (citations and quotation marks omitted).

For the same reason, to the extent Petitioner suggests that the jail riot case was filed to impact negatively the penalty phase of his capital case on retrial, this suggestion fails to establish any appearance of vindictiveness. Evidence of the jail riot had been introduced during the first penalty phase trial. See R.T. A-8. The possibility the prosecution later might use a conviction in the jail riot case as additional aggravating evidence in the retrial on the

penalty phase of the capital case does not establish actual or apparent vindictiveness. See United States v. Johnson, 469 Fed. Appx. 632, 640-41 (9th Cir.), cert. denied, 133 S. Ct. 377 (2012) (rejecting under Kent defendant's claim that the prosecution's decision to file enhanced penalty information after the defendant rejected a plea constituted vindictive prosecution); United States v. Maciel, 461 Fed. Appx. 610, 617 (9th Cir. 2011) (rejecting similar claim based on prosecution's filing of evidence of prior conviction information after defendant rejected plea offer). Given the prosecution's announcement prior to start of Petitioner's capital trial of its intent to file the jail riot charges, Petitioner's circumstance was "not a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on not pleading guilty." Bordenkircher v. Hayes, 434 U.S. at 360 (emphasis added).[29]

In addition to arguing that the prosecution's alleged vindictiveness violated due process, Petitioner also argues that the

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[29] Petitioner's citation to Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) ("Blackledge") (see FAP, pp. 56, 58-59; Reply, p. 35-36), does not alter the Court's conclusion. In Blackledge, the Supreme Court found a constitutional violation from the prosecution's response to the defendant's invocation of the right to appeal a misdemeanor conviction, which in North Carolina carried with it the statutory right to a trial de novo. The prosecution's response had been to bring a more serious charge on the same conduct prior to the new trial. Id. at 25-29. Unlike in Blackledge, Petitioner had not exercised any appellate rights prior to the time he was charged regarding the jail riot, and the new charges were based on different conduct than the conduct alleged in the capital case.

prosecution's alleged vindictiveness violated Petitioner's right to present a defense. See FAP, pp. 59-60; Reply, pp. 37-38. As previously discussed, however, there was no vindictiveness. Therefore, Petitioner's derivative "right to present a defense" argument must be rejected. The mere fact that some potential evidence may become unavailable prior to the initiation of a charge does not establish any violation of a defendant's constitutional "right to present a defense." See, e.g., United States v. Roberts, 2005 WL 1560722 (E.D. Wisc. June 24, 2005), adopted, 2005 WL 182251 (E.D. Wisc. July 28, 2005).

For the foregoing reasons, Petitioner would not be entitled to federal habeas relief on Ground Five even under a de novo standard of review. It necessarily follows that the California Court of Appeal's presumed rejection of Ground Five on the merits and (alternatively) the California Supreme Court's summary denial of Ground Five on the merits were not unreasonable under 28 U.S.C. section 2254(d). See Harrington v. Richter, 562 U.S. 86 (2011).[30]

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[30] Petitioner requests leave to file briefing regarding section 2254(d) review of this claim. The request is denied. Petitioner has had ample time and opportunity to brief all issues, including issues concerning the standard(s) of review and the application of those standard(s) to Petitioner's claims.

V. Petitioner is Not Entitled to Federal Habeas Relief on his Claim that the Trial Court Improperly Used Petitioner's Prior Juvenile Adjudication as a Strike.

Petitioner alleges that the trial court improperly used his prior juvenile adjudication to impose a sentence beyond the statutory maximum. See FAP, Ground Four, pp. 52-55; Reply, pp. 29-31. Petitioner cites Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Apprendi"), which provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Petitioner argues that a juvenile adjudication in which a defendant does not have the right to a jury trial cannot qualify as a "prior conviction" within the meaning of Apprendi. FAP, pp. 53-54.

The California Court of Appeal issued the last reasoned decision on this claim, rejecting the claim on direct appeal. See People v. McGhee, 2010 WL 2510095, at *9.

A. Background

The prosecution alleged that Petitioner suffered a 1989 juvenile adjudication for assault with a firearm (Cal. Penal Code § 245(a)(2)) qualifying as a prior conviction (a "strike") under the Three Strikes Law (C.T. 131; see also R.T. 2882 (noting same)). In a bifurcated proceeding, the trial court found this allegation true, observing that Petitioner admitted the allegation when Petitioner testified (R.T.

3017-18; see also R.T. 1578, 1584-86 (Petitioner's admission)).[31]

Petitioner filed a motion to strike on the ground that he was not afforded a jury trial on the juvenile adjudication (C.T. 309-12). The trial court denied the motion. See R.T. 3302.

B. Governing Legal Standards

In Apprendi, the United States Supreme Court held that, regardless of its label as a "sentencing factor," any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum, among other things, must be "proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"), the Supreme Court held that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . ." Blakely, 542 U.S. at 303 (original emphasis). In Cunningham v. California, 549 U.S. 270, 293 (2007), the Supreme Court held that a

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[31] Under the Three Strikes Law, qualifying strikes are defined as the "serious" felonies listed in California Penal Code section 1192.7(c) and the "violent" felonies listed in California Penal Code section 667.5(c). See Cal. Penal Code §§ 667(d)(1), 1102.12(b)(1). California Penal Code section 667(d)(3) provides, in pertinent part, that a prior juvenile adjudication may constitute a strike if the prior offense is described as a serious felony or violent felony in California Penal Code sections 1192.7 or 667.5, or if the prior offense is listed in California Welfare and Institutions Code section 707(b). California Welfare and Institutions Code section 707(b) lists the offense of assault with a firearm. See Cal. Welf. & Inst. Code § 707(b)(13). Thus, Petitioner's juvenile assault conviction qualified as a strike.

California judge's imposition of an upper term sentence based on facts found by the judge rather than the jury violated the Constitution.

C. Analysis

It is clear that Apprendi and its progeny do not inhibit a sentencing court's use of prior adult convictions. See United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir. 2005) ("The Supreme Court has made clear that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt or admitted by the defendant to satisfy the Sixth Amendment.") (citation omitted); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002) ("Apprendi expressly excludes recidivism from its scope. Defendant's criminal history need not be proved to a jury beyond a reasonable doubt. [citations].").

The Court of Appeal rejected Petitioner's contention that the use of his prior juvenile adjudication violated Apprendi. See People v. McGhee, 2010 WL 2510095, at *9. The Court of Appeal relied on People v. Nguyen, 46 Cal. 4th 1007, 1028, 95 Cal. Rptr. 3d 615, 209 P.3d 946, cert. denied, 559 U.S. 1067 (2009), a California Supreme Court decision holding that juvenile strike priors may enhance an adult sentence beyond the statutory maximum.

In United States v. Tighe, 266 F.3d 1187, 1194-95 (9th Cir. 2001) ("Tighe"), a federal criminal case, the Ninth Circuit held that the prior conviction exception to Apprendi did not extend to nonjury juvenile adjudications. However, in Boyd v. Newland, 467 F.3d 1139, 1152 (9th Cir. 2006), cert. denied, 550 U.S. 933 (2007) ("Boyd"), the

Ninth Circuit held that Tighe did "not represent clearly established federal law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. section 2254(d)(1). The Boyd Court noted that California courts and several other circuits had disagreed with Tighe. Boyd, 467 F.3d at 1152 (citing cases); see also People v. Nguyen, 46 Cal. 4th at 1021-28 (the "overwhelming majority of federal decisions and cases from other states" have held that nonjury juvenile adjudications may be used to enhance later adult sentences, and that the United States Supreme Court "has declined numerous opportunities to decide otherwise") (footnote omitted).

Consequently, under the standard of review set forth in 28 U.S.C. section 2254(d)(1), Petitioner is not entitled to federal habeas relief on this claim. See Boyd, 467 F.3d at 1152; John-Charles v. California, 646 F.3d 1243, 1252-53 (9th Cir.), cert. denied, 565 U.S. 1097 (2011) (Boyd is binding; use of the petitioner's prior nonjury juvenile adjudication to enhance the petitioner's sentence not contrary to, or an unreasonable application of, clearly established Supreme Court law); see also Wright v. Van Patten, 552 U.S. 120, 126 (2008) (where Supreme Court's cases "give no clear answer to the question presented," state court's rejection of the petitioner's claim did not constitute an unreasonable application of clearly established Federal law) (citation and internal quotations omitted); Kessee v. Mendoza-Powers, 574 F.3d 675, 678-79 (9th Cir. 2009) (state court's application of Apprendi's prior conviction exception not unreasonable under AEDPA standard of review, where United States Supreme Court had not "given explicit direction" on the issue and state court's decision was consistent with those of other courts).

Thus, Petitioner is not entitled to federal habeas relief on Ground Four. See 28 U.S.C. § 2254(d).

VI. Petitioner's Claim of Cumulative Error Does Not Merit Federal Habeas Relief.

Petitioner contends that cumulative error based on the claims discussed above violated his constitutional rights to due process, a fair trial, effective assistance of counsel, self-representation, and trial by jury (FAP, Ground Six, pp. 61-64; Reply, pp. 38-40). The Los Angeles County Superior Court issued the last reasoned decision rejecting this claim on the merits, finding that there was no cumulative error justifying another trial. See Respondent's Lodgment 20, p. 526.[32] The Superior Court's decision was not unreasonable, and this Court would reach the same conclusion even under a de novo standard of review.

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that

[32] The California Court of Appeal rejected the claim as procedurally barred (Respondent's Lodgment 20, p. 549), and the California Supreme Court summarily rejected Petitioner's claim "on the merits" (Respondent's Lodgment 23).

they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted).

No such symmetry of otherwise harmless errors exists in the present case. Accordingly, Petitioner is not entitled to federal habeas relief on Ground Six. See 28 U.S.C. § 2254(a) and (d).

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the First Amended Petition with prejudice.[33]

DATED: August 1, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[33] Petitioner's request for an evidentiary hearing is denied. When evaluating the reasonableness of a state court's decision denying the merits of a petitioner's claim, the federal habeas court may not consider evidence unpresented to the state courts. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011); Gulbrandson v. Ryan, 738 F.3d 976, 993 n.6 (9th Cir. 2013), cert. denied, 134 S. Ct. 2823 (2014). To the extent any of Petitioner's claims may be subject to de novo review, Petitioner has failed to demonstrate that an evidentiary hearing would reveal anything material to such claims. Finally, Petitioner previously has had ample opportunity to develop the record and to present evidence to the courts from which he has sought relief during the past nine years.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) JUDGMENT

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the First Amended Petition is denied and dismissed with prejudice.

DATED: _____, 2017.

_____
JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On April 25, 2012, Petitioner, who then was proceeding pro se with assistance from the California Appellate Project, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody," accompanied by an attached memorandum ("Pet. Mem."). See Pet. Mem.,

p. 3, n.1. Petitioner concurrently filed a "Motion to Stay and Hold in Abeyance Federal Proceedings Pending Exhaustion of Federal Claims in State Court" ("Motion to Stay"). The Motion to Stay sought an order holding this action in abeyance because certain grounds for relief therein assertedly were unexhausted (Motion to Stay, p. 5).

On August 29, 2012, Respondent filed an "Answer to the Petition for Writ of Habeas Corpus and Response to Petitioner's Motion to Stay, etc." (the "Answer"). The Answer asserted that the Motion to Stay should be denied because all the claims then were exhausted, and that the Petition should be dismissed because the claims allegedly were untimely. See Answer, pp. 1, 4-11.[1] On March 4, 2013, Petitioner filed a reply to the Answer.

On March 15, 2013, the Court issued an order: (1) denying the Motion to Stay as moot; (2) denying without prejudice Respondent's request to dismiss the Petition as untimely; and (3) ordering Respondent to file a Supplemental Answer addressing the merits of the claims alleged in the Petition. See "Order Re Motion to Stay, Statute of Limitations Issues, and Further Briefing" (Docket. No. 31). On March 27, 2013, the Court appointed the Federal Public Defender's Office to represent Petitioner. See Minute Order (Docket No. 33).

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[1] Respondent concurrently lodged documents. Herein, the Court refers to these documents, as well as other documents lodged by Respondent on September 11, 2013, and March 21, 2017, as "Respondent's Lodgments."

On April 17, 2013, Petitioner filed a "Motion for Leave to File Amended Petition, etc." ("Motion to Amend"), unaccompanied by a proposed amended petition. See Motion to Amend (Docket No. 38). On April 19, 2013, the Magistrate Judge denied the Motion to Amend. On June 26, 2013, the District Judge denied Petitioner's "Motion for Review of the April 19, 2013 Order of United States Magistrate Judge re Leave to Amend." See Docket Nos. 41, 49.

On September 11, 2013, Respondent filed a Supplemental Answer addressing the merits of the claims alleged in the Petition.[2] On December 12, 2013, Petitioner filed a Supplemental Reply.

Meanwhile, on November 14, 2013, Petitioner filed a "Renewed Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Renewed Motion to Amend"), and lodged a proposed amended petition containing new evidence and exhibits. Petitioner advised that he intended to move for a stay of this action pending exhaustion of his state court remedies if the Court granted leave to amend the Petition to add the new evidence. On December 12, 2013, Respondent filed an opposition to the Renewed Motion to Amend.

On January 9, 2014, the Court ordered the parties to address the propriety of a stay as it related to the Renewed Motion to Amend. See Docket No. 78. On January 30, 2014, in accordance with the Court's

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[2] Respondent concurrently lodged documents, including the Clerk's Transcript ("C.T.") and Reporter's Transcript ("R.T."). Respondent also lodged under seal the Reporter's Transcript of a July 21, 2008 hearing.

order, Petitioner filed a "Motion to Stay Federal Habeas Action, etc." ("Renewed Motion to Stay"). On March 7, 2014, Respondent filed a response in which Respondent indicated that he did not oppose a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 538 U.S. 1042 (2003). On March 11, 2014, Petitioner filed a "Report on the Status of the State Court Exhaustion Proceeding," advising that Petitioner had filed a habeas petition and supporting exhibits with the Los Angeles County Superior Court on February 6, 2014. On March 19, 2014, Petitioner filed a "Notice of New Case Law, etc." in support of the Renewed Motion to Stay.

On April 1, 2014, the Court issued an order: (1) denying without prejudice the Renewed Motion to Amend; and (2) granting the Renewed Motion to Stay the proceedings under Kelly v. Small, so that Petitioner could exhaust claims not presented in the Petition and later move to amend the Petition to include the newly-exhausted claims. See "Order Re Renewed Motion for Leave to Amend and [Renewed] Motion to Stay" (Docket No. 86). The Court declined to decide whether any future amendment to include newly-exhausted claims would be appropriate (id.).

On February 17, 2017, Petitioner filed an unopposed "Application to Lift Stay of Proceedings Imposed Pursuant to Kelly v. Small" ("Application to Lift Stay"). Petitioner also filed a "Notice of Motion and Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Post-Stay Motion to Amend"), and lodged a proposed amended petition with supporting exhibits, some of which were filed under seal. See Docket Nos. 90-93. On February 23, 2017, the

Magistrate Judge granted the Application to Lift Stay.

On March 21, 2017, Respondent filed a response to the Post-Stay Motion to Amend, which indicated that Respondent did not oppose the motion. Respondent concurrently lodged multiple documents with the response. On March 22, 2017, the Magistrate Judge granted the Post-Stay Motion to Amend.

On March 22, 2017, Petitioner filed the operative "Amended Petition for Writ of Habeas Corpus" ("First Amended Petition" or "FAP"), which had been lodged with the Post-Stay Motion to Amend. The First Amended Petition references the exhibits Petitioner lodged with the Post-Stay Motion to Amend ("FAP Exh."). On April 19, 2017, Respondent filed an Answer ("FAP Answer"). On May 3, 2017, Petitioner filed a Reply.

BACKGROUND

A jury found Petitioner guilty of one count of conspiracy to commit assault, one count of conspiracy to commit vandalism, three counts of resisting executive officers in the performance of their duties, and two counts of assault by means likely to produce great bodily injury (FAP, p. 8; Respondent's Lodgment 1, p. 2; C.T. 288-92, 295-97).[3] These convictions arose out of Petitioner's participation in a jail riot in which multiple inmates threw multiple objects at their jailers. See Respondent's Lodgment 1, pp. 3-6. The trial court

[3] The jury found Petitioner not guilty of one count of assault on Deputy Gordon McMullen. See C.T. 293-94.

sentenced Petitioner to 75 years to life (Respondent's Lodgment 1, p. 2; C.T. 322-27; R.T. 3306-10).

On June 23, 2010, the California Court of Appeal affirmed in a reasoned decision (Respondent's Lodgment 1). On October 13, 2010, the California Supreme Court summarily denied review (Respondent's Lodgment 3).

On October 19, 2011, Petitioner constructively filed a habeas petition with the Los Angeles County Superior Court, alleging claims similar to those asserted herein. Compare FAP with Respondent's Lodgment 4.[4] On December 7, 2011, the Superior Court denied the petition in a reasoned decision (Respondent's Lodgment 5). The Superior Court indicated that many of Petitioner's claims had been raised and rejected on direct appeal. See Respondent's Lodgment 5, pp. 2-3 (citing, inter alia, In re Waltreus, 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9 (1965) ("Waltreus") (an issue raised and rejected on appeal may not be asserted in a subsequent state habeas petition) and In re Clark, 5 Cal. 4th 750, 765-66, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) ("Clark") (absent justification, successive and/or untimely habeas petitions will be summarily denied)). The Superior Court observed that "[m]any of the arguments made . . . are nearly, word for word, the same arguments raised in the direct appeal"). See id. at 3. The Superior Court found that Petitioner had not shown prejudice with respect to the ineffective assistance of counsel claim. See id. at 3-

[4] Petitioner's first round of state habeas petitions were filed without counsel and without the evidence that Petitioner's public defenders since have presented.

5 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

On March 21, 2012, Petitioner constructively filed a habeas petition with the California Court of Appeal, alleging claims similar to those asserted herein (Respondent's Lodgment 6). On April 12, 2012, the California Court of Appeal issued a brief but reasoned decision (Respondent's Lodgment 6). The Court of Appeal denied some claims with citations to Clark, Waltreus, and Hagan v. Superior Court, 57 Cal. 2d 767, 769-71, 22 Cal. Rptr. 206 (1962) (court may refuse to consider repetitious applications). The Court of Appeal denied Petitioner's ineffective assistance of counsel claim with citations to, inter alia, Strickland v. Washington, 466 U.S. 668 (1984) (Respondent's Lodgment 6).

On May 9, 2012, Petitioner constructively filed a habeas petition with the California Supreme Court, alleging claims similar to Grounds One, Five and the cumulative error claim raised herein (Respondent's Lodgment 8). On August 15, 2012, the California Supreme Court denied the petition without comment (Respondent's Lodgment 9).

On February 6, 2014, Petitioner filed a habeas petition with the Los Angeles County Superior Court, presenting his expanded claim of ineffective assistance of trial counsel (asserted as Ground One herein) and an updated cumulative error claim similar to Ground Six herein. See Respondent's Lodgment 20, pp. 466-509. On March 28, 2014, the Superior Court denied the petition in a reasoned decision. See id. at 511-27.

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On April 23, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Court of Appeal, presenting Grounds One and Six asserted herein (Respondent's Lodgments 15-17). On August 27, 2014, the Court of Appeal summarily denied the petition as procedurally barred. See Respondent's Lodgment 20, p. 549 (copy of order citing In re Reno, 55 Cal. 4th 428, 452, 460-61, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012) (habeas petitioner challenging final criminal judgment must prosecute case without unreasonable delay)).

On September 19, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Supreme Court, presenting Grounds One and Six asserted herein (Respondent's Lodgments 18-20). On January 18, 2017, after informal briefing, the California Supreme Court denied the petition "on the merits," citing Harrington v. Richter, 562 U.S. 86, 99-100 (2011), and Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (Respondent's Lodgments 21-23).

SUMMARY OF TRIAL EVIDENCE

In January of 2005, Petitioner was housed in the 3300 A-Row ("A-Row") of the Men's Central Jail (R.T. 647, 744). A-Row inmates are subject to high security measures, including being handcuffed before leaving their cells and being handcuffed when escorted to and from their cells (R.T. 640). Deputy Raul Ibarra had worked on A-Row for just under a year as of January of 2005 (R.T. 642-43). Ibarra testified that he had been trained to identify who stands out as a "ring leader" in a group (R.T. 643). Based on his training and contact with the inmates on A-Row (including Petitioner), Ibarra

opined that Petitioner was the ring leader, or "shot caller" (R.T. 644-46, 696). Inmates must ask the shot caller for permission to do such things as go on passes or use the phone (R.T. 644, 725). Ibarra had heard inmates on the row screaming out that they were going on a pass and Petitioner responding with a "yes" or a "no" (R.T. 645).

The Removal of Inmate Gonzalez from A-Row

Around 4:00 p.m. on January 7, 2005, Ibarra observed inmate Rodolfo Gonzalez intoxicated in Gonzalez' cell, and Ibarra spoke with his partners (Deputies Taylor, Orosco, and Argueta) regarding a plan to remove Gonzalez from the cell (R.T. 651-54, 684). As a ruse to cause Gonzalez to leave the row voluntarily, the deputies planned to tell Gonzalez he had an attorney pass (R.T. 654-55, 692). Ibarra announced over the loud speaker to the entire module that Gonzalez had an attorney pass and that he had five minutes to get ready (R.T. 655-56, 694). Ibarra and Argueta then went to Gonzalez' cell, with Taylor behind and Orosco manning the gates (R.T. 656-57, 699). Without offering any resistance, Gonzalez submitted to being handcuffed and he walked (staggered) out of his cell and toward the gate, escorted by the deputies (R.T. 657-59, 727). When Gonzalez reached Petitioner's cell, however, Petitioner said to Gonzalez, "Hey, I didn't give you permission to go on this pass, what are you doing?" (R.T. 659-60, 697, 699-700). Gonzalez replied, "I'm sorry," and started walking back to his cell (R.T. 660, 700). Ibarra yanked Gonzalez by the handcuffs to get Gonzalez off balance, and told Gonzalez he was going to walk off the row (R.T. 660, 701). Gonzalez struggled "a little bit," but Ibarra and Argueta each grabbed Gonzalez by an arm and started

dragging Gonzalez backward from the row (R.T. 660-61, 701-03).

Ibarra testified that, as the deputies removed Gonzalez, Petitioner screamed "Dale gas la juras," meaning, to assault the deputies with whatever liquids the inmates had at their disposal (R.T. 661-62, 703, 707). Inmates including Petitioner, Francisco Morales, and Gerardo Reyes, then pelted all four deputies on the row with oranges, apples, and liquids (such as urine or bleach) R.T. 662-64, 704, 707, 731-32). Gonzalez dropped to the floor and began kicking the deputies (R.T. 665, 704-05, 709). Ibarra sprayed Gonzalez in the face with "O.C. spray" to cause Gonzalez to comply, and removed him from the row (R.T. 665-66, 709-10).

Ibarra testified that he later went into "the pipe chase" behind Petitioner's cell, where Ibarra heard Petitioner telling Reyes that, if they jumped on the sinks in their cells, they could break the sinks and use the porcelain to throw at deputies (R.T. 668-72, 720-22, 734). Reyes reportedly "agreed" (R.T. 672, 734). Ibarra stayed in the pipe chase a few seconds, and then, as he started to walk off, he heard what sounded like glass or porcelain hitting the ground and breaking (R.T. 672-75, 722). Inmates then started throwing porcelain at the deputies (R.T. 675-79). Ibarra saw Petitioner, Francisco Morales and Reyes throwing porcelain (R.T. 679).

The Fire on A-Row

Deputy Joseph Morales (referred to herein as "Deputy Morales" to avoid any confusion with inmates Francisco Morales and Erick Morales)

testified that he and his partner, Deputy Gordon McMullen, came to the gate of A-Row around 10:00 p.m. that day. Deputy Morales testified that the inmates (including Petitioner, Reyes, Francisco Morales, Tafoya, Trujillo and Cortez) immediately began throwing objects, including porcelain from their sinks, at Deputy Morales and the other deputies (R.T. 737-45, 1210-11, 1220, 1227; see also R.T. 2139-45, 2183-86 (McMullen similarly testifying in rebuttal)).[5] Later, when Deputies Morales and McMullen used a water hose to put out a fire on A-Row from an adjacent row (C-Row), the inmates (including Petitioner) "constantly" "bombarded" the deputies with porcelain (R.T. 1212, 1215-16, 1226, 1228-31; see also R.T. 2146-57, 2160-62, 2187-95, 2205 (McMullen similarly testifying)). Deputy Morales saw Reyes throw a piece of porcelain that hit McMullen in the hand (R.T. 1214, 1217-18, 1230; see also R.T. 2157-58, 2195-96, 2202 (McMullen testifying that he was hit in the hand with porcelain).[6] Deputy Morales said that numerous pieces of porcelain were thrown at him and McMullen as they tried to put out a fire on A-Row, and that a piece of porcelain larger than a golf ball "whizzed" by him, coming within a half inch of hitting him in the eye (R.T. 765-69; see also R.T. 2158, 2163, 2204-05 (McMullen testifying regarding the piece of porcelain that almost hit Deputy Morales)). Neither Deputy Morales nor Deputy McMullen saw which of the inmates throwing porcelain threw that particular piece (R.T. 765-66, 2158-59). Deputy Morales and McMullen left the row when

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[5] Deputy Morales later clarified that Cortez was not in his regular cell but rather was in the shower during the incident (R.T. 1202-03, 1207, 1232; see also FAP Exh. 17 (diagram of row)). The showers did not have sinks (R.T. 1232).

[6] As noted above, the jury found Petitioner not guilty of assaulting Deputy McMullen (C.T. 293-94).

it became too dangerous to stay (R.T. 765).

The Extraction of Inmates from A-Row

Sergeant Thomas Wilson testified that he started his shift at 10 p.m. that day and, after briefing and preparation, led an approximately 15-person emergency response team and a four-person extraction team into A-Row to quell the riot (R.T. 932-34, 970-71). Both teams immediately were pummeled with pieces of porcelain (R.T. 934-35, 972). Some of the pieces "nearly struck" the cameraman, Deputy Alfredo Alvarez, while he was filming (R.T. 935; see also R.T. 921-23 (Deputy Alvarez testifying that he videotaped the "riot suppression")). Two or three inmates, including Petitioner and Reyes, were the main aggressors (R.T. 936-37).

Sergeant Wilson testified that, in an effort to suppress the resistance, two of the deputies involved in the extraction fired pepper ball guns into the cells from where the porcelain was being thrown (R.T. 938, 973-75; see also R.T. 1238-46 (Deputy John Coleman testifying regarding firing a pepper ball gun at cells where the inmates were not complying (including Petitioner's cell))). Another deputy or two were spraying from a large fire extinguisher-sized canister of pepper spray primarily at cells 6-8 (Reyes', Petitioner's and Trujillo's cells; see FAP Exh. 17) (R.T. 942-45, 973-74). Reyes eventually gave up and came out of his cell as commanded (R.T. 942-43). Petitioner did not give up despite being commanded to do so. More than 30 pepper balls were fired into Petitioner's cell, and five or more bursts from the canisters were also sent into his cell (R.T.

944, 975-76). Trujillo had to be taken from his cell because he was overcome by pepper spray and pepper ball powder (R.T. 946-47). Meanwhile, after slamming his mattress against the bars of his cell and yelling profanities, Petitioner went to the back of his cell, where he used his mattress as a shield (R.T. 947-48, 980-81). The team removed the rest of the inmates on A-Row and then returned to Petitioner's cell and extracted Petitioner (R.T. 948-49, 974; see also R.T. 1250-58 (Deputy Hector Beltran testifying Petitioner resisted until handcuffed forcibly)). A videotape of these events was played for the jury (R.T. 938-51, 976-77, 981-83).

The Defense

Gonzalez testified that he was housed on A-Row on January 7, 2005, and had been drinking that day (R.T. 1274-75). Gonzalez heard his name called out over the loud speaker for a visit or "pass," but he did not hear the type of pass (R.T. 1275-76). Gonzalez readied himself to leave his cell, and Deputy Ibarra supposedly came alone to the cell and cuffed Gonzalez from the front with handcuffs and a waist chain (R.T. 1276-77, 1297-98). Ibarra walked away from the cell and toward the gate (R.T. 1298-99). Gonzalez' cell door was opened and Gonzalez walked out onto A-Row where he saw Ibarra standing in front of Petitioner's cell talking to Petitioner (R.T. 1278, 1300-02, 1307-08). Gonzalez heard Ibarra say, "He's not refusing," but could not hear Petitioner (R.T. 1278, 1304, 1307).

Gonzalez walked toward Ibarra and asked what type of pass he had (R.T. 1277-78, 1302-04). Gonzalez stopped walking at or near

Petitioner's cell (R.T. 1284, 1302). When Ibarra said the visit was for an attorney, Gonzalez refused to go because Gonzalez was in jail for a parole or probation violation, had already been found in violation, and did not have an attorney (R.T. 1278-81, 1284, 1306-08, 1315-18, 1334-36, 1342). Gonzalez supposedly was afraid of what might happen because Gonzalez had been involved in a riot against officers at a different facility and he feared retaliation (R.T. 1279-80, 1312-14). Specifically, Gonzalez feared the deputies would take him outside and toss him around, slap him, "ruffle" him up, or talk down to him (R.T. 1281). Gonzalez denied asking Petitioner for permission to go on the pass (R.T. 1285-86).

Gonzalez turned to walk back to his cell and felt Deputy Ibarra grab him by the neck in a choke hold and take him to the ground (R.T. 1281-82, 1284-85, 1318-19). Gonzalez struggled, kicked, and fought to free himself, while Ibarra told Gonzalez to stop resisting and punched, kicked, and did "everything he could do" to regain control (R.T. 1285-86, 1320-21). Ibarra grabbed Gonzalez by the neck and single-handedly dragged Gonzalez from the row, where Ibarra and other deputies beat Gonzalez, hitting him 20 to 30 times and kicking him, as they tried to subdue him and as Gonzalez fought to defend himself (R.T. 1286-91, 1321, 1327-31, 1337-41). Gonzalez was maced until he passed out (R.T. 1291-93, 1327, 1337). Gonzalez claimed he had no bruises from the supposed beating because he has a dark complexion (R.T. 1340-41). Gonzalez agreed he had received no medical treatment,

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but denied having refused medical treatment (id.).[7] Gonzalez testified that, as he was being dragged from the row, he heard other inmates (including Petitioner) screaming (R.T. 1321-22, 1331-32, 1348).

The day after the incident, Gonzalez gave a statement saying he did not recall what had happened during the incident (R.T. 1344-45, 1349). Gonzalez admitted that the first time he came forward with a purported memory of details concerning what supposedly had happened during the incident was two days before Petitioner's trial (R.T. 1323-24, 1345-49). Gonzalez also admitted that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed (R.T. 1333-34).

Petitioner testified that he had problems with his jailers from the first day he arrived on A-Row in 2003 (R.T. 1530–36). When he was being processed, a deputy reportedly threatened Petitioner and took Petitioner down a hallway where the deputy and others beat Petitioner (R.T. 1531-33). Petitioner also testified concerning other beatings (R.T. 1534, 1536). Petitioner agreed that he "always" was the victim in these run-ins with his jailers (R.T. 1592-93). Petitioner denied being a shot caller on his row, denied other inmates ever asked his

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[7] Deputy Richard Thompsen testified in rebuttal that he and a nurse addressed Gonzalez' medical needs after Gonzalez was removed from A-Row (R.T. 2252-55). Gonzalez had redness on his face, neck, and upper torso indicative of exposure to pepper spray (R.T. 2256). Thompsen observed no other injuries (e.g., bruises or cuts), but did not recall if he looked under Gonzalez' clothing for injuries (R.T. 2257, 2260). Gonzalez reported no problems other than exposure to pepper spray (R.T. 2257-58). Gonzalez refused any treatment (R.T. 2259).

permission to leave their cells, and denied he told Gonzalez that Gonzalez did not have Petitioner's permission to leave the row on the day of the riot (R.T. 1536-37, 1539, 1695).

Regarding the riot, Petitioner testified that he watched Deputy Ibarra handcuff Gonzalez and walk away from Gonzalez' cell (R.T. 1542-44). According to Petitioner, there were no other deputies then on the row (R.T. 1543). Petitioner could see that Gonzalez was drunk from how Gonzalez was walking (R.T. 1544-46). Petitioner called Ibarra to Petitioner's cell and told Ibarra that Gonzalez was in no condition to walk down the escalator, and that Ibarra would get himself in trouble if Ibarra walked a drunken inmate past the sergeant's office (R.T. 1546-49, 1691-96).

Petitioner described the events leading up to Gonzalez' removal from the row in a manner consistent with Gonzalez' testimony (i.e., Gonzalez refused to leave and turned to go back to his cell; Ibarra grabbed Gonzalez by the neck and pulled Gonzalez back; Ibarra and Gonzalez ended up on the floor; Ibarra hit and kicked Gonzalez and got Gonzalez back into a choke hold; Ibarra dragged Gonzalez from the row) (R.T. 1549-57, 1700, 1849-50).

Petitioner said that he and other inmates yelled at Ibarra and then at the deputies who were beating Gonzalez in the "sally port area" (R.T. 1552-53, 1557-58). Petitioner admitted that he told Ibarra to "get off" Gonzalez, and Petitioner admitted he threw a milk carton and an apple at Ibarra, but Petitioner denied telling others to throw things (R.T. 1553-55). Petitioner claimed the inmate response

had been a spontaneous reaction to seeing Gonzalez being beaten (R.T. 1555). Petitioner threw from his cell everything from within his cell that was capable of being thrown (R.T. 1558).

Petitioner testified that "shortly after" Gonzalez was removed from A-Row, Deputy Yzabal told the men on the row through the loud speaker that the deputies were going to drag the inmates out and "fuck [the inmates] up" (R.T. 1559). These threats continued over the loud speaker "for awhile" (R.T. 1561-62, 1825-26).[8] Another deputy (Argueta) sprayed the cells from the front with a "big ole" canister of mace saying, "How do you like that? That's just the beginning. There's more to come," while another deputy sprayed mace into the cells through the vents from the pipe chase behind the cells (R.T. 1560-62, 1567-68, 1707, 1716-17, 1805-07).[9] Petitioner and others then began to kick their sinks and break the porcelain (R.T. 1562-63, 1567, 1706, 1718-19). Petitioner denied telling others to break their sinks, and said his sink was not the first sink broken (R.T. 1564,

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[8] Deputy Mark Yzabal testified in rebuttal that he did not issue any threats over the loud speaker to the inmates and that, in fact, he did not even use the loud speaker that day (R.T. 2265-66, 2273-74). Deputy Yzabal went to the hallway outside A-Row and observed inmates (including Petitioner) throwing porcelain at the sally port and front door (R.T. 2267-69, 2270, 2275). Petitioner and Reyes were throwing porcelain in unison and yelling, "Fuck the jura, fuck the police" (R.T. 2269, 2275-76).

[9] Deputy McMullen testified in rebuttal that, when he came on his shift at 10 p.m. on the night of the riot, there had been no sergeant's authorization to activate emergency response measures (R.T. 2130). McMullen said that the deputies are not issued canister-sized pepper spray. Such canisters are locked up and brought in only when emergency response teams are deployed (R.T. 2133-35, 2177).

1705-10).

Petitioner admitted he threw porcelain (R.T. 1568, 1715-16, 1725-26). Other inmates threw porcelain too, but Petitioner claimed the throwing was chaotic and not coordinated (R.T. 1568-69, 1708, 1722-23). Petitioner denied throwing anything when deputies (Morales and McMullen) later tried to put out a fire on A-Row (R.T. 1567-69, 1723-26). Petitioner heard others throwing porcelain at that time (R.T. 1570). Petitioner claimed he did not throw porcelain in the direction of the deputies until he saw that an extraction team was going to come in and remove inmates from the row. Petitioner admitted he then was trying to prevent the team from coming in, supposedly because he was scared (R.T. 1573-75, 1596-97, 1715, 1725-28, 1735, 1738-39, 1813-23, 1855; see also R.T. 1696-97 (Petitioner admitting he threw approximately 10 pieces of porcelain at the deputies)). Petitioner claimed he stopped throwing porcelain when he knew the team was on the row because he supposedly did not want to hit one of the members of the team (R.T. 1575, 1739-40, 1753, 1757-61, 1818; but see R.T. 1745-50, 1758, 1761 (Petitioner admitting that the video of the incident showed him throwing porcelain directly at the deputies and hitting/clearing the shields the deputies were holding)).

Petitioner claimed he did not submit when the team reached his cell because he was being shot with pepper balls and sprayed with mace or pepper spray (R.T. 1576-77, 1742-57, 1762-66, 1808, 1824-28, 1837). Petitioner claimed he was afraid he would be beaten (R.T. 1673-74, 1803-04). Petitioner admitted that the video depicted 16 other inmates being led peacefully in handcuffs from their cells, but

Petitioner said he did not see any of them walking by because Petitioner was behind his mattress and blinded by mace (R.T. 1835-37).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Petitioner's trial counsel assertedly rendered ineffective assistance by allegedly failing to investigate and present a defense (FAP, Ground One, pp. 18-41);

2. The trial court assertedly denied Petitioner his right to self-representation (FAP, Ground Two, pp. 41-47);

3. The trial court assertedly violated Petitioner's right to due process and right to a fair and speedy trial by denying his motion to dismiss based on the delay in charging Petitioner (FAP, Ground Three, pp. 47-52);

4. The prosecutor assertedly engaged in vindictive prosecution (FAP, Ground Five, pp. 55-60);

5. The trial court assertedly violated Petitioner's constitutional rights by using a juvenile adjudication as a "strike" under California's Three Strikes Law (FAP, Ground Four, pp. 52-55); and

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6. Cumulative error assertedly denied Petitioner due process and a fair trial (FAP, Ground Six, pp. 61-64).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 565 U.S. 34, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation

omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that

those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards to a particular claim, the Court usually looks to the last reasoned state court decision regarding that claim. See DeWeaver v. Runnels, 556 F.3d 995, 997 (9th Cir.), cert. denied, 558 U.S. 868 (2009); Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION[10]

I. Petitioner is Not Entitled to Federal Habeas Relief on His Claim of Ineffective Assistance of Counsel.

Petitioner contends that his trial counsel rendered ineffective assistance by allegedly failing to: (1) interview or present any inmate witnesses other than Petitioner and Rodolfo Gonzalez; or (2) investigate and present evidence regarding the general conditions in the Los Angeles County Men's Central Jail where Petitioner was housed (FAP, Ground One, pp. 23-41; Reply, pp. 4-19).

The Los Angeles County Superior Court issued the last reasoned decision denying Petitioner's ineffective assistance of counsel claim on the merits. The Superior Court considered the evidence submitted by Petitioner in detail and determined that Petitioner had not shown he was prejudiced by counsel's alleged omissions. See Respondent's

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[10] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein. Respondent contends Petitioner's claims are untimely. See FAP Answer, p. 1. The Court assumes, arguendo, the timeliness of Petitioner's claims. See Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001), cert. denied, 535 U.S. 950 (2002) (court may deny on the merits an untimely claim that fails as a matter of law).

Lodgment 20, pp. 521-26. For the reasons discussed below, this determination was not unreasonable. See 28 U.S.C. § 2254(d).

A. Background

In February of 2003, Petitioner was arrested and charged with capital murder. Pending trial, Petitioner was housed in the Los Angeles County Men's Central Jail. There, On January 7, 2005, the riot occurred. Petitioner's capital trial began in September of 2007. See Respondent's Lodgment 1, p. 2.

On November 14, 2007, after the guilt phase of the capital murder trial had ended in a guilty verdict and the penalty phase had ended in a mistrial, the Los Angeles District Attorney filed a felony complaint charging Petitioner with crimes associated with the January 7, 2005 jail riot. In March of 2008, Petitioner was held to answer the riot charges. See Respondent's Lodgment 1, pp. 2-3; R.T. 6, 22; C.T. 123-24. Petitioner represented himself for the first few months of the proceedings (R.T. 22-24). On February 21, 2008, after representation for a brief time by another attorney, Petitioner's trial counsel in the capital case began representing Petitioner in the riot case (R.T. 22-24; see also FAP, p. 23).

The date originally set for trial in the riot case was June 30, 2008, but Petitioner's counsel sought and obtained two continuances until July 21, 2008 (FAP, p. 24; see also C.T. 138-43, 168). Counsel then requested a third continuance, claiming that counsel still needed more time to locate and interview 21 potential defense witnesses

before counsel could announce ready (see C.T. 176-77 (motion); R.T. A-5 - A-6). The presiding judge (who also presided over the capital case) denied the motion (R.T. A-6 - A-9). The judge reasoned, inter alia, that counsel had known about the jail riot for a long time (because the riot had been identified as one of the aggravating factors in the capital case), and the prosecutor had put counsel on notice of the prosecution's intent to file charges concerning the jail riot even before the guilt phase of the capital case began (id.).

On the same day, the presiding judge transferred the riot case to another judge for trial, and Petitioner's counsel renewed his motion for a continuance (R.T. A-7, A-9, 2-3). The trial judge denied the renewed motion, after confirming that nothing had changed during the brief time that had passed following the previous denial (R.T. 3-4, 28, 30).

Petitioner also then requested a Marsden hearing (R.T. 13).[11] At the Marsden hearing, Petitioner complained of counsel's performance representing Plaintiff in his capital case and suggested that communications had broken down (R.T. 15-16). Petitioner also argued that counsel should be replaced because counsel allegedly had "assumed a defeatist position" in the riot case – doing "nothing" to prepare a defense (R.T. 17-19).

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[11] See People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970) (establishing standards governing requests for substitution of counsel).

Petitioner's counsel reported that he had told Petitioner "there is no defense to what you see on the [video]tape [of the jail incident]," but had discussed with Petitioner "what would be a defense" (R.T. 21). Counsel said he had identified potential witnesses and provided a list of those witnesses to the defense investigator prior to trial (when Petitioner was proceeding pro se, and again in February of 2008 when counsel started representing Petitioner in the present case) (R.T. 20-22, 24-25).[12] The investigator reportedly made arrangements to see certain potential witnesses in prison, but "[t]hat was not done" (R.T. 25).

Counsel also said that in June of 2008 the investigator reported to counsel that he could not locate "other" potential witnesses because the investigator did not have the witnesses' dates of birth. See R.T. 24, 26-27; see also C.T. 177 (counsel stating in motion for continuance filed on July 17, 2008, that the information the defense was provided included the witnesses' jail booking numbers and housing locations, but not "any other personal information, such as date of birth"); C.T. 174 (declaration of prosecutor filed on July 14, 2008, stating that the defense had been provided in discovery with a computer printout listing the name, cell location, and booking number

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[12] The defense investigator reportedly had been looking for these witnesses since 2006. During a chambers conference in Petitioner's capital case on December 5, 2006, the defense investigator stated that he had been attempting to find other inmates involved in the jail riot based on identifying information Petitioner had provided. See FAP Exh. 11, pp. 43-44. The witnesses were relevant to the capital case because the prosecution presented evidence of Petitioner's participation in the riot during the penalty phase of the capital case. See R.T. 21.

of every inmate witness (discovery bates stamped 91-94) (filed as FAP Exh. 18)); but see FAP Exh. 6(A) (June 8, 2008, memorandum from the investigator to the California Department of Corrections ("CDC") which includes the dates of birth for each of 20 witnesses, a return fax stamp dated June 11, 2008, and the locations for 16 witnesses).[13] Counsel explained that he did not replace the investigator because counsel had faith in the investigator's ability to find witnesses based on previously having worked with the investigator (R.T. 25). The investigator supposedly just needed more time (R.T. 26).

The court asked what efforts the investigator had made since June and also asked whether counsel had told the investigator to report to counsel what the investigator was doing (R.T. 26-27). Counsel responded that he had given the investigator a list and had inquired of the investigator, but the investigator "threw [the list] back at [counsel] and said I don't have a date of birth" (R.T. 27). The court continued, "So what you're telling me is the investigator did make an attempt to find these people, he just couldn't find them?" and counsel answered, "That's correct." (id.).

The court denied Petitioner's request to substitute counsel and declined to overturn the denial of a continuance (R.T. 30). The court told Petitioner:

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[13] While the defense investigator evidently had located 16 of the 20 witnesses by June 11, 2008 (FAP Exh. 6(A)), when and how the investigator actually shared with counsel the information obtained from the CDC is uncertain. See FAP Exh. 6, ¶¶ 7-8; FAP Exh. 19, ¶ 7 (generally stating that copies of Exhibits 6(A) and 7 were found in counsel's trial file after trial, without indicating when those exhibits were given to counsel).

> [T]here was nothing to stop you or your attorney from asking for another investigator if you were unhappy with the job the investigator was doing during the five months since the preliminary hearing. But I can't fault [trial counsel] for that. And this is a Marsden motion, and I'm not going to revisit the motion to continue.

(R.T. 30).

Petitioner then asked, "Can I make a motion to represent myself pro per?" (R.T. 30). The court said that Petitioner could do so, but "without any further continuances" (id.). Petitioner immediately asked for a 30-day continuance (id.). The court responded, "I've got a jury outside the door here, so I won't let you go pro per on that basis. ¶ So if you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied" (R.T. 31). Petitioner advised the court that he wanted time to subpoena information so that he could locate witnesses and thought he could obtain "at least . . . a couple [witness] statements" in 30 days (id.). The trial court expressed doubt that Petitioner would be able to subpoena witnesses, given counsel's representations during the Marsden hearing that the defense investigator had not been able to locate witnesses (R.T. 32 ("You assumed that [the witnesses are] in custody, but [the investigator] hasn't been able to find them. And [the investigator] would know if they were a custody status.")). Petitioner requested "some inquiry," and the court asked whether the investigator was there to support Petitioner's Marsden motion (R.T. 32). The investigator was not

present (see FAP Exh. 6, ¶ 9). The court concluded:

> [Counsel] has indicated to me that this investigator was sent out on the case and given a list. That's [counsel's] responsibility, he did that. Okay. You haven't given me another reason to remove [counsel] as the lawyer. You only requested pro per status so that you can get a continuance which I've denied. And the Marsden motion is denied.

(R.T. 33).

B. Additional Evidence Presented on Habeas Review

Petitioner presents the following additional evidence in connection with Grounds One and Six:

Declaration of Daniel Hines dated June 17, 2013 (FAP Exh. 1), which states in part:

> In January of 2005, Hines was housed a few cells away from Petitioner in the A-Row (¶ 1). Hines remembers seeing an inmate he knew as "Sleepy" being escorted to the attorney room by deputies and, when Sleepy refused to go, Hines saw one of the deputies push Sleepy into a wall, and deputies then dragged Sleepy down the tier (¶ 2). Hines and others yelled at the deputies to put Sleepy back into his cell (¶ 2). Someone threw something at the deputies and things escalated (¶ 2). "We just went crazy when we saw how Sleepy

was being treated" (¶ 2). What happened was "completely spontaneous." Hines never heard anyone "command" the inmates to break their sinks, and Petitioner was not a "shot caller" and did not order anybody to do anything (¶ 3).

The deputies left the tier and later came back to each cell on the tier and asked the inmates one by one if they were ready to come out and, if the inmate said no, he was shot with pepper balls (¶ 4). Hines was shot with pepper balls approximately 56 times before he was dragged from his cell (¶ 4). Hines saw Petitioner afterward, and Petitioner's face was red and swollen (¶ 5).

A day or so after the incident, each inmate was brought individually into a room with a sergeant and "about two other officers" (¶ 6).[14] When Hines was asked about what he saw, he "essentially" was told what he was supposed to say (i.e., "You didn't see nothing, right? You know what's going to happen if you say you did") (¶ 6). Hines agreed because he was afraid he would get beaten up if he disagreed (¶ 6).

Hines "thinks" he was out of prison in 2007 and 2008 (before and during Petitioner's trial), had regular contact with his parole officer through which he could have been contacted, and Hines would have testified on Petitioner's

[14] Hines does not state he was present when other inmates were brought to this room (¶ 6).

behalf (¶ 7).

Declaration of Erick Morales dated July 23, 2013 (FAP Exh. 2), which states in part:

> In 2005, Morales was in jail on the same tier as Petitioner (¶ 1). Morales had known Petitioner for the two years they were on the tier together (¶ 1). In January of 2005, Morales saw deputies bringing a prisoner to a visit with "a chokehold [sic] around the prisoners [sic] neck" (¶ 2). "The inmates became upset and started yelling and throwing things at the deputies. This was spontaneous. No one person started it. [Petitioner] didn't start it or tell anyone else what to do. Whatever we did, we did on our own. There wasn't a shot caller on our tier." (¶ 3).
>
> In 2007 and 2008, Morales was in prison and "it would have been easy to find [him]" (¶ 4). Morales would have testified on Petitioner's behalf (¶ 5).

Declaration of Gerardo Reyes dated July 7, 2013 (FAP Exh. 3), which states in part:

> In January of 2005, Reyes was housed in the cell next to Petitioner (¶ 1). Reyes remembered a time when deputies (including Deputy Orosco) came to the tier to bring Gonzalez out of his cell, one deputy telling Gonzalez he had an attorney visit (¶ 2). Reyes thought the deputies were lying

because of what Reyes had heard about Gonzalez' prior problems with deputies (i.e., Gonzalez was involved in a riot at another jail during which deputies may have been injured) (¶ 3). Reyes thought the deputies were trying to retaliate (¶ 3). Some other inmates and Reyes asked the deputies where they were really taking Gonzalez. (¶ 4). "We said we knew he wasn't going to an attorney visit." (¶ 4).

When Gonzalez tried to go back to his cell, the deputies grabbed Gonzalez and dragged him out of the tier, cuffed, and not resisting (¶ 4). Reyes was upset about how the deputies handled the situation because they "lied about where they were taking him, then they dragged him out," so Reyes threw an apple at the deputies (¶ 5). Other inmates started throwing things too (¶ 5). Reyes believes he was the first to break his sink, using a knob within a sock to break the sink (¶ 5). Petitioner did not make any agreement with Reyes to break their sinks; Reyes just decided to break his sink (¶ 5).

"[Petitioner] was not a shot caller. He didn't start the incident, lead it, or tell anyone what to do during it. [Petitioner] did not tell me to break my sink or to do anything else. In jail, if a deputy messes with any one of the inmates, the rest are going to jump in to help the inmate. That's just what we do." (¶ 6). The deputies seemed to dislike Petitioner (¶ 8).

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> In 2007 and 2008, Reyes was incarcerated and "would have been easy to find" (¶ 9). Reyes would have testified in Petitioner's defense (¶ 9).

Declaration of Timothy Trujillo dated June 25, 2013 (FAP Exh. 4), stating in part:

> In January of 2005, Trujillo was housed in the cell adjacent to Petitioner (¶ 1). Trujillo "participated in an incident (cell extraction) that occurred which stem [sic] from sheriffs deputies physically assaulting and using excessive force on a man whom [sic] at the time was unable to defend himself because he was handcuffed" (¶ 2). When he saw the "assault," Trujillo wanted the deputies to stop, so he began to throw personal property (bars of soap, a container of grease, food items) (¶ 3). "Out of anger and protest I even began breaking things in my cell such as my sink, desk, and light fixture" (¶ 4). "Not at any time ever did [Petitioner] or anyone . . . tell or order anyone on the row to participate in the incident[,] nor was anyone told to break and/or cause damage to anything in their cell. [Petitioner] was just a regular guy like everyone else on the row[,] he did not possess any leadership over anyone" (¶ 5). When the deputies came back to do the cell extraction, Trujillo was shot with pepper balls and was beaten (¶ 6).

Trujillo does not indicate where he was in 2007 and 2008, and does not state whether he would have testified in Petitioner's

defense.[15]

Declaration of Jay Reddix dated August 21, 2013 (FAP Exh. 5), which states in part:

> In January of 2005, Reddix was housed on the same row as Petitioner (¶ 1). Reddix recalls "a cell extraction" that occurred around that time (¶ 1). Reddix was lying on his bed when he heard a commotion, stood up and looked out to see two deputies dragging another inmate down the tier (¶ 2). The inmate was handcuffed and being poked with the deputies' sticks as they dragged him (¶ 2). Reddix watched the inmate fall and saw the deputies continue to drag the inmate off the tier, beating the inmate all the way out of the tier (¶ 2). Reddix heard other inmates yelling at the deputies to stop and inmates started throwing things (¶ 3).
>
> A few hours later, there was a cell extraction where the deputies first asked the inmates to volunteer to come out (¶ 4). The deputies were in full riot gear, wearing masks and holding shields, so Reddix did not want to come out (¶ 4). Based on his prior experience of being beaten by deputies in jail, Reddix felt certain if he did come out he would be beaten (¶ 4).

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[15] To establish prejudice caused by the failure to call a witness, Petitioner must provide evidence, inter alia, that the witness would have testified at trial if called upon. See, e.g., United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir.), cert. denied, 488 U.S. 910 (1988).

Nobody volunteered to leave their cells, so the deputies began shooting gas balls into each cell, including Reddix's cell, and Reddix then volunteered to leave his cell (¶ 5). Reddix crawled out of his cell backwards and was picked up and dragged off the tier (¶ 5).

Reddix did not hear any of the inmates tell anyone else to break their sinks or to throw things at the deputies (¶ 6). In Reddix's opinion, the deputies started the incident (¶ 6). Reddix was able to communicate with all of the other inmates on the tier (¶ 7). If there was a shot caller, Reddix would have known (¶ 7). There was no shot caller and Petitioner was not a shot caller (¶ 7).

In 2007 and 2008, Reddix was in prison and "would have been easy to find" (¶ 8). Reddix would have testified in Petitioner's defense (¶ 8).

Declaration of Robert Royce dated August 29, 2013 (FAP Exh. 6), which states in part:

Royce was appointed as the defense investigator in both Petitioner's capital case and in the case involving the jail incident (¶ 2). Petitioner gave Royce 7-10 names of inmates he thought had the best view of the incident at the jail (¶ 5). Royce was able to locate the names of other potential witnesses from reports of the incident that the sheriff's deputies wrote (¶ 5). Royce planned to locate as many

witnesses as possible, then go interview them (¶ 5). To visit witnesses still held in county jail, Royce needed Petitioner's attorney to obtain a court order (¶ 6). To visit witnesses who had been transferred to prison, Royce needed a written request from the attorney and a travel order if the prison was located outside of Los Angeles County (¶ 6). Royce told Petitioner's counsel "more than once" what he needed to visit witnesses, "but nothing ever came of it" (¶ 7).

Royce located many of the potential witnesses by contacting the California Department of Corrections in June of 2008 (¶ 7 & Exhibit A to the Declaration (copy of CDC correspondence wherein Royce provided the inmates' names and dates of birth, and the CDC provided locations and CDC numbers for 16 inmates)). Although Royce was busy with his practice, he had the time and was willing to travel and interview witnesses for Petitioner's case (¶ 8). The only reason why witnesses were not interviewed was because counsel never gave Royce the necessary authorizations (¶ 8). Royce told Petitioner's counsel about the witnesses Royce had located, and Royce does not know why counsel failed to authorize Royce to interview the witnesses (¶ 8).

Royce was not in court on the day Petitioner's trial commenced (¶ 9). Royce only interviewed one inmate (Gonzalez) for Petitioner's jail incident case, and did so shortly before Gonzalez testified (¶ 10).

> Royce was "ready" to investigate "potential impeachment material" on the deputies involved in the incident, but counsel "did not pursue this avenue of investigation" (¶ 11).

"Memo" from Robert Royce to Clay Jacke dated June 8, 2008 (FAP Exh. 7) (which has not been authenticated) states:

> The police reports from the incident listed 18 witnesses with "old addresses" that Royce had checked. Royce located "possible" addresses for 13 of the witnesses and would be following up to make contact at the addresses to interview those witnesses. Royce located five witnesses housed in the Los Angeles County Jail (for which he would need a letter from counsel to access).[16] Royce found civil rights cases filed against eight of the deputies alleged to have been involved in the incident. See id.

"Order for Additional Funds For Investigator, etc." filed June 9, 2008 (FAP Exh. 8), authorizing 50 additional investigative hours for Petitioner's case. Petitioner's counsel concurrently filed a declaration requesting those funds for "locating, interviewing and subpoenaing witnesses." See id.

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[16] Four of these five witnesses were identified as being in CDC custody as of June 11, 2008. Compare FAP Exs. 6(A) & 7.

"Declaration and Order Re Fees for All Court Appointments" dated September 9, 2008, by Petitioner's counsel (FAP Exh. 9), stating in part that counsel had studied "reports and video" and interviewed Petitioner prior to Petitioner's trial. See id.

"Incident Report" dated January 8, 2005 (FAP Exh. 10), listing 20 inmate "suspects" (other than Petitioner) including names, dates of birth, residential addresses, and booking numbers. See id.

Partial Transcripts from Petitioner's Capital Case dated December 5, 2006 and October 26, 2008 (FAP Exhs. 11 and 13) (filed under seal in this case).

Minute Order from Petitioner's Capital Case dated October 25, 2007 (FAP Exh. 12), containing the jury's guilty verdict. See id.

Minute Order from Petitioner's Capital Case dated November 9, 2007 (FAP Exh. 14), wherein the trial court declared a mistrial as to the penalty phase of trial proceedings. See id.

"Felony Complaint for Arrest Warrant" dated November 24, 2007 (FAP Exh. 15), for the charges arising from the jail riot. See id.

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"Notice to court of defendant renouncing pro-per status and request for counsel" filed on January 8, 2008 (FAP Exh. 16), filed in the riot case. See id.

"3300 A-Row diagram (FAP Exh. 17), identifying the inmates in cells as follows: A-3 Francisco Morales, A-4 Rudy Tafoya, A-5 Erick Morales, A-6 Gerardo Reyes, A-7 Petitioner, A-8 Timothy Trujillo, A-10 Daniel Hines, A-11 Daniel Valenzuela, and A-19 Walter Cortez. See id.

"Housing Location Inquiry" as of November 27, 2007 (FAP Exh. 18) (bates stamped 91-94), listing inmates for Module 3300, including their booking numbers and cell locations. See id.

Declaration of Rebecca Dobkin dated November 12, 2013 (FAP Exh. 19), wherein Petitioner's federal habeas counsel's investigator states that she reviewed the trial files from Petitioner's counsel and from Robert Royce, and that copies of FAP Exhibits 6(A), 7, 10, and 18, were found in the trial file of Petitioner's trial counsel, and copies of FAP Exhibits 6(A) and 7 were found in Royce's file. See id.

"Annual Report on Conditions Inside Los Angeles County Jail, 2008-2009, dated May 5, 2010 (FAP Exh. 20), which discusses "deputy abuse" and retaliation. See id.

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"Declaration of Tom Parker in Support of Plaintiffs' Motion for Class Certification" filed in *Rosas and Goodwin v. Baca*, C.D. Cal. Case No. CV 12-428-DDP, dated February 23, 2012 (FAP Exh. 21), concerning allegations of abuse and excessive force in the Los Angeles County jails. See id.

"Report of the Citizens' Commission on Jail Violence" dated September 2012 (FAP Exh. 22), concerning allegations of "unreasonable violence" by deputies in Los Angeles County jails. See id.

C. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

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Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have

been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 105.

D. The Superior Court Reasonably Determined that Petitioner's Claim of Ineffective Assistance Fails for Want of Prejudice.

Petitioner alleges that counsel's investigation was deficient because counsel assertedly: (1) failed to interview any potential inmate witnesses prior to trial (FAP, Ground One, pp. 24-25, 29-36); and (2) failed to investigate the general conditions of the Los Angeles County Men's Central Jail (FAP, Ground One, pp. 36-41).

Assuming, arguendo, that counsel's performance was unreasonable, Petitioner has failed to prove any Strickland prejudice resulting therefrom. See Strickland, 466 U.S. at 697. Petitioner was convicted of conspiracy to commit assault and vandalism, three counts of resisting an executive officer, and assault by means likely to produce great bodily injury on Deputy Morales and on Deputy Alvarez (C.T. 288-96). The trial evidence compellingly established Petitioner's guilt

as to all of these charges. Petitioner suggests that the verdicts might have been different if counsel had presented the other inmate witnesses' testimony and evidence of deputy-on-inmate abuse at the jail. However, as the Superior Court reasonably determined, and as discussed below, such evidence would not have produced a substantial likelihood of a different trial outcome.

For the conspiracy charges, the prosecution needed only to show that two or more persons agreed to commit vandalism or assault, and took one overt act to further the conspiracy. See C.T. 254-63 (jury instructions). "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." People v. Morante, 20 Cal. 4th 403, 416, 84 Cal. Rptr. 2d 665, 975 P.2d 1071 (1999) (citations omitted). "The elements of a conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.'" People v. Vu, 143 Cal. App. 4th 1009, 1024-25, 49 Cal. Rptr. 3d 765 (2006) (citations omitted). "To prove an agreement, it is not necessary to establish that the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." Id. at 1025 (citation omitted).

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At Petitioner's trial, the evidence included deputies' testimony regarding what Petitioner and others said and did, a videotape showing what Petitioner and others did, and Petitioner's own incriminating testimony. Petitioner admitted that more than one inmate (including Petitioner) intentionally broke their sinks and threw pieces of porcelain and other items at the deputies (constituting five of the alleged overt acts for conspiracy to commit assault and both of the alleged overt acts for conspiracy to commit vandalism) (R.T. 1567, 1573, 1706, 1715-16, 1718-19, 1722, 1725-28, 1747-50, 1758, 1838-39; see C.T. 262-63, 288-90 (conspiracy jury instructions and related verdicts)).

The inmate declarations Petitioner now submits allege that, contrary to prosecution evidence, Petitioner did not order anyone to throw anything, break sinks or take any other action during the riot, and each declaration denies that Petitioner was a "shot caller" for the row (FAP Exhs. 1-5). Hines and Erick Morales state that the inmates became upset and threw things at deputies as a spontaneous reaction to the manner in which Gonzalez was removed (FAP Exh. 1, ¶ 2-3; FAP Exh. 2, ¶ 3). Reyes states that he was the first to break his sink and that Petitioner did not make any agreement with him to break sinks (FAP Exh. 3, ¶ 5).

It was reasonable for the Superior Court to conclude that the inmates' potential testimony would not have produced a substantial likelihood of a different trial outcome. The inmate testimony would have supported the prosecution evidence that multiple inmates broke their sinks within a short time frame (see FAP Exh. 3, ¶ 5 (Reyes

admitting he broke his sink); FAP Exh. 4, ¶ 4 (Trujillo admitting that he broke his sink)). The inmate testimony also could have supported the logical inference that the inmates were acting in concert and by agreement during the riot. Moreover, Petitioner need not have specifically directed the other inmates to break their sinks or throw things at the deputies to be found guilty of conspiracy. In fact, while finding Petitioner guilty of conspiracy, the jury found "not true" the overt act allegation that Petitioner urged another inmate to break his sink. For the remainder of the charges (i.e., resisting executive officers and assault by means likely to produce great bodily injury), the inmates' testimony would have been largely if not entirely cumulative of the evidence adduced at trial concerning the officers' use of force.

Furthermore, in some respects, the inmates' testimony actually would have undercut Petitioner's defense and would have supported rather than impugned the jury's verdicts. For example, Petitioner was convicted of resisting executive officers (Deputies Ibarra, Argueta, Orosco, and Taylor), the deputies who removed Gonzalez from A-Row. See C.T. 291 (verdict); R.T. 656-57 (Deputy Ibarra testifying regarding who removed Gonzalez from the row); but see R.T. 1276-77, 1281-91, 1297-98, 1318-21, 1327-31, 1337-41, 1549-57, 1700, 1849-50 (Gonzalez and then Petitioner testifying that it was only Deputy Ibarra who removed Gonzalez from the row). A person may be found guilty of resisting executive officers in two separate ways: "The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her

duty." People v. Smith, 57 Cal. 4th 232, 240, 159 Cal. Rptr. 3d 57, 303 P.3d 368 (2013) (citation omitted). A defendant cannot be convicted of an offense against an officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time the offense against the officer was committed. Id. at 241 (citations omitted). Here, Petitioner's admission that he intentionally threw things directly at Deputy Ibarra to "interfere" with Ibarra as Ibarra attempted to remove Gonzalez from the row supported this charge (R.T. 1839-40). The inmate declarations reinforce the fact that inmates threw things at the deputies to try to prevent the removal of Gonzalez from the row. See FAP Exh. 1, ¶ 2 (Hines stating that the inmates yelled to have Gonzalez put back in his cell and threw things at the deputies); FAP Exh. 2, ¶ 3 (Erick Morales stating that the inmates yelled and threw things); FAP Exh. 3, ¶¶ 4-5 (Reyes stating that inmates asked questions challenging Gonzalez' removal and threw things at the deputies); FAP Exh. 4, ¶ 3 (Trujillo stating that he threw things because he wanted the deputies to stop the "assault" on Gonzalez); FAP Exh. 5, ¶ 3 (Reddix stating that he heard inmates yelling at the deputies to stop what they were doing to Gonzalez and that inmates threw things).

The jury had before it ample evidence of the deputies' use of force in dealing with the inmates on A-Row during the riot. As noted above, Deputy Ibarra admitted that Gonzalez' removal involved dragging and pepper spraying Gonzalez (R.T. 665-66, 709-10). Gonzalez testified that he struggled and fought with Ibarra, who had him by the neck and dragged him from the row in front of the other inmates, and that he then was beaten by Ibarra and other deputies and maced into

submission (R.T. 1286-93, 1321, 1327-31, 1337-41). Petitioner testified that Gonzalez was beaten in the sally port area (R.T. 1552-53, 1557-58). When the extraction team later came onto A-Row, two deputies were firing pepper ball guns into the cells from where the porcelain was being thrown, and one or two deputies were spraying pepper spray near those cells (R.T. 938, 942-45, 973-75). The deputies admittedly fired more than 30 pepper balls into Petitioner's cell, and sprayed five or more bursts of pepper spray from the canister into his cell when Petitioner refused to comply with their commands (R.T. 944, 975-76). The videotape showed, and Deputy Morales confirmed, that the extraction team used "a lot" of pepper spray and pepper balls to remove inmates from their cells (R.T. 778, 786-87). However, the videotape also showed that 16 of the inmates on the row walked out peacefully in handcuffs during the extraction (R.T. 1836). The other inmates' testimony would not have added anything significantly material to all of this trial evidence regarding the deputies' use of force. None of the inmates were present when Petitioner was removed from his cell, so they could not have testified competently regarding the circumstances under which Petitioner purported to have acted in self-defense at that time.

The inmate testimony would have undermined Petitioner's defense at trial in several additional respects. Contrary to Petitioner's and Gonzalez' purportedly emphatic trial testimony that Deputy Ibarra was the only deputy to remove Gonzalez from the row, all of the other inmate witnesses now agree that more than one deputy removed Gonzalez from A-row. See FAP Exh. 1, ¶ 2 (Hines referring to "deputies" removing Gonzalez from the row); FAP Exh. 2, ¶ 2 (same for Erick

Morales); FAP Exh. 3, ¶ 2 (same for Reyes); FAP Exh. 4, ¶¶ 2-3 (same for Trujillo); FAP Exh. 5, ¶ 2 (same for Reddix). Contrary to Petitioner's trial testimony that the deputies threatened over the loud speaker to "fuck [the inmates] up" right after Gonzalez was removed from A-Row, none of the other inmate witnesses now state that the deputies ever threatened the inmates over the loud speaker. See FAP Exhs. 1-5.

Finally, as the Superior Court reasonably emphasized, the other inmates' testimony would have been vulnerable to effective impeachment for bias, given these inmates' own participation in the riot and the fact that the proffered testimony of each is "so similar in content and language" (despite the inmates' differing vantage points) as to raise "the specter of whether the statements offered by the inmates were specifically designed for achieving a certain outcome or result in the litigation" (Respondent's Lodgment 20, pp. 523-25). Each inmate's testimony also would have been impeached by Gonzalez' trial admission that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed.

In sum, the Court finds no substantial, reasonable likelihood of a different verdict had the jury been presented with the inmates'

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testimony.[17] As discussed above, such testimony is largely cumulative of the trial evidence concerning the force used by the deputies during the riot, impeaches the defense witnesses' testimony in some respects, does not materially mitigate Petitioner's own incriminating admissions, and actually supports certain aspects of the prosecution's case. Additionally, as the Superior Court correctly observed, the inmate testimony would have been vulnerable to effective impeachment. See Respondent's Lodgment 20, pp. 523-25. Finally, the inmate testimony would not have undermined the compelling strength of the prosecution's evidence.

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[17] Nor does the Court find any prejudice from counsel's alleged failure to investigate the reported history of deputy-on-inmate abuse at the jail. Petitioner has provided reports post-dating Petitioner's conviction that generally concern allegations of physical abuse and excessive force in the Los Angeles County jails (FAP Exhs. 20-22). Petitioner claims these reports chronicle a long history of deputy-on-inmate violence based on "numerous publicly available reports," which counsel supposedly could have probed for leads on evidence to lend credibility to the defense that Petitioner feared physical abuse at the hands of his jailers (FAP, p. 37). Petitioner has not identified specific evidence within these reports existing at the time of Petitioner's trial that counsel could or should have unearthed. See FAP, p. 37 & n. 4. Petitioner's vague and speculative allegations that there existed unidentified evidence counsel should have presented do not establish Strickland prejudice. See Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (no Strickland prejudice where petitioner did "nothing more than speculate that if interviewed, [a potential witness] might have given information helpful to [petitioner]"); see also Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), cert. denied, 559 U.S. 995 (2010) (speculation insufficient to show Strickland prejudice); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991) (petitioner cannot satisfy Strickland standard by "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"). In any event, there is no substantial, reasonable likelihood that general evidence of deputy-on-inmate abuse in the county jail system would have altered the result of Petitioner's trial.

The Superior Court's rejection of Petitioner's ineffective assistance claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground One.

II. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that the Trial Court Unconstitutionally Denied Petitioner's Request for Self-Representation.

Petitioner challenges the trial court's denial of Petitioner's request for self-representation, which Petitioner made immediately after the court denied Petitioner's Marsden motion on the eve of trial. See FAP, Ground Two, pp. 41-47; Reply, pp. 19-26. The California Court of Appeal issued the last reasoned decision rejecting this claim, ruling that the trial court did not abuse its discretion by denying Petitioner's request. See People v. McGhee, 2010 WL 2510095, at *6-7 (Cal. App. June 23, 2010).[18] The Court of Appeal stated, inter alia, that "[Petitioner's] request for self-representation brought on the eve of trial appears to be a ploy to obtain a continuance." Id. at *7 (citations omitted).

A. Governing Legal Standards

Under Faretta v. California, 422 U.S. 806, 820-21 (1975), a criminal defendant is constitutionally entitled to waive his or her

[18] Respondent's Lodgment 1, which purports to be this decision of the Court of Appeal, is missing several pages.

Sixth Amendment right to counsel and to represent himself or herself at trial. See also Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir.), cert. denied, 521 U.S. 1111 (1997) (Faretta rule is clearly established by United States Supreme Court for purposes of 28 U.S.C. section 2254(d)). Under Ninth Circuit law, a Faretta request must be: (1) knowing and intelligent; (2) unequivocal;[19] (3) timely; and (4) not asserted for purposes of delay. Hirschfield v. Payne, 420 F.3d 922, 926 (9th Cir. 2005); United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991).

In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, 546 U.S. 860 (2005), the Ninth Circuit recognized that, although no United States Supreme Court case has directly addressed the timing of a request for self-representation, Faretta itself incorporated a timing element. Id. at 1060. The Ninth Circuit read Faretta to "require a court to grant a Faretta request when the request occurs 'weeks before trial.'" Id. at 1061. However, the Ninth Circuit ruled that, "[b]ecause the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." Id. (footnote omitted). The Marshall Court held that, because the petitioner's request for self-

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[19] This Court assumes, arguendo, that Petitioner made an unequivocal Faretta request. But see Jackson v. Ylst, 921 F.2d 882, 888-89 (9th Cir. 1990) (request for self-representation that was an "impulsive response to the trial court's denial of [defendant's] request for substitute counsel" deemed equivocal); Young v. Knipp, 2013 WL 2154158, at *8 (C.D. Cal. May 15, 2013) (Faretta request coupled with request for 30-day continuance deemed equivocal).

representation on the morning of trial "fell well inside the 'weeks before trial' standard for timeliness established by Faretta," the state court's finding of untimeliness "clearly comport[ed] with Supreme Court precedent." Id.

B. Analysis

Petitioner made his request for self-representation on July 21, 2008, the day the case was assigned for trial after two previous continuances of the trial date. Because Petitioner's request came well within the "weeks before trial" standard set forth in Faretta, the trial court's rejection of Petitioner's Faretta request was not an objectively unreasonable application of Faretta. See Marshall v. Taylor, 395 F.3d at 1061; see also Burton v. Davis, 816 F.3d 1132, 1141-42 (9th Cir. 2016) (where defendant made request three days before jury was empaneled, Faretta did not "clearly entitle" defendant to habeas relief for denial of request); Stenson v. Lambert, 504 F.3d 873, 884-85 (9th Cir. 2007), cert. denied, 555 U.S. 908 (2008) (because there was no Supreme Court holding that request for self-representation made on eve of trial was timely, denial of request did not violate Faretta and was not objectively unreasonable under AEDPA); Ake v. Biter, 2013 WL 1515859, *12 (C.D. Cal. Feb. 6, 2013), adopted, 2013 WL 1511745 (C.D. Cal. Apr. 11, 2013) (request on the day set for trial and the day before jury selection began untimely; denial comported with Faretta); see generally Williams v. Taylor, 529 U.S. 362, 412 (2000) ("[AEDPA] restricts the source of clearly established law to [the Supreme] Court's jurisprudence").

Furthermore, Petitioner made his request for self-representation after the presiding judge denied trial counsel's request for a continuance and after the trial judge denied Petitioner's Marsden motion. See FAP, pp. 45-46; R.T. A5-A7, A-11, 3-4, 13-31. With his request for self-representation, Petitioner concurrently made another request for a trial continuance (R.T. 30-31). On this record, it was not unreasonable for the Court of Appeal to find that Petitioner made the Faretta motion as a ploy for the purpose of delay. See Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982) (if a defendant accompanies a Faretta motion with a request for continuance, this may be considered evidence of purpose to delay); see also Hirschfield v. Payne, 420 F.3d at 927 (state court finding that Faretta request was made for the purpose of delay was not unreasonable where the request came the day before the start of trial, was accompanied by a request for continuance, and the defendant previously had made requests to substitute counsel).[20]

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[20] Petitioner argues that the trial court (and the Court of Appeal) denied the Faretta request in reliance on Petitioner's failure to give a sufficient "reason to remove Mr. Jacke as the lawyer" (Reply, p. 20 (quoting R.T. 33); Reply, p. 21 (quoting People v. McGhee, 2010 WL 2510095, at *7)). The record belies this argument. The trial court denied the Faretta request because Petitioner was requesting another continuance on the eve of trial. See R.T. 31 ("[I]f you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied."); R.T. 33 ("You only requested pro per status so that you can get a continuance which I've denied."). The trial court's discussion of Petitioner's reasons for removing counsel concerned Petitioner's Marsden motion. See R.T. 33. Similarly, the Court of Appeal found no abuse of discretion in denying the Faretta request because, under the totality of circumstances, Petitioner's request appeared "to be a ploy to obtain a continuance." See People v. McGhee, 2010 WL 2510095, at *6-7.

Petitioner's citations of Buhl v. Cooksey, 233 F.3d 783, 794 (3d Cir. 2000) ("Buhl"), Moore v. Haviland, 531 F.3d 393 (6th Cir. 2008), cert. denied, 558 U.S. 933 (2009) ("Moore"), and Jones v. Norman, 633 F.3d 661, 664 (8th Cir. 2011) ("Jones") (see Reply, p. 20) do not alter the Court's conclusion. In Buhl, the Third Circuit found timely a Faretta request that was filed several weeks before trial was scheduled to begin. Because a timely request had been made, Third Circuit precedent required the trial court to inquire concerning the defendant's reasons for the request to aid the court in determining if the request was voluntary, knowing, and intelligent. Id. at 794-97. In Petitioner's case, there was no Faretta request made weeks before trial, and it is clear from the record that the trial court understood that Petitioner's supposed reason for making the Faretta request was to obtain a continuance to conduct discovery that had not been done – the same reason for which counsel had requested and been denied a continuance. See R.T. A-6 - A-8, 19-32; C.T. 176-77 (motion to continue). In Moore, the Sixth Circuit found a Faretta violation where the trial court did not rule on the Faretta request at all. Moore, 531 F.3d at 402-03. In Jones, the Eighth Circuit found a Faretta violation where the trial court had applied too high a standard in determining whether the Faretta request was knowing and voluntary. Jones, 633 F.3d at 666-67. None of these out of circuit decisions apply in Petitioner's circumstance.

Petitioner faults the trial court for not inquiring of the defense investigator concerning the status of discovery. See FAP, p. 45; R.T. 32. The defense had not made the investigator available for the hearing, and the trial court was entitled to rely on the

representations of Petitioner's counsel concerning the status of the investigation. Under the circumstances, Faretta does not clearly require the inquiry for which Petitioner argues. See Faretta, 422 U.S. at 835.

Petitioner also argues that he made his Faretta request at the first available opportunity after he realized his counsel had not prepared desired witnesses. No United States Supreme Court law clearly establishes that an eve of trial Faretta motion is timely under such circumstances. Moreover, contrary to Petitioner's argument, he actually did have prior opportunities to make a Faretta request in essentially the same factual circumstances. There were pretrial conferences on April 22, 2008, and June 4, 2008, and the case was called for trial on June 30, 2008 (C.T. 136-38, 142). On June 30, 2008, Petitioner was present with another attorney appearing on behalf of his trial counsel who was engaged in another trial (C.T. 142). The trial court then continued the trial date to July 14, 2008, because, inter alia, defense counsel supposedly needed time to locate and interview witnesses (C.T. 139-40, 142). Thus, on the June 30, 2008 trial date, Petitioner was on notice that desired witnesses had not been interviewed. Yet, Petitioner did not make any Faretta request at that time (C.T. 142-43).

Defense counsel then filed a motion to dismiss for want of prosecution and discriminatory prosecution on July 11, 2008, in which counsel declared, "The defendant has informed me and I believe him when he says witnesses are impossible to find. The defense investigator has been unable to locate several of the witnesses. . . .

The police reports did not record the residence addresses of the inmates. The reports merely indicate that they resided at the county jail. This makes it impossible to find witnesses" (C.T. 144-57). When the case returned for trial on July 14, 2008, Petitioner again was present with a substitute attorney appearing because trial counsel was still engaged in another trial (C.T. 168). Once again, Petitioner was on notice that desired witnesses had not been interviewed. Furthermore, Petitioner was on notice that counsel purportedly believed that it would be impossible to find the witnesses. Yet, Petitioner still did not make any Faretta request at the July 14, 2008 hearing (C.T. 168). Instead, he waited until after the Superior Court's July 21 denials of two 11th hour requests for a third continuance before invoking Faretta in the apparent (and ultimately vain) hope of reversing these continuance denials.

Petitioner has failed to demonstrate that the Court of Appeal's rejection of his Faretta claim was contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Therefore, Petitioner is not entitled to federal habeas relief on Ground Two.

III. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that He Was Denied a Fair Trial By the Delay in Charging Him.

Petitioner claims that he was denied his due process right to a fair trial by the delay between the jail riot and the filing of the charges. See FAP, Ground Three, pp. 47-52 (erroneously referring to

this claim as a "speedy trial" claim); Reply, pp. 26-29.[21] The Court of Appeal issued the last reasoned decision denying this claim, finding that Petitioner had not shown prejudice from the delay. See People v. McGhee, 2010 WL 2510095 at *7-8. In reviewing this claim, the Court is limited to the record that was before the Court of Appeal at the time of its decision. See Ryan v. Gonzalez, 568 U.S. 57, 68 (2013) (review "is limited to the record that was before the state court that adjudicated the claim on the merits") (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)).[22]

A. Background

Three days before the scheduled trial date, Petitioner filed a motion to dismiss the charges for want of prosecution (pre-indictment delay) and for assertedly discriminatory prosecution (C.T. 144-57).

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[21] The Sixth Amendment right to a speedy trial attaches only at the time of arrest, indictment, or other official accusation. See United States v. Marion, 404 U.S. 307, 321 (1971) ("Marion") (holding that the Sixth Amendment speedy trial provision is not implicated until formal charges are filed or defendant suffers actual restraint on liberty); see also Doggett v. United States, 505 U.S. 647, 654 (1992); United States v. MacDonald, 456 U.S. 1, 6-7 (1982); United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Pre-charge delay (i.e., delay prior to arrest or the filing of formal charges) does not implicate the Sixth Amendment right to a speedy trial. United States v. Lovasco, 431 U.S. 783, 788-89 (1977); Marion, 404 U.S. at 321-23.

[22] Petitioner did not submit any additional evidence to the California Supreme Court before the Supreme Court summarily denied review in 2010 (Respondent's Lodgments 2 and 3). If Petitioner had done so, such additional evidence could be considered in reviewing this claim. See Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

Petitioner alleged that the prosecutor waited until November 13, 2007 to file any felony complaint for crimes arising from the January 5, 2005 incident, and then charged only Petitioner (C.T. 146). Petitioner argued that the prosecution sought to have the jail riot case precede the retrial on the penalty phase of Petitioner's capital case. Yet, as Petitioner conceded, the prosecution had announced before the beginning of the guilt phase of the capital trial that the state would file jail riot charges against Petitioner (C.T. 147). Petitioner also alleged that the prosecution had "tendered" an "unofficial/off the record settlement" in the capital case prior to the start of the penalty phase (C.T. 148). Petitioner alleged that the settlement assertedly discussed would have given him life without parole in the capital case, and "the riot case would be included in some way," in return for Petitioner's waiver of appeal (C.T. 148). Petitioner alleged that the delay in filing the charges in the jail riot case caused the loss of potential defense witnesses, the fading of memory, and the destruction of physical evidence (C.T. 147, 149, 151). Petitioner further alleged that the prosecution brought the jail riot charges in "bad faith" to try to "coerce" a plea in the capital case and to avoid a trial on the penalty phase of the capital case (C.T. 148). Petitioner argued that this conduct effectively deprived him of his due process right under the federal constitution (C.T. 149-50 (citing United States v. Ross, 123 F.3d 1181 (9th Cir. 1997)).

The prosecution opposed the motion, arguing that the decision to file the present charges preceded the murder trial and was unrelated to Petitioner's rejection of any alleged plea offers in the capital

case (C.T. 170-71; see also C.T. 173-74). The prosecutor stated that, in preparing for the capital case, he had discovered the videotape of the jail riot showing Petitioner throwing porcelain at the officers. The prosecutor claimed that, because he then was busy preparing for the murder trial and the statute of limitations on the potential riot charges was not yet close to expiring, the prosecutor had opted to wait to proceed on the riot charges (C.T. 170-71; R.T. A-4 - A-5). The prosecutor said that he had charged only Petitioner in the jail riot case because, as a "special unit" prosecutor, he did not have any responsibility or jurisdiction over the others who had been involved in the jail riot (R.T. A-4).

The presiding judge denied Petitioner's motion, characterizing the video evidence against Petitioner as "very compelling," and finding that there was no vindictiveness by the prosecution and no material prejudice as a result of the delay in filing (R.T. A-5). As previously indicated, the Court of Appeal later ruled that Petitioner had failed to show prejudice resulting from the pre-charge delay.

B. Governing Legal Standards

The Due Process Clause provides a criminal defendant with some protection against delay between the commission of an offense and the initiation of a prosecution. United States v. Lovasco, 431 U.S. at 788-89; Marion, 404 U.S. at 322. However, a claim that pre-charge delay denied a defendant due process requires, inter alia, proof of "actual, non-speculative prejudice [to the defense] from the delay, meaning proof that demonstrates exactly how the loss of evidence or

witnesses was prejudicial." United States v. Barken, 412 F.3d 1131, 1134 (9th Cir. 2005) (citations and internal quotations omitted). "Once prejudice is sufficiently proved, the court then undertakes the task of balancing the length of the delay against the reason for the delay." United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992); see also United States v. Lovasco, 431 U.S. at 789-90.

"A defendant claiming preindictment delay carries a 'heavy burden' of showing actual prejudice that is 'definite and not speculative.'" United States v. Ross, 123 F.3d 1181, 1185 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998) (citations omitted). "Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." United States v. Manning, 56 F.3d at 1194; see also United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007), cert. denied, 555 U.S. 865 (2008) (burden is one that is "rarely met"); see generally Marion, 404 U.S. at 325-26 (a defendant's reliance solely on the "real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost," is not in itself enough to demonstrate actual prejudice).

C. Analysis

The Court of Appeal reasonably determined that Petitioner failed to carry his burden to prove prejudice from the pre-charge delay. Petitioner asserts that he was prejudiced from the delay because he was unable to find and present any inmate witnesses other than Gonzalez. By the time he was charged, the witnesses reportedly had

either been released from jail or transferred to various state prisons. See FAP, pp. 50-51. Petitioner also asserts that one witness, Walter Cortez, had died by the time Petitioner was charged (FAP, p. 51). Petitioner suggests that these witnesses could have testified to events not captured on the videotape, and could have corroborated the defense testimony (FAP, pp. 51-52). Petitioner asserts that, by delaying bringing the charges, the prosecution intentionally gained a tactical advantage (FAP, p. 50).

However, Petitioner presented no competent evidence to the Court of Appeal regarding the identities of the other inmates who supposedly could have testified (other than the deceased Walter Cortez), the substance of their potential testimony, or when the other inmates were released or transferred from the jail. See Respondent's Lodgment 12, pp. 65-77; Respondent's Lodgment 14, pp. 17-20. Petitioner thus failed to furnish definite, nonspeculative proof that the charging delay actually impaired Petitioner's ability to defend himself. See United States v. Manning, 56 F.3d at 1194; see also United States v. Butz, 982 F.2d 1378, 1380 (9th Cir.), cert. denied, 510 U.S. 891 (1993) (assertions that a key witness had died, witnesses had dimmed memories, and that the defendant did not secure witnesses because of the belief no charges were forthcoming, were too speculative to demonstrate actual prejudice).

At trial, Petitioner testified at length and in detail concerning what he claimed transpired on the day of the jail riot (R.T. 1539-78, 1596-97, 1687-1841, 1846-55, 2104-2124). Petitioner's memory of the incident did not appear to have been impaired by the passage of time.

Petitioner said he was testifying based on his memory of how events actually happened rather than from the videotape (R.T. 2105-06).[23]

As for the potential witnesses never called by the trial defense, the Court of Appeal reasonably found from Petitioner's failure to identify the witnesses (other than the deceased Walter Cortez) and Petitioner's failure to delineate the substance of the witnesses' purported testimony that Petitioner had offered only speculation that these witnesses could have provided any evidence that would have been valuable to Petitioner.[24] People v. McGhee, 2010 WL 2510095 at *8. As the Court of Appeal reasonably concluded, Petitioner's speculation did not meet Petitioner's heavy burden to show prejudice from a pre-indictment delay. United States v. Butz, 982 F.2d at 1380; United States v. Huntley, 976 F.2d at 1290.[25]

Petitioner suggests that the Court of Appeal was required to evaluate prejudice in light of the applicable statute of limitations. See Reply, pp. 27-28 (quoting Marion, 404 U.S. at 326). Marion does

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[23] Gonzalez' purported memory appeared similarly unimpaired by the passage of time (R.T. 1279, 1281-82, 1285-86, 1292-93, 1320-21, 1327-28, 1337, 1340, 1343).

[24] Again, in reviewing the reasonableness of the Court of Appeal's denial of this claim, only the evidence that was then before the Court of Appeal may be considered. The inmate declarations submitted years later may not be considered in this review.

[25] Because the Court of Appeal reasonably determined that Petitioner failed to demonstrate prejudice to the Court of Appeal, this federal Court need not and does not balance "the length of the delay against the reason for the delay." See United States v. Huntley, 976 F.2d at 1290.

not so hold. To the contrary, Marion states that "in light of the applicable statute of limitations," "possibilities" of prejudice inherent in any extended delay do not demonstrate actual prejudice. See Marion, 404 U.S. at 326 (emphasis added). "There is [] no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitations already perform that function." Id. at 323 (quoting Toussie v. United States, 397 U.S. 112, 114 (1970). Here, the statute of limitations had not run, and Petitioner did not demonstrate actual prejudice.

The Court of Appeal's rejection of Petitioner's due process claim regarding pre-charging delay was not contrary to, or an unreasonable application of, any clearly established Federal law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground Three.

IV. Petitioner's Claim of Vindictive Prosecution Does Not Merit Federal Habeas Relief.

Petitioner contends that the prosecutor engaged in vindictive prosecution by bringing the charges in the jail riot case after Petitioner assertedly refused to accept a plea offer and waive his appellate rights in the capital case. See FAP, Ground Five, pp. 55-60; Reply, pp. 32-38. Petitioner alleges that the prosecution's decision violated due process and, by virtue of the pre-charge delay, his right to present a defense. Id.

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Petitioner raised this claim (among numerous other claims) in Petitioner's first round of habeas petitions filed in the state courts in 2011-12. See Respondent's Lodgment 4, pp. 54-57; Respondent's Lodgment 6, pp. 56-59; Respondent's Lodgment 8, pp. 26-30. The Superior Court and the Court of Appeal issued reasoned decisions denying the petitions, stating that the petitions reiterated issues raised on direct appeal and that Petitioner had failed to demonstrate ineffective assistance of counsel (Respondent's Lodgments 5 and 6).[26] Neither decision specifically mentioned Petitioner's vindictive prosecution claim (id.). The California Supreme Court denied Petitioner's habeas petition summarily (Respondent's Lodgment 9). Petitioner had not raised his vindictive prosecution claim on direct appeal, and the Court of Appeal's reasoned decision on direct appeal had not addressed such a claim. See Respondent's Lodgments 1-3, 12, 14. Therefore, there is no reasoned state court decision specifically discussing Petitioner's vindictive prosecution claim, Ground Five herein.

Petitioner argues that no state court ever reached the merits of Ground Five and this Court should review the claim de novo. See FAP, pp. 55-56; Reply, pp. 32-34. Respondent argues, inter alia, that the Court of Appeal's reasoned decision did not invoke any procedural bar as to Ground Five and this Court should review the denial of the claim under 28 U.S.C. section 2254(d). See FAP Answer, pp. 9-11, 34-35. Although the issue is not free from doubt, it appears that section 2254(d) should apply to the review of this claim.

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[26] Respondent's Lodgment 6 consists of several disparate documents.

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . ." Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1096 (2013). This "strong" presumption may be rebutted only in "unusual circumstances." Id., 133 S. Ct. at 1096-99. Even so, where the state court failed to address a federal claim as a result of "sheer inadvertence," the claim has not been adjudicated on the merits. Id., 133 S. Ct. at 1097.

In seeking de novo review of Ground Five, Petitioner theorizes that the Court of Appeal erroneously believed that its own previous opinion on Petitioner's direct appeal had discussed and denied Ground Five, even though Petitioner never raised Ground Five on direct appeal. Petitioner further theorizes that the California Supreme Court then adopted as its own basis for denying Ground Five the manifestly erroneous belief Petitioner imputes to the Court of Appeal. And, according to Petitioner, the California Supreme Court made this egregious error even though Petitioner expressly had told the Supreme Court in the habeas petition filed therein that claims in that petition had not been made on direct appeal (Respondent's Lodged Document 8 at pp. 5-6).

Petitioner's arguments for de novo review of Ground Five should be rejected. Nothing (including possible factual error in the

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Superior Court's previous habeas decision[27]) sufficiently rebuts the "strong" presumption that the Court of Appeal adjudicated Ground Five on the merits, albeit without any specific discussion. See Smith v. Oregon Bd. of Parole and Post-Prison Supervision, 736 F.3d 857, 860-61 (9th Cir. 2013) (applying presumption to cursory state court order).

Moreover, assuming arguendo the Court of Appeal did not adjudicate Ground Five on the merits and instead based its denial on the theorized mischaracterization of its own ruling on direct appeal, this federal Court should not presume that the California Supreme Court embraced the Court of Appeal's manifestly erroneous reasoning. Although a federal habeas court usually "looks through" a California Supreme Court's summary denial to presume the Supreme Court adopted the rationale of the lower court, such presumption may be refuted by "strong evidence." See Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) ("Kernan"). In Kernan, the United States Supreme Court deemed the "look through" presumption "amply refuted" in circumstances where it would have been absurd for the California Supreme Court to have adopted the rationale of the lower court. Id. at 1606. In the present case, the California Supreme Court's adoption of the rationale Petitioner theorizes would have been no less absurd. As in Kernan, the California Supreme Court's denial here "quite obviously rested upon some different ground. . . . Containing no statement to the

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[27] Of course, the Superior Court's decision is not the decision under review with respect to Ground Five. See Barker v. Fleming, 423 F.3d 1085, 1092-93 (9th Cir. 2005), cert. denied, 547 U.S. 1138 (2006) (federal habeas court ordinarily reviews only the most recent state court reasoned decision on a petitioner's claim).

contrary, the Supreme Court of California's summary denial of [the petitioner's] petition was therefore on the merits. Harrington v. Richter, 562 U.S. 86, 99 . . . (2011)." Id.; see, e.g., Ortega v. Cate, 2016 WL 3514118, at *7-8 (C.D. Cal. May 20, 2016), adopted, 2016 WL 3511540 (C.D. Cal. June 27, 2016) ("look through" presumption refuted where lower court's decision was obviously wrong).

More than negligible uncertainty attends the above analysis, however. In particular, it is exceedingly difficult under existing case law to determine the precise point at which the California Supreme Court's theoretical adoption of incorrect lower court reasoning transitions along an improbability continuum from mere error to error sufficiently absurd to refute the "look through" presumption. Therefore, notwithstanding the above analysis, and out of an abundance of caution, the Court will first discuss the merits of Ground Five as if this Court's review were de novo.

A. Background

Prior to trial, when Petitioner's counsel filed the motion to dismiss the charges for want of prosecution and discriminatory prosecution (discussed above), counsel also filed a motion to recuse the Los Angeles County District Attorney as the prosecuting agency (C.T. 158-66). Petitioner alleged that the prosecution initially decided not to file a case regarding the jail riot, and further alleged that:

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> This new case was filed because the prosecution suffered a hung jury in the special circumstances death case against Mr. McGhee and because of the perceived infirmities with the guilty verdicts. The [capital] trial took place well after the riot, and before the filing of the jailhouse riot complaint. Before the start of the penalty phase, the People entered into discussion with the defense that if [Mr. McGhee] were to accept the sentence of life without the possibility of parole in the death case and waive any appeal rights, the People would resolve the jail riot case (which had not been filed yet). The People indicated that if the proposal were to be turned down, the jailhouse case would be filed. The two cases were linked. One was being used as "leverage" for a disposition in the other.
>
> Mr. McGhee was charged in bad faith. ¶ The People seem upset because Mr. McGhee will not waive his rights to trial on the penalty phase and appeal of the guilty verdict. . . .

(C.T. 161).

At the hearing on the motions, Petitioner's counsel argued that Petitioner had been singled out for prosecution (R.T. A-1, A-3 - A-4). As summarized above, the prosecutor explained that Petitioner was the only inmate over which the prosecutor had jurisdiction, and reminded the Court that the prosecutor had said before the murder trial began that the prosecutor would be filing charges regarding the jail riot (R.T. A-4 - A-5). The presiding judge denied the motion to recuse the

prosecutor, finding no vindictiveness, and transferred the case to another department for trial (R.T. A-5, A-11).

As part of the later Marsden hearing before the trial court, Petitioner again discussed the prosecution's decision to charge him for the jail riot, claiming: "I was told I was offered life without parole on the condition that I waive all my rights to appeal. It was also communicated to me that if I did not accept this offer, I would be charged on a three strikes case stemming from the jailhouse incident that occurred two years and ten months before the offer. I refused to be bullied or blackmailed into a deal simply because I wished to exercise my right to appeal" (R.T. 17). Plaintiff claimed that, out of 20 or more alleged participants in the jail riot, he was the only person charged (R.T. 17). Petitioner also alleged that prejudice resulted from the prosecution for the jail riot, because a conviction for the jail riot assertedly would be used as an aggravating factor in the penalty phase of his death penalty case (R.T. 18-19).

Petitioner's trial counsel complained that the trial on the jail riot had been set in "a rush," claiming that, when counsel initially reported needing time to interview witnesses, the presiding judge had set the case for trial (R.T. 20-21). Petitioner's counsel conceded that the prosecution's alleged offer in the capital case of life without parole in exchange for a waiver of appeal had occurred before the beginning of the first penalty phase of the capital case, rather than after the first penalty phase jury hung (R.T. 21). Counsel also acknowledged that the prosecutor in the capital case had put on the

record before the start of the capital trial that the prosecution would be filing charges for the jail riot (R.T. 21).

B. Governing Legal Standards

A vindictive prosecution can violate a defendant's Fifth Amendment right to due process. United States v. Goodwin, 457 U.S. 368, 372 (1982). "For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his [or her] protected statutory or constitutional rights is 'patently unconstitutional.'" Id. at 372 n.4 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). "To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." Nunes v. Ramirez-Palmer, 485 F.3d 432, 441 (9th Cir.), cert. denied, 552 U.S. 962 (2007) (quotations and citations omitted). Otherwise, the decision whether to prosecute rests within the prosecution's discretion. See Bordenckircher v. Hayes, 434 U.S. at 364 ("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion") (footnote omitted). "Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir.), cert. denied, 516 U.S. 814 (1995) (citations and internal quotations omitted).

C. Analysis

Petitioner has presented no direct evidence of actual vindictiveness, and the Court's review of the record had disclosed no such evidence.[28] In the absence of direct evidence of actual vindictiveness, a petitioner may establish a prima facie case only by submitting objective evidence of an appearance of vindictiveness. See United States v. Montoya, 45 F.3d at 1299. "[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982) (citation omitted).

The record also fails to demonstrate any appearance of vindictiveness. The record reflects that the prosecutor formed the intent to bring jail riot charges against Petitioner, and put Petitioner on notice of this intent, even before Petitioner's capital trial began. The fact, if it is a fact, that the state did not bring criminal charges against any other participant in the jail riot does not alter this conclusion. Apart from all other considerations, the state's reasonable belief that Petitioner's command to Gonzalez

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[28] The Court has reviewed all of the papers on file, including the October 26, 2008 transcript from Petitioner's capital case that has been filed under seal as FAP Exh. 13. This exhibit contains a sealed bench discussion regarding a possible plea offer that the prosecution ultimately decided not to extend to Petitioner. FAP, Exh. 13 at 58-59. The Court discerns no evidence of actual vindictiveness from any of the papers on file.

had precipitated the riot, as well as the state's reasonable, related belief that Petitioner had been the "shot caller," provided manifestly rational bases for singling out Petitioner for prosecution.

Moreover, the Ninth Circuit has "sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including waiving appeal." United States v. Kent, 649 F.3d 906, 914 (9th Cir.), cert. denied, 565 U.S. 924 (2011) ("Kent") (citations omitted). Even if the prosecutor in Petitioner's case had threatened Petitioner with filing the jail riot charges if Petitioner did not plead in the capital case, the prosecutor permissibly could make good on such a threat without giving rise to an appearance of vindictiveness. "As a matter of law, the filing of additional charges to make good on a plea bargaining threat . . . will not establish requisite the punitive motive." Id.; see also Bordenkircher v. Hayes, 434 U.S. at 364 ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights," doing so legitimately "encourages the negotiation of pleas") (citations and quotation marks omitted).

For the same reason, to the extent Petitioner suggests that the jail riot case was filed to impact negatively the penalty phase of his capital case on retrial, this suggestion fails to establish any appearance of vindictiveness. Evidence of the jail riot had been introduced during the first penalty phase trial. See R.T. A-8. The possibility the prosecution later might use a conviction in the jail riot case as additional aggravating evidence in the retrial on the

penalty phase of the capital case does not establish actual or apparent vindictiveness. See United States v. Johnson, 469 Fed. Appx. 632, 640-41 (9th Cir.), cert. denied, 133 S. Ct. 377 (2012) (rejecting under Kent defendant's claim that the prosecution's decision to file enhanced penalty information after the defendant rejected a plea constituted vindictive prosecution); United States v. Maciel, 461 Fed. Appx. 610, 617 (9th Cir. 2011) (rejecting similar claim based on prosecution's filing of evidence of prior conviction information after defendant rejected plea offer). Given the prosecution's announcement prior to start of Petitioner's capital trial of its intent to file the jail riot charges, Petitioner's circumstance was "not a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on not pleading guilty." Bordenkircher v. Hayes, 434 U.S. at 360 (emphasis added).[29]

In addition to arguing that the prosecution's alleged vindictiveness violated due process, Petitioner also argues that the

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[29] Petitioner's citation to Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) ("Blackledge") (see FAP, pp. 56, 58-59; Reply, p. 35-36), does not alter the Court's conclusion. In Blackledge, the Supreme Court found a constitutional violation from the prosecution's response to the defendant's invocation of the right to appeal a misdemeanor conviction, which in North Carolina carried with it the statutory right to a trial de novo. The prosecution's response had been to bring a more serious charge on the same conduct prior to the new trial. Id. at 25-29. Unlike in Blackledge, Petitioner had not exercised any appellate rights prior to the time he was charged regarding the jail riot, and the new charges were based on different conduct than the conduct alleged in the capital case.

prosecution's alleged vindictiveness violated Petitioner's right to present a defense. See FAP, pp. 59-60; Reply, pp. 37-38. As previously discussed, however, there was no vindictiveness. Therefore, Petitioner's derivative "right to present a defense" argument must be rejected. The mere fact that some potential evidence may become unavailable prior to the initiation of a charge does not establish any violation of a defendant's constitutional "right to present a defense." See, e.g., United States v. Roberts, 2005 WL 1560722 (E.D. Wisc. June 24, 2005), adopted, 2005 WL 182251 (E.D. Wisc. July 28, 2005).

For the foregoing reasons, Petitioner would not be entitled to federal habeas relief on Ground Five even under a de novo standard of review. It necessarily follows that the California Court of Appeal's presumed rejection of Ground Five on the merits and (alternatively) the California Supreme Court's summary denial of Ground Five on the merits were not unreasonable under 28 U.S.C. section 2254(d). See Harrington v. Richter, 562 U.S. 86 (2011).[30]

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[30] Petitioner requests leave to file briefing regarding section 2254(d) review of this claim. The request is denied. Petitioner has had ample time and opportunity to brief all issues, including issues concerning the standard(s) of review and the application of those standard(s) to Petitioner's claims.

V. Petitioner is Not Entitled to Federal Habeas Relief on his Claim that the Trial Court Improperly Used Petitioner's Prior Juvenile Adjudication as a Strike.

Petitioner alleges that the trial court improperly used his prior juvenile adjudication to impose a sentence beyond the statutory maximum. See FAP, Ground Four, pp. 52-55; Reply, pp. 29-31. Petitioner cites Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Apprendi"), which provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Petitioner argues that a juvenile adjudication in which a defendant does not have the right to a jury trial cannot qualify as a "prior conviction" within the meaning of Apprendi. FAP, pp. 53-54.

The California Court of Appeal issued the last reasoned decision on this claim, rejecting the claim on direct appeal. See People v. McGhee, 2010 WL 2510095, at *9.

A. Background

The prosecution alleged that Petitioner suffered a 1989 juvenile adjudication for assault with a firearm (Cal. Penal Code § 245(a)(2)) qualifying as a prior conviction (a "strike") under the Three Strikes Law (C.T. 131; see also R.T. 2882 (noting same)). In a bifurcated proceeding, the trial court found this allegation true, observing that Petitioner admitted the allegation when Petitioner testified (R.T.

3017-18; see also R.T. 1578, 1584-86 (Petitioner's admission)).[31]

Petitioner filed a motion to strike on the ground that he was not afforded a jury trial on the juvenile adjudication (C.T. 309-12). The trial court denied the motion. See R.T. 3302.

B. Governing Legal Standards

In Apprendi, the United States Supreme Court held that, regardless of its label as a "sentencing factor," any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum, among other things, must be "proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"), the Supreme Court held that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . ." Blakely, 542 U.S. at 303 (original emphasis). In Cunningham v. California, 549 U.S. 270, 293 (2007), the Supreme Court held that a

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[31] Under the Three Strikes Law, qualifying strikes are defined as the "serious" felonies listed in California Penal Code section 1192.7(c) and the "violent" felonies listed in California Penal Code section 667.5(c). See Cal. Penal Code §§ 667(d)(1), 1102.12(b)(1). California Penal Code section 667(d)(3) provides, in pertinent part, that a prior juvenile adjudication may constitute a strike if the prior offense is described as a serious felony or violent felony in California Penal Code sections 1192.7 or 667.5, or if the prior offense is listed in California Welfare and Institutions Code section 707(b). California Welfare and Institutions Code section 707(b) lists the offense of assault with a firearm. See Cal. Welf. & Inst. Code § 707(b)(13). Thus, Petitioner's juvenile assault conviction qualified as a strike.

California judge's imposition of an upper term sentence based on facts found by the judge rather than the jury violated the Constitution.

C. Analysis

It is clear that Apprendi and its progeny do not inhibit a sentencing court's use of prior adult convictions. See United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir. 2005) ("The Supreme Court has made clear that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt or admitted by the defendant to satisfy the Sixth Amendment.") (citation omitted); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002) ("Apprendi expressly excludes recidivism from its scope. Defendant's criminal history need not be proved to a jury beyond a reasonable doubt. [citations].").

The Court of Appeal rejected Petitioner's contention that the use of his prior juvenile adjudication violated Apprendi. See People v. McGhee, 2010 WL 2510095, at *9. The Court of Appeal relied on People v. Nguyen, 46 Cal. 4th 1007, 1028, 95 Cal. Rptr. 3d 615, 209 P.3d 946, cert. denied, 559 U.S. 1067 (2009), a California Supreme Court decision holding that juvenile strike priors may enhance an adult sentence beyond the statutory maximum.

In United States v. Tighe, 266 F.3d 1187, 1194-95 (9th Cir. 2001) ("Tighe"), a federal criminal case, the Ninth Circuit held that the prior conviction exception to Apprendi did not extend to nonjury juvenile adjudications. However, in Boyd v. Newland, 467 F.3d 1139, 1152 (9th Cir. 2006), cert. denied, 550 U.S. 933 (2007) ("Boyd"), the

Ninth Circuit held that Tighe did "not represent clearly established federal law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. section 2254(d)(1). The Boyd Court noted that California courts and several other circuits had disagreed with Tighe. Boyd, 467 F.3d at 1152 (citing cases); see also People v. Nguyen, 46 Cal. 4th at 1021-28 (the "overwhelming majority of federal decisions and cases from other states" have held that nonjury juvenile adjudications may be used to enhance later adult sentences, and that the United States Supreme Court "has declined numerous opportunities to decide otherwise") (footnote omitted).

Consequently, under the standard of review set forth in 28 U.S.C. section 2254(d)(1), Petitioner is not entitled to federal habeas relief on this claim. See Boyd, 467 F.3d at 1152; John-Charles v. California, 646 F.3d 1243, 1252-53 (9th Cir.), cert. denied, 565 U.S. 1097 (2011) (Boyd is binding; use of the petitioner's prior nonjury juvenile adjudication to enhance the petitioner's sentence not contrary to, or an unreasonable application of, clearly established Supreme Court law); see also Wright v. Van Patten, 552 U.S. 120, 126 (2008) (where Supreme Court's cases "give no clear answer to the question presented," state court's rejection of the petitioner's claim did not constitute an unreasonable application of clearly established Federal law) (citation and internal quotations omitted); Kessee v. Mendoza-Powers, 574 F.3d 675, 678-79 (9th Cir. 2009) (state court's application of Apprendi's prior conviction exception not unreasonable under AEDPA standard of review, where United States Supreme Court had not "given explicit direction" on the issue and state court's decision was consistent with those of other courts).

Thus, Petitioner is not entitled to federal habeas relief on Ground Four. See 28 U.S.C. § 2254(d).

VI. Petitioner's Claim of Cumulative Error Does Not Merit Federal Habeas Relief.

Petitioner contends that cumulative error based on the claims discussed above violated his constitutional rights to due process, a fair trial, effective assistance of counsel, self-representation, and trial by jury (FAP, Ground Six, pp. 61-64; Reply, pp. 38-40). The Los Angeles County Superior Court issued the last reasoned decision rejecting this claim on the merits, finding that there was no cumulative error justifying another trial. See Respondent's Lodgment 20, p. 526.[32] The Superior Court's decision was not unreasonable, and this Court would reach the same conclusion even under a de novo standard of review.

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that

[32] The California Court of Appeal rejected the claim as procedurally barred (Respondent's Lodgment 20, p. 549), and the California Supreme Court summarily rejected Petitioner's claim "on the merits" (Respondent's Lodgment 23).

they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted).

No such symmetry of otherwise harmless errors exists in the present case. Accordingly, Petitioner is not entitled to federal habeas relief on Ground Six. See 28 U.S.C. § 2254(a) and (d).

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the First Amended Petition with prejudice.[33]

DATED: August 1, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[33] Petitioner's request for an evidentiary hearing is denied. When evaluating the reasonableness of a state court's decision denying the merits of a petitioner's claim, the federal habeas court may not consider evidence unpresented to the state courts. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011); Gulbrandson v. Ryan, 738 F.3d 976, 993 n.6 (9th Cir. 2013), cert. denied, 134 S. Ct. 2823 (2014). To the extent any of Petitioner's claims may be subject to de novo review, Petitioner has failed to demonstrate that an evidentiary hearing would reveal anything material to such claims. Finally, Petitioner previously has had ample opportunity to develop the record and to present evidence to the courts from which he has sought relief during the past nine years.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the First Amended Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which any objections have been made. The Court accepts and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the First Amended Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: _____, 2017.

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JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) JUDGMENT

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the First Amended Petition is denied and dismissed with prejudice.

DATED: _____, 2017.

_____
JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

S221382

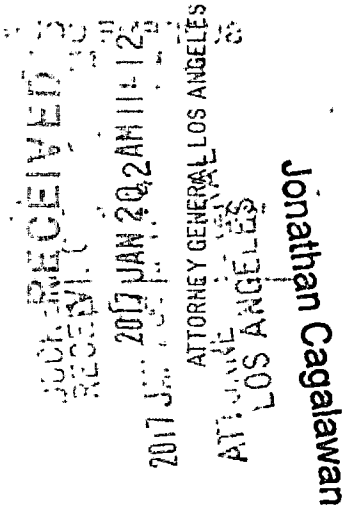
IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re TIMOTHY McGHEE on Habeas Corpus.

The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, 99-100, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

CANTIL-SAKAUYE
Chief Justice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Supreme Court of California
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re TIMOTHY MCGHEE, on Petition for Writ of Habeas Corpus.	B255754 (Los Angeles County Super. Ct. No. BA331315) ORDER

BY THE COURT:

The petition for writ of habeas corpus, filed April 23, 2014, has been read and considered. A petitioner mounting a collateral attack on a final criminal judgment by way of habeas corpus must prosecute his case without unreasonable or substantial delay. (*In re Reno* (2012) 55 Cal.4th 428, 452, 460-461.) Petitioner has been aware since the time of his trial in 2008 that his trial counsel did not interview potential witnesses to the jail riot, which occurred in 2005. He raised this failure to investigate in prior writ petitions. He did not, however, obtain the inmates' declarations until 2013. Petitioner has failed to state good cause for the substantial delay.

The petition is denied. The application to file Exhibit 11 under seal is granted.

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 03/28/14

CASE NO. BA331315

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: TIMOTHY MCGHEE

INFORMATION FILED ON 03/24/08.

COUNT 01: 182(A)(1) PC FEL
COUNT 02: 182(A)(1) PC FEL
COUNT 04: 69 PC FEL
COUNT 05: 69 PC FEL
COUNT 06: 245(A)(1) PC FEL
COUNT 07: 245(A)(1) PC FEL
COUNT 08: 69 PC FEL
COUNT 09: 245(A)(1) PC FEL

ON 03/28/14 AT 830 AM IN CENTRAL DISTRICT DEPT 102

CASE CALLED FOR JUDICIAL ACTION

PARTIES: STEPHEN A. MARCUS (JUDGE) JULIANNA LOZA (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT IS IN RECEIPT OF A PETITION FOR WRIT OF HABEAS CORPUS FILED ON FEBRUARY 6, 2014.

.

THE COURT HAS READ AND CONSIDERED THE PETITION FOR WRIT OF HABEAS CORPUS FILED ON FEBRUARY 6, 2014.

.

THE COURT'S RULING IS REFLECTED IN AN ATTACHED MEMORANDUM OF DECISION.

.

A COPY OF THE ATTACHED MEMORANDUM OF DECISION AND THIS MINUTE ORDER ARE MAILED VIA UNITED STATES MAIL THIS DATE TO:

.

JENNIFER HOPE TURNER
411 WEST FOURTH STREET, SUITE 7110
SANTA ANA, CALIFORNIA 92701-4598

.

CASE NO. BA331315
DEF NO. 01 DATE PRINTED 03/28/14

TIMOTHY JOSEPH MCGHEE
CDC# G-47302
SAN QUENTIN STATE PRISON
POST OFFICE BOX G47302
SAN QUENTIN, CALIFORNIA 94974
.
CUSTODY STATUS: THE DEFENDANT REMAINS REMANDED.

COURT ORDERS AND FINDINGS:

-PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

NEXT SCHEDULED EVENT:

PROCEEDINGS TERMINATED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER

DEPARTMENT 102, JUDGE STEPHEN A. MARCUS

In Re,

TIMOTHY McGHEE,

Petitioner,

On Habeas Corpus.

Case No.: BA331315

MEMORANDUM OF DECISION

(HABEAS CORPUS)

The Court has read and considered Petitioner's Writ of Habeas Corpus which was filed on February 6, 2014. The petitioner has raised a litany of claims regarding the fact he was denied his Sixth Amendment right to effective assistance of counsel. Petitioner also claims that the cumulative effect of trial errors caused his trial to be fundamentally unfair. Finally, petitioner has also attempted to overcome the claim that his petition is untimely filed by offering arguments that focus on that issue.

Petitioner has failed to surmount his most difficult hurdle in this habeas petition which is the fact that this petition is untimely and is a successive petition to one filed in 2011 raising the same issues. This court is not required to entertain unjustified successive petitions on the merits. *In re Clark* (1993) 5 Cal.4th 750, 771, 775. The petition is also untimely and petitioner fails to explain the long delay in filing the present petition. *In re Clark, supra,* 765, 782, 786. The good cause explanation offered by petitioner for the five year delay is not sufficient. The habeas petition must be denied for this reason.

Petitioner's habeas petition must also be denied on the merits as to his claim of ineffective assistance of counsel. In a habeas proceeding, the burden of proof is on the petitioner to establish, by a preponderance of substantial and credible evidence, the contentions upon which he seeks habeas relief. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945; *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296; *In re Martin* (1987) 44 Cal.3d 1, 28-29.) "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to prove them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) All facts upon which petitioner relies to overturn the judgment must be proven true. (*In re Martin, supra,* 44 Cal.3d at pp. 28-29; *In re Lawler* (1979) 23 Cal.3d 190, 194.) Summary disposition of a petition which does not state a *prima facie* case for relief is the rule. (*In re Clark* (1993) 5 Cal.4th 750, 781; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258-1259.)

Petitioner has not met his burden of proof under the two prong test of *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217, which requires (1) a showing that counsel's performance was "deficient"; and (2) proof of actual prejudice. The claim of ineffective assistance of counsel must be rejected because trial counsel's performance was neither deficient, nor did it cause actual prejudice to petitioner under *Strickland v. Washington.* It is clear to the court that petitioner has not established that he has suffered prejudice as a "demonstrable reality" because of trial counsel's representation during petitioner's trial. Finally, the court does not find that cumulative effect of any trial error caused petitioner to have a trial that was unfair.

MOST OF THE PETITIONER'S CLAIMS ARE BARRED FROM BEING RAISED AGAIN ON A HABEAS PETITION, BECAUSE THEY WERE RAISED AND REJECTED ON DIRECT APPEAL AND PREVIOUS HABEAS PETITIONS

Issues that could have been brought or were brought and rejected on appeal are procedurally barred from being raised on a Petition for Writ of Habeas Corpus. (*In re Waltreus,*

supra, (1965) 62 Cal.2d 218, 225.) The California Supreme Court has long held that defendants cannot use the habeas process as a vehicle for a second appeal. (*In re Waltreus* (1965) 62 Cal.2d at p. 225.) The only exceptions to the *Waltreus* rule allow the petitioner to raise these issues by showing (1) a claimed constitutional error which is both clear and fundamental and strikes at the heart of the trial process; (2) a lack of fundamental jurisdiction; (3) the trial court committed acts in excess of jurisdiction that do not require a redetermination of the facts; or (4) a change in the law affecting a defendant after the appeal. (*In re Harris,* 5 Cal.4th 813 at pp. 829, 834-843.) "Where an issue was available on direct appeal, the mere assertion that one has been denied a 'fundamental' constitutional right can no longer justify a post conviction, post appeal collateral attack." (*Id.* at 834.) In asserting a 'fundamental violation of constitutional rights' exception, the petitioner must prove that the claimed constitutional error is both (1) clear and fundamental, and (2) strikes at the heart of the trial process. (*Ibid.*)

Petitioner raised the identical issue of ineffective assistance of counsel on his direct appeal. Petitioner claimed he should have been granted a continuance, so the inmate witnesses could have been interviewed, and that his counsel was ineffective, because he didn't seek discovery of the names of inmates sooner. The Appellate Court in an opinion dated June 23, 2010, denied petitioner's argument that his trial counsel was ineffective. In denying this claim, the Court of Appeal, Second Appellate District held:

> "Appellant further contends he was denied effective representation. However, to show that the actions of his counsel amounted to ineffective assistance of counsel, Appellant must show how he was harmed by his counsel's actions. Here, there is only speculation and conjecture that testimony from unnamed witnesses might have benefited Appellant's case. Thus, under any standard, the purported failure by his counsel was not harmful to Appellant".

Since petitioner raised this issue on direct Appeal and it was rejected, it cannot be reconsidered by subsequent writ petition. Petitioner is clearly using this habeas petition as another attempt to get a second appeal, a practice which is barred by *In re Waltreus.*

The present habeas petition also includes the claim of ineffective assistance of counsel, which was raised and rejected in a prior habeas petition which was filed on October 24, 2011. In the petition filed in 2011, petitioner claimed his trial counsel had rendered deficient performance and was ineffective within the meaning of the Sixth Amendment of the United States Constitution. The only difference between the previous petition and the present one is the inclusion of affidavits from the investigator and the inmate witnesses.

This habeas petition includes the same claim raised and rejected in a prior habeas petition and petitioner has not alleged facts establishing an exception to the rule barring reconsideration of claims previously rejected. Such successive claims constitute an abuse of the writ of habeas corpus. *In re Reno* (2012) 55 Cal.4th 428, 455; *In re Martinez* (2009) 46 Cal.4th 945, 956; *In re Clark* (1993) 5 Cal.4th 751, 767-768. The piecemeal approach taken by petitioner in presenting his contentions in successive petitions is improper and cannot be the basis for attacking the validity of a judgment against him. *In re Connor* 16 Cal.2d 701, 705. Nor is there anything in the present petition, which shows that a fundamental miscarriage of justice has occurred. *In re Clark* (1993) 5 Cal.4th 750, 799; *In re Swain* 34 Cal.2d 300, 303-304.

TIMELINESS OF PETITION

Petitioner's biggest hurdle in this case is the failure to demonstrate good cause for the lengthy delay in filing this second habeas petition. It is obvious that petitioner recognizes this problem as he devotes half of his habeas petition explaining why he believes his petition is in fact "timely". The court does not find that petitioner exercised due diligence in pursuing his claims.

The California Supreme Court has instructed that "a [habeas corpus] petition should be filed as promptly as the circumstances allow...." *Walker v. Martin* (2011) 131 S. Ct. 1120, 1125.

"A prisoner must seek habeas relief without substantial delay; [citations], as 'measured from the time the petitioner or counsel, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claims." *Walker v. Martin* (2011), *supra*; *In re Reno* (2012) 55 Cal.4th 428, 460-461.

Petitioner was aware throughout the pendency of the case that testimony from his fellow inmates had not been offered in the trial. The only new thing in this petition is petitioner is now blaming trial counsel for failing to provide authorization to the investigator so he could interview the inmates who were present during the melee. Previously, petitioner blamed the investigator for not having interviewed the inmate witnesses before trial. There is nothing that has changed about petitioner's argument that he was denied a fair trial. He still maintains his trial was unfair, because the inmate witnesses were not interviewed before the trial, and their testimony was not offered to support petitioner's claims. It is the same old song being offered by petitioner.

Petitioner was aware of the potential testimony of the inmates in his cell block from the moment the incident occurred. He was clearly aware that defense counsel did not call any inmate witnesses except for inmate Gonzalez. Indeed, the petitioner raised the identical claims of ineffective assistance of counsel in his habeas petition which was filed October 24, 2011, more than two years ago. Petitioner also raised the same identical claims in his motion for a new trial. Thus, there is ample documentation in the record that petitioner was aware of the claims he is making for more than five years. Indeed, petitioner was pro per in the early months of the trial and made no efforts himself to interview the inmate witnesses for his trial defense. The failure to interview these witnesses when he was representing himself seems to weaken his claim he needed their testimony during his trial.

The inexcusable delay in bringing this habeas petition requires that the petition be denied on that ground alone. "The general rule is still that...untimely petitions will be summarily denied." (*In re Clark* (1993) 5 Cal.4th 750, 797.) In order to overcome the bar of untimeliness, "the petitioner has the burden of establishing (1) absence of substantial delay, (2) good cause for the delay, or (3) that the claims fall within the exception to the bar of untimeliness." *In re Robbins* (1988) 10 Cal.4th 770. "Substantial delay is measured from the time the petitioner or his counsel knew, or reasonably should have known of the information offered in support of the claim and the legal basis for the claim." (*Id* at p. 780) Petitioner must allege with specificity "facts showing when information offered in support of the claim was obtained, and that the information was neither known, nor reasonably should have been known, at an earlier time..." in

order to prove absence of substantial delay. (*In re Gallego* (1998) 1998 Cal.4th 825, 833.) A claims that is substantially delayed may still be considered if the petitioner can show good cause for the delay.

The petitioner can demonstrate good cause for delay by establishing that because they were investigating a meritorious claim, they delayed the presentation of other claims in order to avoid "piecemeal presentation of claims." (10 Cal.4th at 792.) If a claim is substantially delayed without good cause, it can still be heard on the merits "if the petitioner demonstrates (i) the error of constitutional magnitude led to a trial that was so fundamentally unfair that absent error no reasonable judge or jury would have convicted the petitioner or (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted. (*Id* at p. 780.)

The law recognizes that abusive writ practices and delayed petitions have a serious impact on the state's administration of criminal justice. The United States Supreme Court noted, **inter alia**, that "when a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (*McClesky v. Zant* (1991) 491 U.S. 467, 491.) The recent discussion in the California Supreme Court case of *In re Reno*, 55 Cal.4th 428, is instructive on how the court should approach the "timeliness" of habeas petition issue.

> "Courts presume the correctness of a criminal judgment (*In re Lawley* (2008) 42 Cal.4th 1231, 1240 [74 Cal.Rptr.3d 92, 179 P.3d 81]), for before the state may obtain such a judgment, 'a defendant is afforded counsel and a panoply of procedural protections, including state-funded **[**1201]** investigation expenses, in order to ensure that the trial proceedings provide a fair and full opportunity to assess the truth of the charges against the defendant and the appropriate punishment' (*In re Robbins*, *supra* [(1998)], 18 Cal.4th at p. 777). Following a **[*451]** conviction, the defendant has the right to an automatic appeal, assisted by competent counsel. (*Ibid.*) If a criminal defendant has unsuccessfully tested the state's evidence at trial and appeal and wishes to mount a further, collateral attack, '"all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."' (*People v. Duvall, supra* [(1995)], 9 Cal.4th at p. 474, quoting *Gonzalez*, at p. 1260.)"
>
> "This limited nature of the writ of habeas corpus is appropriate because use of the writ tends to undermine society's legitimate interest in the finality of its

criminal judgments, a point this court has emphasized many times. In *In re Clark*, *supra*, 5 Cal.4th at page 776, for example, we explained: **[***321]** "'[T] writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.' [Citation.] And when a habeas petitioner succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' [citation], prejudice the government and diminish the chances of a reliable criminal adjudication. ...' (Quoting *McCleskey v. Zant* (1991) 499 U.S. 467, 491 [113 L.Ed.2d 517, 111 S.Ct. 1454].) More recently, this court opined that '[o]ur cases have long emphasized that habeas corpus is an extraordinary remedy "and that the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments."' (*In re Morgan* (2010) 50 Cal.4th 932, 944 [114 Cal.Rptr.3d 591, 237 P.3d 993].)"

"A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. 'It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief.' (*In re Clark*, *supra*, 5 Cal.4th at p. 765.) 'By requiring that such challenges be made reasonably promptly, we vindicate society's interest in the finality of its criminal judgments, as well as the public's interest "in the orderly and reasonably prompt implementation of its laws." [Citation.] Such timeliness rules serve other salutary interests as well. Requiring a prisoner to file his or her challenge promptly helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories. In addition, we cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over. Accordingly, we enforce time limits on the filing of petitions for writs of habeas corpus in **[*460]** noncapital cases [citation], as well as in cases in which the death penalty has been imposed.' (*In re Sanders, supra* [(1999)] 21 Cal.4th at p. 703.)"

"The filing of a habeas corpus petition containing untimely – and thus noncognizable – claims wastes scarce judicial resources. The sheer number of such improper claims in the petition before us, and in other similar petitions, imposes a tremendous burden on the judicial system that obstructs the orderly administration of justice. As we explain, the filing of untimely claims without any serious attempt at justification is an example of abusive writ practice."

Therefore, "a party seeking relief by way of a petition for . . . an extraordinary writ is required to move expeditiously." (*In Re Moss* (1985) 175 Cal.App.3d 913, 921.) "Any significant delay in seeking collateral relief..., must be fully justified." (*People v. Jackson* (1973) 10 Cal.3d 265, 258; *In re Robbins* (1998) 18 Cal.4th 770, 780.) In this case, petitioner has failed to justify the more than five year delay in bringing this second habeas action.

There are two underlying themes offered by the petitioner to explain why he didn't act expeditiously to investigate his potential habeas claims. First, petitioner claims that trial counsel concealed the fact that the investigator had located witnesses at the time of trial and that the investigator didn't interview the witnesses because the trial counsel didn't authorize him. While the trial counsel's statements on the record are in disagreement with those offered by the petitioner, the fact remains that petitioner knew his counsel had not interviewed these witnesses. The claim of ineffective assistance of counsel is derived from the lack of investigation by the defense such that the inmate witnesses were not interviewed. For purposes of filing a habeas petition for ineffective assistance of counsel, there is very little difference between whether the investigator was at fault or the trial counsel was at fault. Petitioner was clearly on notice that he needed to interview the inmate witnesses and demonstrate that they could offer exonerating evidence in his trial. Petitioner has included no information about what investigative steps or efforts he made to prepare his habeas petition before 2014. There is certainly no explanation offered as to why petitioner took two years to follow up upon the Court's Memorandum of Decision issued on December 11, 2011, denying his first habeas petition. The Court clearly stated "Petitioner's claim that additional witnesses would have supported his claim seems speculative since no affidavits have been offered regarding these unknown witnesses". Petitioner has failed to establish a factual record of his due diligence efforts and for this reason, the petition must be denied.

Petitioner's second theme is that he lacked counsel and was somehow unable to locate witnesses, obtain documents or secure declarations. Generally, an indigent prisoner is not entitled to appointed counsel to assist with the preparation of a habeas petition. However, if an indigent prisoner files a habeas corpus petition and the court determines the petition states a prima facie case for relief, then due process considerations require the court to appoint counsel to represent the prisoner. *People v. Barton* (1978) 21 Cal.3d 513, 519. This is not the case here. Therefore, petitioner was not entitled to have counsel appointed for him. As a side note, petitioner is also convicted of a capital crime. In California, an indigent prisoner who has been convicted of a capital crime and sentenced to death has a statutory right to the assistance of court

appointed counsel not only on appeal but also in a habeas corpus proceeding. Government Code 68662; *In re Morgan* (2010) 50 Cal.4th 932. The Court is unaware of whether habeas counsel has been appointed in petitioner's capital case but if this were the case, petitioner would have had access to certain investigative services based on the fact that the same evidence was used as an aggravating factor in his death penalty case. Petitioner's reliance on his lack of counsel to justify the delay is without merit.

Petitioner has also made a point of trying to link petitioner's habeas claims to recent Commissions and investigations that show that there is a problem involving Sheriff's Deputies committing violence against inmates in the jails. Based on the facts of this case, the Court finds the connection between these commission reports and this case to be tenuous. It is highly unlikely that the generalized information offered in this petition that some members of the Sheriff's department are engaged in inappropriate conduct and violence towards inmates would have been admissible evidence in the petitioner's trial. Since there was a video of the events in this case, the claim that this was another example of Sheriff violence on inmates would be very difficult to make.

PETITIONER DID NOT ESTABLISH HIS TRIAL COUNSEL WAS INEFFECTIVE IN REPRESENTING HIM

The Court will now analyze the actual evidence offered by petitioner and determine if this evidence meets the *Strickland v. Washington* requirements. Petitioner has argued that his trial counsel did not competently investigate his case because he did not interview inmate witnesses who were present for the confrontation between the Deputy Sheriff's and the inmates. Petitioner further argues that defense counsel did not present a viable defense as a result of not interviewing these potential witnesses. To support this claim, petitioner has attached a number of affidavits from the inmate witnesses which indicate what their testimony would be.

The Court finds that the inmate witness affidavits can be broadly classified as "impeachment evidence" offered to impeach the testimony of the Sheriff Deputies. Specifically, the inmate affidavits claim that the petitioner did not exhort his fellow inmates to break the sinks and throw the porcelain pieces at the Sheriff's Deputies. There is a real issue whether the statements of the inmates is truly impeachment evidence as it is not clear the inmates were in a position to hear everything petitioner may have said that day. It could also be argued that the testimony by the inmates is not impeachment evidence because "it does not call into question any witness' veracity. It is also true that much of the testimony offered by petitioner through his affidavits would have difficulty surviving the filter of Evidence Code 352.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]' [Citation.] A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.] ' "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)

It is entirely possible that a trial judge would have excluded much of the inmate testimony because it had a slight probative value regarding any witness's veracity and involved collateral matters. Indeed, the main focus of the inmate testimony seems to be the mistreatment of inmate Gonzalez who was being removed from the cell block for being drunk and the right of inmates to attack Sheriff Deputies when they feel an inmate has been abused. The court rejects the notion that the evidentiary value of these affidavits can be transformed into evidentiary claims of constitutional proportion. The failure by the trial counsel to call these particular inmate witnesses did not affect the petitioner's Sixth Amendment right to present a defense. Based on this analysis, the Court would find that defense counsel was not deficient in not interviewing the inmate witnesses.

Assuming arguendo, the affidavits of the inmates would have been admissible at trial, there are other problems associated with their testimony. In addressing the new affidavits provided by petitioner, the court does not find them to be of such a quality that they could have produced a more favorable outcome as required under *Strickland v. Washington*. First, the affidavits are from inmates who were in jail with petitioner and who would have the twin liabilities of being perceived as biased since they were involved with the attack on the Sheriff's Deputies and would have been subject to impeachment because of likely felony records. There are also evidentiary problems with the proffered affidavits as the inmates offer speculative opinion evidence and there are legal questions whether some of their testimony would have been admissible at trial.

Many of the inmates that the defense is claiming would testify now may have had Fifth Amendment problems at the time of the trial. Since they were involved in the jail riot they could have potentially faced criminal charges for their actions. Certainly attorneys would have been appointed to represent the inmate witnesses in order to determine whether they would be claiming Fifth Amendment protection.

These problems may have cause trial counsel to decide not to call the inmate witnesses for strategic and tactical reasons. For example, Daniel Hines (petitioner's exhibit 1) wants to testify that all the inmates acted spontaneously in attacking the Sheriff's Deputies during the confrontation. Mr. Hines would only be able to testify as to his motivation for engaging in the melee. He appears to have been an active participant that attacked the Deputies who were trying to escort Mr. Gonzalez out of his cell block. Contrary to the underlying theme in petitioner's habeas petition, inmates do not have the right to throw things at Deputy Sheriff's even if they think the Deputies are acting improperly. Witness Hines also indicates that he agreed with the statement by a Sheriff that "you didn't see nothing, right." This statement would tend to impeach witness Hines testimony. (Hines claims in his affidavit that he was forced to make or agree with this statement) The biggest obstacle to this inmate's testimony is the fact there was a videotape played to the jury which documented the ERT Sheriff's team entering the cell block and the subsequent actions of the petitioner and his fellow inmates. The video can establish what each

inmate did during the confrontation. For example, the witnesses were able to identify the petitioner by the color of his clothing and the location of his cell. This visual depiction of the incident is very strong evidence and would probably outweigh the testimony of the inmate witnesses. It is not probable that the testimony of the inmates involved in the melee would have undermined the testimony of the Sheriff's Deputies and the videotape of the actual events.

The declaration of inmate Erick Morales (Exhibit 2) has the same problems as that of inmate Hines. Inmate Morales can't offer opinion evidence regarding the other inmates and does not contradict the evidence against petitioner, namely, the videotape. Inmate Reyes admits to breaking his sink and engaging in criminal conduct by throwing things at the Deputies. It is difficult to discern how his testimony would have led to a more favorable outcome for the petitioner.

Inmate Gerardo Reyes statement (Exhibit 3) is particularly troublesome as he offers opinions about how the Deputies treated petitioner as compared to the other inmates and makes categorical denials as to what petitioner did during the melee without offering any foundation that these statements are based on personal knowledge. The statement seems unauthentic and contains declarations designed solely for the purpose of having the petition granted. The affidavit contains inadmissible opinion evidence. Timothy Trujillo, another inmate witness (Exhibit 4) that the petitioner has claimed would have helped his case, indicated he threw personal property at the Deputies. He also admitted that he broke things such as his sink, desk and light fixture in his cell in order to obtain items to throw. Mr. Trujillo also believes he has a right to attack the Sheriff's if he determines that the Deputies used excessive force on one of the inmates.

It is the court's position that these witnesses presented a double edged sword. On one hand they are able to claim they were not engaging in assault and vandalism at the request/order of petitioner. On the other hand, they would reaffirm that the inmates mutinied in the cell block, assaulted the Deputy Sheriffs and vandalized their cells. The claim by the inmates that their actions were spontaneous seems minimally probative. The court would also note that the affidavits attached to the petition are so similar in content and language that it calls into question

why the inmate witnesses gave almost identical versions of the incident since they were in different cells and had separate vantage points. It certainly raises the specter of whether the statements offered by the inmates were specifically designed for the purpose of achieving a certain outcome or result in the litigation and, thus, should be discounted. While all witnesses have to be judged by the same credibility standards, it is clear that the inmate witnesses offered by petitioner have some negative aspects. It is the Court's conclusion that the proposed testimony from the inmates at the jail would not outweigh the evidence presented at the trial and would have not led to a more favorable outcome from the jury.

As previously stated, the Court finds that a decision not to call these witnesses could be termed a matter of trial tactics. Whether to call certain witnesses is.... A matter of trial tactics, unless the decision results from unreasonable failure to investigate. *People v. Bolin* (1998) 18 Cal.4th 297, 334. In order to establish ineffective assistance of counsel based on an alleged failure to investigate, a defendant "must show at the outset that 'counsel knew or should have known' further investigation might turn up materially favorable evidence." *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244. As for the failure to investigate a defense, the defendant "must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of an inadequate presentation of a potentially meritorious defense." *In re Sixta* (1989) 48 Cal.3d 1247. Petitioner has not made the requisite showing here. The opinion evidence that petitioner did not order or they did not hear petitioner order the attack on the Sheriff's Deputies does not mean that petitioner lost a meritorious defense. The potential credibility issues associated with the inmate witnesses and all the other evidence seems to suggest petitioner has not shown trial counsel's representation was ineffective. It is also true that the evidence offered by petitioner would show he and the other inmates intentionally engaged in vandalism, one of the felonies charged in the case. Even assuming counsel's performance was deficient in a failure to investigate, petitioner is not able to establish prejudice in light of the other evidence presented at trial. The court concludes it is not reasonably probable that petitioners would have received a more favorable result if his trial counsel had presented the additional witnesses.

There is also the evidence presented by the prosecution in the case. Deputy Ibarra testifies he hears petitioner tell the other inmates "if we break our sinks, we can use the pieces to throw at them Deputies." The prosecution put on evidence that Gerardo Reyes was overheard saying "it was a good idea!" There is the circumstantial evidence showing a conspiracy in that six or seven sinks were broken and the porcelain chips were thrown at the Sheriff's Deputies. The physical evidence of seven broken sinks speaks to a plan or conspiracy among the inmates. There was evidence introduced that petitioner was a "shot caller" in the jail and the most likely person to be the ringleader of this group attack on the Sheriff's Deputies. Even Gonzalez testified that McGhee was talking to Deputy Ibarra when he was being escorted from the cell block. This corroborates the Deputies account that McGhee ordered Gonzalez to refuse to go with the Deputies. Moreover, Gonzalez testified that he decided to refuse Depute Ibarra's request that he leave the cell for an attorney pass just at the precise moment he hears petitioner talking to Ibarra. Thus, the testimony offered by inmate Gonzalez at the trial supports the prosecution case in many aspects. In reviewing the trial transcripts, the court finds that the case against petitioner was a strong one in evidentiary terms and, therefore, a favorable outcome would not be achievable with the inmate declarations offered in this petition.

PETITIONER'S CLAIM OF CUMULATIVE ERROR IS REJECTED

The Court does not find true petitioner's contention that the cumulative trial errors in the case deprived him of a fair trial. A defendant is entitled to a fair trial, not a perfect one. *People v. Bradford* (1997) 14 Cal.4th 1005, 1057. When reviewing court can determine that the record developed at trial establishes guilt beyond a reasonable doubt, "the interest in fairness has been satisfied and the judgment should be affirmed. After reviewing the trial record, the court does not find there was cumulative error justifying another trial. The petitioner's claims in this regard were meritless and are rejected.

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Based on the foregoing reasons, the Habeas Petition is denied.

DATED: MARCH 28, 2014

Stephen Marcus

STEPHEN A. MARCUS, JUDGE
LOS ANGELES SUPERIOR COURT

The clerk is to send notice

194,CLOSED,REOPENED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:12-cv-03578-JAK-E

Timothy Joseph McGhee v. Kevin Chappell
Assigned to: Judge John A. Kronstadt
Referred to: Magistrate Judge Charles F. Eick
Case in other court: 9th CCA, 17-56688
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 04/25/2012
Date Terminated: 10/16/2017
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Timothy Joseph McGhee represented by **Andrea Arisa Yamsuan**
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ATTORNEY TO BE NOTICED

V.

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TERMINATED: 04/17/2013
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/25/2012	1	PETITION for Writ of Habeas Corpus by a Person In State Custody (28:2254) Case assigned to Judge John A Kronstadt and referred to Magistrate Judge Charles F Eick.(Filing fee $ 5 DUE.), filed by Petitioner Timothy Joseph McGhee. (et) (Entered: 04/27/2012)
04/25/2012	2	NOTICE OF REFERENCE TO A U.S. MAGISTRATE JUDGE. Pursuant to the provisions of the Local Rules, the within action has been assigned to the calendar of Judge John A Kronstadt and referred to Magistrate Judge Charles F. Eick to consider preliminary matters and conduct all further matters as appropriate. The Court must be notified within 15 days of any change of address. (et) (Entered: 04/27/2012)
04/25/2012	3	PETITIONER MOTION to Stay and hold in abeyance federal proceedings pending exhaustion of federal claims in state court filed by Petitioner Timothy Joseph McGhee. (et) (Entered: 04/27/2012)
04/25/2012	4	DECLARATION of BRUCE ERIC COHEN Updating Status of State Habeas Proceedings that are the subject of the Habeas Petition and MOTION to Stay being filed in this Court contemporaneously 3 filed by Petitioner Timothy Joseph McGhee. (et) (Entered: 04/27/2012)
04/25/2012	5	CONSENT TO PROCEED before a U. S. Magistrate Judge in accordance with Title 28 Section 636(c) filed by Petitioner. The Petitioner does not consent to have a United States Magistrate Judge conduct all further proceedings in this case. (et) (Entered: 04/27/2012)
05/08/2012	6	ORDER by Magistrate Judge Charles F. Eick. Based on the Petition and "Petitioner's Motion to Stay and Hold in Abeyance, etc.," filed herein, It is Hereby Ordered that, within 23 days of the date of this Order, Respondent shall file: (1) an Answer to the Petition; and (2) a Response to "Petitioner's Motion to Stay and Hold in Abeyance, etc." All lodged documents must be numbered sequentially. Each lodged document must be stapled or otherwise securely fastened, and must bear the lodgment number and case number on the first page of the document. It is Further Ordered that, if Petitioner desires to file a Reply to the Answer, Petitioner shall do so within 15 days of the date the Answer is filed. It is Further Ordered that Respondent shall give timely notice of any court proceeding to any person who is a "crime victim" within the meaning of 18 U.S.C. section 3771. (sp) (Entered: 05/08/2012)
05/08/2012	7	ORDER by Magistrate Judge Charles F. Eick. It is Ordered that Petitioner shall serve upon Respondent or, if appearance has been entered by counsel, upon Respondent's attorneys, a copy of every future pleading or other document submitted for consideration by the Court. (sp) (Entered: 05/08/2012)
05/25/2012	8	APPLICATION for Extension of Time to File ANSWER to Petition for Writ of Habeas Corpus and RESPONSE to Petitioner's Motion to Stay and Hold in Abeyance filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Kouhpainezhad, Tannaz) (Entered: 05/25/2012)

05/25/2012	9	ORDER by Magistrate Judge Charles F. Eick: granting 8 Application for Extension of Time to File. IT IS HEREBY ORDERED that Respondent is granted to and including June 30, 2012, to file an Answer to the Petition for Writ of Habeas Corpus and a Response to Petitioner's Motion to Stay and Hold in Abeyance. This Court's Order filed on May 8, 2012, otherwise remains in effect. (rp) (Entered: 05/25/2012)
06/19/2012	10	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File an Answer to the Petition for Writ of Habeas Corpus and a Response to Petitioner's Motion to Stay and Hold in Abeyance filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Kouhpainezhad, Tannaz) (Entered: 06/19/2012)
06/19/2012	11	ORDER by Magistrate Judge Charles F. Eick. Having considered Respondent's Application for Enlargement of Time, and good cause appearing, It is Hereby Ordered that Respondent is granted to and including 7/30/12, to file an Answer to the Petition for Writ of Habeas Corpus and a Response to Petitioner's Motion to Stay and Hold in Abeyance. This Court's order filed on 5/8/12, otherwise remains in effect. (sp) (Entered: 06/19/2012)
07/25/2012	12	NOTICE of Change of Attorney Information for attorney David C Cook counsel for Respondent Kevin Chappell. Adding DAVID C. COOK as attorney as counsel of record for KEVIN CHAPPELL, Warden for the reason indicated in the G-06 Notice. Filed by Respondent Kevin Chappell, Warden San Quentin State Prison (Cook, David) (Entered: 07/25/2012)
07/25/2012	13	APPLICATION for Extension of Time to File ANSWER to Petition for Writ of Habeas Corpus and a RESPONSE to Petitioner's Motion to Stay and Hold in Abeyance filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Cook, David) (Entered: 07/25/2012)
07/26/2012	14	ORDER by Magistrate Judge Charles F. Eick. Having considered Respondent's Application for Enlargement of Time, and good cause appearing, It is Hereby Ordered that Respondent is granted to, and including, 8/29/12, to file an Answer to the Petition for Writ of Habeas Corpus and a Response to Petitioner's Motion to Stay and Hold in Abeyance. This Court's Order, filed on 5/8/12, otherwise remains in effect. (sp) (Entered: 07/26/2012)
08/29/2012	15	ANSWER AND RESPONSE *TO PETITIONER'S MOTION TO STAY AND HOLD IN ABEYANCE FEDERAL PROCEEDINGS PENDING EXHAUSTIONOF FEDERAL CLAIMS IN STATE COURT* filed by Respondent Kevin Chappell.(Cook, David) (Entered: 08/29/2012)
08/29/2012	16	NOTICE OF LODGING filed re Return to Habeas Petition (2254) 15 (Cook, David) (Entered: 08/29/2012)
09/04/2012	17	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. The Court is in receipt of Respondent's "Answer to Petition for Writ of Habeas Corpus and Response to Petitioner's Motion to Stay, etc.," filed 8/29/12. Petitioner shall file a Reply within 20 days of the date of this Order. Failure timely to do so may result in the denial and dismissal of the Petition. (sp)

		(Entered: 09/04/2012)
09/07/2012	18	Unopposed APPLICATION for Enlargement of Time; Declaration of Petitioner; Declaration of Mairead Donahey filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 09/10/2012)
09/10/2012	19	MINUTES (IN CHAMBERS): ORDER by Magistrate Judge Charles F. Eick. The Court is in receipt of "Petitioner's Unopposed Application for Enlargement of Time, etc.," filed 9/7/12. The time within which Petitioner must comply with the Court's 9/4/12 Minute Order is extended to 10/29/12. (sp) (Entered: 09/10/2012)
10/29/2012	20	Unopposed APPLICATION for Enlargement of Time; Declaration of Mairead Donahey filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 10/31/2012)
10/31/2012	21	ORDER Granting Petitioner's Application for Enlargement of Time by Magistrate Judge Charles F. Eick. Having considered Petitioner's Application for Enlargement of Time, and good cause appearing, It is Hereby Ordered that Petitioner is granted to and including 12/14/12, to file a reply to Respondent's Answer to Petition for Writ of Habeas Corpus. This Court's order filed 5/8/12 otherwise remains in effect. (sp) (Entered: 10/31/2012)
11/13/2012	22	Mail Returned addressed to Timothy Joseph McGhee re Order on Application for Extension of Time to File Document, 21 . ***Mail returned due to incorrect CDC number on docket. Clerk has made correction and will re-mail document #21*** (rp) (Entered: 11/16/2012)
12/13/2012	23	Unopposed APPLICATION for Enlargement of Time; Declaration of Mairead Donahey filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 12/18/2012)
12/17/2012	24	ORDER by Magistrate Judge Charles F. Eick. Having considered Petitioner's Application for Enlargement of Time, and good cause appearing, It is Hereby Ordered that Petitioner is granted to and including 1/28/13, to file a reply to Respondent's Answer to Petition for Writ of Habeas Corpus. This Court's order filed on 5/8/12, otherwise remains in effect. (sp) (Entered: 12/18/2012)
01/24/2013	25	APPLICATION for Enlargement of Time; Declaration of Mairead Donahey filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 01/29/2013)
01/24/2013	26	MOTION for Appointment of Counsel Pursuant to 18 U.S.C. 3006A(a)(2)(B) filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 01/29/2013)
01/30/2013	27	MINUTES (IN CHAMBERS): ORDER by Magistrate Judge Charles F. Eick. Petitioner's "Motion for Appointment of Counsel, etc.," filed 1/24/13, is denied without prejudice. See Knaubert v. Goldsmith, 791 F.2d 722, 728-30 (9th Cir.), cert. denied, 479 U.S. 867(1986). (sp) (Entered: 01/30/2013)
01/30/2013	28	ORDER GRANTING PETITIONER'S APPLICATION FOR ENLARGEMENT OF TIME by Magistrate Judge Charles F. Eick. Having considered Petitioner's Application for Enlargement of Time, and good cause

		appearing, It is Hereby Ordered that Petitioner is granted to and including 2/28/13, to file a reply to Respondent's Answer to Petition for Writ of Habeas Corpus. This Court's order filed 5/8/12 otherwise remains in effect. (sp) (Entered: 01/31/2013)
03/04/2013	30	REPLY to Respondent's Answer; Memorandum of Points and Authorities filed by Petitioner Timothy Joseph McGhee. (sp) (Entered: 03/11/2013)
03/08/2013	29	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. More than 6 months after the filing of Respondent's Answer to the Petition, Petitioner requests leave to file a First Amended Petition herein. The request is denied without prejudice. (See document for further information.) (sp) (Entered: 03/08/2013)
03/15/2013	31	ORDER RE MOTION TO STAY, STATUTE OF LIMITATIONS ISSUES, AND FURTHER BRIEFING by Judge John A. Kronstadt, re Return to Habeas Petition (2254) 15 , MOTION to Stay MOTION to hold case in abeyance 3 . Accordingly, on the present record, this Court cannot find as a matter of law that the Petition is untimely. Respondent's request that the Court dismiss the Petition as untimely is therefore denied without prejudice. Within thirty (30) days of the date of this Order, Respondent shall file a Supplemental Answer addressing the merits of all claims alleged in the Petition. Petitioner may file a Supplemental Reply within fifteen (15) days of the date the Supplemental Answer is filed. (rp) (Entered: 03/15/2013)
03/25/2013	32	PETITIONER'S RENEWED MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO 18 USC 3006A (a)(2)(B) filed by Petitioner Timothy Joseph McGhee. (rp) (Entered: 03/27/2013)
03/27/2013	33	MINUTES (IN CHAMBERS): ORDER by Magistrate Judge Charles F. Eick: granting 32 Motion for Appointment of Counsel. The Court is in receipt of "Petitioner's Renewed Motion for Appointment of Counsel, etc.,"filed March 25, 2013. The Federal Public Defender's Office is appointed to represent Petitioner in this action. The briefing schedule set in the "Order, etc.," filed March 15, 2013, shall remain the same, unless the Court otherwise orders. (rp) (Entered: 03/27/2013)
03/29/2013	34	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Jennifer Hope Turner on behalf of Petitioner Timothy Joseph McGhee. Filed by Petitioner Timothy Joseph McGhee. (Turner, Jennifer) (Entered: 03/29/2013)
04/12/2013	35	APPLICATION for Extension of Time to File SUPPLEMENTAL ANSWER to Petition for Writ of Habeas Corpus filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Cook, David) (Entered: 04/12/2013)
04/12/2013	36	ORDER by Magistrate Judge Charles F. Eick: granting 35 Application for Extension of Time to File. IT IS HEREBY ORDERED that Respondent is granted to and including May 14, 2013, to file a Supplemental Answer to the Petition for Writ of Habeas Corpus. (rp) (Entered: 04/15/2013)

04/17/2013	37	NOTICE OF REASSIGNMENT of California Attorney General Office on behalf of Respondent Kevin Chappell. California Attorney General Tannaz Kouhpainezhad terminated. (Kouhpainezhad, Tannaz) (Entered: 04/17/2013)
04/17/2013	38	NOTICE OF MOTION AND MOTION for Leave to File Amended Petition For Writ of Habeas Corpus, Or, In The Alternative, to Amend Briefing Schedule *; Declaration of Counsel* filed by Petitioner Timothy Joseph McGhee. Motion set for hearing on 5/17/2013 at 09:30 AM before Judge John A. Kronstadt. (Attachments: # 1 Proposed Order)(Turner, Jennifer) (Entered: 04/17/2013)
04/19/2013	39	MINUTES (IN CHAMBERS): ORDER by Magistrate Judge Charles F. Eick. Petitioner's "Motion for Leave to File Amended Petition, etc.", filed 4/17/13, is denied. The Court's previously orders remain in force, although the Court will entertain an application by Petitioner for additional time to file the Supplemental Reply, after Respondent files the Supplemental Answer. (sp) (Entered: 04/19/2013)
05/03/2013	40	NOTICE OF REASSIGNMENT of California Attorney General Office E. Carlos Dominguez on behalf of Respondent Kevin Chappell. California Attorney General David C Cook terminated. (Dominguez, E) (Entered: 05/03/2013)
05/03/2013	41	NOTICE OF MOTION AND MOTION for Review of April 19, 2013 Order of United States Magistrate Judge re Order on Motion for Leave, 39 filed by Petitioner Timothy Joseph McGhee. Motion set for hearing on 6/24/2013 at 08:30 AM before Judge John A. Kronstadt. (Turner, Jennifer) (Entered: 05/03/2013)
05/06/2013	42	(IN CHAMBERS) ORDER TAKING PETITIONER'S OBJECTIONS TO AND MOTION FOR REVIEW OF APRIL 19, 2013 ORDER OF UNITED STATES MAGISTRATE JUDGE UNDER SUBMISSION by Judge John A Kronstadt: The Court, on its own motion, advances the Motion to June 10, 2013 at 8:30 a.m. and concludes that the matter can be decided without oral argument. Any opposition to the Motion shall be filed by May 13, 2013, with the reply to be filed no later than May 20, 2013. The Court advises counsel that Petitioner's Motion will be taken under submission on May 20, 2013 and off the motion calendar. No appearance by counsel is necessary on June 10, 2013. 41 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY.(ake) TEXT ONLY ENTRY (Entered: 05/06/2013)
05/07/2013	43	Second EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File a Supplemental Answer to the Petition for Writ of Habeas Corpus *; Declaration of E. Carlos Dominguez* filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Dominguez, E) (Entered: 05/07/2013)
05/07/2013	44	ORDER by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that Respondent is Granted until 6/13/13, to file a Supplemental Answer to the Petition for Writ of Habeas Corpus. (sp) (Entered: 05/08/2013)

05/10/2013	45	OPPOSITION re: MOTION for Review of April 19, 2013 Order of United States Magistrate Judge re Order on Motion for Leave, 39 41 *MEMORANDUM OF POINTS AND AUTHORITIES* filed by Respondent Kevin Chappell. (Harris, Julie) (Entered: 05/10/2013)
05/20/2013	46	REPLY To Opposition To MOTION for Review of April 19, 2013 Order of United States Magistrate Judge re Order on Motion for Leave, 39 41 filed by Petitioner Timothy Joseph McGhee. (Turner, Jennifer) (Entered: 05/20/2013)
06/06/2013	47	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Supplemental Answer to the Petition for Writ of Habeas Corpus *; Declaration of E. Carlos Dominguez* filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Dominguez, E) (Entered: 06/06/2013)
06/06/2013	48	ORDER by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that Respondent is Granted until 7/13/13, to file a Supplemental Answer to the Petition for Writ of Habeas Corpus. (sp) (Entered: 06/06/2013)
06/26/2013	49	MINUTES (IN CHAMBERS) ORDER by Judge John A. Kronstadt: denying 41 Motion for Review of April 19, 2013 Order of United States Magistrate Judge re Leave to Amend (shb) (Entered: 06/27/2013)
07/08/2013	50	Fourth EXPARTE APPLICATION for Extension of Time to File Supplemental Answer to Petition for Writ of Habeas Corpus; Declaration of E. Carlos Dominguez filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Dominguez, E) (Entered: 07/08/2013)
07/08/2013	51	ORDER by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that Respondent is Granted until 8/12/13, to file a Supplemental Answer to the Petition for Writ of Habeas Corpus.(sp) (Entered: 07/08/2013)
08/07/2013	52	APPLICATION for Extension of Time to File SUPPLEMENTAL ANSWER to PETITION for WRIT of HABEAS CORPUS filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Cook, David) (Entered: 08/07/2013)
08/07/2013	53	ORDER by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that Respondent is Granted until 9/11/13, to file a Supplemental Answer to the Petition for Writ of Habeas Corpus. Absent extraordinary circumstances not including the press of work in other cases, no further extensions will be granted. (sp) (Entered: 08/07/2013)
09/11/2013	54	NOTICE OF APPEARANCE of California Attorney General Office on behalf of Respondent Kevin Chappell. (Cook, David) (Entered: 09/11/2013)
09/11/2013	55	NOTICE of Manual Filing filed by Respondent Kevin Chappell of APPLICATION TO LODGE CONFIDENTIAL TRANSCRIPT UNDER SEAL; [PROPOSED] ORDER. (Cook, David) (Entered: 09/11/2013)
09/11/2013	56	ANSWER *SUPPLEMENTAL to PETITION FOR WRIT of HABEAS CORPUS*

		filed by Respondent Kevin Chappell.(Cook, David) (Entered: 09/11/2013)
09/11/2013	57	NOTICE OF LODGING filed *SUPPLEMENTAL* re Return to Habeas Petition (2254) 56 (Cook, David) (Entered: 09/11/2013)
09/12/2013	58	APPLICATION TO LODGE CONFIDENTIAL TRANSCRIPTS UNDER SEAL filed by Respondent Kevin Chappell. Lodged Proposed Order. (rp) (Entered: 09/12/2013)
09/12/2013	59	ORDER by Magistrate Judge Charles F. Eick: granting 58 . IT IS HEREBY ORDERED that the Reporter's Transcript of the July 21, 2008 hearing to replace counsel be lodged under seal. (rp) (Entered: 09/12/2013)
09/19/2013	60	EXPARTE APPLICATION for Extension of Time to File Supplemental Reply to Supplemental Answer to Petition for Writ of Habeas Corpus filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order) (Turner, Jennifer) (Entered: 09/19/2013)
09/19/2013	61	ORDER by Magistrate Judge Charles F. Eick. Good cause having been shown, Petitioner's application for an extension of time is granted. The due date for Petitioner's Supplemental Reply to Respondent's Supplemental Answer to the Petition for Writ of Habeas Corpus is extended 3 weeks, from 9/26/13, to and including 10/17/13. (sp) (Entered: 09/19/2013)
10/09/2013	62	EXPARTE APPLICATION for Extension of Time to File Supplemental Reply to Supplemental Answer to Petition for Writ of Habeas Corpus filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order) (Turner, Jennifer) (Entered: 10/09/2013)
10/09/2013	63	ORDER by Magistrate Judge Charles F. Eick. Good cause having been shown, Petitioner's application for an extension of time is granted. The due date for Petitioner's Supplemental Reply to Respondent's Supplemental Answer to the Petition for Writ of Habeas Corpus is extended 28 days, from 10/17/13, to and including 11/14/13. (sp) (Entered: 10/10/2013)
11/14/2013	64	EXPARTE APPLICATION for Extension of Time to File Supplemental Reply to Supplemental Answer to Petition for Writ of Habeas Corpus; Declaration of Counsel filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order)(Turner, Jennifer) (Entered: 11/14/2013)
11/14/2013	65	NOTICE of Manual Filing filed by Petitioner Timothy Joseph McGhee of Exhibit 11 and 13 to Petitioner's Proposed Amended Petition for Writ of Habeas Corpus. (Turner, Jennifer) (Entered: 11/14/2013)
11/14/2013	66	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. The Court is in receipt of Petitioner's (third) "Unopposed Ex Parte Application for Extension of Time to File Supplemental Reply, etc.," filed 11/14/13. Petitioner may file the Supplemental Reply on or before 12/12/13. Absent extraordinary circumstances (not including any renewed or continuing efforts to amend the Petition filed 4/25/12, any travel by counsel, or the press of work in any other case), no further extension will be granted. (sp) (Entered: 11/14/2013)

11/14/2013	67	NOTICE OF MOTION AND Renewed MOTION to AMEND *Petition for Writ of Habeas Corpus* filed by Petitioner Timothy Joseph McGhee. Motion set for hearing on 12/13/2013 at 09:00 AM before Magistrate Judge Charles F. Eick. (Attachments: # 1 Proposed Amended Petition, # 2 Exhibit Index, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6, # 9 Exhibit 7, # 10 Exhibit 8, # 11 Exhibit 9, # 12 Exhibit 10, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Exhibit 18, # 21 Exhibit 19, # 22 Exhibit 20, # 23 Exhibit 21, # 24 Exhibit 22)(Turner, Jennifer) (Entered: 11/14/2013)
11/14/2013	68	EX PARTE APPLICATION TO FILE EXHIBITS UNDER SEAL ; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF COUNSEL filed by Petitioner Timothy Joseph McGhee. Lodged Proposed Order.(rp) (Entered: 11/15/2013)
11/15/2013	69	ORDER by Magistrate Judge Charles F. Eick. Good cause having been shown, It is Hereby Ordered that the following exhibits to Petitioner's proposed amended Petition for Writ of Habeas Corpus will be filed under seal: Exhibit 11, Exhibit 13. (sp) (Entered: 11/15/2013)
11/15/2013	72	SEALED DOCUMENT- EXHIBIT 11 to Petitioner's Proposed Amended Petition for Writ of Habeas Corpus. (mat) (Entered: 12/04/2013)
11/15/2013	73	SEALED DOCUMENT- EXHIBIT 13 to Petitioner's Proposed Amended Petition for Writ of Habeas Corpus. (mat) (Main Document 73 replaced on 12/4/2013) (mat). (Entered: 12/04/2013)
11/18/2013	70	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. The Court is in receipt of Petitioner's "Renewed Motion for Leave to File Amended Petition for Writ of Habeas Corpus", filed 11/14/13. Respondent shall file a response to the Motion on or before 12/12/13. At that time, the Court will take the Motion under submission without oral argument, unless the Court otherwise orders. Absent extraordinary circumstances, no extension of the 12/12/13, deadline will be granted. (sp) (Entered: 11/18/2013)
11/21/2013	71	NOTICE of Appearance filed by attorney Kelly Elizabeth Dahlstrom on behalf of Petitioner Timothy Joseph McGhee (Attorney Kelly Elizabeth Dahlstrom added to party Timothy Joseph McGhee(pty:pet))(Dahlstrom, Kelly) (Entered: 11/21/2013)
12/12/2013	74	OPPOSITION opposition re: Renewed MOTION to AMEND *Petition for Writ of Habeas Corpus* 67 filed by Respondent Kevin Chappell. (Cook, David) (Entered: 12/12/2013)
12/12/2013	75	APPLICATION for Leave to File An Oversized Brief; Declaration of Cousel *Unopposed* filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order)(Turner, Jennifer) (Entered: 12/12/2013)
12/12/2013	76	REPLY filed by Petitioner Timothy Joseph McGhee *Supplemental Reply; Memorandum of Points and Authorities* (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Turner, Jennifer) (Entered: 12/12/2013)

12/12/2013	77	ORDER Granting Leave to File an Oversized Brief by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that, under the provisions of Local Rule 11-6, Petitioner is granted leave to file an oversized supplemental reply brief. (sp) (Entered: 12/13/2013)
01/09/2014	78	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. On or before 1/30/14, Petitioner shall file papers addressing the propriety of a stay under both Rhines v. Weber, 544 U.S. 269(2005) and Kelly v. Small, 315 F.3d 1063(9th Cir.), cert. denied, 538 U.S. 1042(2003). See also King v. Ryan, 564 F.3d 1133(9th Cir.), cert. denied, 558 U.S. 887(2009). Respondent shall file papers regarding the stay issues within 14 days after the filing of Petitioner's papers. (sp) (Entered: 01/09/2014)
01/30/2014	79	NOTICE OF MOTION AND MOTION to Stay Case pending exhaustion of state court proceedings filed by Petitioner Timothy Joseph McGhee. Motion set for hearing on 2/28/2014 at 09:30 AM before Judge John A. Kronstadt. (Attachments: # 1 Proposed Order)(Dahlstrom, Kelly) (Entered: 01/30/2014)
01/31/2014	80	MINUTE ORDER IN CHAMBERS by Magistrate Judge Charles F. Eick. The Court is in receipt of Petitioner's "Motion to Stay, etc.", filed 1/30/14. As provided in the Court's 1/9/14 Minute Order, Respondent's papers regarding the stay issues are due within 14 days after 1/30/14. Upon filing of Respondent's papers, the Court will take the Motion under submission without oral argument, unless the Court otherwise orders. Accordingly, the previously noticed 2/28/14 hearing date is vacated. (sp) (Entered: 01/31/2014)
02/07/2014	81	APPLICATION for Extension of Time to File OPPOSITION to PETITIONER'S MOTION to STAY FEDERAL HABEAS ACTION filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Cook, David) (Entered: 02/07/2014)
02/07/2014	82	ORDER by Magistrate Judge Charles F. Eick. Good cause appearing, It is Hereby Ordered that Respondent shall have to and including 3/15/14, to file an Opposition to Petitioner's Motion to Stay Federal Habeas Action. (sp) (Entered: 02/10/2014)
03/07/2014	83	OPPOSITION *TO PETITIONER'S MOTION TO STAY FEDERAL HABEAS ACTION* filed by Respondent Kevin Chappell. (Cook, David) (Entered: 03/07/2014)
03/11/2014	84	STATUS REPORT *of the State Court Exhaustion Proceeding* filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Attachment A)(Turner, Jennifer) (Entered: 03/11/2014)
03/19/2014	85	NOTICE New Case Law In Support of Pending Motion to Stay Federal Habeas Action filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Attachment A)(Turner, Jennifer) (Entered: 03/19/2014)
04/01/2014	86	ORDER Re Renewed Motion for Leave to Amend and Motion to Stay by Judge John A. Kronstadt. It is Hereby Ordered that: 1. The Motion to Amend is Denied without prejudice; 2. The Motion to Stay is Granted only to the

		extent that the motion seeks a Kelly stay; and 3. Petitioner promptly shall attempt to exhaust state court remedies with respect to his unexhausted claims. If a state court grants Petitioner relief so as to moot this federal action, Petitioner promptly shall so inform this Court. Otherwise, within 30 days of the exhaustion of Petitioner's unexhausted claims, Petitioner shall file a motion to lift the stay and a motion for leave to amend the Petition, together with a proposed amended petition. (Entered: 04/01/2014)
12/08/2015	87	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Celeste Bacchi on behalf of Petitioner Timothy Joseph McGhee. Filed by Petitioner Timothy Joseph McGhee. (Attorney Celeste Bacchi added to party Timothy Joseph McGhee(pty:pet))(Bacchi, Celeste) (Entered: 12/08/2015)
12/08/2015	88	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Andrea Arisa Yamsuan on behalf of Petitioner Timothy Joseph McGhee. Filed by Petitioner Timothy Joseph McGhee. (Attorney Andrea Arisa Yamsuan added to party Timothy Joseph McGhee(pty:pet))(Yamsuan, Andrea) (Entered: 12/08/2015)
02/17/2017	89	APPLICATION for Order for TO LIFT STAY OF PROCEEDINGS IMPOSED PURSUANT TO KELLY V. SMALL filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order) (Yamsuan, Andrea) (Entered: 02/17/2017)
02/17/2017	90	NOTICE OF MOTION AND MOTION to AMEND *PETITION FOR WRIT OF HABEAS CORPUS* filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Amended Petition for Writ of Habeas Corpus, # 2 Exhibit 1-22) (Yamsuan, Andrea) (Entered: 02/17/2017)
02/17/2017	91	EX PARTE APPLICATION to file document *EXHIBITS 11 and 13* under seal filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order)(Yamsuan, Andrea) (Entered: 02/17/2017)
02/17/2017	92	SEALED DECLARATION IN SUPPORT OF EX PARTE APPLICATION to file document *EXHIBITS 11 and 13* under seal 91 filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Unredacted Document Exh. 11-13) (Yamsuan, Andrea) (Entered: 02/17/2017)
02/17/2017	93	ORDER by Magistrate Judge Charles F. Eick: granting 91 EX PARTE APPLICATION to Seal Documents. GOOD CAUSE HAVING BEEN SHOWN, IT IS HEREBY ORDERED that Exhibits 11 and 13 be filed under seal. (hr) (Entered: 02/17/2017)
02/17/2017	94	ORDER to File Exhibits 11 and 13 Under Seal by Magistrate Judge Charles F. Eick, re EX PARTE APPLICATION to file document EXHIBITS 11 and 13 under seal 91 . Good cause Having Been Shown, It is Hereby Ordered that Exhibits 11 and 13 be filed under seal. (sp) (Entered: 02/24/2017)
02/23/2017	95	ORDER LIFTING KELLY STAY by Magistrate Judge Charles F. Eick granting 89 APPLICATION for Order. Petitioner's application to lift the Kelly

		stay is GRANTED. Respondent shall file a Response to Petitioner's Motion to Amend Petition within 30 days of the date of this order and lodge the records from the recent round of exhaustion proceedings. (sp) (Entered: 02/24/2017)
03/21/2017	96	NOTICE OF NON-OPPOSITION - *RESPONSE TO MOTION RE AMENDED PETITION* filed by Respondent Kevin Chappell. (Cook, David) (Entered: 03/21/2017)
03/21/2017	97	NOTICE OF LODGING filed re Non-Opposition to Motion 96 (Attachments: # 1 Pet. Writ Hab. Corp, # 2 COA Exh. I, # 3 COA Exh. II, # 4 COA Exhibits, # 5 Supreme Ct. Pet., # 6 CSC Exhibits, # 7 CSC Exhibits, # 8 CSC Exhibits II, # 9 CSC Exhibits, # 10 Informal Response, # 11 Reply Informal Response, # 12 Order Denying Petition)(Cook, David) (Entered: 03/21/2017)
03/22/2017	98	MINUTES (IN CHAMBERS) by Magistrate Judge Charles F. Eick: granting 90 MOTION to Amend Petition for Writ of Habeas Corpus. Respondent shall file an Answer to the "Amended Petition for Writ of Habeas Corpus" within twenty-eight (28) days of the date of this Order. Petitioner may file a Reply within fourteen (14) days of the date the Answer is filed. (dml) (Entered: 03/22/2017)
03/22/2017	99	FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS against Respondent Kevin Chappell amending Petition for Writ of Habeas Corpus (2254) 1 , filed by Petitioner Timothy Joseph McGhee(dml) (Entered: 03/22/2017)
04/19/2017	100	APPLICATION to Exceed Page Limitation ANSWER WITH MEMORANDUM OF POINTS AND AUTHORITIES filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order) (Cook, David) (Entered: 04/19/2017)
04/19/2017	101	ANSWER *TO FIRST AMENDED PETITION* filed by Respondent Kevin Chappell.(Cook, David) (Entered: 04/19/2017)
04/19/2017	102	ORDER by Magistrate Judge Charles F. Eick: granting 100 APPLICATION for Leave to File Excess Pages. Good cause appearing, it is Hereby Ordered that Respondent may file a Memorandum of Points and Authorities in support of his Answer to First Amended Petition for Writ of Habeas Corpus which exceeds 25 pages in length. (sp) (Entered: 04/20/2017)
05/03/2017	103	APPLICATION to Exceed Page Limitation Reply with Supporting Memorandum of Points and Authorities filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order) (Bacchi, Celeste) (Entered: 05/03/2017)
05/03/2017	104	TRAVERSE *REPLY TO RESPONDENTS ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES* filed by Petitioner Timothy Joseph McGhee. (Bacchi, Celeste) (Entered: 05/03/2017)
05/03/2017	105	ORDER by Magistrate Judge Charles F. Eick: granting 103 APPLICATION for Leave to File Excess Pages. Good cause having been shown, It is Hereby

		Ordered that Petitioner may file a Memorandum of Points and Authorities in support of his Reply to Respondent's Answer to First Amended Petition for Writ of Habeas Corpus which exceeds 25 pages in length. (sp) (Entered: 05/04/2017)
08/01/2017	106	NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Charles F. Eick. Objections to R&R due by 8/21/2017 (Attachments: # 1 Report and Recommendation) (dml) (Entered: 08/01/2017)
08/01/2017	107	REPORT AND RECOMMENDATION issued by Magistrate Judge Charles F. Eick. Re Petition for Writ of Habeas Corpus (2254) 1 (dml) (Entered: 08/01/2017)
08/16/2017	108	APPLICATION for Extension of Time to File Objection to Report and Recommendation (Issued) 107 *; Declaration of Andrea A. Yamsuan* filed by Petitioner Timothy Joseph McGhee. (Attachments: # 1 Proposed Order) (Yamsuan, Andrea) (Entered: 08/16/2017)
08/16/2017	109	ORDER by Magistrate Judge Charles F. Eick. Having considered Petitioner's Unopposed Application for Extension of Time to File Objections to Report and Recommendation, and good cause appearing, It is Hereby Ordered that the application is Granted and that Petitioner shall have to and including 9/20/17, in which to file his objection. (sp) (Entered: 08/16/2017)
09/20/2017	110	OBJECTION to Report and Recommendation (Issued) 107 *APPLICATION FOR CERTIFICATE OF APPEALABILITY* filed by Petitioner Timothy Joseph McGhee.(Yamsuan, Andrea) (Entered: 09/20/2017)
09/20/2017	111	NOTICE OF LODGING filed re Notice of Lodging, 97 (Yamsuan, Andrea) (Entered: 09/20/2017)
09/20/2017	112	NOTICE OF LODGING filed *AMENDED* re Notice of Lodging, 97 (Attachments: # 1 2nd District Opinion)(Yamsuan, Andrea) (Entered: 09/20/2017)
10/16/2017	113	ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE by Judge John A. Kronstadt. The Court accepts and adopts the Magisrate Judge's Report and Recommendation. It is Ordered that Judgment be entered denying and dismissing the First Amended Petition with prejudice. (Attachments: # 1 Report and Recommendations) (sp) (Entered: 10/18/2017)
10/16/2017	114	JUDGMENT by Judge John A. Kronstadt. Pursuant to the Order Accepting Findings, Conclusions and Recommendations of U.S. Magistrate Judge, It is Adjudged that the First Amended Petition is denied and dismissed with prejudice. (MD JS-6, Case Terminated). (sp) (Entered: 10/18/2017)
10/16/2017	115	Order by Judge John A. Kronstadt denying Certificate of Appealability. (mat) (Entered: 10/19/2017)
11/07/2017	116	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner Timothy Joseph McGhee. Appeal of Judgment, 114 , R&R - Accepting Report

		and Recommendations, 113 . (Appeal Fee - Fee exempt pursuant to statute). (Yamsuan, Andrea) (Entered: 11/07/2017)
11/07/2017	117	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 17-56688 assigned to Notice of Appeal to 9th Circuit Court of Appeals 116 as to Petitioner Timothy Joseph McGhee. (bp) (Entered: 11/08/2017)
05/31/2018	118	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 116 filed by Timothy Joseph McGhee. CCA # 17-56688.The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 422, 327, (2003). Any pending motions are denied as moot. (bp) (Entered: 06/04/2018)

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B212538

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. TIMOTHY MC GHEE, DEFENDANT-APPELLANT.	)	SUPERIOR COURT NO. BA331315 JAN 12 2009

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE DAVID S. WESLEY, JUDGE

REPORTERS' TRANSCRIPT ON APPEAL

JULY 21, 2008

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CA 90013

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

ORIGINAL

COURT OF APPEAL - SECOND DIST.
FILED
JAN 23 2009
JOSEPH A. LANE Clerk
Deputy Clerk

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SHERRY R. QUENGA, CSR 6709
OFFICIAL REPORTER

PENALTY PHASE GOES. AND I AM SAYING THIS TO YOU NOW BECAUSE I DON'T WANT TO BE MISUNDERSTOOD. I REMEMBER SPECIFICALLY SAYING THAT I AM DOING THIS BECAUSE I DIDN'T WANT TO BE MISUNDERSTOOD. BUT I WAS SO BUSY GETTING READY FOR THE MURDER TRIAL THAT I DIDN'T WANT TO TAKE THE TIME OUT TO DO THE PAPERS NECESSARY FOR THE WARRANTS.

SO THAT'S THE EXPLANATION.

IN ANY EVENT, I WILL SUBMIT ON THE PAPERS.

THE COURT: ALL RIGHT.

YEAH, I AM GOING TO DENY THE MOTION. I DON'T THINK THERE IS A VALID BASIS TO GRANT EITHER MOTION.

I DO NOT PERCEIVE THAT THE PROSECUTION IS VINDICTIVE IN ITS TREATMENT OF MR. MC GHEE. AND FRANKLY THE EVIDENCE IS VERY COMPELLING GIVEN THE VIDEO TAPE OF THE INCIDENT AT THE JAIL AND I DO NOT BELIEVE THAT THE DEFENDANT HAS BEEN MATERIALLY PREJUDICED BY THE DELAY IN FILING. I DON'T THINK THE PEOPLE ARE TRYING TO DO ANYTHING IMPROPER. AND SO THAT WILL BE THE COURT'S RULING.

LET'S GO TO THE MOTION TO CONTINUE NOW.

MR. JACKE FILED A MOTION TO CONTINUE BY FAX ON FRIDAY. AND I AM DISINCLINED TO GRANT THIS, MR. JACKE. DO YOU CARE TO ARGUE FURTHER?

MR. JACKE: YES.

YOU KNOW, I DON'T MIND COMING IN AS AN UNDERDOG. BUT I DO MIND AND I THINK IT IS A MATTER OF

FAIRNESS AND JUSTICE PERCEIVED AND ACTUAL, THAT THERE IS SOMEWHAT OF A RUSH TO TRY THIS CASE, THE RIOT CASE, AS WE'LL CALL IT. AND I HAVE BEEN IN SUPERIOR COURT SINCE MARCH 24TH. I THINK THAT WAS THE HELD TO ANSWER DATE. AND ABOVE AND BEYOND THAT THERE ARE QUITE A FEW PEOPLE WHO -- AND I HAVE PARED DOWN THE LIST -- THERE ARE QUITE A FEW PEOPLE THAT I THINK HAVE INSIGHT ABOVE AND BEYOND -- AND I INDICATE TO THE COURT IF THE COURT WANTED TO HEAR MY DEFENSE I WOULD DISCLOSE SUCH IN CAMERA. AND I THINK THOSE PEOPLE ARE POTENTIAL DEFENSE WITNESSES. AND WE NEED TO HAVE THEIR INFORMATION BEFORE I ANNOUNCE READY.

I AM AVAILABLE. I AM PHYSICALLY AVAILABLE. BUT IN TERMS OF THOSE PEOPLE BEING INTERVIEWED, THEY HAVE NOT BEEN INTERVIEWED AND I THINK THEY NEED TO BE INTERVIEWED BEFORE I ANNOUNCE LEGALLY READY TO TRY THIS CASE.

THE COURT: THE CONCERN I HAVE, YOU HAVE KNOWN ABOUT THE CASE FOR A LONG TIME. IT WAS ONE OF THE IDENTIFIED AGGRAVATING EVENTS THAT THE PROSECUTION PUT YOU ON NOTICE OF WELL BEFORE WE GOT READY FOR THE GUILT PHASE IN THE CAPITAL CASE. SO YOU HAVE HAD AMPLE OPPORTUNITY TO PREPARE A DEFENSE.

I AM JUST TRYING TO KEEP CASES MOVING. I SEE NO PARTICULAR NEED TO RUSH THE CASE OTHER THAN THAT WHICH HAS BEEN STATED BY YOU THAT THIS CASE HAS BEEN DELAYED A LONG TIME.

WELL, LET'S GET IT TRIED. IT'S A FAIRLY

FORTHRIGHT EVENT THAT OCCURRED AT THE JAIL. I CAN UNDERSTAND THE PROSECUTION WANTING TO GO FORWARD.

I DO NOT THINK TRYING THIS CASE INVOLVING THE JAIL INCIDENT WILL HAVE ANY BEARING ON THE RETRIAL OF THE PENALTY PHASE. WE WILL GO FORWARD WITH THE PENALTY PHASE. I AM GOING TO BE TALKING ABOUT THAT IN A MOMENT. I HAVE ORDERED 110 JURORS TO REPORT ON AUGUST 4TH.

I AM GOING TO SEND THIS CASE OUT TODAY TO ANOTHER COURT BECAUSE I AM TOO BUSY TO TRY IT. SO MC GHEE WILL GET HIS DESIRE TO HAVE ANOTHER JUDGE PRESIDE OVER THIS MATTER WHICH IS PROBABLY TO THE BENEFIT OF ALL.

I DO NOT SEE A VALID BASIS FOR CONTINUING THIS CASE BEYOND TODAY. AND I AM GOING TO DENY THE MOTION TO CONTINUE.

MR. JACKE: MAY I RESPOND TO THE COURT'S REMARKS?

THE COURT: YES.

MR. JACKE: THE COURT HAS INDICATED THAT I HAVE KNOWN ABOUT THIS CASE FOR A LONG TIME BEFORE THE GUILT PHASE. THIS IS TRUE. BUT THE CASE A, WAS NOT FILED.

B, I DID NOT HAVE THE CASE IN TERMS OF BEING A LAWYER ON THE CASE UNTIL SHORTLY BEFORE THE PRELIMINARY HEARING.

MR. MC GHEE WAS INITIALLY IN PRO PER AND HE HAD MR. SALTALAMACCHIA -- WAS HIS WHAT I WILL CALL HIS STANDBY COUNSEL. AT MR. MC GHEE'S REQUEST SHORTLY BEFORE THE PRELIMINARY HEARING I AGREED TO REPRESENT

HIM. BUT HAVING KNOWLEDGE THAT SOMETHING EXISTS AND PREPARING FOR IT IS FAR DIFFERENT.

THIS MATTER BEING PRESENTED FOR THE PENALTY PHASE IS FAR DIFFERENT PREPARATION THAN IT WOULD BE FOR TRIAL. IT'S NIGHT AND DAY BECAUSE I WOULD NOT EVEN DREAM OF CALLING WITNESSES FOR THE PENALTY PHASE BECAUSE -- ON THIS INCIDENT BECAUSE I'M TRYING TO MINIMIZE THE EXPOSURE OF THESE FACTS BEFORE THE JURY. HERE IT IS VASTLY DIFFERENT. SO MY HAVING KNOWLEDGE -- I HAD A KNOWLEDGE OF A WHOLE LOT OF THINGS INVOLVING MR. MC GHEE BUT WHETHER I WAS PREPARING TO GO TO TRIAL TO DETERMINE HIS GUILT OR INNOCENCE IS FAR DIFFERENT THAN THESE FACTS BEING PROPOSED IN THE PENALTY PHASE.

THE COURT: I HAVE A GREAT DEAL OF RESPECT FOR YOU, MR. JACKE. AND THIS COURT AND YOU GO WAY BACK TO WHEN I FIRST BECAME A JUDGE. YOU HAVE ALWAYS CONDUCTED YOURSELF IN A HIGHLY PROFESSIONAL AND SKILLED MANNER.

IT IS MY BELIEF THAT YOU WOULD HAVE THOROUGHLY INVESTIGATED ALL INCIDENTS, BE THEY INCIDENTS THAT WERE LIKELY TO OCCUR IN THE GUILT PHASE OR IN THE PENALTY PHASE. AND IF THERE WAS A SIGNIFICANT DEFENSE THAT COULD HAVE BEEN RAISED TO THIS INCIDENT IN THE PENALTY PHASE I AM CONFIDENT YOU WOULD HAVE RAISED IT.

MY POINT IS, YOU HAVE KNOWN ABOUT THE INCIDENT FOR A LONG TIME. MR. CHUN HAS SAID AND YOU HAVE AGREED THAT MR. CHUN COMMUNICATED HE WAS INTENDING TO FILE THIS AS A SEPARATE CASE. AND SO YOU HAVE KNOWN THAT FOR SOME TIME. I THINK YOU HAVE HAD AMPLE

OPPORTUNITY TO PREPARE AND I DO THINK THE CASE SHOULD GO FORWARD.

YOU ARE A VERY BUSY ATTORNEY. MR. CHUN IS A VERY BUSY ATTORNEY. THESE COURTS ARE VERY BUSY. WE TRY TO SCHEDULE CASES AND GET THEM TRIED AND DO THE BEST WE CAN. AND I FEEL THIS IS THE TIME TO TRY THE CASE.

SO, THE MOTION TO CONTINUE IS DENIED.

NOW, I WILL TELL YOU THAT JUDGE WESLEY HAS AGREED TO TAKE THE CASE. NOW, YOU WOULD HAVE THE RIGHT, EITHER SIDE, TO EXERCISE A 170.6 BUT I AM GOING TO ASSIGN THE CASE TO JUDGE WESLEY THIS MORNING FOR TRIAL UNLESS YOU WANT TO EXERCISE YOUR RIGHT TO A 170.6.

MR. CHUN: THE PEOPLE ARE HAPPY WITH JUDGE WESLEY.

MR. JACKE: THAT'S FINE.

THE COURT: ALL RIGHT. SO THE CASE IS ASSIGNED FORTHWITH.

I DO WANT TO TALK FOR JUST A MINUTE BEFORE MR. MC GHEE IS REMOVED ABOUT THE PENALTY PHASE RETRIAL.

AS I HAVE STATED, THE MATTER IS SET FOR AUGUST 4TH. JURORS HAVE BEEN ORDERED.

I HAVE SENT TO COUNSEL A QUESTIONNAIRE. THE PURPOSE IN PREPARING THE QUESTIONNAIRE WAS IN THE EVENT THE JAIL CASE WAS NOT FINISHED BY AUGUST 4TH WE WOULD BE ABLE TO HAND OUT THE QUESTIONNAIRE ON AUGUST 4TH AND THEN GIVE THE JURY -- THOSE JURORS A REASONABLE PERIOD OF TIME TO -- OR RATHER A BETTER DATE AS TO WHEN TO RETURN.

I EXPECT JUDGE WESLEY WILL TRY THIS CASE

PET. APP. 215-234
SUBMITTED IN PAPER FORM
UNDER SEAL

B212538

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. TIMOTHY MC GHEE, DEFENDANT-APPELLANT.	)	SUPERIOR COURT NO. BA331315 JAN 12 2009

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE DAVID S. WESLEY, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

JULY 31, 2008,
AUGUST 1, 4, 2008,
NOVEMBER 21, 2008

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CA 90013

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

ORIGINAL

COURT OF APPEAL - SECOND DIST.
FILED
JAN 23 2009
JOSEPH A. LANE Clerk
Deputy Clerk

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SHERRY R. QUENGA, CSR 6709
OFFICIAL REPORTER

CASE NUMBER: BA331315
CASE NAME: PEOPLE VS. TIMOTHY MC GHEE
LOS ANGELES, CALIFORNIA; THURSDAY, JULY 31, 2008
DEPARTMENT 102 HON. DAVID S. WESLEY, JUDGE
OFFICIAL REPORTER: SHERRY R. QUENGA, CSR 6709
TIME: 9:46 A.M.

APPEARANCES:

THE DEFENDANT BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL H. CLAY JACKE, II, ATTORNEY AT LAW; HOON CHUN, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: GOOD MORNING. WE'RE ON THE RECORD IN THE CASE OF PEOPLE VERSUS TIMOTHY MC GHEE, PRESENT WITH COUNSEL MR. JACKE. AND MR. CHUN FOR THE PEOPLE. ALL OF THE JURORS AND THE ALTERNATE JUROR ARE PRESENT. ARE WE READY TO PROCEED?

MR. CHUN: YES, YOUR HONOR.

THE COURT: LET ME JUST -- BEFORE WE START, JUST TELL THE JURY WHAT WE'RE DOING TODAY AND TOMORROW BECAUSE WE HAD A LITTLE HEARING AFTER YOU ALL LEFT

WITH JUROR NO. 2 WHO HAS SOME SCHEDULING PROBLEMS THAT WE KNEW WERE COMING. AND SINCE THE CASE RAN ABOUT A DAY AND A HALF OVER WHAT OUR ESTIMATE WAS, WE'RE GOING TO ACCOMMODATE THAT SCHEDULE WHICH MEANS WE'RE GOING TO WORK UNTIL ONE O'CLOCK TODAY AND THEN YOU'RE OFF. AND WE'RE GOING TO DO AS MUCH OF THE CLOSING ARGUMENTS AS WE CAN. AND THEN TOMORROW FOR YOUR DELIBERATIONS, YOU WILL RETURN AT 1:30, AND THEN WE'LL TAKE IT FROM THERE, OKAY. SO THAT'S THE SCHEDULE.

AND, MR. CHUN, YOU MAY ADDRESS THE JURY.

MR. CHUN: THANK YOU, YOUR HONOR.

PEOPLE'S OPENING ARGUMENT +

MR. CHUN: COUNSEL, YOUR HONOR, LADIES AND GENTLEMEN OF THE JURY, GOOD MORNING. WELL, LET'S GET STARTED.

YOU KNOW, ONE OF THE FIRST THINGS THEY DO WHEN THEY TEACH YOU HOW TO TRY A CASE, WHICH WAS A BIT LONGER AGO THAN I CARE TO ADMIT THESE DAYS, WHAT THEY DO IS THEY SIT YOU WHERE YOU'RE SITTING AND THEY READ JURY INSTRUCTIONS AT YOU. AND I DO MEAN AT YOU. BECAUSE THESE THINGS, AS YOU'VE JUST EXPERIENCED, NO MATTER HOW WELL READ THEY ARE, COME AT YOU LIKE A WALL OF WORDS, OKAY. AND IT'S HARD TO FOCUS AND FIGURE OUT WHAT'S BEING SAID BECAUSE IT'S JUMPING FROM TOPIC TO TOPIC, AND SOME OF THESE CONCEPTS ARE A LITTLE BIT

ARCHAIC. AND LET'S FACE IT, LAWYERS AREN'T NECESSARILY THE MOST CLEAR AND SIMPLE WRITERS IN THE WORLD. AND THESE INSTRUCTIONS ARE WRITTEN BY LAWYERS AND JUDGES.

SO THROUGHOUT THIS, WE'RE GOING TO BE GOING INTO SOME OF THESE INSTRUCTIONS AND TRYING TO SIMPLIFY AND TRANSLATE INTO NORMAL LANGUAGE WHAT THIS STUFF MEANS. BEFORE I DO THAT THOUGH, LET'S SET THE CONTEXT FOR THIS CASE. CASES LIKE THIS, IT'S IMPORTANT TO SET CONTEXT. AND ALTHOUGH THIS SOUNDS OBVIOUS, SOMETIMES JURORS FORGET THAT WHEN YOU'RE DEALING WITH A CASE IN THE JAIL, YOU'RE NOT DEALING WITH BEHAVIOR IN YOUR LIVING ROOM. OKAY. THE SAME RULES DON'T APPLY IN A JAIL AS IN YOUR LIVING ROOM. OKAY. GUESTS IN YOUR LIVING ROOM HAVE A CERTAIN EXPECTATION OF TREATMENT. AND GUESTS IN YOUR LIVING ROOM AND YOUR HOME HAVE A CERTAIN BEHAVIOR THEY'RE GOING TO ENGAGE IN.

JAIL IS DIFFERENT, OKAY. I MEAN JUST AN EXAMPLE, YOU KNOW THAT IN JAIL, YOU'RE LOCKED UP, OKAY. YOU'RE SUBJECT TO BEING HANDCUFFED, YOU'RE SUBJECT TO BEING TAKEN OUT OF YOUR CELL, OKAY. AND PEOPLE CAN TELL YOU WHERE TO GO. THERE ARE CERTAIN RULES ABOUT NOT HAVING ALCOHOL. OKAY. IMAGINE SUCH A THING IN YOUR LIVING ROOM, OKAY. IMAGINE IN YOUR LIVING ROOM, YOUR GUESTS COME IN AND YOU GET TO SLAP HANDCUFFS ON THEM, TELL THEM THEY CAN'T DRINK, YOU KNOW, OF COURSE NOT, OKAY.

SO WE HAVE TO RECOGNIZE WHEN YOU SEE THIS -- THIS KIND OF CASE AND SEE THE KIND OF BEHAVIOR THAT'S DESCRIBED BY BOTH INMATES AS WELL AS DEPUTIES -- AND I'M TRYING TO BE NEUTRAL ABOUT THAT -- YOU'VE GOT TO KEEP IN MIND, YOU CAN'T JUDGE THIS THROUGH THE PRISM OF, WELL, THIS SEEMS SO INCREDIBLE. BUT, AGAIN, YOU CAN'T JUDGE IT THROUGH THE PRISM OF OUR OWN LIVING ROOMS. OKAY. SO IT'S VERY IMPORTANT TO KEEP THAT IN MIND.

THE SECOND THING IS TO KEEP YOUR EYE ON THE BIG PICTURE IN THIS CASE. LADIES AND GENTLEMEN, THIS IS A CASE OF CAUGHT ON TAPE. THAT MAN OVER THERE, YOU SAW WAS CAUGHT ON TAPE THROWING REPEATEDLY PIECES OF JAGGED PORCELAIN LIKE THIS (INDICATING), THROWING THEM LIKE A BASEBALL AT DEPUTIES. OKAY. AND HERE I DON'T CARE IF YOU'RE IN YOUR LIVING ROOM, I DON'T CARE IF YOU'RE IN THE JAIL, YOU CAN'T DO THAT. THAT'S ALL WE'RE SAYING WITH THIS CASE, YOU CAN'T DO THAT.

ALL RIGHT. LET'S TALK ABOUT THE LAW. WE JUST CAN'T HAVE THAT SORT OF THING IN A HIGH-SECURITY AREA OF THE COUNTY JAIL ESPECIALLY, OKAY. I MEAN IS THERE ANY -- IS THAT UNREASONABLE REALLY?

LET'S TALK ABOUT SOME BASIC PRINCIPLES. OKAY. ONE RULE THAT YOU WERE READ AND IS THE PART OF ANY CRIMINAL CASE IS REASONABLE DOUBT. AND THERE ARE A LOT OF MISCONCEPTIONS ABOUT IT. AND THERE ARE SO

MANY MISCONCEPTIONS, IN FACT, REASONABLE DOUBT, THE INSTRUCTION -- AND THESE ARE NUMBERED, SO THAT'S WHY I GAVE YOU THE NUMBER, 2.90. SO JUST IN CASE YOU WANT TO CHECK -- CHECK AND MAKE SURE THAT I'M SAYING THE RIGHT THING.

2.90 TALKS ABOUT -- THERE'S SO MANY MIS- -- THERE'S SO MANY MISCONCEPTIONS, IT KNOCKS DOWN SOME MISCONCEPTIONS ABOUT WHAT REASONABLE DOUBT IS. FIRST OF ALL, IT'S NOT A MERE POSSIBLE DOUBT, OKAY. BECAUSE A LOT OF PEOPLE THINK, WELL, BEYOND A REASONABLE DOUBT MEANS BEYOND A POSSIBLE DOUBT. NO, THERE IS A DIFFERENCE BETWEEN WHAT'S POSSIBLE AND WHAT'S REASONABLE. OKAY. I MEAN PRETTY MUCH ANYTHING IS POSSIBLE. THE QUESTION ISN'T, WHEN YOU GET BACK THERE, IS IT POSSIBLE. THE QUESTION IS: IS IT REASONABLE? OKAY.

AND JUST AS A PRACTICE TIP, WHEN YOU GET BACK THERE, IF YOU -- AND THIS WILL HAPPEN, I ALMOST CAN GUARANTEE YOU. THERE WILL BE A JUROR WHO WILL SAY, BUT I THINK IT'S POSSIBLE THAT, I THINK IT'S POSSIBLE THAT. AND YOUR EARS SHOULD BE RINGING AT THIS POINT. WHY SHOULD IT BE RINGING? BECAUSE IT'S NOT A MERE POSSIBLE DOUBT. IT'S RIGHT IN YOUR INSTRUCTION.

SO AGAIN -- AND, AGAIN, YOU KNOW, IT'S NOT HELPFUL TO ATTACK YOUR FELLOW JURORS. I KNOW YOU ALL KNOW HOW TO HAVE DISCOURSE, ALTHOUGH I'VE -- YOU KNOW, SOMETIMES WHEN YOU ATTEND CONDO BOARD

MEETINGS AND THINGS LIKE THAT, YOU GET A LITTLE WORRIED. BUT, AGAIN, JUST PLEASE GENTLY BRING THE JUROR BACK TO THE INSTRUCTION: LOOK, IT'S NOT POSSIBLE, THAT'S NOT REALLY WHAT WE'RE DEALING WITH. IS IT REASONABLE? IS IT LOGICAL? IS IT COMMON SENSE?

OKAY. WE DON'T WANT YOU LEAVING YOUR COMMON SENSE AT THE DOOR THERE. THERE'S LOTS OF THINGS WE WANT YOU TO LEAVE AT THE DOOR LIKE PREJUDICES, SYMPATHY, EMOTIONAL REACTIONS OF ALL SORTS, OKAY. BUT LOGIC, COMMON SENSE, REASONABLENESS IS NOT ONE OF THEM.

THE OTHER THING THAT IT TELLS YOU IS IT'S NOT IMAGINARY DOUBT. JUST BECAUSE YOU CAN IMAGINE IT, JUST BECAUSE YOU CAN SAY WHAT IF, IT AIN'T NECESSARILY SO. THAT'S NOT WHAT'S RELEVANT TO A CRIMINAL CASE.

ANOTHER PRACTICE TIP AND, YOU KNOW, PRETTY LIKELY THIS WILL HAPPEN TOO. YOU'LL GET BACK THERE AND YOU'LL HEAR ONE OR MORE OF YOUR FELLOW JURORS SAY THESE WORDS, SOMETHING LIKE THIS: WELL, WHAT IF? WELL, WHAT IF? OKAY. AND THAT SHOULD BE, AGAIN, A CLUE. WAIT, WHAT IF? IT'S NOT ABOUT WHAT IF'S. IT'S ABOUT WHAT WAS THE EVIDENCE, NOT WHAT IF'S, OKAY, NOT IMAGINARY DOUBT.

AND, AGAIN, YOU KNOW, SOMETIMES -- AND WE ALL ARE FANS OF THE JURY SYSTEM, THE JUDGE, MY DEFENSE ATTORNEY HERE, AND MYSELF. BUT SOMETIMES IF THERE'S A COMPLAINT ABOUT IT, SOMETIMES YOU GET A

JUROR BACK THERE WHO -- AGAIN, I DON'T THINK ANY OF YOU ARE LIKE THIS. BUT SOMETIMES YOU GET PEOPLE IN A GROUP DYNAMIC THAT KIND OF LIKE TO SHOW HOW SMART THEY ARE. WE'VE ALL SEEN THEM. YOU KNOW, IF YOU ATTEND A LECTURE, SOMETIMES THESE ARE PEOPLE WHO RAISE THEIR HANDS AND THEY ASK QUESTIONS NOT BECAUSE THEY'RE INTERESTED IN THE ANSWER, BUT BECAUSE THEY WANT TO SHOW HOW SMART THEY ARE. IT'S THAT KIND OF MENTALITY.

WE JUST CAN'T DO THAT. OKAY. AND VERY OFTEN SOME JURORS -- NOT VERY OFTEN, BUT SOMETIMES THERE ARE JURORS WHO GET BACK THERE AND THEY WANT TO SHOW OTHER JURORS HOW SMART THEY ARE, HOW MORE IMAGINATIVE THEY ARE. IT'S NOT AN IMAGINATION CONTEST, IT'S NOT WHAT THIS IS. IT'S REASONABLE, IT'S LOGICAL, IT'S COMMON SENSE, OKAY. THAT'S WHAT YOU GOT TO HAVE FOR REASONABLE DOUBT.

AND THERE'S A VERY POWERFUL PRINCIPLE, IT'S A SIMPLE BUT VERY ELEGANT PRINCIPLE. IT'S IN THE CONTEXT OF AN INSTRUCTION 2.01 ON CIRCUMSTANTIAL EVIDENCE. BUT IF YOU THINK ABOUT IT, IT HAS WIDER APPLICATION TOO. AND HERE IT IS, IF YOU LOOK AT THIS EVIDENCE AND IT'S REASONABLE WHEN YOU LOOK AT ALL THE EVIDENCE TO SAY THAT DEFENDANT IS INNOCENT, THEN WHAT DO YOU GOT? YOU GOT REASONABLE DOUBT. YOU GOT TO ACQUIT, RIGHT? RIGHT? IT MAKES SENSE.

BUT IF ONE INTERPRETATION OF THE EVIDENCE IS REASONABLE AND THE OTHER INTERPRETATION IS UNREASONABLE -- NOW, THIS IS WHAT THE JURY INSTRUCTION

SAYS IN 2.01 -- YOU MUST -- IT'S AT THE END -- YOU MUST ACCEPT THE REASONABLE AND REJECT THE UNREASONABLE. THIS IS NOT A SHOULD, THIS IS NOT A MAY, THIS IS A MUST. YOU MUST ACCEPT THE REASONABLE AND REJECT THE UNREASONABLE. THERE IS THAT WORD AGAIN, REASONABLE, LOGICAL, COMMON SENSE.

THE SECOND BASIC PRINCIPLE OF ANY CRIMINAL TRIAL, IT HAS TO BE BASED ON THE EVIDENCE ONLY. OKAY. AND, AGAIN, YOU KNOW, THERE'S BEEN A LOT OF STUFF, KIND OF WHAT I'LL CALL EXTRACURRICULARS THAT AREN'T REALLY EVIDENCE, REACTIONS OF PARTIES, OKAY, REACTIONS OF PEOPLE IN THE AUDIENCE, REACTIONS OF ATTORNEYS, THAT'S NOT EVIDENCE. REACTIONS ARE NOT EVIDENCE. OKAY. AND YOU GOT TO JUST -- THAT'S NOT EVIDENCE ONE WAY OR THE OTHER, OKAY. SO THAT'S ONE THING.

YOU HAVE TO -- AND 1.00, IT SAYS YOU HAVE TO DECIDE THIS CASE FROM THE EVIDENCE RECEIVED IN THE TRIAL AND NOT FROM ANY OTHER SOURCE. OKAY. CAN'T GO TALK TO NEIGHBORS. PLEASE LET'S NOT DO THAT BECAUSE SOMETIMES EVERY ONCE IN AWHILE WE GET SOMEBODY WHO SAYS I TALKED TO A FRIEND OF MINE AND THEY SAY THIS. PLEASE DON'T DO THAT BECAUSE WE COULD HAVE A MISTRIAL.

AND EVIDENCE NOT SYMPATHY, NOT PREJUDICE. NOW, HERE'S SOMETHING THAT'S HARD FOR JURORS SOMETIMES TO GET, IT'S ALL IN 1.00. WE ALL CAN AGREE ESPECIALLY IN A CITY LIKE OURS, THAT PREJUDICE

IS A HORRIBLE THING. AND, EVERYONE I'M SURE IF I ASKED YOU, SHOULD YOU ACT WITH PREJUDICE, YOU'D ALL SAY, OF COURSE NOT. WHAT ARE YOU NUTS? I MEAN PREJUDICE IS A BAD THING.

IN THE JURY INSTRUCTION -- AND THEN SYMPATHY, WHAT ABOUT SYMPATHY THOUGH, THE IDEA OF HAVING SYMPATHY? WELL, OUTSIDE A COURTROOM AND OUTSIDE YOUR DUTIES AS JURORS, SYMPATHY, IF I SAID IS IT GOOD TO HAVE SYMPATHY, YOU'D PROBABLY SAY, YEAH, IT'S GOOD TO BE A SYMPATHETIC PERSON. THAT'S KIND OF A COMPLIMENT, RIGHT? AND IF SOMEONE SAYS, WELL, YOU'RE NOT A VERY SYMPATHETIC PERSON, IT SOUNDS LIKE AN INSULT.

BUT FOR YOUR ROLES AS JURORS, IT'S IN THE SAME SENTENCE, YOU CAN'T BE INFLUENCED BY SYMPATHY OR PREJUDICE. IN YOUR ROLES AS JURORS, IT IS EQUALLY BAD TO BE PREJUDICE AS SYMPATHETIC, OKAY. IN YOUR ROLES AS JURORS IN THIS CASE, WE WANT YOU TO DECIDE DISPASSIONATELY, WITHOUT EMOTION, AND BASED ON THE EVIDENCE. OKAY. NO, YOU KNOW, OH, I HAVE SYMPATHY BECAUSE, YOU KNOW, I LIKE THIS ABOUT THE -- ABOUT THE ONE PARTY OR THE OTHER, OKAY. THAT'S JUST IRRELEVANT.

ATTORNEYS' STATEMENTS ARE NOT EVIDENCE. SIMPLY BECAUSE SOMEBODY ASKS A QUESTION, YOU KNOW, YOU DON'T ASSUME THAT THE ANSWER IS TRUE. WE HAD KIND OF AN EXAMPLE OF THAT. THERE WAS SOME QUESTIONING BY MR. JACKE ABOUT -- ABOUT WHETHER THIS VENT OR OPENING OR WHATEVER YOU WANT TO CALL IT WAS NINE FEET OFF THE

GROUND. AND WHAT HAPPENED WHEN YOU GUYS HEARD THAT? DID YOU GUYS THINK, OH, MY GOODNESS, HE MUST KNOW SOMETHING, IT MUST BE NINE FEET OFF THE GROUND. THEN WE WENT TO THE JAIL, CAME BACK, AND LET YOU SEE, IT'S LIKE ABOUT THE TOP OF HIS HEAD, SIX FOOT TWO.

THE DEFENDANT: THAT'S A LIE.

MR. CHUN: OKAY. ALL RIGHT. NOW, HERE AGAIN, OKAY, WE GOT TO IGNORE REACTIONS, OKAY. YOU CAN'T BE MANIPULATED BY REACTIONS. WE'LL TALK AT THE END OF THIS CASE IN MY ARGUMENT ABOUT THE MANIPULATIVE PERSONALITY THAT SOME PEOPLE HAVE, OKAY. WE'LL TALK ABOUT THAT. DON'T WORRY.

OKAY. THE BOTTOM LINE IS THIS: THIS IS WHAT EVERY JUROR SHOULD BE ABLE TO TELL TO THEIR FELLOW JURORS TO BE A FAIR JUROR. YOU HAVE TO BE ABLE TO SAY I HONESTLY BELIEVE MY POSITION IS REASONABLE, NOT JUST POSSIBLE, BUT REASONABLE. OKAY. AND YOU HAVE TO BE ABLE TO SAY HERE IS THE SPECIFIC EVIDENCE I AM RELYING UPON THAT WE ALL SAW, NOT MY NEIGHBOR TOLD ME OR I HAD THIS EXPERIENCE ONCE OR I SAW THIS MOVIE ONCE, OKAY. AND THAT'S WHAT WE'RE FIGHTING ALSO IN CASES LIKE THIS IS HOLLYWOOD MOVIES ABOUT IN-CUSTODY SITUATIONS. OH, MY GOODNESS, I MEAN IN ALL THOSE MOVIES, YOU KNOW WHAT THE PORTRAYALS ARE LIKE. BUT THEY'RE SELLING TICKETS AND IT'S NOT EVIDENCE, OKAY.

FINALLY, LET ME END THIS PORTION BY TALKING ABOUT FLAG POLES. I'LL EXPLAIN THAT IN A SECOND. ONCE AGAIN, I'M SURE THAT WE'RE ALL FANS OF

THE JURY SYSTEM. BUT ONE THING THAT SOMETIMES IS TROUBLESOME AND IT DOESN'T HAPPEN THAT OFTEN, BUT SOMETIMES IT DOES, IS THERE'S SOMETHING ABOUT THE DYNAMIC OF PEOPLE GETTING TOGETHER, BEING LOCKED IN A ROOM, AND TRYING TO DEBATE SOMETHING. SOMETIMES SOMETHING STRANGE HAPPENS. PEOPLE -- PEOPLE TEND TO OBSESS ABOUT THINGS THAT WHEN YOU LOOK BACK ON IT, YOU'RE GOING, WELL, WHY DID WE OBSESS ABOUT THAT? IT WASN'T REALLY THAT IMPORTANT.

OKAY. GIVE YOU AN EXAMPLE FROM HISTORY. DURING THE MIDDLE OF THE 20TH CENTURY, OUR COUNTRY WAS IN A WAR, PEOPLE WERE DYING, THIS WAS A USELESS WAR, NOBODY WAS GETTING ANYWHERE. BOTH SIDES DECIDED WE NEED TO RESOLVE THIS. THEY HAD PEACE TALKS. THE BEST PEOPLE ON BOTH SIDES ARE PUT INTO THIS ROOM TO TRY TO RESOLVE IT. BUT THAT TALK TOOK LONGER. PEOPLE DIED. AND DO YOU KNOW WHY IT WAS DELAYED? BECAUSE THEY GOT HUNG UP ON SOMETHING THAT REALLY DIDN'T MATTER IN HINDSIGHT. BUT AT THE TIME, THEY THOUGHT IT MATTERED, SOMETHING ABOUT SETTING THE RIGHT TONE. THEY CONVINCED THEMSELVES IT WAS IMPORTANT.

DO YOU KNOW WHAT IT WAS? WHOSE FLAGPOLE AT THE NEGOTIATING TABLE WOULD BE BIGGER. THAT'S WHAT THEY WERE ARGUING ABOUT WHILE LIVES ARE DYING -- WHILE PEOPLE ARE DYING. THEY THOUGHT THAT WAS IMPORTANT AT THE TIME. OH, LET ME NOT LEAVE YOU HANGING. OUR SIDE GOT THE BIGGER BASE AND THEIR SIDE

GOT THE TALLER FLAG. NOW, WAS THAT REALLY SOMETHING THAT NEEDED TO BE DISCUSSED AND DECIDED? NO.

SO ONE THING THAT'S IMPORTANT IS WHOEVER IS YOUR FOREMAN -- AND YOU CAN DECIDE IT HOWEVER WAY YOU WANT. HOPEFULLY IT'S SOMEBODY WITH GOOD INTERPERSONAL SKILLS AND GOOD ORGANIZATIONAL SKILLS AND CAN FACILITATE DISCUSSION. THAT PERSON SHOULD HELP THE OTHER JURORS. AND THE OTHER JURORS SHOULD ALSO PARTICIPATE IN DECIDING WHAT DO WE REALLY NEED TO DECIDE? WHAT DID WE REALLY NEED TO DECIDE? WHAT'S IMPORTANT? AND THEN STICK LIKE A LASER BEAM ON THOSE ISSUES, OKAY. DON'T GET CAUGHT UP WITH FLAGPOLES AND WHOSE FLAGPOLE IS BIGGER AND SO FORTH.

BECAUSE IN A CRIMINAL CASE, IT'S NOT JUST A FREE-FLOWING DISCUSSION. THERE ARE CERTAIN THINGS I HAVE TO PROVE. THERE ARE CERTAIN DEFENSES HE HAS AND CERTAIN DEFENSES THAT ARE NOT AVAILABLE ON CERTAIN COUNTS. WE'LL GO THROUGH THAT, OKAY. I HAVE TO PROVE WHAT ARE CALLED ELEMENTS. AND THOSE ARE THE ONLY THINGS I HAVE TO PROVE, OKAY. HE HAS CERTAIN DEFENSES, OKAY. AND SOMETIMES A DEFENSE IS GOING TO BE AVAILABLE AND NOT AVAILABLE. AND THIS WILL BE MORE CLEAR AS WE TALK ABOUT IT. BUT STICK TO -- THE LAW WILL FRAME FOR YOU WHAT ISSUES YOU HAVE TO DECIDE. AND YOU WANT TO STICK TO THAT.

COUNT 1 AND COUNT 2, THEY'RE BOTH CONSPIRACY COUNTS. COUNT 1 IS CONSPIRACY TO COMMIT ASSAULT. AND COUNT 2 IS CONSPIRACY TO COMMIT

VANDALISM. THE CONSPIRACY TO COMMIT ASSAULT IS AN ONGOING ONE. IT'S THE ASSAULTING OF IBARRA, TAYLOR, OROSCO, AND ARGUETA WHEN THEY'RE ESCORTING GONZALEZ OFF THE -- OFF. IT RUNS THROUGH WHILE THEY'RE THROWING PORCELAIN SHARDS, DEFENDANT AND HIS FRIENDS ARE THROWING PORCELAIN SHARDS DURING THE FIRST SHIFT. IT RUNS THROUGH WHEN THEY THROW PORCELAIN SHARDS AT MC MULLEN AND MORALES WHO ARE TRYING TO PUT OUT THAT FIRE. AND IT RUNS THROUGH WHAT YOU SAW ON THE VIDEOTAPE WHEN THEY'RE THROWING PORCELAIN SHARDS AT THE RIOT DEPUTIES, OKAY. THIS IS JUST AN ONGOING THING. IT REALLY IS SOMETHING THAT CUTS ACROSS THE ENTIRE CASE.

COUNT 2 IS CONSPIRACY TO COMMIT VANDALISM. OKAY. AND THEY CONSPIRE TO BREAK THEIR SINKS, OKAY. LET'S TALK FOR A MOMENT ABOUT WHAT CONSPIRACY IS, OKAY. AND BEFORE I GET INTO THE LEGAL WORDS, HERE'S WHAT IT IS, OKAY, THINK THESE WORDS: COMMON INTENT, OKAY, ACTING TOGETHER, OKAY. ANOTHER WAY TO THINK ABOUT IT -- AND I'LL EXPLAIN THIS COMMENT IN A MOMENT -- IS SINGING THE SAME SONG, OKAY. AND REMEMBER THIS ABOUT CONSPIRACY: YOU ONLY NEED TO CONSPIRE WITH ONE OTHER PERSON.

AND WHAT YOU'LL FIND IN THIS CASE IS IF YOU FOLLOW TWO PEOPLE, YOU'LL SEE A THREAD, A DISTINCT CLEAR THREAD THAT RUNS THROUGH THE ENTIRE SERIES OF EVENTS. AND IT'S THE DEFENDANT AND HIS NEIGHBOR AND FRIEND GERARDO REYES IN CELL 6. IT'S CELL 6 AND CELL

7. AND YOU WILL ALWAYS -- AS LONG AS YOU FIND A CONSPIRACY BETWEEN THEM -- THE CONSPIRACY IS BROADER THAN THAT, BUT I DON'T HAVE TO PROVE BROADER. SO REMEMBER THE IDEA IS TO STICK TO WHAT HAS TO BE DECIDED. WHAT YOU'RE GOING TO FIND IS 6 AND 7, THERE'S GOING TO BE A LINE, THOSE TWO ARE GOING TO BE SINGING TOGETHER FROM BEGINNING TO END. AND WE'LL TALK ABOUT THAT IN A SECOND.

THE LAW OF CONSPIRACY, HERE'S THE TWO ELEMENTS OF THE LAW OF CONSPIRACY -- REMEMBER, ELEMENTS ARE WHAT I GOT TO PROVE. THIS IS DEFINED IN INSTRUCTION 6.10 AND 6.12. FIRST OF ALL, THERE HAS TO BE AN AGREEMENT. NOW, SOMETIMES THIS WORD GETS MISCONSTRUED. AND THERE HAS TO BE AN OVERT ACT. LET ME TALK ABOUT THE AGREEMENT REQUIREMENT. IT'S BASICALLY AGREEMENT PLUS ACT, AGREEMENT PLUS ACT, OKAY, TWO WAYS, JUST THINK OF THAT, AGREEMENT PLUS ACT.

NOW, AGREEMENT, WHEN SOME -- YOU KNOW, WHEN YOU'RE OUTSIDE THIS COURTROOM, YOU MAY THINK AN AGREEMENT IS -- HAS TO BE SOMETHING FORMAL, IT HAS TO BE EXPRESSED IN WORDS, HEY, WILL YOU GO TO -- WILL YOU SING THIS SONG WITH ME? YES, I WILL SING THIS SONG WITH YOU, OKAY. YEAH, THAT IS AN AGREEMENT. BUT THAT'S -- AND THAT'S AN EXPRESS AND FORMAL AGREEMENT, BUT YOU DON'T NEED THAT. IT IS NOT NECESSARY TO SHOW A MEETING OF THE ALLEGED CONSPIRATORS OR THE MAKING OF AN EXPRESS OR FORMAL AGREEMENT, 6.12. NO EXPRESS

AGREEMENT NEEDED. THE AGREEMENT MAY BE INFERRED FROM ALL CIRCUMSTANCES TO SHOW THE -- AND THIS IS A PHRASE TO REMEMBER -- COMMON INTENT, COMMON INTENT EITHER BY DIRECT TESTIMONY OF THE FACT OR BY CIRCUMSTANTIAL EVIDENCE. OKAY. COMMON INTENT, THAT'S 6.12, IT'S IN THERE.

LET ME GIVE YOU JUST AN EXAMPLE. IT MAY SEEM LIKE A TRIVIAL EXAMPLE, BUT HERE GOES: I GAVE YOU AN EXAMPLE OF A SONG. IF I SAY, HEY, WILL YOU SING "I LOVE L.A." WITH ME? YEAH, I'LL SING "I LOVE L.A." WITH YOU AND WE START SINGING. NOW WE HAVE A FORMAL EXPRESS AGREEMENT. WELL, WHAT IS THIS SORT OF NON-EXPRESS AGREEMENT? HOW WOULD THAT OCCUR?

WELL, THIS IS HOW IT WILL OCCUR: MY LAW CLERK ALEX WOULD SING THIS SONG "I LOVE L.A." AND I'M GOING, OH, THAT SOUNDS GOOD, AND I STAND NEXT TO HIM AND I START SINGING WITH HIM. NOW, THERE IS NOT A FORMAL AGREEMENT. I HAVEN'T ASKED HIM AND HE HASN'T ASKED ME. BUT ARE WE ACTING WITH COMMON INTENT? SURE, 'CAUSE WE'RE SINGING THE SAME SONG. WE'RE DOING THE SAME THING AT THE SAME TIME WITH THE SAME PURPOSE. OKAY. THAT'S AN IMPLIED AGREEMENT. OKAY. THAT'S WHAT AN IMPLIED AGREEMENT IS.

SO, AGAIN, WHEN YOU GET BACK THERE AND SOME JUROR IS SAYING, WELL, I DON'T KNOW THAT THEY EVER ACTUALLY SPOKE, I -- YOU KNOW, I'M TROUBLED BY THIS -- AND THERE'S EVIDENCE ACTUALLY IT DID, BUT I'M TROUBLED BY THAT, JUST REMIND THEM, PLEASE, THAT YOU

DON'T NEED AN EXPRESS AGREEMENT, THAT WHAT YOU NEED IS COMMON INTENT, SINGING THE SAME SONG AT THE SAME TIME. ACTING IN UNISON IS ANOTHER WAY TO PUT IT.

THE SECOND THING YOU NEED IN ADDITION TO AGREEMENT IS YOU NEED AN OVERT ACT. OKAY. WHAT DOES AN OVERT ACT MEAN? WELL, AN OVERT ACT MEANS YOU GO BEYOND JUST THINKING ABOUT IT AND YOU START DOING IT. YOU DON'T HAVE TO COMPLETE IT. NOW, IN THIS CASE, THE ASSAULT IS COMPLETED. THIS IS MORE OF A SITUATION FOR LIKE, AS AN EXAMPLE, LIKE, OKAY, WE'RE GOING TO ASSAULT THAT DEPUTY OVER THERE. OKAY. HERE, HERE'S -- HERE'S A BASEBALL WE CAN THROW AT HIM. AND I -- AND I GRAB A BASEBALL AND GIVE IT TO SOMEBODY, BUT IT'S NOT ACTUALLY THROWN. THE ASSAULT HAS NOT EVEN BEEN DONE, BUT THAT'S AN OVERT ACT, OKAY. THAT'S NOW GOING BEYOND JUST PLANNING TO DOING. ONCE YOU GO BEYOND THINKING TO DOING, THEN YOU'VE GOT AN OVERT ACT. OKAY. OVERT ACT MEANS ANY STEP TAKEN OR ACT COMMITTED WHICH GOES BEYOND MERE PLANNING OR AGREEMENT.

STARTED TO TAKE ACTION, 6.10. THERE MUST BE PROOF OF -- AND THEN HERE'S SOMETHING ELSE ABOUT OVERT ACT. SOME PEOPLE THINK, WELL, IF YOU WANT TO CONVICT SOMEONE OF CONSPIRACY, DO EACH OF THE PEOPLE IN THE CONSPIRACY HAVE TO DO AN OVERT ACT? OKAY. AND, ALSO, IF I SEE LISTED A BUNCH OF OVERT ACTS LIKE HERE, I BELIEVE THERE'S GOING TO BE FIVE OR SIX ON COUNT 1 AND TWO ON -- TWO OVERT ACTS LISTED ON

COUNT 2, THE VANDALISM. DO I HAVE TO FIND BOTH OF THEM TRUE OR ALL OF THEM TRUE? NO. YOU ONLY NEED ONE OVERT ACT.

SO IF YOU'VE GOT OVERT ACTS LISTED 1 THROUGH 5, YOU CAN FIND ONE OR YOU CAN FIND TWO OR THREE OR FOUR OR FIVE OR ALL OF THEM. IT DOESN'T MATTER. AND REMEMBER THE WHOLE THING ABOUT KEEPING FOCUSED. ONCE YOU DECIDE THAT ONE OVERT ACT HAS BEEN PROVED, MOVE ON BECAUSE YOU DON'T NEED ANY MORE. OKAY. YOU DON'T NEED TO ARGUE ABOUT THE FLAGPOLE BECAUSE ONCE YOU FIND ONE OVERT ACT, THAT'S IT, YOU'RE DONE.

IS IT NECESSARY THAT -- THAT THE DEFENDANT HIMSELF HAD COMMITTED AN OVERT ACT? NO. 6.10 -- I CAN'T REMEMBER 6.1 OR 6.12. BUT IT SAYS IN THERE, QUOTE: IT IS NOT NECESSARY TO THE GUILT OF ANY PARTICULAR DEFENDANT THAT HE PERSONALLY COMMITTED AN OVERT ACT. OKAY. SO TWO PEOPLE CAN AGREE TO DO SOMETHING AND THEN ONLY PERSON NO. 2 ACTUALLY TAKES SOME ACTION.

TWO -- LET'S SAY TWO PEOPLE AGREE, A AND B AGREE TO MURDER SOMEBODY. A GOES AND BUYS A GUN, BUT B JUST SITS AND DOES NOTHING. HAS THE OVERT ACT REQUIREMENT BEEN MADE? YES. AN OVERT ACT HAS BEEN DONE. AND EVEN THOUGH IT'S BY A, IT STILL IS BINDING ON B, OKAY, BECAUSE YOU ONLY NEED ONE OVERT ACT BY ANYONE IN THE CONSPIRACY, OKAY. THE DEFENDANT HIMSELF NEED NOT COMMIT AN OVERT ACT, OKAY.

SO ALEX AND I CONSPIRED TO DO SOMETHING, BUT I'M THE ONLY ONE THAT TAKES AN ACT -- TAKES AN OVERT ACT. HAS THE OVERT ACT REQUIREMENT BEEN MET AS TO ME? CLEARLY, 'CAUSE I -- I DID, OKAY. WHAT ABOUT TO ALEX? YES. IT IS NOT NECESSARY TO THE GUILT OF ANY PARTICULAR DEFENDANT THAT HE PERSONALLY COMMITTED THE OVERT ACT. AS LONG AS I WAS IN THE CONSPIRACY AND I DID THE OVERT ACT, THAT'S IT. OKAY. SO JUST REMEMBER THAT. SOMETIMES JURORS FIND THAT CONFUSING, BUT THAT'S THE RULE. YOU ONLY NEED ONE OVERT ACT BY ANY OF THE CONSPIRATORS NOT NECESSARILY BY DEFENDANT. OKAY. THAT'S HOW IT WORKS.

OKAY. LET'S TALK ABOUT CONSPIRACY TO COMMIT AN ASSAULT. WHAT IS ASSAULT? NOW, WHEN I SAY THERE HAS TO BE A CONSPIRACY TO COMMIT ASSAULT, WE HAVE TO KNOW WHAT ASSAULT MEANS, RIGHT? OKAY. THERE'S A FORMAL DEFINITION FOR ASSAULT. I MEAN IT'S NOT THAT FAR FROM WHAT YOU MIGHT THINK. FIRST ELEMENT OF ASSAULT IS -- AND, AGAIN, THIS IS -- WE'RE TRYING TO SHOW AN AGREEMENT TO DO THIS, WHETHER EXPRESS OR IMPLIED, OKAY.

A PERSON WILLFULLY AND UNLAWFULLY COMMITTED AN ACT WHICH BY ITS NATURE WOULD PROBABLY AND DIRECTLY RESULT IN PHYSICAL FORCE ON ANOTHER PERSON.

LET'S TRANSLATE THIS.

SOMEONE TRIED TO USE PHYSICAL FORCE

AGAINST SOMEONE. THAT'S ONE FIRST ELEMENT OF ASSAULT. OKAY. I DON'T KNOW WHY THEY PHRASE IT SO COMPLICATED.

SECOND ELEMENT: THE PERSON WAS AWARE OF FACTS THAT WOULD LEAD A REASONABLE PERSON TO REALIZE THAT AS A DIRECT, NATURAL AND PROBABLE RESULT OF HIS ACTS, PHYSICAL FORCE WOULD BE APPLIED TO ANOTHER PERSON. WHAT ARE THEY TRYING TO GET AT HERE? THAT YOU EITHER INTENDED TO APPLY PHYSICAL FORCE OR THAT YOU SHOULD HAVE KNOWN, AS A REASONABLE PERSON, THAT IT WOULD RESULT IN PHYSICAL FORCE.

SO YOU REMEMBER WHEN HE STARTS SAYING STUFF LIKE -- IT REALLY DOESN'T HELP HIM -- THAT HE'S JUST LOBBING THINGS IN SOMEONE'S DIRECTION, OKAY. WELL, AS A REASONABLE PERSON, YOU SHOULD KNOW THAT AS A RESULT OF WHAT YOU'RE DOING, IT SHOULD BE APPLIED TO ANOTHER PERSON; IN ADDITION, THAT'S JUST A BUNCH OF COCKAMAMIE YOU KNOW WHAT BECAUSE WE'LL SHOW YOU HOW -- WE'LL DISCUSS HOW IT'S OBVIOUS THAT HE'S THROWING AT THE DEPUTIES INTENTIONALLY.

BUT BASICALLY WHAT WE'RE TRYING TO KEEP OUT IS THE IDEA THAT IT WASN'T JUST AN HONEST ACCIDENT, OKAY, LIKE COMPLETE HONEST ACCIDENT, YOU KNOW. LIKE IF YOU'RE IN -- ON A BALCONY AND YOU'RE READING A NEWSPAPER AND THE WIND BLOWS AND, WHOA, YOU KNOW, THIS -- THIS NEWSPAPER FALLS. AND IT'S LIKE, YOU KNOW, MAYBE THE SUNDAY TIMES OR SOMETHING, I DON'T KNOW, HEAVY, OKAY, HITS SOMEBODY ON THE HEAD BELOW. WELL, NO, I MEAN YOU DIDN'T -- YOU DIDN'T KNOW AND YOU

CAN'T SAY YOU SHOULD HAVE KNOWN, OKAY, IT WAS JUST AN ACCIDENT.

THAT'S WHAT WE'RE TRYING TO GET AT HERE, JUST A COMPLETE ACCIDENT. OKAY. YOU DIDN'T -- YOU DIDN'T EVEN DO ANYTHING INTENTIONAL. YOU DIDN'T EVEN -- I MEAN IT MIGHT BE DIFFERENT IF YOU TOSSED THE NEWSPAPER OVER THE BALCONY OVER A BUSY STREET. YEAH, I MEAN, YOU KNOW, THAT'S -- YOU KNOW, THIS COULD BE MET THEN. BUT IF YOU'RE JUST -- JUST 'CAUSE THE WIND TOOK IT, UNEXPECTED WIND, NO.

THIRD THING, THE PERSON HAD THE PRESENT ABILITY TO APPLY PHYSICAL FORCE. THIS APPLIES IN SITUATIONS WHERE, FOR EXAMPLE, IF I GOT A GUN, BUT IT -- BUT IT DOESN'T HAVE BULLETS, OKAY. AND I CLICK THE GUN, BUT, YOU KNOW, REALLY THERE WERE NO BULLETS IN THE GUN, OKAY. ALL RIGHT. SO I -- MAYBE I WANT TO SCARE SOMEBODY, SO I CLICK A GUN AND I KNOW THERE'S NO BULLETS IN IT. AND I CLICK IT, BUT THERE'S NO PRESENT ABILITY FOR ME TO APPLY PHYSICAL FORCE. OKAY. ALL RIGHT.

TO CONSTITUTE ASSAULT, IT IS NOT NECESSARY THAT ANY INJURY BE INFLICTED, OKAY. BUT THAT'S THE OTHER THING TO REMEMBER ABOUT THIS, JUST -- THE CRIME OF ASSAULT DOESN'T REQUIRE AN ACTUAL TOUCHING. THE CRIME OF ASSAULT DOESN'T REQUIRE THAT I SHOW THAT SOMEBODY WAS INJURED OR TOUCHED. ALL YOU HAVE TO HAVE IS THE PHYSICAL MEANS TO ACCOMPLISH THE RESULT, THE FORCE. AND IF THERE IS THIS ABILITY,

THERE'S PRESENT ABILITY EVEN IF THERE IS NO INJURY.

OKAY. COULD HAVE RESULTED IN FORCE EVEN IF IN OUR CASE -- LET ME JUST TRANSLATE IT FOR OUR FACTS. COULD HAVE RESULTED IN FORCE EVEN IF HE MISSED, OKAY. SO PRESENT ABILITY EXISTS AS LONG AS HE COULD HAVE, AS LONG AS HE COULD HAVE HIT SOMEBODY EVEN IF HE MISSED. OKAY.

LET'S TAKE A LOOK AT THE EVIDENCE. WE TALKED ABOUT THE LAW. LET'S TAKE A LOOK AT THE EVIDENCE. WHAT EVIDENCE HAVE I PRESENTED TO YOU, WHICH IS MY DUTY TO PRESENT TO YOU, TO SHOW COMMON INTENT TO ASSAULT? HOW DO I SHOW THAT THEY HAD AN AGREEMENT TO COMMIT AN ASSAULT? FIRST OF ALL, IN THIS CASE, AS I INDICATED, THERE IS EVIDENCE OF AN EXPRESS AGREEMENT. AND THAT'S FROM DEPUTY IBARRA BACK IN THE PIPE CHASE -- I'M SORRY, I'M SORRY -- EXPRESS AGREEMENT TO ASSAULT, SORRY. IT STARTS EARLIER THAN THAT. BEFORE THE PIPE CHASE EVEN, HE REMEMBERS THAT AS HE AND ARGUETA AND TAYLOR AND EVENTUALLY OROSCO ARE TRYING TO GET GONZALEZ OFF THE ROW, HE HEARS THE DEFENDANT UTTER A VERBAL INVITATION, "GAS THE DEPUTIES." OKAY. AND THIS IS NO DIFFERENT THAN ALEX SAYING TO ME, HEY, LET'S SING WE LOVE L.A., AND THEN WE BOTH START SINGING. THE INVITATION WAS ACCEPTED.

BY -- LOOK AT THAT NAME. THERE'S MORALES IN CELL -- I BELIEVE IT'S A-4. IT'S HARD TO READ THAT. A-3? OKAY, SORRY. A-3 HE SAID AND ALSO REYES. REMEMBER I TOLD YOU THIS LINE BETWEEN REYES

AND MC GHEE, THEY'RE NEIGHBORS. YOU'LL FIND THAT LINE THROUGHOUT THE CASE. OKAY. THAT'S ALL YOU NEED TO DECIDE IS REYES AND MC GHEE CONSPIRED. THE CONSPIRACY IS WIDER THAN THAT, BUT YOU ONLY HAVE TO FIND CONSPIRACY WITH AT LEAST ONE OTHER PERSON IN THE WORLD FOR HIM TO BE GUILTY. YOU'LL SEE THAT NAME REYES COME UP AGAIN AND AGAIN.

HE EXTENDS THE INVITATION AND THE INVITATION IS ACCEPTED, BOOM, WE HAVE AN AGREEMENT. THESE GUYS AS WELL AS OTHER DEPUTIES (SIC), ALTHOUGH IBARRA COULDN'T SAY FOR SURE WHO ELSE, WERE THROWING STUFF. REMEMBER IT DOESN'T HAVE TO BE AN EXPRESS AGREEMENT. IT CAN BE AN IMPLIED AGREEMENT FROM THE CIRCUMSTANCES, OKAY.

NOW, REMEMBER I TOLD YOU ASSAULT, THIS -- IT'S NOT JUST THE IBARRA THING. IT EXTENDS BEYOND TO MC MULLEN AND MORALES AND TO THE RIOT SQUAD AS WELL. AND WHAT YOU HEARD FROM THAT TESTIMONY WHICH IS FROM MORALES AND MC MULLEN AND YZABEL AND COLEMAN AND WILSON AND THE VIDEOTAPE, I MEAN ALL THOSE SOURCES OF INFORMATION IS THAT AT ONE POINT OR ANOTHER, ALL THESE GUYS IN RED, CORTEZ AND IN CELLS A-3 -- A-3 THROUGH A-8, THERE'S MC GHEE, WERE THROWING PORCELAIN SHARDS.

AND WHAT'S REALLY INTERESTING IS THESE TWO SEEM TO BE -- A-6 AND A-7, REMEMBER I TOLD YOU KEEP YOUR EYES ON A-6 AND A-7 -- THEY DO A LOT OF THROWING TOGETHER, OKAY. REMEMBER ON THE VIDEOTAPE,

IF YOU REMEMBER THE VIDEOTAPE, WHO SEEMS TO BE THROWING THE MOST? A-6 -- A-7 AND THE CELL IN FRONT OF HIM, A-6. IT'S A-6 AND A-7, A-6 AND A-7, OVER AND OVER AGAIN. OKAY. ALL THOSE WITNESSES TELL YOU AND THE VIDEO.

YOUR HONOR, COULD WE JUST KILL THE LAST ROW OF LIGHTS IF WE COULD?

THE COURT: ALL RIGHT.

MR. CHUN: THANK YOU.

AND SO WHAT YOU GOT IS YOU GOT COMMON LOCATION, COMMON ACTION, COMMON TIME. AND THERE'S TWO INFERENCES FROM THIS. LOOK AT THIS LOCATION OF WHERE THE THROWING IS ALL OCCURRING FROM, RIGHT HERE (INDICATING). ALL RIGHT HERE (INDICATING). NOT FROM DOWN HERE, NOT FROM CELL 9 ON, BUT ALL HERE, OKAY. AND YOU CAN JUST -- YOU CAN MAKE ONE INFERENCE LIKE, OH -- OH, IT'S JUST ALL ONE BIG COINCIDENCE, OKAY, JUST ALL ONE BIG COINCIDENCE. OR YOU CAN AGREE THAT, HEY, THESE GUYS AT THE VERY LEAST HAD AN IMPLIED UNDERSTANDING TO SING THE SAME SONG. COMMON INTENT, YOU HAVE TO ACCEPT THE REASONABLE, YOU HAVE TO REJECT THE UNREASONABLE.

AND THEN YZABEL'S TESTIMONY, WE JUST GOT THAT YESTERDAY. THEY SPOKE IN UNISON, THEY THREW IN UNISON. HOW MUCH MORE CAN YOU HAVE AS AN EXAMPLE OF CONSPIRACY THAN TWO PEOPLE SINGING THE SAME SONG, DOING THE SAME THING AT THE SAME TIME? THEY YELL FUCK THE DEPUTIES, FUCK THE JURAS, AND THEY THROW IN

UNISON. THAT WAS THE TESTIMONY OF YZABEL.

COMMON LOCATION, COMMON ACTION, COMMON TIME. AGAIN, I'M FOCUSING ON A-6 AND A-7 BECAUSE THOSE TWO, THOSE TWO GUYS, IT'S VERY CLEAR, THEY'RE THE RINGLEADERS HERE. THEY'RE THE BIG TROUBLEMAKERS HERE.

TO HAVE AN OVERT ACT, REMEMBER IT'S AGREEMENT PLUS OVERT ACT. WE DEALT WITH THE AGREEMENT PART. WHAT'S THE OVERT ACT? WELL, HERE THERE'S A BUNCH OF OVERT ACTS. SOME OF THEM COME FROM IBARRA. MC GHEE AND OTHERS THREW FOOD AND OTHER ITEMS AT THE DEPUTIES. WELL, YOU KNOW, IN THIS CASE THOUGH, GUESS WHAT? THE DEFENDANT HIMSELF ADMITTED IT. REMEMBER HE SAID, YEAH, I THREW STUFF, OTHER PEOPLE THREW STUFF. SO THIS IS -- THE OVERT ACT REQUIREMENT IS REALLY MET HERE. MC GHEE URGED ANOTHER TO BREAK THE SINK TO THROW AT DEPUTIES. THAT'S WHAT IBARRA TESTIFIED TO.

REMEMBER YOU CAN FIND ANY OF THESE, OVERT ACT 1, OVERT ACT 4, 2, 3, 5, 6. ONCE YOU FIND ONE, STOP, YOU DON'T NEED TO GO ANY FURTHER. OKAY. BECAUSE ALL THE REST OF IT IS FLAGPOLES. MC GHEE BROKE HIS SINK, YOU KNOW, 'CAUSE -- 'CAUSE -- WHY IS THAT AN OVERT ACT? WELL, THAT'S LIKE IN HIS CASE, BUYING THE GUN BECAUSE THAT'S GOING TO BE USED AS THE WEAPON. THAT'S WHY IT'S AN OVERT ACT FOR ASSAULT. MC GHEE THREW SHARDS AT DEPUTIES. WELL, THAT'S PRETTY CLEAR WHY THAT'S AN OVERT ACT.

YOU HAD TESTIMONY UP THE WAZZU ABOUT

THAT, YOU HAD IBARRA, YZABEL, MORALES, MC MULLEN, COLEMAN, WILSON. DO YOU REALLY THINK ALL THOSE DEPUTIES GOT IN HERE AND JUST LOOKED -- LOOKED AT YOU GUYS AND DECIDED JUST TO LIE AND PUT THEIR CAREERS AT RISK? YOU KNOW, ALL THOSE GUYS, ALL THOSE DEPUTIES ALL LIED. BECAUSE THAT'S WHAT YOU'D HAVE TO BELIEVE TO BELIEVE THIS CHARACTER'S STORY THAT, OH, HE JUST TOSSED TWO LITTLE PIECES OUT THE FRONT OF HIS CELL AT THE WALL IN FRONT OF HIM. COME ON.

NOW, ALL HE HAS TO DO IS TURN IN HIS CHAIR AND LOOK AT YOU AND ACT POLITE, AND YOU GUYS ARE GOING TO BUY WHATEVER HE SELLS. WE'VE ALL DEALT WITH USED CAR SALESMEN, OKAY. THEY'RE ALSO VERY POLITE WHEN THEY WANT TO SELL YOU SOMETHING. ANY OF THESE THINGS, OKAY. MC GHEE ADMITS, BY THE WAY, BREAKING HIS SINK. YOU CAN STOP RIGHT THERE. I MEAN ANY OF THESE THINGS. OTHER INMATES THREW PIECES OF BROKEN PORCELAIN, MC GHEE ADMITS THAT. MC GHEE AND OTHERS CONTINUED TO THROW AT THE RIOT DEPUTIES, THAT'S ON VIDEO. ANY OF THOSE THINGS. THIS IS NOT AN OVERT ACT CASE BECAUSE YOU ONLY NEED TO FIND ONE.

ALL RIGHT. VANDALISM, CONSPIRACY TO COMMIT VANDALISM, WHAT'S THE LAW OF VANDALISM? YOU HAVE TO CONSPIRE TO DO WHAT? OKAY. AND VANDALISM IS DEFINED UNDER THE LAW AS DAMAGING SOMEONE ELSE'S PROPERTY, AND THAT YOU HAVE TO DO IT MALICIOUSLY. OKAY. BASICALLY WHAT WE'RE TRYING TO GET AT IS IF YOU'RE -- IF I'M A GUEST AT YOUR HOUSE AND I

ACCIDENTALLY DROP A TEACUP OR SOMETHING OR A COFFEE CUP, A COFFEE MUG, AND I BREAK IT, YEAH, I DAMAGED SOME OF YOUR PROPERTY, BUT I DIDN'T DO IT MALICIOUSLY. OKAY. I DIDN'T DO IT MALICIOUSLY, IT WAS JUST AN ACCIDENT. THAT'S WHAT WE'RE TRYING TO GET AT. THERE'S NO WAY YOU CAN JUST LOOK AT WHAT HE DID AND SAY, OH, IT'S JUST AN ACCIDENT. I MEAN HE'S OBVIOUSLY DOING IT BECAUSE HE'S ANGRY. HE'S DOING IT TO ANNOY AND INJURE AND -- INJURE COUNTY PROPERTY.

OKAY. EVIDENCE OF AGREEMENT, REMEMBER YOU HAVE TO HAVE AGREEMENT. WHAT'S THE EVIDENCE THAT THEY AGREED TO DO THAT WHICH IS TO MALICIOUSLY DESTROY PROPERTY? YOU HAVE THE EXPRESS AGREEMENT, THAT'S FROM THE PIPE CHASE, THAT'S IBARRA'S TESTIMONY. HE GOES TO THAT PIPE CHASE AND HE HEARS THE WORDS OF MC GHEE, WE COULD BREAK THE SINKS AND USE THE PIECES TO THROW AT DEPUTIES. AND HE HEARS REYES SAY OKAY. THERE YOU HAVE AN EXPRESS AGREEMENT TO VANDALIZE, TO BREAK THE SINKS FOR THE PURPOSE OF INJURING DEPUTIES. OKAY. THAT'S NOT JUST ACCIDENT. THAT'S NOT JUST DROPPING A COFFEE MUG. THAT'S NOT, AS HIS TESTIMONY -- HOW RIDICULOUS. AGAIN, HE THINKS HE JUST -- ALL HE HAS TO DO IS LOOK AT YOU AND TELL THE STORY OF I STARTED KICKING THE SINK AND I WAS SO SURPRISED, IT FELL AND BROKE, YOU KNOW. COME ON. REALLY?

AND THEN YOU HAVE CORROBORATION FOR -- FOR THIS, THAT THEY WERE ACTING TOGETHER TO BREAK THE

SINKS AND THROW AT DEPUTIES BECAUSE YZABEL'S TESTIMONY THAT A-6 AND A-7 -- YOU SEE HOW A-6 AND A-7 KEEP COMING UP? FROM INDEPENDENT WITNESSES, COMPLETELY FROM INDEPENDENT SOURCES YOU GOT A-6 AND A-7. THEY SPOKE IN UNISON AND THEY THREW IN UNISON. THEY SANG THE SAME SONG THROUGHOUT, THROUGHOUT WHAT YOU HEARD ABOUT THESE EVENTS. COMMON LOCATION, COMMON ACTION, COMMON TIME.

AND THEN LOOK AT THE OVERALL PICTURE OF WHAT SINKS WERE BROKEN. MORALES RECORDED THIS. I KNOW THE VIDEO CAMERAS WENT INTO -- POINTED INTO CELLS 6, 7 AND 8, SO WE HAVE PICTURES OF THAT. BUT MORALES ALSO DOCUMENTED 4, 5, 10 AND 11. OKAY. AND HE RECORDED THAT IN HIS REPORT. LOOK AT THIS. OTHER THAN THE ASIAN APPEARING INMATE IN A-9, THE THREE LATINO APPEARING INMATES TO THE RIGHT AND THE THREE LATINO APPEARING INMATES TO THE LEFT OF -- WHO? -- MC GHEE, THE DEFENDANT, BROKE THEIR SINKS. BUT NOT THE REST OF THE ROW. JUST A COINCIDENCE? YEAH, IT'S JUST A COINCIDENCE.

IT'S A COINCIDENCE THAT ALL THESE GUYS AT THE SAME TIME HAD THE SAME THOUGHT AS MC GHEE. OH, LET ME START KICKING MY SINK, AN INDEPENDENT -- THIS IS WHAT YOU HAVE TO BELIEVE -- AND THE GUY IN CELL 6 DECIDED, REYES, YEAH, LET ME START KICKING MY SINK (MOTIONING). OH, THE SINK FELL AND BROKE. MC GHEE (MOTIONING), OH, THE SINK FELL AND BROKE. CELL 5, YEAH, LET ME START KICKING MY SINK

(MOTIONING). OH, THE SINK BROKE, IT FELL. CELL 4, LET ME START KICKING MY SINK. I DON'T KNOW THAT ANYBODY ELSE -- I MEAN I'M NOT COORDINATING WITH ANYBODY ELSE, BUT, OH, THE SINK BROKE. AND IT'S ON, 10 -- 8, 10, 11, ALL JUST A COINCIDENCE, ALL PEOPLE JUST -- AND FUNNY ENOUGH, NOBODY FROM CELL 12 ON HAS THIS -- HAS THIS IDEA. WHAT INFERENCE DO YOU MAKE FROM THAT? WHAT'S THE REASONABLE -- NOT WHAT'S POSSIBLE. WHAT'S REASONABLE? WHAT'S LOGICAL? COMMON LOCATION, COMMON ACTION, COMMON TIME, THESE GUYS ARE SINGING THE SAME SONG, THEY'RE ACTING WITH COMMON INTENT.

WE NEED AN OVERT ACT FOR VANDALISM. THESE ARE NOT OVERT ACT CASES BECAUSE IN SOME CASES, YOU KNOW, CONSPIRACY DOESN'T GET VERY FAR. AND THAT'S THE KIND OF CASE WHERE OVERT ACT BECOMES A REAL ISSUE. OKAY. THIS IS NOT AN OVERT ACT CASE. FOR VANDALISM, THERE'S TWO LISTED OVERT ACTS. ONCE YOU FIND ONE, STOP, THE REST OF IT IS FLAGPOLES.

MC GHEE BROKE HIS SINK. GUESS WHAT? HE ADMITTED IT. OKAY. HE ADMITTED IT. MC GHEE BROKE HIS SINK, THERE'S THE OVERT ACT. YOU DON'T HAVE TO GO ANY FURTHER. BUT IF YOU WANTED TO, PLUS OTHER INMATES BROKE SINKS, 6, 7, 8, 4, 5, 10, 11, OKAY. AND REMEMBER YOU ONLY NEED ONE OVERT ACT BY ANY CONSPIRATOR, IT CAN BE MC GHEE, IT CAN BE SOMEBODY ELSE. RIGHT? IT'S NOT AN OVERT ACT CASE.

JUST -- I JUST WANTED TO SHOW YOU THESE

EXHIBITS. I DON'T KNOW, ONLY 'CAUSE, YOU KNOW, IT'S KIND OF HARD TO DO FREEZE FRAME, SO I DIDN'T WANT TO WASTE THESE. SIX, SEVEN AND EIGHT ON THE VIDEO. BUT, YOU KNOW, OTHERS, MORALES DOCUMENTED THE PHOTOS OF SOME OF THE BROKEN PIECES. THIS IS BY NO MEANS ALL. NOBODY EVER CLAIMED THAT THIS IS ALL THE BROKEN PIECES, JUST SOME OF THEM.

OKAY. SO YOU GOT AGREEMENT, SINGING THE SAME SONG. YOU GOT -- YOU GOT AT LEAST THEY SUNG ONE NOTE, EITHER ONE OF THEM. AND SO YOU GOT OVERT ACT -- I MEAN AGREEMENT PLUS ACT, OVERT ACT, GUILTY OF COUNT 1, CONSPIRACY TO COMMIT ASSAULT, GUILTY OF COUNT 2, VANDALISM. OKAY. 'CAUSE WE SHOWED -- FOR EACH ONE WE SHOWED AN AGREEMENT, WHETHER EXPRESS OR IMPLIED, AND THEN WE SHOWED AN ACT, OKAY, AT LEAST ONE ACT BY ANY ONE OF THOSE GUYS.

COUNT 4, THESE ARE -- AND I'M GOING TO GO OUT OF ORDER ONLY BECAUSE I WANT TO TALK ABOUT OBSTRUCTION, THE OBSTRUCTION COUNTS, THEY'RE PENAL CODE SECTION 69. SO WHENEVER YOU SEE PENAL CODE SECTION 69 OR THE WORD OBSTRUCTION OR THE WORD DETER, WE'RE TALKING ABOUT THE SAME THING WHICH IS TRYING TO PREVENT A POLICE OFFICER -- THAT'S WHAT IT MEANS PEACE OFFICER, DEPUTIES ARE POLICE OFFICERS -- FROM DOING THEIR DUTY. OKAY. IN THE JURY INSTRUCTIONS, THEY'RE DEFINE AS EXECUTIVE OFFICERS. IN THIS CASE, JUST VIEW IT AS POLICE OFFICERS. YOU'RE GOING TO BE INSTRUCTED THAT POLICE OFFICERS ARE EXECUTIVE OFFICERS.

AND HERE'S -- REMEMBER THESE EVENTS OCCUR OVER A PERIOD OF TIME. SO IF COUNT 4 IS ATTEMPTED OBSTRUCTION OF IBARRA, TAYLOR, ARGUETA AND OROSCO, THAT'S INVOLVING THE GONZALEZ THING, OKAY, WHEN THEY'RE -- WHEN THEY'RE PELTED, OKAY. THAT'S WHAT THAT REFERS TO.

COUNT 5 IS ATTEMPTED OBSTRUCTION BY VIOLENCE OF NIGHT SHIFT DEPUTIES; THAT'S MC MULLEN AND MORALES, THE HOSE GUYS, THE HOSE GUYS, OKAY. SO THERE'S THE EARLY GUYS, THE HOSE GUYS.

AND THERE'S ATTEMPTED OBSTRUCTION BY VIOLENCE OF RIOT SQUAD, COUNT 8. AND THAT'S THE RIOT SQUAD. OKAY. SO THAT'S ONE EASY WAY TO THINK ABOUT IT. OKAY. THE EARLY GUYS, THE HOSE GUYS, AND THEN THE RIOT GUYS. OKAY.

OKAY. HERE FROM COUNTS 4 ON AND NOT -- NOT REALLY CONSPIRACY, BUT COUNTS 4 ON, THERE'S A CONCEPT YOU NEED TO BE AWARE OF. EVERYTHING OTHER THAN CONSPIRACY IS SUBJECT TO A RULE CALLED AIDING AND ABETTING. APPLIES TO COUNTS 4, 5, 6, 7, 8, 9. THERE IS NO COUNT 3, AND YOU'RE NOT SUPPOSED TO SPECULATE ABOUT WHY OR, YOU KNOW -- JUST DON'T SPECULATE, OKAY.

AND ON THOSE COUNTS, 4 THROUGH 9, YOU'RE LIABLE IF YOU'RE EITHER A CONSPIRATOR OR AN AIDER AND ABETTOR. COUNT 1 AND 2, OBVIOUSLY I CHARGED CONSPIRACY, YOU GOT TO FIND CONSPIRACY. BUT ANY OTHER COUNT, WHICH IS ALL THE REST OF THEM, YOU HAVE EITHER CONSPIRACY OR AIDING AND ABETTING. I'M NOT GOING TO

REPEAT MYSELF ON WHAT CONSPIRACY IS. BUT YOU HAVE TO UNDERSTAND THAT WHEN YOU'RE A CONSPIRATOR, IF ALEX AND I CONSPIRE, I AM RESPONSIBLE FOR EVERYTHING HE DOES, AND HE'S RESPONSIBLE FOR EVERYTHING I DO. OKAY. IF WE CONSPIRE TO THROW -- OKAY, PORCELAIN SHARDS AT THE WALL, EVERY THROW HE DOES IS LIKE I THREW IT AND EVERY THROW I DO IS LIKE WHAT HE THREW. OKAY, THAT'S CALLED INDIRECT LIABILITY.

OKAY. THINK OF IT LIKE THE THREE MUSKETEERS, ALL FOR ONE AND ONE FOR ALL. THAT'S WHAT INDIRECT LIABILITY IS. BUT THE LAW ALLOWS THAT KIND OF ONE FOR ALL, ALL FOR ONE UNDER CONSPIRACY AND ALSO THERE'S A SEPARATE THEORY CALLED AIDING AND ABETTING. THAT, ALSO, IF WE AID AND ABET, SAME THING, WHAT HE DOES IS WHAT I DO AND WHAT I DO IS WHAT HE DOES. OKAY. SO THIS ALSO -- DISTINCT CONCEPT CALLED AIDING AND ABETTING.

FOR AIDING AND ABETTING, YOU HAVE TO KNOW THAT A CRIME IS BEING COMMITTED. YOU HAVE TO HAVE THE INTENT TO COMMIT THAT SAME CRIME YOURSELF OR ENCOURAGE SOMEONE ELSE TO COMMIT THAT CRIME OR MAKE IT EASIER. OKAY. HERE, THEY'RE ALL -- YOU'LL SEE IN AIDING AND ABETTING, THEY'RE ALL DOING THE SAME CRIME, OKAY. SO IT'S JUST INTENT TO COMMIT HERE. AND YOU HAVE TO BY ACT OR ADVICE, AID, PROMOTE, OR ENCOURAGE. THAT'S VERY BROAD WORDS: AID, PROMOTE OR ENCOURAGE.

LET ME GIVE YOU AN EXAMPLE. THIS IS NOT EVEN CLOSE TO THIS CASE. BUT, FOR EXAMPLE, IF

SOMEBODY STOPS AT MY DOOR AND SAYS I'M GOING TO ROB A BANK AND THE BANK IS THE GREAT WESTERN BANK, BUT I'M HAVING TROUBLE FINDING IT, OKAY. COULD YOU PLEASE LET ME KNOW WHERE THIS BANK IS SO I COULD ROB IT? AND I GO, OH, YEAH, SURE, LET ME GET IN THE CAR AND SHOW YOU. I DRIVE WITH HIM AND I GO, THERE IT IS, THERE'S THE BANK, GO AHEAD, DO WHAT YOU NEED TO DO. I'VE AIDED AND ABETTED A BANK ROBBERY.

OKAY. I CAN'T DO THAT. AND I'M RESPONSIBLE JUST LIKE THE GUY WHO GOES IN. OKAY, BECAUSE I KNEW WHAT HE WAS GOING TO DO, I INTENDED TO IN THIS CASE ENCOURAGE OR FACILITATE, AND BY ACT OR ADVICE -- BOTH ACTUALLY 'CAUSE I GOT IN THE CAR AND I POINTED OUT THE BANK -- I AIDED, I PROMOTED, OR I ENCOURAGED THIS CRIME, OKAY. SO YOU CAN'T HELP CRIMINALS DO CRIMES. YOU CAN'T HELP OTHER CRIMINALS DO CRIMES. THAT'S BASICALLY WHAT IT IS, OKAY.

AND ALSO ON THESE COUNTS, THESE LATER COUNTS, SOME OF THOSE COUNTS HAVE MORE THAN ONE VICTIM. AND THIS OCCURS IN CASES WHERE THERE'S LIKE A BIG GROUP OF PEOPLE WHO ARE BEING ASSAULTED. LIKE IN THIS CASE, LIKE FOR EXAMPLE -- I'LL JUST GIVE YOU AN EXAMPLE -- FOR THE RIOT SQUAD, LIKE HE'S THROWING PORCELAIN AT THE WHOLE SQUAD, OKAY. SO WHO DO YOU NAME AS A VICTIM? THE LAW REQUIRES THAT THERE BE SOME KIND OF NAME. AND THERE'S A COUPLE WAYS TO GO AS A PROSECUTOR.

ONE IS TO LIST AS A SEPARATE COUNT EACH

AND EVERY MEMBER OF THE RIOT SQUAD. OKAY. I DIDN'T WANT TO DO THAT, OKAY, 'CAUSE I TRUSTED YOU FOLKS WILL BE ABLE TO USE COMMON SENSE, OKAY. SO WHAT WE DID IS WE LISTED THE GUYS WHO TESTIFIED. AND SINCE HE'S THROWING AT THE WHOLE GROUP, WHEN HE'S THROWING AT THE WHOLE GROUP, HE'S ALSO THROWING AT ANYONE IN THAT GROUP. SO THAT'S WHY WE LISTED WITH THESE -- AND WE'LL GO THROUGH THIS. BUT, FOR EXAMPLE, I THINK OBSTRUCTION, WE SAY HE WAS TRYING TO OBSTRUCT MC MULLEN AND MORALES. WELL, YOU CAN FIND EITHER ONE. OKAY. THE RULE IS YOU JUST HAVE TO AGREE AS TO ONE NAME. SO, FOR EXAMPLE, IF I SAY HE OBSTRUCTED MORALES AND MC MULLEN, YOU JUST HAVE TO FIND HE OBSTRUCTED MORALES OR HE OBSTRUCTED MC MULLEN. OKAY.

AS TO THE RIOT SQUAD, YOU DON'T NEED TO FIND THAT -- I THINK I'VE LISTED FOUR NAMES OR THREE NAMES: ALVAREZ, THE VIDEOGRAPHER, THAT'S EASY 'CAUSE YOU CAN ALWAYS TELL WHERE HE IS BECAUSE THAT'S FROM THE PERSPECTIVE OF THE CAMERA. OKAY. THERE'S ALSO COLEMAN, WILSON, AND FOR THE OBSTRUCTION COUNT, BELTRAN. YOU DON'T HAVE TO AGREE THAT ALL OF THEM ARE VICTIMS, JUST AS LONG AS YOU UNANIMOUSLY AGREE AS TO ANY ONE. OKAY.

ALL RIGHT. OBSTRUCTION, WHAT ARE THE ELEMENTS? WHAT DO I HAVE TO PROVE FOR OBSTRUCTION? I HAVE TO PROVE THAT DEFENDANT WILLFULLY AND UNLAWFULLY ATTEMPTED AND SPECIFICALLY INTENDED TO DETER AN EXECUTIVE OFFICER FROM PERFORMING ANY DUTY. OKAY.

HIS INTENT WAS TO DETER OFFICERS. THERE'S ALSO THIS CONCEPT WILLFULLY, OKAY.

WILLFULLY, IF YOU READ IT IN THE INSTRUCTIONS, DOES NOT REQUIRE AN INTENT TO VIOLATE THE LAW. OKAY. THAT'S I BELIEVE 1.20 OR SOMETHING LIKE THAT. OKAY. SO JUST -- BUT THE INTENT HERE IS NOT TO VIOLATE THE LAW. THE INTENT HAS TO BE -- THE SPECIFIC INTENT HAS TO BE TO DETER, OKAY, WHICH HE ADMITTED THAT HIS ACTIONS, WHATEVER THEY WERE, WERE INTENDED TO DETER. OKAY. I MEAN A LOT OF THIS STUFF CAME FROM HIS OWN MOUTH UP THERE, OKAY, WHETHER HE KNEW IT OR NOT.

AND HE HAS TO INTEND TO DETER AN EXECUTIVE OFFICER PERFORMING ANY DUTY. SO THE OFFICER HAS TO BE -- POLICE OFFICER HAS TO BE DOING HIS DUTY AND HE HAS TO HAVE INTENDED TO DETER THAT DUTY. HE DOES NOT HAVE TO INTEND TO VIOLATE THE LAW BECAUSE WILLFULLY SAYS YOU DON'T HAVE TO INTEND TO VIOLATE THE LAW.

AN EXECUTIVE OFFICER, WHAT'S AN EXECUTIVE OFFICER? YOU'RE GOING TO BE INSTRUCTED L.A. SHERIFF'S DEPUTY, POLICE OFFICERS, THEY'RE EXECUTIVE OFFICERS. THAT'S NOT AN ISSUE.

NOW, I NOTICE SOMETHING. ATTEMPT TO DETER IS ENOUGH. IF YOU GET BACK THERE AND SOME OF THE JURORS SAY, WELL, HOW LONG DID HE REALLY SUCCEED IN DELAYING? THAT'S NOT AN ISSUE. THAT'S NOT SOMETHING I HAVE TO PROVE. I DO NOT HAVE TO PROVE

THAT HE SUCCESSFULLY DETERRED, THAT HE SUCCEEDED. ALL I HAVE TO SHOW IS HE ATTEMPTED TO DETER SO LONG AS THE INTENT WAS THERE.

AND THE DEPUTY ON OBSTRUCTION COUNTS ONLY, OKAY, WHEN YOU SEE AN OBSTRUCTION COUNT, YOU SEE I HAVE TO PROVE DUTY, I HAVE TO PROVE -- IF I HAVE TO PROVE DUTY, ONLY IF DUTY IS AN ELEMENT OF THE OFFENSE. NOW, NOTICE WE HAVEN'T BEEN TALKING ABOUT EXCESSIVE FORCE FOR ASSAULT OR -- OR VANDALISM BECAUSE IS DUTY AN ELEMENT OF THOSE -- IS DUTY AN ELEMENT OF THOSE CRIMES? NO.

OKAY, BUT NOW WE'RE DEALING WITH -- I HAVE TO PROVE THAT THE POLICE OFFICER WAS ENGAGED IN HIS DUTY. THERE I ALSO HAVE TO PROVE AS PART OF HIS DUTY, IT'S IMPLIED THAT AN OFFICER HAS TO BE REFRAINING FROM USING EXCESSIVE FORCE FOR PURPOSES OF -- FOR PURPOSES OF SAYING HE'S DOING HIS DUTY. IF YOU'RE EXCEEDING YOUR FORCE -- ALLOWABLE FORCE AS AN OFFICER, THEN YOU'RE NOT DOING YOUR DUTY, OKAY. BUT, AGAIN, ONLY WHEN -- THIS COMES UP WHEN YOU HAVE THE CONCEPT OF PROVING -- I HAVE TO PROVE DUTY, OKAY, NOT FOR ASSAULT, NOT FOR VANDALISM, OKAY. DON'T CONFUSE THESE COUNTS.

AND THE OTHER ELEMENT THAT HAS TO BE PROVEN IS THE ATTEMPT WAS ACCOMPLISHED BY SOME MEANS OF VIOLENCE. HERE THERE'S NOT REALLY A DISPUTE THAT THERE WAS SOME FORM OF VIOLENCE. I MEAN THROWING -- YOU KNOW, YOU'LL SEE, THIS -- THROWING STUFF IS

VIOLENCE, OKAY. WE CAN ALL AGREE THROWING STUFF IS VIOLENCE, OKAY. ALL RIGHT. I MEAN... ALL RIGHT.

THE FACTS, WHAT -- OKAY, SO LET'S DEAL WITH COUNT 4. LET'S DO THEM ONE AT A TIME.

COUNT 4, OBSTRUCTION, THAT'S IBARRA, TAYLOR, OROSCO, AND ARGUETA. YOU ONLY HAVE TO FIND THAT ONE OF THOSE GUYS WAS A VICTIM. AGREEMENT AS TO ONE NOT ALL. ASSAULTED BY FOOD ITEMS AND CARTONS OF URINE WHEN STRUGGLING TO GET GONZALEZ OFF THE ROW FOR PRUNO. MC GHEE ADMITS THERE WAS VIOLENCE. HE ADMITS THAT HE THREW AT THE DEPUTIES AND THAT HE INTENDED TO DETER. WHAT'S THE ISSUE?

NEED ONLY AGREE AS TO ONE VICTIM, I TOLD YOU THAT.

SO WHAT'S THE ISSUE HERE? I MEAN HE ADMITTED THAT HE WAS TRYING TO DETER AND HE USED VIOLENCE WHICH IS THROWING. SORRY. IS IT THAT HE -- IBARRA, WHETHER HE WAS -- AND ALL THOSE GUYS WERE EXECUTIVE OFFICERS? NO. YOU'RE GOING TO BE TOLD THAT THEY ARE. IS IT THAT HE -- THERE WAS AN ATTEMPT TO DETER, NO ATTEMPT -- NO. OKAY, 'CAUSE HE TELLS YOU I THREW WITH THE INTENT TO DETER.

HERE'S WHAT THE ISSUE IS ON THIS COUNT 4, IBARRA, TAYLOR, AND OROSCO. HOPEFULLY THIS HELPS YOU AVOID THE FLAGPOLE ISSUES, YOU FOCUS LIKE A LASER BEAM AND THIS ISSUE ON COUNT 4 ONLY. THIS IS NOT GOING TO COUNT 1, THIS IS NOT GOING TO COUNT 2. DON'T MIX APPLES AND ORANGES.

ON THIS COUNT, THE ISSUE IS GOING TO BE WAS HE DOING A LAWFUL DUTY? WAS IBARRA AND ALL THEM DOING THEIR LAWFUL DUTY? AND THIS TURNS OUT, AS A MATTER OF FACT, JUST TO WHO YOU BELIEVE, OKAY. AND IF YOU BELIEVE IBARRA, LOOK, THE GUY IS ON PRUNO, THEY TRY TO USE A RUSE TO DO THIS THE QUIET WAY, HE'S NOT FALLING FOR IT. THEY GOT TO GET HIM OFF THE ROW FOR HIS OWN SAFETY AND ALSO TO DISCIPLINE HIM BECAUSE YOU CAN'T HAVE INMATES DRINKING LIKE THAT. SO THEY'RE PULLING HIM OFF. AND IBARRA IS SAYING THEY'RE JUST PULLING, OKAY. WHAT'S UNREASONABLE ABOUT THAT IN A JAIL CONTEXT? IN YOUR LIVING ROOMS, YEAH, OKAY. BUT THIS IS NOT YOUR LIVING ROOM. OKAY. WHAT'S UNREASONABLE ABOUT THAT?

SHOULD WE JUST -- SHOULD IBARRA JUST SAY, OH, OKAY, WELL, ALL RIGHT, GO BACK TO YOUR CELL AND KEEP DRINKING PRUNO? WHOOPS. YOU SAID NO, OKAY, WE'LL JUST KEEP DRINKING PRUNO. IS THAT REASONABLE? IS THAT HOW WE WANT OUR JAILS TO RUN? YOU KNOW, IN YOUR LIVING ROOM, OF COURSE, IF SOMEBODY SAYS, YEAH, I DON'T WANT -- I DON'T WANT TO GO THERE, OF COURSE, IN YOUR LIVING ROOM YOU SAY, OKAY. BUT IN A JAIL CONTEXT, WHEN SOMEBODY HAS BEEN DRINKING AND IT'S AGAINST JAIL RULES AND IT'S AGAINST THE LAW, A CRIME TO DO THAT, NO.

I DON'T THINK YOU'RE GOING TO HEAR ARGUMENT THAT JUST PULLING SOMEBODY IS EXCESSIVE FORCE. YOU'RE NOT GOING TO HEAR ARGUMENT FROM ME

EITHER THAT IF MC GHEE -- WHAT MC GHEE AND GONZALEZ SAY HAPPENED, THAT THAT'S NOT EXCESSIVE FORCE. I MEAN YOU DON'T -- YOU DON'T GET TO JUST POUND ON A GUY, OKAY, JUST POUND AND POUND AND POUND AWAY AND STOMP, AND THEN BRING HIM OVER HERE AND STOMP AND POUND AND STOMP AND POUND AND BRING HIM -- I MEAN YOU DON'T GET TO DO THAT, OKAY. NO ONE IN THEIR RIGHT MIND WOULD THINK THAT.

BUT YOU GOT TO BELIEVE MC GHEE AND GONZALEZ. CONSIDER THE SOURCES OF YOUR INFORMATION. MC GHEE IS THE GUY, THIS USED CAR SALESMAN WHO SITS THAT CHAIR, TURNS TO YOU -- REMEMBER IN RESPONSE TO ONE OF MY QUESTIONS, HE MADE THIS BIG -- HE'S LIKE AN ACTOR UP THERE. AND HE STARTED TELLING YOU ABOUT, OH, YOU SHOULD SEE THESE BIG CANISTERS THEY HAVE OF PEPPER SPRAY. YOU DON'T THINK HE KNEW HE WAS TRYING TO PLAY TO YOUR EMOTIONS AND SYMPATHIES? THAT BIG CANISTER OF PEPPER SPRAY. AND THEN WHAT DID WE LEARN ABOUT THAT? THAT STUFF IS ALL LOCKED UP. HE APPARENTLY THOUGHT THAT THEY KEPT IT -- 'CAUSE THAT'S WHAT HE SAID -- IN THAT OFFICER'S CAGE. BUT THEY DON'T. THEY KEEP IT UNDER LOCK AND KEY IN THE ARMORY AND ONLY A SERGEANT CAN RELEASE THAT.

ANYWAYS, BUT THE MAIN THING, YOU KNOW, THIS IS A VERY COMMON THING THAT -- A CLASSIC THING THAT MANY JURORS FIND HELPFUL IS WHEN YOU HAVE TESTIMONY LIKE ONE PERSON SAYS THIS, ANOTHER PERSON SAID A PERSON SAYS THAT, ONE THING THAT YOU LOOK AT

IS, WELL, WHAT'S THE PHYSICAL EVIDENCE? AND IN AN ATTACK, WHAT'S AN IMPORTANT PIECE OF PHYSICAL EVIDENCE? INJURIES. MC GHEE AND GONZALEZ TELL THE SAME STORY OF BEING BEATEN HERE, STOMPED, BEATEN HERE, STOMPED, BEATEN THERE, STOMPED. BUT WHAT'S UNDISPUTED IS THIS -- EVEN GONZALEZ ADMITTED THIS -- HE NEVER SOUGHT ANY MEDICAL ATTENTION AND HE HAD NOT A SINGLE VISIBLE INJURY.

I DON'T KNOW IF ANY OF YOU HAVE EVER BEEN IN A -- IN A FIGHT, EVEN A LITTLE SCHOOL FIGHT OR OBSERVED A SCHOOL FIGHT. COME ON, BEING ON THE GROUND AND PUNCHED AND STOMPED BY MULTIPLE PEOPLE AND NOT EVEN A LITTLE CUT? NOT EVEN A LITTLE CUT. NOT EVEN AN ABRASION. HAVE YOU EVER -- HAVE YOU EVER LIKE GONE BY AN EDGE IN A WALL AND SCRAPED YOUR KNEE OR YOUR LEG? EVEN THAT KIND OF CONTACT CAUSES AN ABRASION, A SCRAPE. NOT EVEN THAT?

AND HIS WITNESS GONZALEZ, WHAT DO YOU MAKE OF THE FACT THAT WHILE WE'RE IN THE MIDDLE OF TRIAL IS WHEN HE COMES FORWARD? IN THE MIDDLE OF TRIAL, HE SURFACES. FOLKS, IT'S WHAT'S REASONABLE. IBARRA -- WHEN IBARRA SAYS, IT'S REASONABLE, IT'S CONSISTENT WITH NO VISIBLE INJURIES. WHAT MC GHEE AND GONZALEZ SAY IS UNREASONABLE BECAUSE IT'S INCONSISTENT WITH NO VISIBLE INJURIES. THAT'S THE ONLY ISSUE ON COUNT 4, AND IT'S NOT REASONABLE TO DECIDE THAT ISSUE IN THE DEFENDANT'S FAVOR.

LET'S GO TO COUNT 5. MC MULLEN AND

MORALES, WHAT'S THE ISSUE HERE? REMEMBER THESE GUYS COME ON THE ROW JUST TO -- ON THE FIRST FLOOR JUST TO SEE WHAT'S GOING ON. AND ON THE SECOND -- SECOND FLOOR, THEY'RE TRYING TO PUT OUT THOSE FIRES. AND THEY TOLD YOU WHY THEY DIDN'T GO ON TO THE SIDE BECAUSE THEY DIDN'T WANT TO TURN THEIR BACKS IN THIS NARROW SPACE; MC MULLEN TOLD YOU, YOU KNOW, WITH INMATES BEHIND HIM.

OKAY. AND, AGAIN, YOU KNOW, THIS ISN'T YOUR LIVING ROOM WHERE -- YOU CAN TURN YOUR BACK ON YOUR GUESTS. SO WHAT? THIS IS AT COUNTY JAIL. YOU GOT TO UNDERSTAND WHAT -- WHAT THESE DEPUTIES HAVE TO DEAL WITH. THESE GUYS MAKE WEAPONS. OKAY. THEY TAKE RAZORS OUT OF -- OUT OF THEIR SHAVERS, THEY MOUNT THEM ON THINGS, AND THEY CUT PEOPLE. YOU HEARD TESTIMONY ABOUT THAT. OKAY.

ALL RIGHT. WHAT'S THE ISSUE HERE WITH MC MULLEN? THEY DIDN'T USE FORCE HERE. THERE'S NO ALLEGATION THAT THEY USED ANY FORCE. THEY'RE NOT -- AGAIN, THEY'RE OBVIOUSLY PEACE OFFICERS. THEY MUST BE DOING THEIR LAWFUL DUTY. THERE'S NO -- THERE'S NO ALLEGATION OF EXCESSIVE FORCE AGAINST THEM. OKAY. SO REMEMBER DON'T CONFUSE COUNT 5 WITH COUNT 4. COUNT 5, NO ALLEGATION MC MULLEN OR MORALES ARE USING ANY FORCE. BUT YOU HAVE TO HAVE ATTEMPTED TO DETER OR -- OR AIDED AND ABETTED OTHERS OR CONSPIRE WITH OTHERS IN ATTEMPTING TO DETER. AND HIS TESTIMONY HERE IS, OH, I DIDN'T THROW ANYTHING AT THE -- AT MC MULLEN AND

MORALES, OKAY. THAT'S THE ISSUE.

OKAY. WHAT EVIDENCE DO YOU HAVE? YOU HAVE BOTH OF THESE GUYS POSITIVELY IDENTIFYING MC GHEE AS ONE OF THOSE GUYS THROWING SHARDS. IT DOESN'T MATTER IF HE THREW ALL THE SHARDS OR WHICH SHARD HE THREW. THIS IS GOING TO BE THE -- SOME OF YOU MAY HAVE THOUGHT, OH, THE PROSECUTOR HAS TO PROVE THAT THE SHARD LEFT HIS HAND AND STRUCK MC MULLEN. NO. FIRST OF ALL, THIS IS A COUNT OF OBSTRUCTION. I DON'T EVEN HAVE TO PROVE ANYTHING HIT ANYBODY, OKAY. IT'S JUST AN ATTEMPT TO DETER.

BUT THEY'VE -- ALL I HAVE TO SHOW IS THAT HE PARTICIPATED IN SOME WAY AS AN AIDER AND ABETTOR, AS AN ACTUAL PARTICIPANT THROWING, OR AS A CONSPIRATOR. OKAY. TO MAKE IT EASY, HE PARTICIPATED, HE THREW. AND YOU HAD MORALES GET UP THERE UNDER OATH AND SAY I'M POSITIVE THAT GUY THREW. YOU HAVE MC MULLEN GET UP THERE AND SAY I'M POSITIVE, HE THREW. OKAY. YOU THINK THEY REALLY LIED ABOUT THAT? THEY -- THEY POSITIVELY IDENTIFY HIM ON THE FIRST FLOOR, POSITIVELY IDENTIFY HIM ON THE SECOND FLOOR, OKAY, NO EXCESSIVE FORCE ISSUES. YOU REALLY THINK THEY LIED ABOUT THAT? I MEAN YOU GOT TO SEE THEM.

YOU KNOW, ONE THING -- ONE -- THERE ARE MOMENTS IN A TRIAL WHEN YOU REALIZE SOMEBODY IS JUST PLAYING IT STRAIGHT. AND THAT'S WHEN YOU ASK MORALES AND YOU ASK MC MULLEN THE SAME THING WHICH IS, HEY, THAT PIECE OF SHARD THAT HIT MC MULLEN, WHO THREW

THAT? AND YOU WOULD THINK THAT IF THEY HAD IT IN FOR MC GHEE, THEY WOULD HAVE SAID, OH, IT WAS MC GHEE, IT WAS THAT DEFENDANT THAT THREW THAT SHARD. BUT THEY DON'T SAY THAT, DO THEY?

MC MULLEN SAYS I HONESTLY DON'T KNOW BECAUSE -- AND THIS IS -- THIS IS -- REALLY MADE SENSE BECAUSE IF I HAD SEEN WHO THREW IT, I WOULD HAVE GOTTEN OUT OF THE WAY. MAKES SENSE, RIGHT? AND MORALES DOESN'T SAY IT WAS MC GHEE, HE SAYS IT WAS REYES. AND BOTH OF THEM, BY THE WAY, I WAS TELLING YOU ABOUT THAT COMMON LINE, BOTH OF THEM SAY THE GUYS -- THE GUYS WHO ARE DOING THE MOST THROWING WERE WHO? REYES IN CELL 6, MC GHEE IN CELL 7. REYES AND MC GHEE TOGETHER AGAIN SINGING THE SAME SONG ALONG WITH OTHERS. WHAT DOES THAT SHOW YOU? THOSE TWO NAMES KEEP POPPING UP ALL OVER THE CASE.

BUT THERE'S POSITIVE IDENTIFICATIONS. AND YOU KNOW THEY'RE PLAYING IT STRAIGHT 'CAUSE THEY'RE NOT TRYING TO MAKE HIM LOOK BAD. IT'S NOT LIKE I HAVE TO PROVE THIS, BUT STILL THEY COULD MAKE HIM LOOK BAD AND THEY DON'T. OKAY. UNLIKE THIS CHARACTER WHO GETS UP HERE AND AT THE DROP OF A HAT, HE'S READY TO ACCUSE ANYBODY AND EVERYBODY INCLUDING ME OF EVERYTHING. OKAY. AND THEN HE TELLS YOU, OH, I'M SO AFRAID TO COMPLAIN. DID HE SEEM LIKE HE WAS AFRAID TO COMPLAIN? EVERY OTHER WORD OUT OF HIS MOUTH IS ABOUT -- IS ABOUT HOW HE'S BEING DENIED HIS RIGHTS AND THIS AND THAT AND HOW SOMEBODY IS -- COME ON.

COUNT 4, OKAY, WE WENT THROUGH OBSTRUCTION, WHY IT'S NOT EXCESSIVE FORCE, WHY YOU BELIEVE IBARRA, NO INJURIES TO GONZALEZ.

COUNT 5, WHY MC MULLEN, MORALES ARE RIGHT. THEY'RE PLAYING IT STRAIGHT. THEY TOLD YOU HE THREW. THEY WEREN'T EXAGGERATING. OKAY.

COUNT 8, ALVAREZ, WILSON, COLEMAN AND BELTRAN, THIS IS THE RIOT SQUAD, OKAY. ALVAREZ IS THE HAVE VIDEOGRAPHER. WILSON IS THE GUY WHO IS LEADING THE TEAM. COLEMAN IS ON THE PEPPER BALL GUN. YOU CAN JUST AGREE AS TO ALVAREZ 'CAUSE IT'S EASY TO KNOW WHERE HE IS 'CAUSE THAT'S WHERE THE CAMERA IS, OKAY. AND HE'S THROWING AT THE WHOLE GROUP. BELTRAN IS THE GUY WHO GOES IN -- FIRST GUY TO GO IN FOR THE CELL EXTRACTION. OKAY.

WHAT'S THE ISSUE HERE? I TOLD YOU WHAT WE HAVE TO PROVE. AGAIN, IT'S NOT THAT THEY'RE POLICE OFFICERS. IT'S NOT THAT HE DIDN'T RESIST OR USE FORCE OR ATTEMPT TO DETER. HE EVEN TELLS YOU THAT THE ACTIONS HE TOOK AT THIS POINT AGAINST THE RIOT SQUAD, ALTHOUGH HE SAYS THIS IS TO GET -- CALL THE ACLU. BUT HE SAYS THAT THIS WAS TO DETER THE OFFICERS, OKAY, HE ADMITS THAT.

OKAY. HERE, I HAVE TO PROVE DUTY, SO THE CONCEPT OF EXCESSIVE FORCE IS POTENTIALLY IN PLAY. AND THE CONCEPT OF EXCESSIVE FORCE COMES INTO PLAY IN SELF-DEFENSE, OKAY. NOW, LET ME CAUTION YOU ABOUT SOMETHING AND THIS HAPPENED DURING JURY INSTRUCTIONS,

AND REMEMBER THE JUDGE TOLD YOU TO CROSS OUT DEFENSE OF OTHERS.

NOW, BEFORE THIS CASE YOU MAY HAVE HAD IN YOUR MINDS THIS CONCEPT THE DEFENSE OF OTHERS. I'M NOT GOING TO EXPLAIN, 'CAUSE IT'S NOT REALLY PROPER FOR ME TO DO THAT, WHY. BUT IN THIS CASE, DEFENSE OF OTHERS DOES NOT APPLY. DEFENDING RODOLFO GONZALEZ IS NOT A DEFENSE. OKAY. IF SELF-DEFENSE APPLIES, AS IMPLIED IN THE WORD SELF-DEFENSE, IT HAS TO BE DEFENDING HIMSELF, OKAY. THAT'S WHY IT'S ONLY AS TO RIOT SQUAD, 8 AND 9. OKAY. 'CAUSE HE'S NOT DEFENDING HIMSELF AGAINST MC MULLEN, THE MIDDLE GUYS, OKAY.

SO ANYBODY WHO SAYS, WELL, I THINK HE WAS TRYING TO DEFEND HIS FRIEND, WHOA, WHOA, WHOA, WHOA, THAT'S DEFENSE OF OTHERS, IT DOESN'T APPLY. REMEMBER THE JUDGE TOLD US TO CROSS THAT OUT. OKAY. REMEMBER THE JUDGE TOLD YOU TO CROSS IT OUT. SO WHEN YOU HEAR -- WHEN YOU HEAR, HEY, I THINK HE WAS DEFENDING RODOLFO HIS FRIEND, YOUR EARS SHOULD BE RINGING, NO, NO, NO, NO, THE JUDGE TOLD US WE DON'T CONSIDER DEFENSE OF OTHERS. OKAY.

ALL RIGHT. MUST BE DOING HIS LAWFUL DUTY. THIS IS COUNT 8 AND 9 NOW WHERE SELF-DEFENSE IS A POTENTIAL DEFENSE TO CONSIDER. AND YOU'LL SEE THIS FORCE -- THIS CONCEPT OF EXCESSIVE FORCE IS SOMETHING THAT YOU HAVE TO LOOK AT FOR PURPOSES OF ASSESSING SELF-DEFENSE.

AND LET ME TABLE RIGHT NOW THIS

DISCUSSION ABOUT SELF-DEFENSE AND EXCESSIVE FORCE 'CAUSE I DON'T WANT TO BE REPETITIVE AND WE'LL TALK ABOUT IT ALL AFTER THE -- WE TALK ABOUT ASSAULT ON THE RIOT SQUAD BECAUSE IT'S A DEFENSE TO COUNT 9, ASSAULT ON RIOT SQUAD AS WELL. OKAY. SO WE'LL TALK ABOUT THIS. I PROMISE WE'LL TALK ABOUT SELF-DEFENSE AND EXCESSIVE FORCE, THOSE CONCEPTS, WHEN WE TALK ABOUT SELF-DEFENSE ON THE RIOT SQUAD ASSAULT CASE. OKAY. COUNT 8 IS OBSTRUCTION RIOT SQUAD, COUNT 9 IS ASSAULT -- FELONY ASSAULT RIOT SQUAD. OKAY. SO WE'LL TALK ABOUT THIS IN A LITTLE WHILE.

LET'S TALK ABOUT THE ASSAULT, FELONY ASSAULTS. IT'S CALLED ASSAULT WITH A DANGEROUS WEAPON. IT DOESN'T MEAN IT HAS TO BE A GUN. IT DOESN'T MEAN IT HAS TO BE A KNIFE. IT CAN BE ANYTHING THAT CAN CAUSE NON-TRIVIAL INJURY. OKAY. THAT'S WHAT A DANGEROUS WEAPON IS. LET ME JUST... THIS IS A DANGEROUS WEAPON (INDICATING), OKAY. LOOK AT THOSE SHARDS. WOULD ANYBODY LIKE THAT THROWN AT THEM? WHEN YOU GET BACK THERE, FEEL THE WEIGHT OF THIS THING IN ADDITION TO ITS SHARPNESS. BIG PICTURE, HE'S ON VIDEOTAPE THROWING THESE THINGS AT DEPUTIES, OKAY. AND THEY'RE SAYING THIS IS SELF-DEFENSE, THAT YOU OUGHT TO CONDONE WHAT HE DID IN A HIGH-SECURITY AREA IN JAIL. YOU GOT TO BE KIDDING ME.

WE TALK ABOUT SIMPLE ASSAULT WHICH IS SOMETHING CALLED A LESSER INCLUDED OFFENSE. LET ME JUST BRIEFLY TALK ABOUT THAT. WHAT IS A LESSER

INCLUDED OFFENSE? BASICALLY IN THE LAW, THERE'S A GREATER OFFENSE AND A LESSER OFFENSE. WE CHARGED THE GREATER OFFENSE OF FELONY ASSAULT. THE LESSER OFFENSE IS SIMPLE ASSAULT. YOU HAVE THE OPTION OF SIMPLE ASSAULT, BUT ONLY IF YOU FIND NOT GUILTY OF FELONY ASSAULT. YOU HAVE TO FIRST UNANIMOUSLY AGREE THAT HE'S NOT GUILTY OF FELONY ASSAULT. OKAY. SO YOU MIGHT AS WELL CONSIDER FELONY ASSAULT FIRST 'CAUSE YOU CAN'T GET TO THE LESSER UNTIL YOU DECIDE AND RESOLVE THE GREATER, OKAY.

THE COURT: THE INSTRUCTION TELLS THE JURY --

MR. CHUN: YES.

THE COURT: -- THAT THEY CAN CONSIDER IT IN ANY ORDER THAT THEY WANT.

MR. CHUN: RIGHT.

BUT YOU CANNOT RETURN A VERDICT -- LET ME JUST BE CLEAR -- YOU CANNOT RETURN A VERDICT AS TO THE LESSER UNLESS YOU FIRST FIND NOT GUILTY OF THE GREATER. OKAY. SO THAT'S WHY I'M SAYING YOU CAN, IF YOU WANT, CONSIDER IT IN EITHER ORDER. BUT IF YOU CAN'T RETURN A VERDICT AS TO THE LESSER UNTIL YOU FIND A NOT GUILTY ON THE GREATER, I'M JUST SAYING AND SUGGESTING THAT YOU MIGHT AS WELL GO TO THE GREATER BECAUSE YOU CAN'T FIND -- YOU CAN'T FIND A VERDICT ON THE LESSER UNTIL YOU FIND NOT GUILTY ON THE GREATER.

OKAY. SO IF I WASN'T CLEAR ABOUT THAT, I'M SORRY. BUT THAT'S WHY IT MAKES MORE SENSE.

THE COURT: JURORS, JUST LOOK AT 17.10 AND

17.49 JUST SO THERE'S NO CONFUSION.

THANK YOU, COUNSEL.

MR. CHUN: THANK YOU.

SIMPLE ASSAULT, WE TALKED ABOUT WHAT THE ELEMENTS OF THAT ARE. OKAY.

FELONY ASSAULT, THE GREATER CRIME, HAS AN ADDITIONAL ELEMENT I HAVE TO PROVE. THAT THE ASSAULT WAS COMMITTED WITH EITHER FORCE LIKELY TO CAUSE GREAT BODILY INJURY OR BY A DEADLY WEAPON WHICH IS ANYTHING USED IN A WAY CAPABLE AND LIKELY TO PRODUCE GREAT BODILY INJURY. JUST A DANGEROUS THING, THAT'S WHAT THEY'RE TALKING ABOUT, DANGEROUS THING. WHEN THEY SAY SOMETHING LIKELY TO CAUSE GREAT BODILY INJURY, GREAT BODILY INJURY DOESN'T MEAN BROKEN BONES, IT DOESN'T NECESSARILY MEAN ANYTHING LIKE THAT OR GUNSHOT OR ANYTHING. THIS IS THE DEFINITION OF GREAT BODILY INJURY.

GREAT BODILY INJURY -- THIS IS 9.02 -- REFERS TO SIGNIFICANT OR SUBSTANTIAL BODILY INJURY OR DAMAGE. IT DOES NOT REFER TO TRIVIAL OR INSIGNIFICANT OR MODERATE HARM. OKAY. SO LONG AS IT'S SOMETHING MORE THAN TRIVIAL AND INSIGNIFICANT, AS LONG AS IT'S SOMETHING THAT'S SUBSTANTIAL. COME ON. THIS (INDICATING) BEING THROWN AT YOU? YOU CAN FEEL THE WEIGHT OF IT. IT'S GOING TO BE IN THIS ENVELOPE RIGHT HERE; IT'S PEOPLE'S EXHIBIT 11.

AND YOU DON'T HAVE TO ACTUALLY HAVE GREAT BODILY INJURY AS LONG AS YOU COULD HAVE AND THAT

IT WAS LIKELY TO PRODUCE NON-TRIVIAL INJURY REGARDLESS OF WHAT -- FOR ANY ASSAULT, ANY TIME YOU HEAR A JUROR SAYING, WELL, BUT THEY DIDN'T REALLY HURT THEM, THAT'S NOT THE ISSUE, THAT'S NOT A DEFENSE. OKAY. THAT MEANS FELONY ASSAULT IS PROVEN.

NOW, HERE'S A CONCEPT THAT'S... LET ME GIVE YOU AN EXAMPLE WHICH IS ACTUALLY TAKEN FROM THE CASE THAT THIS ALL ARISES OUT OF, THIS DOCTRINE, IMPERVIOUS DEFENSE. AND LET ME JUST STATE IT FOR YOU AND THEN SHARE -- AND SHARE WITH YOU THE EXAMPLE ACTUALLY AND THE FACTS OF THAT CASE.

THE DOCTRINE IF I, EITHER BY PUTTING ON CLOTHING OR POSITIONING MYSELF IN A CERTAIN WAY, HAVE -- CREATE THIS BARRIER THAT'S PROTECTIVE OF ME, IF THE VICTIM DOES THAT, OKAY, EITHER BY POSITIONING HIMSELF BEHIND A SHIELD OR POSITIONING HIMSELF BEHIND BARS OR BY PUTTING ON ARMOR OR RIOT GEAR, WHATEVER, THE DEFENDANT DOESN'T GET THE BENEFIT OF THAT. OKAY. HE DOESN'T GET TO SAY, WELL, WAIT A SECOND, THE VICTIM OVER THERE, HE HAD ALL THIS RIOT GEAR ON OR HE WAS STANDING BEHIND A BAR, HE HAD AN IMPERVIOUS DEFENSE, WHICH REALLY WASN'T IMPERVIOUS, BUT -- BUT, YOU KNOW, HE HAD AN IMPERVIOUS DEFENSE. HE DOESN'T GET TO SAY THAT. THE INSTRUCTION TELLS YOU THAT.

9.02, A PERSON MAY BE GUILTY OF COMMITTING AN ASSAULT WITH FORCE LIKELY TO CAUSE GREAT BODILY INJURY OR WITH A DEADLY WEAPON OR INSTRUMENT EVEN THOUGH THE ALLEGED VICTIM HAS CREATED

AN APPARENTLY IMPERVIOUS DEFENSE. A PERSON MAY COMMIT THESE CRIMES EVEN THOUGH THERE ARE EXTERNAL CIRCUMSTANCES BEYOND HIS CONTROL -- MEANING THE DEFENDANT'S CONTROL -- WHICH PREVENT INJURY AND THUS FRUSTRATES THE DEFENDANT'S INTENT. FURTHER, THE DEFENDANT'S KNOWLEDGE OF CIRCUMSTANCES WHICH MAY PREVENT INJURY IS IRRELEVANT IF THE DEFENDANT HAS THE ABILITY TO CARRY OUT THE METHOD OF ASSAULT CHOSEN.

AS LONG AS HE'S CAPABLE OF THROWING THIS SHARD, IT DOES NOT MATTER THAT A DEPUTY WAS STANDING BEHIND BARS, PROTECTIVE BARS, OR THAT A DEPUTY PUT ON RIOT GEAR. WHY IS THAT? BECAUSE A DEFENDANT DOESN'T GET TO TAKE ADVANTAGE OF ANY PRECAUTIONS THAT A VICTIM TAKES BECAUSE WHAT WE'RE DOING IS WE'RE JUDGING NOT -- WE DON'T JUDGE VICTIMS ON THIS COUNT. OKAY. WE DON'T JUDGE WHETHER THEY TOOK ENOUGH STEPS TO PROTECT THEMSELVES. OKAY. WE JUDGE THE VIOLENCE OF DEFENDANT'S ACTIONS. AND WHAT I DO OR WHAT ANY OTHER VICTIM DOES TO PROTECT HIMSELF HAS NOTHING TO DO WITH HOW VIOLENT HIS ACTIONS WERE.

DO NOT JUDGE EFFECTIVENESS OF VICTIM'S DEFENSE. JUDGE THE VIOLENCE OF DEFENDANT'S ACTIONS. I GUARANTEE YOU DEFENSE ATTORNEYS -- MAYBE NOT THIS ONE -- VERY OFTEN WILL TRY TO SOMEHOW GET AROUND THIS. BUT THE RULE IS -- THE RULE IS THAT EVEN THOUGH THE ALLEGED VICTIM HAS CREATED AN APPARENTLY IMPERVIOUS DEFENSE, IT DOESN'T MATTER, OKAY. I COULD PUT ON A SUIT OF ARMOR AND SAME CONDUCT, YOU COULD BE NAKED OR

YOU COULD PUT ON A SUIT OF ARMOR, IT'S THE SAME CONDUCT. HE'S GUILTY OF THE SAME CRIME.

I COULD STAND BEHIND -- IN FACT, THE EXAMPLE IS FROM THE -- FROM THE CASE WHERE ALL THIS ARISES IS IF I'M A GAS STATION ATTENDANT AND I'M BEHIND BULLETPROOF GLASS AND SOMEONE ASSAULTS ME WITH A GUN, BUT THE BULLETPROOF GLASS IS THIS THICK (INDICATING), IT DOESN'T MATTER, YOU STILL COMMITTED ASSAULT WITH A FIREARM EVEN THOUGH THERE WAS NO WAY THAT THE BULLET COULD EVER HIT ME.

BECAUSE WHY? LOOK, I'M THE ONE THAT PUT MYSELF BEHIND THE BULLETPROOF GLASS JUST LIKE THESE DEPUTIES PUT THEMSELVES BEHIND BARS OR PUT THEMSELVES BEHIND SHIELDS. BUT THOSE ARE MY ACTIONS, YOU SEE. A PERSON MAY COMMIT THESE CRIMES EVEN THOUGH EXTERNAL CIRCUMSTANCES BEYOND HIS CONTROL. HE DOESN'T HAVE CONTROL OF THE MAKING OF THE BULLETPROOF GLASS. HE DOESN'T HAVE CONTROL OF WHERE I POSITION MYSELF. IT'S IRRELEVANT BECAUSE WE'RE JUDGING HIS ACTIONS NOT THE VICTIM'S OR ANYONE ELSE'S. OKAY, THAT'S 9.02.

SO IF YOU HEAR BACK THERE -- AND IT MAY BE THAT YOU'LL HEAR A JUROR SAY, WELL, WAIT A SECOND, HOW LIKELY IS IT THAT THEY WERE GOING TO STRIKE THEM BECAUSE THEY WERE IN RIOT GEAR, YOU KNOW, THEY WERE EXPOSED, BUT, YOU KNOW, RIOT GEAR AND, YOU KNOW, OTHER THINGS, THEY WERE BEHIND A BAR. AND, OKAY, WELL, SOME PIECES ACTUALLY CAME THROUGH AND ONE NEARLY HIT MC MULLEN, BUT -- OR ONE HIT MC MULLEN

AND ONE NEARLY HIT MORALES IN THE HEAD. BUT, HEY, THEY WERE BEHIND -- NO, NO. ALL THAT STUFF, ALL THAT DISCUSSION, TAKE THEM BACK, PLEASE, TO 9.02, IMPERVIOUS DEFENSE IS NOT A DEFENSE.

LET'S LOOK AT THE FACTS NOW UNDERSTANDING THE LAW.

SIX AND SEVEN, MC MULLEN AND MORALES, THESE ARE THE HOSE DEPUTIES, ASSAULTED BY PORCELAIN SHARDS WHILE TRYING TO PUT OUT THE FIRE. I'M NOT GOING TO SAY MUCH ABOUT THIS. I MEAN, LOOK, MC MULLEN WAS ACTUALLY -- EVEN WITH THE BARS, MC MULLEN, EVEN THOUGH THE BARS ARE IRRELEVANT, MC MULLEN GOT HIT BY ONE OF THESE THINGS. AND IT'S JUST FORTUNATE THAT, YOU KNOW, IT WASN'T A STRAIGHT-ON HIT, OKAY. I THINK IT WAS THAT PIECE.

AND MORALES TELLS YOU, HE -- ONE PIECE JUST WHIZZED RIGHT BY HIS HEAD. THINK OF HOW MUCH FORCE THIS THING HAS TO BE THROWN TO GO FROM THE FIRST FLOOR UP TO THE SECOND FLOOR. WHEN YOU GET BACK THERE, JUST PASS THIS AROUND. BE CAREFUL WITH THIS, OKAY, IT'S VERY SHARP. HOLD IT HERE AND PASS THIS AROUND, YOU'LL FEEL THE WEIGHT OF IT.

I DON'T THINK THERE'S GOING TO BE MUCH ARGUMENT ABOUT THIS. OKAY. NO SELF -- AND REMEMBER NO SELF-DEFENSE APPLIES TO THIS COUNT 6 AND 7. WHY? WHY AREN'T YOU BEING INSTRUCTED AS TO SELF-DEFENSE ON THIS COUNT? BECAUSE MC MULLEN AND MORALES NEVER USED ANY FORCE OF ANY KIND. WHERE IS THE EVIDENCE OF

MC MULLEN AND MORALES, THE HOSE GUYS, USING ANY FORCE? THERE ISN'T ANY. THAT'S WHY NO SELF-DEFENSE. IF SOMEONE TRIES TO START RAISING SELF-DEFENSE, SELF-DEFENSE, SELF-DEFENSE TO MC MULLEN AND MORALES, WHOA, WHOA, WHOA, WHOA. SELF-DEFENSE ONLY APPLIES TO 8 AND 9. YOU'RE GOING TO BE SPECIFICALLY INSTRUCTED AS TO THAT.

COUNT 9, RIOT SQUAD. AND THEN WHEN WE TALK ABOUT THIS, WE'LL ALSO TALK ABOUT SELF-DEFENSE, 8 AND 9. REMEMBER 8 IS OBSTRUCTION RIOT SQUAD, 9 IS ASSAULT RIOT SQUAD. I TOLD YOU I'D TALK ABOUT SELF-DEFENSE AND WE WILL.

ALVAREZ, COLEMAN, WILSON, COUNT 9. IT DOESN'T INCLUDE BELTRAN BECAUSE HE WASN'T PART -- THERE'S NO EVIDENCE THAT HE WAS PART OF THE ORIGINAL TEAM ENTERING. THAT'S WHY IT DOESN'T INCLUDE BELTRAN. THEY'RE ASSAULTED BY PORCELAIN SHARDS ON THE VIDEO. OKAY. SHIELDS, RIOT GEAR, BARS, ALL THAT IS IRRELEVANT. IMPERVIOUS DEFENSE IS IRRELEVANT, REMEMBER. THINK BULLETPROOF GLASS IS NOT EVEN RELEVANT. OKAY. REMEMBER THAT. BULLETPROOF GLASS IS NOT EVEN RELEVANT. JUDGE VIOLENCE OF DEFENDANT'S ACTIONS ONLY.

OKAY. GUILTY EXCEPT I SAID I'D TALK ABOUT SELF-DEFENSE. OKAY. PEOPLE BEAR THE BURDEN OF PROOF ON THIS ONE AS WELL. NOW, LET'S TALK ABOUT SELF-DEFENSE. LIMITED TO CERTAIN COUNTS NOT AS TO IBARRA, ET AL., COUNTS 1 THROUGH 4. NOT AS TO

MC MULLEN AND MORALES, COUNT 5, 6 AND 7. BY THE WAY, WHY NOT AS TO COUNTS 1 THROUGH 4? SELF-DEFENSE NOT DEFENSE OF OTHERS, OKAY, REMEMBER THAT? NOT DEFENSE OF OTHERS.

THE CONCEPT OF EXCESSIVE FORCE COMES IN AS TO COUNT 4 ONLY BECAUSE I HAVE TO PROVE DUTY. IBARRA WAS DOING HIS DUTY, THAT'S WHERE EXCESSIVE FORCE COMES IN. SO ON THE FIRST SET OF DEPUTIES, IT ONLY -,- THIS SORT OF -- CONCEPTS THAT WE'RE TALKING ABOUT EXCESSIVE FORCE ONLY APPLIES TO COUNT 4 BECAUSE I HAVE TO PROVE DUTY. AS TO THE MIDDLE COUNTS, SELF-DEFENSE DOESN'T APPLY, EXCESSIVE FORCE ISSUES DON'T APPLY, THE HOSE DEPUTIES, FORGET ABOUT ALL OF THAT.

ONLY APPLICABLE, IF AT ALL, TO COUNTS 8 AND 9. YOU'RE GOING TO BE SPECIFICALLY INSTRUCTED THAT ON 5.30. IT SAYS THAT ON 5.30, AT THE VERY END OF 5.30. SELF-DEFENSE, IF IT APPLIES AT ALL, ONLY APPLIES TO COUNTS 8 AND 9, RIOT SQUAD, OKAY. IF SOMEBODY IS TALKING SELF-DEFENSE AND IT'S NOT RIOT SQUAD, NO, NO, NO, WE'RE LIMITED TO THAT DEFENSE ONLY TO RIOT SQUAD.

SELF-DEFENSE, THREE REQUIREMENTS, GENERAL REQUIREMENTS. YOU GOT TO UNDERSTAND THESE RULES ARE DRAFTED FOR GENERAL APPLICATION AND -- BUT THEN THERE'S A VERY SPECIFIC RULE, A VERY SPECIFIC RULE THAT APPLIES WHEN YOU'RE DEALING WITH POLICE OFFICERS. OKAY. AND WE'LL GET TO THAT.

SELF-DEFENSE GENERAL RULE IS THAT YOU HAVE TO HAVE ACTUAL FEAR. I HAVE TO ACTUALLY BE AFRAID. I HAVE TO BE ACTUALLY AFRAID THAT INJURY IS IMMINENT. MY FEAR HAS TO BE REASONABLE. IT'S NOT ENOUGH FOR ME JUST TO SAY I WAS AFRAID AND NO MATTER HOW RIDICULOUS OR SILLY IT IS, I JUST KEEP SAYING, NO, I WAS AFRAID, I WAS AFRAID. NO, WHAT ARE YOU TALKING ABOUT? I WAS AFRAID. WELL, GUESS WHAT, YOU DON'T GET TO JUST SET UP YOUR OWN STANDARD OF SELF-DEFENSE.

CAN YOU IMAGINE WHAT THIS WORLD WOULD LOOK LIKE IF WE JUST LET PEOPLE CLAIM SELF-DEFENSE JUST BECAUSE THEY CLAIM THAT THEY WERE AFRAID? ALL ANYONE WOULD EVER HAVE TO DO IS GET UP ON THE WITNESS STAND AND SAY I WAS AFRAID. THANK YOU VERY MUCH. YEAH, IT'S UNREASONABLE, BUT I WAS AFRAID. THANK YOU. WELL, YEAH, BUT I WAS AFRAID. THAT'S ALL THEY WOULD HAVE TO SAY, REPEAT THAT LIKE A MANTRA.

OKAY. BECAUSE THE FEAR HAS TO BE REASONABLE, IT HAS TO BE LOGICAL. IT HAS TO MAKE COMMON SENSE. OKAY. AND THE ONLY REASON I MENTION THAT IS, FIRST OF ALL, HE WASN'T AFRAID. BUT EVEN IF YOU -- EVEN IF YOU THOUGHT THAT HE WAS AFRAID, REMEMBER ALL THIS STUFF THAT HE'S TALKING ABOUT, HIS FRIEND AND ALL THIS, THAT'S THE FIRST SHIFT DEPUTIES, OKAY. THE SHIFT CHANGES AT TEN. HE DOESN'T EVEN -- HE EVEN ADMITS WHEN THE RIOT SQUAD COMES IN, HE HAS NO WAY OF KNOWING THAT ANY OF THE DEPUTIES IN THOSE RIOT UNIFORMS ARE ANY OF THE EARLIER DEPUTIES.

YOU KNOW, THIS WOULD BE LIKE LATE AT NIGHT OR -- OR EARLY IN THE MORNING, I'M -- YOU'RE IN YOUR NEIGHBORHOOD AND YOU SEE SOME KIND OF ATTACK OR SOMETHING BY A PERSON. MIDNIGHT COMES AROUND, IT'S PITCH DARK AND YOU SEE IN APPROXIMATELY THE SAME AREA, A DARK FIGURE, ROUGHLY, MAYBE LOOKS LIKE, BUT YOU CAN'T TELL, AND YOU DECIDE TO START SHOOTING AT THEM. AND YOU SAY, WELL, BUT I SAW, I THINK, SOMEBODY THAT MAY POSSIBLY HAVE BEEN THAT PERSON IN DAYLIGHT. AND I WAS -- I WAS CONVINCED OF IT. WELL, THANK YOU VERY MUCH, BUT WHAT -- WHAT YOU DO HAS TO BE REASONABLE, OKAY. AND THE MEASURE OF FORCE THAT YOU USE HAS TO BE REASONABLE, OKAY. THE MEASURE OF FORCE YOU HAVE TO USE IS REASONABLE.

AND THE RIGHT CEASES WHEN THE DANGER CEASES. THINK ABOUT THAT. WHEN THERE'S NO MORE ATTACKING, WHEN THERE'S NO MORE THREATENING -- AND HE ADMITTED THAT ALL THE THREATS WERE ON THE FIRST SHIFT. WHEN ALL THAT STOPS, HIS RIGHT CEASES. AND IF YOU ARE THE AGGRESSOR, YOU CANNOT CLAIM SELF-DEFENSE UNLESS YOU TAKE SOME PRETTY DRASTIC STEPS, ALL OF WHICH HE DID NOT DO. HE ADMITTED THAT HE DID NOT DO. A LOT OF THIS IS COMING FROM HIS MOUTH.

HE ADMITTED THAT HE THREW PORCELAIN FIRST, AND THEN THE PEPPER BALLS CAME IN RESPONSE. AND YOU'LL SEE WHY THAT SINGLE ADMISSION, WHEN WE GET TO THE SPECIAL RULE ESPECIALLY ABOUT PEACE OFFICERS, ABSOLUTELY WIPES OUT SELF-DEFENSE. IF YOU'RE THE

AGGRESSOR -- THERE'S THIS 5.54 -- IF YOU'RE THE AGGRESSOR, YOU CANNOT CLAIM SELF-DEFENSE UNLESS YOU STATE AND INFORM THE OTHER SIDE, DO EVERYTHING IN YOUR POWER TO INFORM THE OTHER SIDE, I'M STOPPING, I'M -- I DON'T WANT TO FIGHT ANYMORE. HE DID THE OPPOSITE HERE. HE'S SLAMMING HIS -- AND THE DEPUTIES GO OUT OF THEIR WAY TO GIVE HIM THE OPPORTUNITY TO GIVE UP. AND HE SAYS HE DOESN'T GIVE UP. AND, IN FACT, HE SLAMS HIS MATTRESS AGAINST THE FRONT TO SHOW THAT HE'S NOT GIVING UP.

BUT HERE'S WHERE THE SPECIAL RULE FOR OFFICERS COMES INTO PLAY. YOU SEE -- AND HERE'S WHAT YOU GOT -- THIS IS WHAT I'M TALKING ABOUT THIS IS NOT YOUR LIVING ROOM AND YOU'RE NOT DEALING WITH JUST NORMAL GUESTS. YOU KNOW, NORMALLY WHEN TWO PEOPLE IN OUR SOCIETY INTERACT, I DON'T GET TO MY HANDS ON YOU, OKAY. I DON'T GET TO -- I DON'T GET TO PUT MY HANDS ON YOU. OKAY. IN A JAIL CONTEXT, POLICE OFFICERS DO. POLICE OFFICERS GET TO USE SOME FORCE. OKAY. YOU DON'T. YOU AND I JUST DEALING WITH EACH OTHER IN YOUR LIVING ROOM, WE DON'T GET TO DO THAT. WE DON'T GET TO PUSH EACH OTHER. WE DON'T GET TO, YOU KNOW, PUT HANDCUFFS, WE DON'T GET TO DRAG, WE DON'T GET TO DO ANY OF THAT. POLICE OFFICERS DO. IT'S PART OF THEIR JOB.

WHAT WOULD IT BE LIKE IN A JAIL IF A POLICE OFFICER COULDN'T DO THAT AND AN INMATE COULD RETALIATE ANY TIME A POLICE OFFICER USED ANY FORCE AT

ALL, EVEN IF REASONABLE FORCE? AS LONG AS A POLICE OFFICER IS USING REASONABLE FORCE, HE GETS TO USE THAT FORCE, OKAY, WITHOUT FEARING RETALIATION. DOESN'T THAT MAKE SENSE? THINK ABOUT IT. A POLICE OFFICER IS USING REASONABLE FORCE, THEN HE SHOULDN'T HAVE TO FEAR BEING RETALIATED ON AND BEING ATTACKED BY THE INMATE. THAT'S THE WAY IT SHOULD RUN. AND THAT'S WHAT THE LAW SAYS.

THIS IS -- ALL THE OTHER SELF-DEFENSE, THERE'S MORE GENERAL RULES. THIS IS A VERY SPECIFIC RULE FOR SELF-DEFENSE IN THE CONTEXT OF PEACE OFFICERS. A PEACE OFFICER WHO IS MAKING A DETENTION MAY USE REASONABLE FORCE TO MAKE THE DETENTION OR TO PREVENT ESCAPE OR TO OVERCOME RESISTANCE. MAKES SENSE, RIGHT? OKAY. A PEACE OFFICER CAN HOLD ON TO AN INMATE, CAN'T -- OR DO OTHER THINGS TO DEAL WITH AN INMATE, TO DETAIN AN INMATE.

WHERE A PEACE OFFICER IS MAKING A DETENTION AND THE PERSON BEING DETAINED HAS KNOWLEDGE OR BY EXERCISE OF REASONABLE CARE, SHOULD HAVE KNOWLEDGE, IF HE EITHER KNEW OR SHOULD HAVE KNOWN THAT THEY WERE TRYING TO DETAIN HIM. YOU MIGHT HAVE BEEN WONDERING WHY I WAS ASKING HIM, WELL, SO YOU KNEW THAT THE RIOT SQUAD WAS COMING IN TO HANDCUFF YOU? YEAH, WELL, HE ADDS THOUGH AND BEAT ME UP. BUT HE KNEW THAT THE RIOT SQUAD WAS COMING IN TO DETAIN HIM, TO HANDCUFF HIM. HE ADMITTED THAT. HE ADMITTED THAT.

ONCE HE ADMITS THAT, ONCE HE ADMITS

THAT HE KNEW -- AND, BY THE WAY, IT'S NOT JUST UP TO HIM TO DECIDE WHETHER HE KNEW. IT'S WHETHER HE KNEW OR SHOULD HAVE KNOWN AS A REASONABLE PERSON SHOULD HAVE KNOWLEDGE. ONCE HE KNEW OR SHOULD HAVE KNOWN, OF COURSE, HE SHOULD HAVE KNOWN THAT THEY WERE COMING IN TO DETAIN HIM AND HE KNEW 'CAUSE HE ADMITTED IT. ONCE YOU KNOW THAT OR SHOULD HAVE KNOWN THAT YOU WERE BEING DETAINED -- THIS IS THE KEY LANGUAGE, THIS IS IT 9.26, THIS IS WHAT WIPES OUT HIS SELF-DEFENSE.

IT IS THE DUTY OF THE PERSON, MEANING THE DEFENDANT TO REFRAIN FROM USING FORCE OR ANY WEAPON, ANY WEAPON. ANY WEAPON. ANY WEAPON. TO RESIST. YOU CAN'T USE FORCE TO RESIST. YOU CAN'T USE A WEAPON UNLESS UNREASONABLE OR EXCESSIVE FORCE IS BEING USED NOT I THINK IN THE FUTURE EXCESSIVE FORCE WILL -- ABOUT TO BE USED. LOOK AT THE PRESENT TENSE, 9.26. THEY'RE GOING TO TRY TO SAY, WELL, HE THOUGHT IT WAS GOING -- THE BEATING WAS GOING TO FOLLOW.

LOOK AT THE PRESENT TENSE. UNLESS UNREASONABLE OR EXCESSIVE FORCE IS BEING USED NOT HE THINKS IT'S ABOUT TO BE USED. IT'S NOT FUTURE TENSE. IS BEING USED. AND WHEN YOU HEAR -- I DON'T KNOW IF YOU'RE GOING TO HEAR THIS ARGUMENT, BUT IF YOU HEAR AN ARGUMENT THAT, WELL, HE THOUGHT IN THE FUTURE AFTER THE DETENTION, THERE WAS GOING TO BE -- NO, EXCESSIVE FORCE IS BEING USED. PRESENT TENSE. SO WHEN YOU HEAR HE THOUGHT HE WAS GOING TO BE BEATEN, THAT'S FUTURE TENSE. EXCESSIVE FORCE IS BEING USED.

AND IT MAKES SENSE IF YOU THINK ABOUT IT. YOU CAN'T JUST, YOU KNOW, WITHOUT KNOWING WHAT DEPUTIES YOU'RE DEALING WITH, JUST DECIDE ON YOUR OWN THAT, OH, MAYBE IT'S THOSE GUYS I SAW DURING THE DAY AND, YOU KNOW, I'M JUST GOING TO ASSUME AND START ATTACKING DEPUTIES. THAT'S NOT HOW THE JAIL WORKS. OKAY. THAT'S NOT EVEN HOW YOU WOULD WANT IT TO WORK IN REAL LIFE IN JUST -- IN ORDINARY SOCIETY EITHER. YOU DON'T JUST ASSUME. BUT IF YOU FOUND THAT THE PEACE OFFICER USED UNREASONABLE OR EXCESSIVE FORCE IN MAKING THE DETENTION, AGAIN, THAT HE USED IT NOT THAT -- THAT THE DEFENDANT BELIEVED HE WOULD USE IT, THAT THE PERSON BEING DETAINED HAS NO DUTY TO REFRAIN FROM USING REASONABLE FORCE TO DEFEND HIMSELF.

AT THAT POINT, YOU SEE, THIS IS LIKE -- THINK OF 9.26 AS A DOOR THROUGH WHICH YOU HAVE TO ENTER BEFORE YOU START APPLYING THE DOCTRINE OF SELF-DEFENSE BECAUSE THIS IS DEALING WITH PEACE OFFICERS. WHEN YOU'RE DEALING WITH PEACE OFFICERS, YOU GOT TO ENTER THROUGH THE DOOR OF 9.26 BECAUSE 9.26 SAYS UNLESS THAT PEACE OFFICER IS USING EXCESSIVE FORCE, YOU DON'T GET TO USE ANY FORCE. YOU DON'T GET TO USE ANY WEAPON. BUT THE TRIGGER IS IF HE USES EXCESSIVE FORCE, OKAY, REGULAR -- IT'S ALL ON. IT'S JUST LIKE REGULAR RULES, SELF-DEFENSE, NORMAL DOCTRINE APPLIES, YOU KNOW, YOU HAVE TO HAVE ACTUAL, REASONABLE FEAR, YOU HAVE TO USE PROPORTIONATE FORCE, BLAH, BLAH, BLAH. OKAY. THINK OF 9.26 AS A DOOR.

LET'S APPLY IT. COUNT 1, DOES IT APPLY, SELF-DEFENSE? NO.

COUNT 2, DOES IT APPLY TO VANDALISM? NO, NOT EVEN BY HIS OWN WORDS. I MEAN HE EVEN SAYS HE DIDN'T VANDALIZE IN RESPONSE TO -- HE DID IT FOR REVENGE NOT FOR PROTECTION.

COUNT 4 -- DON'T WORRY ABOUT COUNT 3.

COUNT 4, OBSTRUCTION AS TO IBARRA. SELF-DEFENSE DOES NOT APPLY. BUT THE CONCEPT OF EXCESSIVE FORCE CAME IN BECAUSE I HAD TO PROVE IBARRA WAS -- IBARRA AND TAYLOR AND OROSCO AND ARGUETA WERE DOING THEIR DUTY, OKAY. THAT'S HOW FAR IT CAME IN. BUT NOT SELF-DEFENSE. OKAY. AND WE TALKED ABOUT HOW IT'S UNREASONABLE TO BELIEVE GONZALEZ.

COUNT 5, OBSTRUCTION OF MC MULLEN AND MORALES, DOES SELF-DEFENSE APPLY? NO. THERE'S NO EVIDENCE THAT MC MULLEN OR MORALES USED ANY FORCE MUCH LESS EXCESSIVE FORCE. YOU SEE, YOU CAN'T EVEN OPEN THAT DOOR. YOU CAN'T EVEN START TO EVEN OPEN THE DOOR ON MC MULLEN OR MORALES BECAUSE YOU CAN'T EVEN ARGUE THAT THEY USED EXCESSIVE FORCE. ONCE -- IF YOU CAN'T USE -- IF THEY'RE NOT USING EXCESSIVE FORCE, YOU CAN'T EVEN PUT YOUR HAND ON THE KNOB. 9.26 IS THE DOOR.

6 AND 7, SAME THING, HOSE DEPUTIES. NO FORCE, YOU CAN'T GET THROUGH THE 9.26 DOOR.

OBSTRUCTION, COUNT 8, COUNT 9, YES, YOU COULD IF YOU SHOWED EXCESSIVE FORCE. OKAY. BUT, YOU KNOW, EVEN IF YOU GET THROUGH THE DOOR, HE'S NOT

AFRAID. YOU KNOW THAT 'CAUSE HE'S REPEATEDLY COME TO THE FRONT OF THE CELL. YOU KNOW THAT HE'S THE AGGRESSOR. EVEN IF YOU GET THROUGH THE DOOR, YOU KNOW THAT THAT'S A PROBLEM.

BUT HERE'S THE REAL PROBLEM, 9.26? YOU DON'T EVEN GET THROUGH THE DOOR. WHEN YOU DO GET THROUGH THE DOOR, YOU STILL HAVE PROBLEMS BECAUSE HE'S NOT AFRAID. AND HIS FEAR WAS NOT REASONABLE 'CAUSE YOU CAN'T, LIKE, JUST SAY IN THE DAYTIME I SAW THIS PERSON. NIGHTTIME, I'M GOING TO ASSUME. THAT'S NOT REASONABLE. YOU CAN'T BE THE AGGRESSOR, YOU CAN'T THROW FIRST. BUT 9.26 IS THAT DOOR THAT HE CAN'T EVEN GET THROUGH. YOU CAN'T USE ANY FORCE. YOU CAN'T EVEN ENTER THE DOOR, THE ROOM OF SELF-DEFENSE, UNLESS THE PEACE OFFICER FIRST USES EXCESSIVE FORCE. SAME ANALYSIS FOR COUNT 1.

ALL RIGHT. THAT'S A MOUTHFUL. SO I GET TO TALK TO YOU GUYS ONE MORE TIME AFTER MR. JACKE GETS TO TALK TO YOU. I THINK PROBABLY THE REPORTER MAY OR MAY NOT NEED A BREAK. AND I'M SORRY ABOUT THAT. BUT THERE'S -- I HOPE YOU UNDERSTAND THERE WAS A LOT TO GO THROUGH. AND I GET A CHANCE TO TALK TO YOU ONE MORE TIME.

PLEASE GIVE MR. JACKE THE SAME ATTENTION THAT YOU GAVE ME. THANK YOU.

THE COURT: THANK YOU, MR. CHUN.

I THINK WE'RE GOING TO TAKE OUR BREAK AT THIS TIME, FOLKS. GO AHEAD AND STEP BACK INTO THE

JURY ROOM, STRETCH. IT WILL BE ABOUT 10, 15 MINUTES, WE'LL BRING YOU BACK IN.

ALTERNATE JUROR NO. 1: YOUR HONOR, CAN I GET SOME MORE PAPER?

THE COURT: YES.

JUROR SEAT NO. 9: ME TOO.

THE COURT: WE'LL GET IT IN TO YOU RIGHT NOW.

(A RECESS WAS TAKEN.)

(THE NEXT PAGE NUMBER IS 2551.)

CASE NUMBER: **BA331315**
CASE NAME: PEOPLE V. **TIMOTHY MCGHEE**
LOS ANGELES, CA; THURSDAY, JULY 31, 2008
DEPARTMENT NO. 102 HON. DAVID S. WESLEY
REPORTER: PHYLLIS YOUNG, CSR NO. 9122
TIME: 11:45 A.M.

APPEARANCES:

THE DEFENDANT, TIMOTHY MCGHEE, BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL CLAY JACKE, II, ATTORNEY AT LAW; HOON CHUN, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: LET'S HAVE THE JURY OUT, GLORIA, PLEASE.

(THE JURORS ARE ENTERING THE COURTROOM.)

THE COURT: WE'RE BACK ON THE RECORD IN THE CASE OF PEOPLE VERSUS TIMOTHY MCGHEE, BA313315, PRESENT COUNSEL, MR. JACKE; MR. CHUN FOR THE PEOPLE.

MR. JACKE, ARE YOU READY TO ADDRESS THE JURY?

MR. JACKE: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, YOU MAY.

MR. JACKE: IT'S 10 MINUTES TO 12:00, STILL MORNING.

GOOD MORNING, LADIES AND GENTLEMEN.

THE JURORS COLLECTIVELY: GOOD MORNING.

MR. JACKE: I'LL TELL YOU WHAT, I'M NOT GOING TO USE THE COMPUTER, BECAUSE IF I PRESENCE A BUTTON ON MINE, YOU'RE GOING TO GET NEWS, MUSIC OR SPORTS AND THAT DOESN'T APPLY HERE.

MR. CHUN CHARGED MR. MC GHEE WITH A LOT OF THINGS, I'M GOING ADDRESS THOSE THINGS. ONE OF THINGS I'M SURPRISED WITH ALL OF THE THINGS THAT MR. CHUN SAID MR. MCGHEE DID, I'M SURPRISED HE DIDN'T CHARGE HIM WITH CAUSING THAT EARTHQUAKE THE OTHER DAY.

NOW, THE FACTS IN THIS CASE BRING ABOUT THE TRUE TEST OF FAIRNESS. YOU GOT LAW ENFORCEMENT ON ONE SIDE, CONVICTED FELONS ON THE OTHER.

WHEN YOU HEARD ABOUT MR. MCGHEE'S CONVICTIONS, AND THE ALLEGATIONS THAT THE CHARGES AROSE FROM A JAIL SETTING, I WONDERED IF ANYBODY WOULD LISTEN TO WHAT I HAVE TO SAY, WOULD ANYBODY CARE, OR WOULD I BE LIKE A SONGWRITER AND NO ONE EVER LISTENED TO MY SONG. BUT I THOUGHT ABOUT IT, AND I DIDN'T HAVE TO THINK TOO LONG.

BECAUSE IF NOTHING ELSE, I KNOW 12 WHO WILL LISTEN, I KNOW 12 WHO WILL CARE, BECAUSE IT'S PART OF THEIR OATH, IT'S PART OF THEIR OBLIGATION.

BECAUSE WHEN YOU SAID YOU COULD SIT ON THIS CASE, KNOWING WHAT THIS CASE IS ABOUT, LADIES AND GENTLEMEN, IT'S LIKE YOU ACCEPTED AN APPOINTMENT WITH FAIRNESS, AN APPOINTMENT THAT YOU COULD NOT CANCEL, AN APPOINTMENT THAT YOU COULD NOT RESCHEDULE, AN APPOINTMENT THAT YOU COULDN'T EVEN BE JUST A LITTLE LATE FOR, BUT YOU HAD TO BE RIGHT ON TIME BECAUSE THAT IS REQUIRED.

THIS CASE COMES DOWN TO WHO DO YOU BELIEVE. DO YOU BELIEVE THE DEPUTIES WHO YOU ARE BROUGHT UP TO RESPECT, OR DO YOU BELIEVE AN INMATE OR TWO, WHO MOST PEOPLE LOVE TO HATE.

WELL, LADIES AND GENTLEMEN, BEING IN JAIL DOES NOT DESTROY CREDIBILITY, NOR DO FELONY CONVICTIONS, JUST LIKE WEARING A BADGE DOES NOT CONCUR CREDIBILITY.

THE PROSECUTION HAS THE EXCLUSIVE BURDEN OF PROOF. ME AND TIMOTHY MCGHEE, WE BEAR NO BURDEN, THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT, IT'S THE HIGHEST STANDARD OF PROOF IN THE LAW. YOU MUST EMBRACE IT, LADIES AND GENTLEMEN, YOU MUST HOLD IT CLOSE TO YOUR BOSOM, YOU MUST NOT LET IT SLIP AWAY. AND WHEN I SAY HOLD IT CLOSE TO YOUR BOSOM, I SAY THAT IRRESPECTIVE OF GENDER.

BEYOND A REASONABLE DOUBT, LADIES AND GENTLEMEN, IS NOT LOWERED BECAUSE YOU HAVE THE LAW ENFORCEMENT TESTIFYING AGAINST MR. MCGHEE.

BEYOND A REASONABLE DOUBT IS NOT

LOWERED BECAUSE THE CHARGES ARISE OUT OF A JAIL SETTING.

BEYOND A REASONABLE DOUBT IS NOT LOWERED BECAUSE MR. MCGHEE HAS TWO PRIOR CONVICTIONS.

NOW, WHEN I LISTEN TO THE PEOPLE'S EVIDENCE, I WAS REMINDED OF SOME LYRICS OF A SONG FROM LONG AGO, I HEARD IT THROUGH THE GRAPEVINE.

GLADYS KNIGHT AND THE PIPS DID IT, ALSO MARVIN GAYE, I KIND OF LIKE THE MARVIN GAYE'S VERSION BETTER. BUT THE IMPORTANT THING IS THE LYRICS SAY BELIEVE HALF OF WHAT YOU SEE AND NONE OF WHAT YOU HEAR.

NOW, LADIES AND GENTLEMEN, HOW DOES THAT APPLY HERE? THE REASON THAT IT APPLIES IS BECAUSE YOU DIDN'T HEAR AND SEE EVERYTHING, YOU ONLY RECEIVED WHAT THEY WANTED TO REVEAL.

NOW, WHAT STARTED THIS INCIDENT THAT WENT FROM APPROXIMATELY 5:00 O'CLOCK AND LASTED HOURS, JUST A LITTLE AFTER MIDNIGHT.

WAS IT THESE ALLEGED WORDS, "GAS THE DEPUTIES," OR WAS IT SOMETHING FAR MORE STUNNING, FAR MORE SEVERE, FAR MORE OUTSTANDING. WAS IT THE BEATING OF MR. GONZALEZ?

COMMON SENSE, LADIES AND GENTLEMEN, WOULD TELL YOU THAT IT WAS THE BEATING OF MR. GONZALEZ THAT STARTED WHAT HAPPENED, IT CAUSED THAT REACTION. AND THIS REACTION, LADIES AND GENTLEMEN, IT'S NOT AN IMPLIED AGREEMENT, IT'S NOT AN

EXPRESSED AGREEMENT. WHAT IT IS, IT'S A REACTION TO WHAT WAS WITNESSED. MR. CHUN SPENT A LOT OF TIME QUESTIONING MR. GONZALEZ ABOUT WHETHER HE HAD AN ATTORNEY OR NOT.

WELL, YOU HAD A PROBATION VIOLATION, YOU DIDN'T HAVE A PROBATION VIOLATION. WELL, YOU KNOW, ON A PAROLE VIOLATION, DID YOU NEED ONE. THE BOTTOM LINE, LADIES AND GENTLEMEN, IBARRA AND OTHERS TRIED A RUSE, THEY CONSPIRED ABOUT THIS RUSE, ABOUT THE ATTORNEY PASS, AND MR. GONZALEZ, FOR WHATEVER REASON, HE DIDN'T GO FOR IT.

NOW, YOU HEARD A LOT ABOUT MR. GONZALEZ AND MEDICAL TREATMENT. DID YOU REFUSE, OR I DIDN'T REFUSE, OR I DON'T RECALL BEING OFFERED MEDICAL TREATMENT, AND THEN YOU HAVE DEPUTY THOMPSEN SAID WELL, I OBSERVED HIS RED FACE AND A RED NECK, HE REFUSED MEDICAL TREATMENT.

I ASKED THE DEPUTY, I SAID "WELL, DID YOU HAVE HIM LIFT UP HIS SHIRT OR LOWER HIS PANTS, ANYTHING TO OBSERVE ANYTHING ELSE ABOUT HIS BODY?" HE SAID I USUALLY DO, BUT IN THIS CASE, I JUST DON'T RECALL, THREE AND A HALF YEARS LATER, THAT MAY BE FAIR.

BUT HERE IS SOMETHING THAT YOU WOULD HAVE TO RECALL, BECAUSE THIS IS SOMETHING THAT STANDS OUT TO EVERYBODY, AND IT'S WHAT STARTED THE WHOLE SERIES OF EVENTS.

I ASKED DEPUTY THOMPSEN, "DID YOU

OBSERVE MR. GONZALEZ TO BE DRUNK OR UNDER THE INFLUENCE?" HE PAUSED FOR A MOMENT, HE SAID "NO. IT'S NOTHING LIKE THAT, NOTHING LIKE THAT IN MY REPORT."

SO LADIES AND GENTLEMEN, ONE OF THE QUESTIONS BECOMES, AND THERE'S A WHOLE LOT IN THIS CASE, BUT ONE OF THE QUESTIONS BECOMES IS WHAT DID THOMPSEN OBSERVE?

THOMPSEN, HE KIND OF CAME THROUGH REAL SUBTLY, BUT HE SAID SOMETHING ELSE THAT WAS SIGNIFICANT. I ASKED HIM, "WAS THIS REFUSAL VIDEOTAPED?" AND HE SAID, "I DON'T KNOW, BUT THEY WERE GOING AROUND TAPING THINGS."

NOW, HE WORKS THE 2:00 TO 10:00 SHIFT. THE VIDEO THAT WE SAW STARTS AROUND MIDNIGHT, AND WHY WOULDN'T YOU WANT TO KNOW ABOUT, OR WHY WOULDN'T YOU WANT TO REVEAL THIS VIDEO FROM EARLIER? BECAUSE IT MIGHT SHOW SOMEBODY ACTING OUT, AND I'M NOT TALKING ABOUT THE INMATES.

BUT, LADIES AND GENTLEMEN, THERE WAS A LOT OF QUESTIONS, A LOT OF WORDS, AND ONE PICTURE, ONE LITTLE STILL FROM A VIDEO WOULD HAVE SAVED A THOUSAND WORDS. BUT MEDICAL TREATMENT OR NOT DOESN'T MEAN MR. GONZALEZ WASN'T BEATEN.

IF SOMEONE WERE TO STRIKE ME, I'M NOT THE DARKEST AFRICAN AMERICAN IN THE WORLD, BUT BRUISES DON'T SHOW UP ON ME RIGHT AWAY.

MR. GONZALEZ, HIS COMPLEXION, YOU SAW IT, WAS DARKER

THAN MINE. SO BRUISES RIGHT AWAY AREN'T TELLING.

ALSO, SOMETHING THAT MR. GONZALEZ TOLD US, HE SAID "WELL, IF YOU MAKE A COMPLAINT, IT ONLY GETS WORSE." AND I FIGURED THIS, IF HE DID REFUSE THAT MEDICAL ATTENTION, IF HE DID, AND ULTIMATELY AT ONE POINT HE SAID, HE DOESN'T RECALL IT BEING OFFERED TO HIM, BUT IF HE DID, DON'T YOU THINK HE WOULD HAVE TO EXPLAIN WHAT HAPPENED IF HE SAID I WANT TO BE TREATED.

YOU SEE, BEING OFFERED FOR THE PEPPER SPRAY, THAT'S ONE THING, THE DEPUTIES SAID THEY HAD TO DO THAT. BUT BEING OFFERED MEDICAL TREATMENT FOR BEING BEAT UP, THAT'S SOMETHING THAT'S NOT SUPPOSED TO GO ON.

SO, LADIES AND GENTLEMEN, THAT'S WHAT YOU HAVE TO THINK ABOUT. SOMETHING ELSE YOU GOT TO THINK ABOUT IS, WHY DIDN'T DEPUTY IBARRA TELL HIS SERGEANT ABOUT THE RUSE. THE REASON WHY IS BECAUSE HE KNEW HE WAS WRONG, JUST LIKE HE DIDN'T PUT ANYTHING IN HIS REPORT ABOUT GOING TO THE PIPE CHASE AND HEARING THESE ALL IMPORTANT WORDS, "HEY, MR. REYES, THIS IS HOW YOU BREAK YOUR SINK." THAT DOESN'T MAKE IT INTO THE REPORT THAT HE WROTE.

WHAT ARE THE CHANCES, LADIES AND GENTLEMEN, AND WE'RE GOING TO TALK ABOUT IT SOME MORE, BUT WHAT ARE THE CHANCES THAT HE GOES INTO THE PIPE CHASE, AND HE JUST HAPPENS TO HEAR "THIS IS HOW YOU BREAK YOUR SINK," AND REYES SAYING, "OKAY."

WHAT ARE THE CHANCES THAT YOU HEAR THAT? AND DID YOU HEAR HIM DESCRIBE ANYTHING ELSE HE HEARD DURING ALL THESE TIMES THAT HE SAID HE WENT BACK THERE? WE DIDN'T HEAR ANYTHING ELSE, EXCEPT "THIS IS HOW YOU BREAK YOUR SINK," OKAY.

NOW, LADIES AND GENTLEMEN, THE INSTRUCTIONS TELL YOU THAT WHEN AN OFFICER USES UNREASONABLE OR EXCESSIVE FORCE, HE'S NO LONGER ENGAGED IN THE PERFORMANCE OF HIS DUTIES.

THUS, THERE CAN BE NO VIOLATION OF PENAL CODE 69, EVEN IF HE'S DETERRED OR PREVENTED FROM PERFORMING HIS DUTIES, IF HE IS USING UNREASONABLE OR EXCESSIVE FORCE.

LADIES AND GENTLEMEN, WHEN IBARRA AND OTHERS START BEATING MR. GONZALEZ, THAT'S EXCESSIVE FORCE. THEIR CONTINUED THREATS ARE EXCESSIVE FORCE. THEY ARE NO LONGER ENGAGED IN LAW ENFORCEMENT AT THAT POINT, LADIES AND GENTLEMEN. THEY ARE NO LONGER PERFORMING THEIR DUTIES, THAT'S WHY NOT GUILTY IS REQUIRED.

ALSO, FOR A VIOLATION OF PENAL CODE 69, THERE ARE THREE ELEMENTS AND THE LAST ONE IS VERY VERY IMPORTANT, BECAUSE IT REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT WHEN MCGHEE ACTED, HE INTENDED TO DETER THE OFFICERS FROM PERFORMING THEIR DUTY.

WHEN MR. MCGHEE THREW THINGS, LADIES AND GENTLEMEN, HIS INTENT WAS CLEAR. HE WANTED TO STOP THE BEATING OF SOMEONE WHO JUST WASN'T AN

ORDINARY SOMEONE ON THE ROW, BUT SOMEONE HE KNEW SINCE THE THIRD GRADE, APPROXIMATELY SINCE HE WAS 8. THIS IS NOT STOPPING A DUTY, IT'S STOPPING A BEATING.

ALSO, LATER ON, MR. MCGHEE TALKED ABOUT WHEN HE THREW THINGS, HE SAID "A RECKONING WAS COMING," THOSE WERE HIS WORDS, A BEAT DOWN, IF YOU WILL, LADIES AND GENTLEMEN, AND THAT'S WHAT HE WANTED TO STOP, NOT A DUTY.

LADIES AND GENTLEMEN, BITS AND PIECES OF VIDEO HAVE BEEN PLAYED FOR YOU, BUT ONE OF THE THINGS I HOPE YOU HEARD, AND TAKE THE TIME TO LISTEN AGAIN, IF YOU DIDN'T HEAR IT, BUT WHEN THE DEPUTIES ARE ON THE ROW, ONE OF THE THINGS YOU HEAR IS "TAKE IT LIKE A MAN," SOUNDS LIKE A THREAT TO ME.

THE 69, RESISTING OR ATTEMPTING TO DELAY AN EXECUTIVE OFFICER AND DELAY THE SHERIFF TALKS ABOUT ATTEMPTING TO PREVENT THEM FROM PERFORMING A DUTY. THEY TALK ABOUT WELL, WE COULDN'T DO ROW CHECKS, WE COULDN'T DO PILL CALL, WE COULDN'T FEED THE INMATES.

BUT LADIES AND GENTLEMEN, IT JUST SEEMS TO ME AND I COULD BE WRONG, AND I DON'T THINK I AM, THAT PART OF YOUR DUTY IS ALSO TO KEEP THE PEACE IN THE JAIL. SO IF INMATES ARE ACTING UP, AND YOU GOT TO RESPOND TO THAT, THAT'S PART OF YOUR DUTY TO DEAL WITH THAT.

IT'S ALMOST LIKE, LADIES AND GENTLEMEN, IF YOU PICTURE, IF YOU WILL, YOU HAVE AN

OFFICER ON TRAFFIC PATROL, HE PULLS OVER ONE MOTORIST FOR WHATEVER THE VIOLATION IS, HE'S ISSUING A TICKET AND YOU SEE IT, AND YOU DRIVE BY, YOU SAY OH, HE'S GIVING HIM A TICKET, I PROBABLY CAN GET AWAY WITH THIS, SO I'M GOING TO GO 85 IN A 40. SO WHAT DOES THE OFFICER DO, HE PUTS DOWN HIS TICKET BOOK, AND THEN HE GOES AFTER YOU.

IT'S REALLY NO DIFFERENT HERE, LADIES AND GENTLEMEN, IT'S A CONTINUED DUTY, IT'S NOT A DELAYED DUTY, IT'S A DETERRED DUTY.

NOW, LADIES AND GENTLEMEN, AS TO THE EXISTING COUNTS THAT GO TO MORALES AND MC MULLEN, IT'S GOING TO BE -- OR THERE WAS A LOT OF TESTIMONY ABOUT OH, MCGHEE AND OTHERS THROWING, MR. MCGHEE SAID HE DIDN'T THROW, AND I'M GOING TO DISCUSS IT IN A LOT MORE DETAIL LATER. BUT IF YOU FIND MR. MCGHEE DID NOT THROW ANY PORCELAIN AT THIS TIME WITH RESPECT TO MORALES AND MC MULLEN, BUT OTHERS DID, HE'S NOT GUILTY, BECAUSE ALTHOUGH HE BROUGHT UP "HE," MEANING MR. CHUN, BROUGHT UP THIS AIDING AND ABETTING, WHERE'S THE PROOF OF ENCOURAGING, WHERE IS THE PROOF OF ANYTHING ELSE LISTED IN AID AND ABETTING TO GET THESE OTHER PEOPLE TO DO IT.

ALSO, WITH RESPECT TO THE ASSAULT CHARGES, WHERE THE VICTIMS ARE MC MULLEN AND MORALES, IF HE'S NOT THROWING, MEANING MR. MCGHEE, IF HE'S NOT ENCOURAGING OTHERS TO THROW, HE'S NOT GUILTY, LADIES AND GENTLEMEN, AND THERE'S NO AIDING AND ABETTING.

NOW, MR. MCGHEE ADMITTED TO THROWING PORCELAIN A NUMBER OF TIMES. HE ALSO DENIED THROWING AT TIMES. HE ALSO SAID "I THREW AND THEN I STOPPED" AT ANOTHER TIME. AND I ASKED A NUMBER OF DEPUTIES, LADIES AND GENTLEMEN, HOW MUCH PORCELAIN WAS LEFT IN MR. MCGHEE'S CELL. IS THERE A PHOTOGRAPH OR CAN YOU DESCRIBE IT? AND NOBODY COULD ANSWER IT.

THERE'S NO PHOTOGRAPH AND NOBODY COULD DESCRIBE IT. BECAUSE, LADIES AND GENTLEMEN, WITH ALL THESE, HE'S THROWING HERE, HE'S THROWING THERE, IT ALLOWS YOU TO INFER HOW MUCH HE ACTUALLY DID THROW. IT ALLOWS THAT, IF SOMEONE COULD DESCRIBE IT OR SOMEONE HAD A PICTURE OF IT, BUT WE HAVE NO PICTURES OF THIS, LADIES AND GENTLEMEN.

ANOTHER THING, MR. MCGHEE IS ACCUSED OF THROWING SO MUCH PORCELAIN, HE'S NOT JUST MERELY TAKING IT FROM HIS SINK, LADIES AND GENTLEMEN, HE HAS TO BE A MANUFACTURER OF IT, BECAUSE WHAT WE HAVE, LADIES AND GENTLEMEN, IS A DESCRIPTION OF A DESCRIPTION OF A DESCRIPTION THAT MR. MCGHEE IS JUST CHUCKING OR HURLING OR THROWING A FAST BALL, JUST CONTINUOUSLY. SO THINK ABOUT THAT WHEN YOU EVALUATE CREDIBILITY, LADIES AND GENTLEMEN.

THERE WAS DISCUSSION ABOUT THE COMPLAINT PROCEDURE AND WELL HEY, IT GOES TO THE SERGEANT FIRST, YOU KNOW, SO YOU KNOW, IT'S NOT LIKE IT GOES TO A DEPUTY, BUT THE SERGEANT, AND YOU GOT THAT THROUGH ONE OF THE LATTER WITNESSES THAT IT GOES

TO THE SERGEANT, BUT THE SERGEANT IS GOING TO INVESTIGATE AND HE'S GOING TO CONTACT THE DEPUTY THAT WAS COMPLAINED ABOUT.

AND WHEN HE INVESTIGATES THE COMPLAINT, IT'S GOING TO GO INTO A PERSONNEL FILE. DO YOU THINK ANY DEPUTY, LADIES AND GENTLEMEN, WELCOMED SOMETHING GOING INTO THEIR PERSONNEL FILE? DO YOU THINK THEY WON'T KNOW ABOUT THIS COMPLAINT?

SO WHEN MR. GONZALEZ AND MR. MCGHEE TALKED ABOUT WELL IF YOU COMPLAIN, THERE CAN BE RETALIATION, IT'S LOGICAL, LADIES AND GENTLEMEN.

NOW, I WANT TO TAKE A MOMENT, IF I CAN, AND TALK ABOUT DEPUTY YZABAL. NOW, MR. MCGHEE, HE NAMED A LOT OF PEOPLE, HE NAMED VOICES, BUT ONE PERSON HE SAID SPECIFICALLY WAS DEPUTY YZABAL, MAKING THREATS OVER THE LOUD SPEAKER.

NOW, YZABAL TRIES TO DISTANCE HIMSELF AS MUCH AS POSSIBLE FROM THAT FLOOR.

"WHERE WERE YOU WORKING THAT DAY?

"I DON'T KNOW, BUT IT WASN'T THAT FLOOR, I THINK IT WAS ON A HIGHER FLOOR.

"WHEN YOU TOOK YOUR BREAK, WHERE DID YOU TAKE YOUR BREAK?

"ON A LOWER FLOOR.

"WELL, WHEN WAS IT OR HOW WAS IT THAT YOU MADE THESE OBSERVATIONS THAT YOU'RE TALKING ABOUT?

"WELL, I WAS JUST PASSING THROUGH, AND

YOU KNOW WHAT, I SAW MR. MCGHEE THROWING SOME PORCELAIN, AND I HEARD SOMETHING IN UNISON BY MCGHEE AND REYES."

I SAID "WELL, DEPUTY, WELL, WHAT TIME WAS THIS?

"WELL, IT WAS JUST AFTER MY BREAK.

"WELL, WHAT TIME IS YOUR BREAK NORMALLY?

"SOMEWHERE BETWEEN 5:00 OR 6:00.

NOW, THAT 5:00 OR 6:00, EVEN IF YOU MAKE IT A LITTLE BIT LATER, YOU GOT TO FIGURE THAT HIS BREAK IS APPROXIMATELY DURING HALF OF HIS SHIFT, BUT THAT SEVERELY UNDERMINES DEPUTY IBARRA WHEN HE SAYS "WELL, I GO THROUGH THE PIPE CHASE AT ABOUT 8:30 TO 8:40 P.M. AND THAT'S WHERE I HEAR THIS SINK BREAKING.

SO LADIES AND GENTLEMEN, YOU START THINKING ABOUT IT, THE TIMING, THEY'RE NOT JUST A LITTLE OFF, IT'S WAY OFF, IT'S MILES APART.

NOW, HERE IS SOMETHING ELSE ABOUT DEPUTY YZABAL, THERE IS NO REPORT. I SAID "OKAY, WELL, YOU DIDN'T WRITE A REPORT. DID YOU AT LEAST TELL SOMEBODY ABOUT YOUR OBSERVATIONS?

"NO, I DIDN'T DO THAT EITHER."

SOMETHING ELSE, MR. CHUN SAID "WELL, DID YOU GO INTO THE OFFICERS' CAGE AND MAKE A THREAT?"

HE SAYS "NO."

LADIES AND GENTLEMEN, FOR ONE IOTA OF A SECOND, DO YOU THINK THAT DEPUTY WAS GOING TO GET ON THE STAND AND SAY YEAH, I MADE THOSE THREATS? IT WASN'T GOING TO HAPPEN, IT WASN'T GOING TO HAPPEN.

NOW, MR. CHUN, WHEN HE TALKED ABOUT THE CREDIBILITY OF THE DEPUTIES, HE SAID "DO YOU THINK THEY'RE GOING TO COME IN HERE AND LIE AND PUT THEIR CAREERS IN JEOPARDY?"

HERE'S THE BETTER WAY TO LOOK AT IT, LADIES AND GENTLEMEN. IF THEY TOLD THE TRUTH, THEIR CAREERS WOULD BE IN JEOPARDY.

NOW, YOU HEARD A LITTLE BIT ABOUT MR. MCGHEE AND SOME RAP LYRICS, AND HE TOLD YOU THAT HE WAS TRYING TO MARKET THEM AND TRYING TO PUT THEM TO BEATS AND THE LIKE.

AND I DON'T CARE HOW DISGUSTING THAT GENRE OF MUSIC IS, YOU GOT TO ADMIT PEOPLE LISTEN TO IT. IT MAY NOT BE YOU, IT MAY NOT BE YOUR KIDS, BUT THERE ARE A LOT OF PEOPLE THAT LISTEN TO IT.

YOU'VE ALSO GOT TO THINK OF SOMETHING ELSE, THESE SO-CALLED LYRICS THAT HE ULTIMATELY WANTED TO MARKET WERE WRITTEN YEARS BEFORE JANUARY THE 7TH OF '05, SO THEY HAVE NO BEARING ON HIS STATE OF MIND OR HIS MOTIVE. BUT WHAT STARTED MR. MCGHEE'S STATE OF MIND OFF WAS TRYING TO HELP RUDY, NOT TRYING TO STOP A DEPUTY FROM DOING THEIR JOB, HIS INTENT WAS TO HELP RUDY.

NOW, LADIES AND GENTLEMEN, I GOT A LOT

OF PAPER HERE, BUT I DO IT THE OLD FASHIONED WAY, I GOT TO WRITE IT OUT AND I GOT TO WRITE IT BIG, BECAUSE NO MATTER HOW BIG THIS PRESCRIPTION IS, I STILL NEED A LOT OF HELP, SO I WRITE BIG.

BUT LET ME SAY TO YOU, THE FACTS OF THIS CASE ARE NO MORE ABOUT A CONSPIRACY TO COMMIT AN ASSAULT OR A VANDALISM THAN PEOPLE SITTING IN A BAR CONSPIRING TO GET DRUNK. YOU GOT PEOPLE IN A BAR REACTING TO ALCOHOL, YOU GOT MR. MCGHEE REACTING TO WHAT HE SEES HAPPENING RIGHT IN FRONT OF HIM, TO SOMEONE HE KNOWS. OTHERS, LADIES AND GENTLEMEN, THEY'RE REACTING TO SOMETHING THAT THEY SEE.

NOW, THE LAW OF CONSPIRACY DOES NOT SAY THAT SEVERAL PEOPLE DOING THE SAME THING, AT THE SAME TIME, IS A CONSPIRACY. I DON'T CARE ABOUT THE NUMBER OF OVERT ACTS, YOU COULD HAVE ONE OR A HUNDRED AND ONE. THERE IS A SPECIFIC INTENT REQUIREMENT.

ONE, IT'S A SPECIFIC INTENT TO AGREE, AND THEN THERE'S A FURTHER SPECIFIC INTENT TO DO THE CRIME. YOU NEED PROOF BEYOND A REASONABLE DOUBT OF BOTH. DO YOU HAVE IT HERE? DO YOU HAVE THE FACTS? YOU HAVE ARGUMENT, BUT DO YOU HAVE THE FACTS? NO, LADIES AND GENTLEMEN, YOU DO NOT.

AND HERE'S SOMETHING ELSE, MR. CHUN, IN HIS ARGUMENT, REFERENCED HIS COLLEAGUE AND HE TALKED ABOUT WELL, IF WE SINK TOGETHER, WE'RE CONSPIRING. AND THEN I THOUGHT ABOUT IT, AND I THOUGHT IT DOESN'T ALWAYS MAKE SINCE, BECAUSE IMAGINE

GOING TO THE BEACH AND YOU SEE SOMEONE KICKING A BEACH BALL, SO THEN YOU GO OUT, AND YOU START KICKING YOUR BEACH BALL. AND THEN SOMEONE ELSE, THEY GO OUT, AND THEY START KICKING THEIR BEACH BALL. IS EVERYBODY CONSPIRING? NO. WE'RE ACTING ON OUR OWN, TO DO A SIMILAR ACT. THINK ABOUT THAT, LADIES AND GENTLEMEN.

AND MR. CHUN TALKED ABOUT THAT THESE SO-CALLED CONSPIRACIES WERE ONGOING. WELL, MR. MCGHEE HAS ONGOING DEFENSES.

NOW, MR. MCGHEE, AS YOU CAN TELL FROM HIS TESTIMONY, IS A MAN WHO SPEAKS HIS MIND. HE TOLD YOU FROM ALMOST THE FIRST DAY OF JAIL THAT HE HAD BEEN THREATENED AND BEATEN. AND ON REFLECTION, HE ALSO TOLD YOU THAT IT COULD HAVE BEEN AVOIDED, BUT THAT'S ON REFLECTION, THAT'S HINDSIGHT.

HE ALSO TOLD YOU ABOUT THE OTHER PROBLEMS HE HAD PRIOR TO JANUARY 7TH, '05. AND YOU KNOW WHAT, THERE MIGHT BE SOMEBODY SAYING, HE'S IN CUSTODY, SO WHAT.

BUT, LADIES AND GENTLEMEN, THESE EVENTS SHAPE HIS MIND-SET. SOME MIGHT SAY HE'S IN CUSTODY, HE DESERVES A BEATING, HE DESERVES A BEAT-DOWN. BUT LADIES AND GENTLEMEN, WE LIVE IN A CIVILIZED SOCIETY, A CIVILIZED WORLD AND ABSOLUTELY NO ONE DESERVES TO BE BEATEN, NOT EVEN PRISONERS OF WAR.

MR. CHUN, IN HIS ARGUMENT, USED A CAGE

ANALOGY, AND HE TALK ABOUT YOU GET POKED AT AND YOU GET PRODDED, BUT YOU'RE IN THIS CAGE AND IT'S LIKE YOU'RE GOING CRAZY.

BUT HE SAID HE WAS AFRAID OF BEING BEATEN, HE SAID HE FELT THAT RECKONING WAS COMING. AND HE TOLD YOU ABOUT DEPUTY YZABAL AND OTHERS MAKING THOSE THREATS OVER THE P.A. HE TALKED ABOUT THE ANIMAL SOUNDS AND WORDS TO THE EFFECT, "OH, YOU'RE REALLY GOING TO GET F'D UP NOW."

LADIES AND GENTLEMEN, AS I SAID BEFORE, THIS SITUATION WENT ON, ON AND OFF REALLY, BUT LASTED APPROXIMATELY SEVEN HOURS. DID IT START WITH "GAS THE DEPUTIES," OR DID IT START WITH DRUNKEN GONZALEZ BEING BEATEN? NOW, THIS "GAS THE DEPUTIES," MR. MCGHEE SAID HE DID NOT SAY IT, HE TOLD YOU WHAT HE SAID TO DEPUTY IBARRA. HE SAID, LOOK, GONZALEZ IS IN NO SHAPE TO GO TO AN ATTORNEY VISIT, AND THEN HE SAID I APPEALED TO HIM PERSONALLY, I SAID "LOOK, DON'T FRONT YOURSELF OFF." AND THEN HE SAID IBARRA SAID "WELL, HE'S NOT REFUSING."

BUT, LADIES AND GENTLEMEN, COMMON SENSE AND REALITY HAVE GOT TO SINK IN AND IT DICTATES THAT WHAT STARTED THIS WAS THE BEATING OF GONZALEZ.

MR. MCGHEE TOLD YOU WHAT HIS INTENT WAS, HE TRIED TO STOP WHAT WAS HAPPENING TO MR. GONZALEZ. OTHER INMATES, LADIES AND GENTLEMEN, ACTED SIMILARLY. THIS IS NOT A CONSPIRACY TO ASSAULT. THIS IS A REACTION, LADIES AND GENTLEMEN,

TO AN INJUSTICE.

NOW, MR. MCGHEE TOLD YOU ABOUT THAT CAGED ANIMAL FEELING AND THE FRUSTRATION HE WAS FEELING, AND HE TALKED ABOUT HE KICKED HIS SINK, IT WAS ALREADY -- HE SAID IT WAS HANGING OFF THE WALL ANYWAY, AND HE SAID HE KICKED IT, AND HE KICKED IT OUT OF FRUSTRATION, AND THAT'S WHEN IT BROKE.

NOW, SOME MIGHT SAY, LADIES AND GENTLEMEN, THAT'S ADMITTING TO A VANDALISM, BUT HE'S NOT CHARGED WITH SIMPLE VANDALISM, HE'S CHARGED WITH CONSPIRACY TO COMMIT VANDALISM. HIS FRUSTRATION, LADIES AND GENTLEMEN, IS NOT PART OF ANY AGREEMENT, NOR IS HIS FRUSTRATION MALICIOUS, IT'S A REACTION TO WHAT'S GOING ON, LADIES AND GENTLEMEN.

NOW, AS I SAID EARLIER, IBARRA TALKS ABOUT GOING INTO THE PIPE CHASE, AND HE HEARS THIS OH, SO IMPORTANT STATEMENT BY MCGHEE TO REYES ABOUT HOW TO BREAK THE SINK.

BUT LADIES AND GENTLEMEN, LOOK AT THE FACTS, LOOK AT THE SEQUENCE OF EVENTS, THIS SEQUENCE OF EVENTS, IS THIS REASONABLE? NO.

IS IT BELIEVABLE? NO.

YOU JUST GO BACK THERE AND HAPPEN TO HEAR THIS. IS THAT REASONABLE? NO.

YOU JUST HAPPEN TO LEAVE IT OUT OF YOUR TRUSTY REPORT. IS THAT REASONABLE? NO.

JUST LIKE HE FORGOT TO TELL THE SERGEANT ABOUT THE RUSE, IS THAT REASONABLE? NO.

HE WANTED TO AVOID THAT, LADIES AND GENTLEMEN.

NOW, WITH RESPECT TO HEARING THESE WORDS, MR. MCGHEE SAID, HE DIDN'T SAY THEM, AND HE ALSO GAVE US AN EXAMPLE, IF HE WANTED TO COMMUNICATE WITH HIS NEIGHBOR, WHAT WOULD HAPPEN? HE SAID, WE CALL IT A SIDEBAR. AND HE SAYS IF MY NEIGHBOR AND I WANT TO TALK, WE GO TO THE FRONT OF THE CELL, HE'D GO TO HIS, I'D GO TO MINE, WE COULD FACE TO FACE, AND WE COULD TALK, NOBODY COULD HEAR IT.

LADIES AND GENTLEMEN, THIS IS NOT A CONSPIRACY TO VANDALIZE, BECAUSE YOU GOT TO HAVE FACTS, YOU JUST DON'T HAVE AN END RESULT, HOW DO YOU GET TO THE RESULT, YOU GOT TO HAVE TRUTH, AND WE DIDN'T HEAR THAT FROM THESE DEPUTIES.

NOW, DEPUTIES MORALES AND MC MULLEN, IT'S TRUE, SELF-DEFENSE DOES NOT APPLY HERE. MR. MCGHEE SAYS HE DIDN'T THROW ANYTHING AND HE DIDN'T URGE OTHERS TO THROW AT THE TIME OF THE FIRE, HE SAID BUT OH, HE DID SEE OTHERS DO SO.

HE SAID THE FIRE WAS TO HIS RIGHT. HE ALSO TALKED ABOUT WATER CASCADING OVER THE TIER ABOVE. NOW THE OTHER DEPUTIES SAID -- MORALES AND MC MULLEN SAID "OH, WE COULDN'T GO TO DOWN THE ROW BECAUSE THOSE OTHER INMATES, EVEN THOUGH THEY WEREN'T DOING ANYTHING, MIGHT HAVE DONE SOMETHING, YOU GOT TO KEEP YOUR EYES ON THEM."

THEY HAVE TWO SETS OF EYES THEY COULD

HAVE USED ONE SET OF EYES, BUT THEY DIDN'T, SO THAT'S ON THEM. BUT YOU GOT TO THINK ABOUT EVERYTHING THAT TOOK PLACE.

NOW, DEPUTY MORALES TALKS ABOUT ASSESSING THE SITUATION BRIEFLY, AND I SAID WELL, PREVIOUSLY DID YOU SAY 15 SECONDS YOU WERE OUT THERE, AND HE SAYS WELL NO, READS ON AND HE SAYS -- HE JUST SAID IT WAS A BRIEF PERIOD OF TIME, AND THEN HE SAID HEY, I HAD TO GO FROM A-ROW TO C-ROW AND NOW WE GOT TO PUT A FIRE OUT. HE TOLD US HE CAN'T RECALL WHERE THE FIRE WAS, BUT HE SAYS, WELL, THEY STAYED AT THE END OF THE ROW RATHER THAN GOING DOWN.

HE DESCRIBED FOR YOU, LADIES AND GENTLEMEN, A VERY FLUID SITUATION, AND HE NAMED NAMES OF CERTAIN INMATES THAT WERE ACTING OUT, AND HE SAID MCGHEE WAS ONE OF THOSE THROWING PORCELAIN. HE ALSO TALKED ABOUT CELL 19, WALTER CORTEZ. WALTER CORTEZ, YOU'LL SEE A LITTLE PICTURE OF HIM ON ONE OF THESE EXHIBITS. YOU'LL SEE A LITTLE RED DOT ON THE EXHIBIT BY HIS CELL, AND YOU'LL SEE THE INITIALS OF MORALES AND MC MULLEN, AND HE WAS INVOLVED TOO.

NOW, MORALES COULDN'T TELL US THE NUMBER OF PIECES THROWN BY EACH, BUT HE SAID IT WAS AT LEAST ONE. AND HE SAYS BUT "HEY, I KNEW THAT IT WAS REYES THAT THREW THE PIECE THAT HIT MC MULLEN." AND I ASKED HIM, I SAID "WELL, DID YOU PUT THAT IN YOUR REPORT?" HE SAID YES.

SO LADIES AND GENTLEMEN, WHAT HE WROTE

THREE AND A HALF YEARS AGO, HE WAS STICKING TO. HE TALKED ABOUT HEY, SOME PIECES FELL SHORT, SOME HIT THE BARS, SOME HE HAD TO DUCK DOWN. I SAID YOU KNOW, THE ONES THAT MADE IT ONTO THE ROW ABOVE, IS THERE ANY PHOTOGRAPHS, OR IS THERE ANYTHING LIKE THAT SO WE CAN GET SOME KIND OF IDEA OF HOW MUCH PORCELAIN WAS COMING UP THERE? HE SAYS NO.

SO, LADIES AND GENTLEMEN, JUST AS A LITTLE TEASER, IS IT REASONABLE THAT EACH INMATE HE NAMED THREW AT LEAST ONE, THAT'S THE LITTLE TEASER QUESTION.

NOW, HE TALKS ABOUT WALTER CORTEZ. WE DON'T HAVE A PICTURE OF THE SHOWER. HE SAID THERE WAS NO PORCELAIN IN THE SHOWER, BUT HEY, MR. CORTEZ, HE WAS THROWING IT TOO, SO I GUESS HE WAS DOING A LITTLE ABDUL-JABBAR STYLE, ENDED UP THERE.

IS HIS TESTIMONY REASONABLE, IS IT BELIEVABLE? NO TO BOTH.

NOW, LET'S GO A LITTLE BIT FURTHER. HE SAYS THEY'RE TRYING TO EXTINGUISH THE FIRE, AND I WANT YOU TO THINK ABOUT THIS HUGE OVERHANG. I THINK DEPUTY MORALES TRIED TO MINIMIZE IT, I THINK DEPUTY MC MULLEN DESCRIBED IT AS THREE TO FOUR FEET, THE SPACE THAT THEY HAD TO WORK IN, AND JUST THINK ABOUT THAT.

WHEN YOU THINK ABOUT WHAT MORALES IS DESCRIBING, ALSO THINK ABOUT THE POSITION THAT MC MULLEN PUT MORALES IN, BASICALLY AT THE ELBOW

PORTION OF THAT ROW, AT THAT ELBOW, YOU CAN'T SEE DOWN THE ROW THAT WELL, CAN SEE THE ROW, BUT YOU CAN'T SEE THE CELLS. THERE'S EXHIBITS THAT CONFIRM THAT, LADIES AND GENTLEMEN. SO YOU THINK ABOUT WHAT MORALES HAD TO SAY.

NOW, I ASKED A LOT OF QUESTIONS THE FIRST DAY ABOUT "WELL, WAS THERE SOMEBODY IN THE SHOWER, DID YOU TAKE SOMEBODY OUT OF THE SHOWER?" AND NOBODY KNEW WHAT I WAS TALKING ABOUT. THEN A DAY LATER, SERGEANT WILSON SAID, YOU KNOW WHAT, I REVIEWED THE VIDEO, AND I THOUGHT ABOUT IT, AND YOU KNOW, IT WAS WALTER CORTEZ FROM C-19 THAT WAS IN THE SHOWER.

AND DEPUTY MORALES, I THINK HE TESTIFIED RIGHT AFTER, REMEMBER EARLIER, HE DIDN'T KNOW WHAT I WAS TALKING ABOUT, BUT HE SAID WELL, YOU KNOW, IT WAS CORTEZ, HE WAS IN THE SHOWER, BUT HE'S THROWING STUFF TOO. BUT REMEMBER, HE TRIED TO PUT PORCELAIN COMING FROM WAY DOWN THE ROW, THAT'S WHAT MORALES TRIES TO DO.

SO INSTEAD OF SAYING WELL, YOU KNOW, I WAS MISTAKEN, THAT WAS WALTER CORTEZ THROWING, YOU KNOW, AND SAYING, WELL, YOU KNOW, IT WAS JUST COMING FROM THAT AREA, NO, NO, HE STUCK TO HIS REPORT. HIS REPORT SAYS WALTER CORTEZ THREW, SO WALTER CORTEZ, EVEN THOUGH THERE'S NO PORCELAIN IN THE SHOWER HAD TO BE THROWING FROM THE SHOWER. THAT WAS HIS TESTIMONY.

NOW, IN THIS FLUID SITUATION, AND NO

PUNT INTENDED WITH PUTTING THIS FIRE OUT, BUT MORALES TALKS ABOUT PUTTING OUT THE FIRES, BUT HE HAS TIME TO NOTE EXACTLY WHO'S THROWING PORCELAIN. ALL THE INDIVIDUALS HE NAMES, THEY WERE THROWING PORCELAIN, HE CAN'T TELL US THE NUMBER OF TIMES, BUT HE SAYS HEY, THAT'S IT.

MORALES ALSO SAID THAT, YOU KNOW, MOST OF THE PEOPLE WERE NOT THROWING ANYTHING, BUT HE LISTS AND I ASKED HIM, IN HIS REPORT, "DID YOU LIST 22 SUSPECTS?" HE SAYS "YES." SO YOU THINK ABOUT WHAT HE HAS TO SAY.

NOW, LET'S ADDRESS DEPUTY MC MULLEN. DEPUTY MC MULLEN, YOU CAN TELL FROM HIS ANSWERS, LIKES TO GIVE EXPANSION TO EVERYTHING, AND THAT'S JUST HOW HE IS, YOU BELIEVE, I DON'T THINK HE WAS PUTTING ON AIRS. SO WHEN I WAS LISTENING TO HIS TESTIMONY, I STARTED TO THINK ABOUT A COOK MAKING A BIG POT OF SOUP, AND HE ADDS A LITTLE BIT, TASTES IT, IT TASTES PRETTY GOOD, LET ME ADD A LITTLE BIT MORE, HE TASTES IT, MAYBE I CAN MAKE IT A LITTLE BETTER, SO HE ADDS A LITTLE MORE.

BUT LADIES AND GENTLEMEN, WHEN YOU KEEP ADDING AND ADDING, IT GETS TO THE POINT WHERE IT DOESN'T TASTE GOOD AT ALL. AND WHEN IT DOESN'T TASTE GOOD, DO YOU TRY TO SWALLOW IT, OR DO YOU THROW IT OUT. WELL, LADIES AND GENTLEMEN, YOU GOT TO THROW IT OUT, AND LET'S TALK ABOUT WHY.

HE SAYS WHEN HE FIRST GOES ON THE ROW,

SEVEN, TEN SECONDS, HE'S GOT TO GET OUT OF THERE. SO HE'S GOING UP THE STAIRWELL, STARTS TO SMELL SMOKE, OH, WE REALLY GOT A PROBLEM ON OUR HAND, OH -- YOU KNOW WHAT HE SAID, SO YOU GOT TO GRAB THE HOSES AND THE LIKE, SO YOU GOT TO FIGURE AT THIS POINT SMOKE IS STARTING TO FILL THE AIR.

I ASKED HIM, WHEN YOU'RE UP THERE TRYING TO PUT OUT THE FIRE, DO YOU HAVE TO KIND OF DUCK AND DODGE, WELL, NO, WE HAD TO PUT OUT THAT FIRE, WE HAD TO PUT OUT THAT FIRE, LADIES AND GENTLEMEN, THAT'S WHAT HE SAID.

NOW, MC MULLEN'S OBSERVATIONS, HIS REACTIONS ARE INCONSISTENT WITH REALITY AND HUMAN NATURE. FIRST OF ALL, IT'S ALL FROM MEMORY, HE DOESN'T WRITE A REPORT.

YOU'RE ON -- YOU'RE AT THREE TO FOUR FEET OPENING IN THE FLOOR LOOKING DOWN TO THE ELEVATOR, PARTNER IS SLIDING TO THE RIGHT SLIGHTLY BEHIND HIM AND HE SAYS WELL HEY, OUR JOB AT THAT POINT WAS TO PUT OUT THAT FIRE.

BUT, LADIES AND GENTLEMEN, IT DOESN'T HAVE TO BE YOU'RE PUTTING OUT A FIRE, BUT JUST THINK ABOUT STANDING IN A BATTING CAGE OR ON A TENNIS COURT AND THE BALLS KEEP COMING AT YOU FASTER.

WELL, YOU JUST DON'T STAND THERE. IF IT'S TENNIS, YOU REACT, YOU MOVE THIS WAY OR THAT WAY. IF IT'S DIRECTED RIGHT AT YOU, YOU MOVE YOUR HEAD, STOOP DOWN, YOU LOOK BACK, IT'S A NORMAL

REACTION, NOT JUST STANDING THERE, HOLDING THAT FIREMAN'S HOSE, THIS IS MY JOB, I GOT TO DO IT.

YOU AVOID BEING HIT, THAT'S WHAT YOU DO, LADIES AND GENTLEMEN, THAT'S COMMON SENSE, THAT'S A COMMON REACTION, THAT'S REALITY, BUT IT DOESN'T HAPPEN HERE BECAUSE THESE ARE DEPUTIES.

NOW, WHEN SOMETHING IS COMING AT YOU, YOU SEE 12 THINGS. YOU MAY SEE IT FROM ITS ORIGIN. IF YOU SEE IT COMING FROM ITS ORIGIN, YOU KNOW WHAT TO DO. OR AT SOME TIME, THINGS ARE JUST COMING AND YOU SEE THEM AT THE LAST SECOND, YOU DON'T KNOW THE ORIGIN, YOU KNOW THE GENERAL DIRECTION, IT'S COMING FROM BELOW, SO YOU GOT TO MOVE OUT THE WAY. BUT LISTEN TO HIS DESCRIPTION, AT LEAST TEN FOR MCGHEE, FIVE FROM CELL-8 AND FIVE TO TEN FROM CELL 6.

NOW, LADIES AND GENTLEMEN, THERE IS NO WAY IN THE WORLD, WITH SMOKE, YOU SHOOTING FIRE DOWN THERE, AND I THINK THEY USED THE WORDS THAT IS ALMOST "PANIC MODE," THAT YOU MAKE THESE OBSERVATIONS WITHOUT DUCKING AND DODGING, AND HE SAYS OH, IT'S PORCELAIN, TONS OF PORCELAIN IS COMING AT US, BUT WE'LL NEVER KNOW BECAUSE WE DON'T HAVE ANY PHOTOS TO SAY THIS IS HOW MUCH CAME UP THERE.

AND YOU MIGHT BE ABLE TO SAY, LADIES AND GENTLEMEN, WHEN REALITY SETS IN, AND YOU THINK ABOUT IT IN TERMS OF REASONABLENESS, YOU SAY WELL, YOU KNOW, I MIGHT BE ABLE TO TELL FROM THE APPROXIMATE AREA WHERE THESE PORCELAIN SHARDS WERE

COMING FROM. WHEN HE FIRST STARTED TESTIFYING, HE SAID "ALL I SAW WERE ARMS, I COULDN'T TELL YOU WHO, BUT THEY WERE ARMS."

HE NEVER SAYS I SEE AN ORANGE JUMPSUIT WITH THE WHITE AND OFF-WHITE THERMAL, BUT HE SAYS HEY, IT'S THE GENERAL AREA. AND THEN UNDER MR. CHUN'S QUESTIONING, "OH, I'M CERTAIN IT WAS MCGHEE, I'M CERTAIN IT WAS REYES. I'M CERTAIN."ON CROSS-EXAMINATION, "I SAW IT COMING FROM THE AREA, I CAN'T SAY WHICH CELL." SO THINK ABOUT THAT WHEN HE TALKS ABOUT BEING CERTAIN.

AND ONCE AGAIN, AS I SAID EARLIER, MR. MCGHEE, THEY'VE GOT HIM THROWING SO MUCH, THAT HE'S MANUFACTURING THIS, NOT MERELY GETTING IT FROM HIS SINK, HE CAN'T BE, BECAUSE IT CAN'T BE THAT MUCH PORCELAIN.

NOW, MR. MCGHEE ALSO TESTIFIED THAT LATER IN THE DAY, HE SAID -- AND IT'S ACTUALLY LATE INTO THE NIGHT AND IT'S ALMOST EARLY MORNING -- THAT HE HEARD THE DEPUTIES START TO ASSEMBLE NEAR THE DOOR, AND HE SAID HE THOUGHT SOMETHING WAS GOING TO HAPPEN, AND HIS THOUGHT, LADIES AND GENTLEMEN, IS JUST NOT RANDOM THOUGHTS, BUT HIS THOUGHTS ARE BASED UPON WHAT IS HAPPENING TO HIM, WHAT HAPPENED THAT DAY, WHAT IS HAPPENING.

NOW, HE WAS ASKED, HE SAYS WELL, WAS IT THE SAME DEPUTIES, WHEN YOU STARTED TO THROW AGAIN, WAS IT THE SAME DEPUTIES THAT YOU SAW EARLIER,

WAS IT THE SAME ONES? HE SAYS LOOK, THEY HAD ON RIOT GEAR, I COULDN'T TELL WHO IT WAS, WELL YOU KNEW THERE WAS A SHIFT CHANGE, DIDN'T YOU KNOW IT WASN'T THE SAME ONE, WHAT DID MCGHEE SAY, "I COULDN'T TELL YOU IF THEY STAYED, I COULDN'T TELL YOU IF THEY LEFT." HE SAID YOU KNOW WHAT, IT'S 10:00 O'CLOCK, SHIFT CHANGE, DIFFERENT DEPUTIES ON, THAT DIDN'T HAPPEN, IT COULDN'T HAPPEN. YOU GOT TO THINK ABOUT THE SITUATION.

HE TALKS ABOUT HE INITIALLY LOOKED. AND AT THAT POINT, HE STARTED TO THROW. MR. CHUN SAYS "WELL, HEY, CAN'T YOU SEE, WHEN YOU'RE THROWING DOWN THE ROW?" AND HE SAYS "NO, BECAUSE I'VE GOT TO BEND DOWN AND I'M EITHER LOOKING AHEAD, OR I'M LOOKING INTO A WALL." AND THEN HE SHOWS THIS VIDEO. HE SAYS "LOOK AT THAT WHITE THAT'S COMING IN AND OUT." AND MR. MCGHEE, HIS RESPONSE, "IF THAT'S MY HEAD, I HAVE TO HAVE A GIRAFFE NECK."

LOOK AT THE SIZE OF THAT WHITE PIECE THAT'S MOVING IN AND OUT. THERE'S NO WAY IN THE WORLD THAT COULD BE HIS HEAD OR HIS FACE FACING OUT DOWN THE ROW.

NOW, HE ALSO SAYS THAT I WANTED TO KEEP THEM AT BAY BECAUSE I WAS FEARFUL AND SO YOU SAY WELL HEY, I SAW IT AND YOU KNOW, THEY GOT CLOSER, YOU KNOW, IN THE VIDEO AND HE'S STILL THROWING.

BUT THEN AT ONE POINT, HE STOPPED, BUT MR. MCGHEE TALKED ABOUT, FROM HIS CELL, WHAT HE WAS

ABLE TO OBSERVE, WHAT HE WAS ABLE TO HEAR, AND HE SAYS WHEN HE FELT THAT THEY WERE ON THE ROW, THAT'S WHEN HE STOPPED.

WHEN THEY WERE OUTSIDE, HE WAS TRYING TO KEEP THEM AT BAY. NOW, ONE INSTRUCTION THAT YOU'VE RECEIVED IS 5.50, IT TALKS ABOUT AN ASSAILED PERSON NEED NOT RETREAT. I'LL PUT IT UP ON THE SCREEN FOR YOU.

"A PERSON THREATENED WITH AN ATTACK THAT JUSTIFIES THE EXERCISE OF THE RIGHT SELF-DEFENSE NEED NOT RETREAT.

IN THE EXERCISE OF HIS RIGHT OF SELF-DEFENSE, A PERSON MAY STAND HIS GROUND AND DEFEND HIMSELF BY THE USE OF ALL FORCE AND MEANS, WHICH WOULD APPEAR TO BE NECESSARY TO A REASONABLE PERSON IN A SIMILAR SITUATION, LADIES AND GENTLEMEN. "A SIMILAR SITUATION" IS VERY IMPORTANT, AND "WITH SIMILAR KNOWLEDGE," THE KNOWLEDGE OF MR. MCGHEE AND A PERSON "MAY PURSUE, IT SAYS 'HIS, HER,' BUT OBVIOUSLY IT'S 'HIS' ASSAILANT UNTIL HE HAS SECURED HIS SELF FROM DANGER IF THAT COURSE, LIKEWISE APPEARS REASONABLY NECESSARY. THE LAW APPLIES EVEN THOUGH THE ASSAILED PERSON MIGHT EASILY HAVE GAINED SAFETY BY FLIGHT OR WITHDRAWING FROM THE SCENE."

SO LADIES AND GENTLEMEN, WHAT THIS IS TELLING YOU -- WELL, FIRST OF ALL, YOU KNOW MR. MCGHEE CAN'T GO FAR, HE CAN JUST GO BY THE BACK OF THE CELL AND THE FRONT OF THE CELL, THAT'S ALL HE

CAN DO. BUT DOESN'T SAY WELL, IF IT'S A PEACE OFFICER, YOU JUST GOT TO STOP, YOU GOT TO WAIT TILL HE DOES SOMETHING, YOU JUST GOT TO STOP.

OKAY, MR. MCGHEE SAID HE WAS RECEIVING THREATS THROUGHOUT THE DAY. YOU'RE GOING TO GET IT NOW, IMMEDIATELY, OKAY, LATER ON, OVER THE LOUD SPEAKER. DO YOU THINK THESE DEPUTIES ARE GOING TO ADMIT THAT? NO. IT'S NOTHING ABOUT THIS INSTRUCTION THAT TALKS ABOUT IT DOESN'T APPLY WHEN THE POLICE ARE INVOLVED.

LET'S TALK ABOUT 5.51, SELF DEFENSE, ACTUAL DANGER NOT NECESSARY.

ACTUAL DANGER IS NOT NECESSARY TO JUSTIFY SELF-DEFENSE. IF ONE IS CONFRONTED BY THE APPEARANCE OF DANGER WHICH AROUSES IN HIS MIND, AS A REASONABLE PERSON, AN ACTUAL BELIEF AND FEAR THAT HE'S ABOUT, NOT THAT HE IS, BUT THAT HE ABOUT TO SUFFER BODILY INJURY AND IF A REASONABLE PERSON, IN A LIKE SITUATION, THAT JAIL SETTING, GOING THROUGH WHAT HE WENT THROUGH, SEEING AND KNOWING THE SAME FACTS, WHAT MR. MCGHEE SAW AND KNEW, WOULD BE JUSTIFIED IN BELIEVING HIMSELF IN LIKE DANGER, AND IF THAT INDIVIDUAL SO CONFRONTED ACTS IN SELF-DEFENSE, UPON THESE APPEARANCES, AND FROM THAT FEAR AND ACTUAL BELIEF, THE PERSON'S RIGHT OF SELF-DEFENSE IS THE SAME WHETHER THE DANGER IS REAL OR MERELY APPARENT, NOTHING ABOUT WELL, IF THE DEPUTIES ARE ACTING WITH REASONABLE FORCE AND THEY'RE, YOU KNOW, THEY'RE DOING

IT REASONABLY, YOU DON'T HAVE TO DO THIS, BECAUSE YOU GOT TO SAY, LADIES AND GENTLEMEN, THAT IT ALL STARTED WITH THE DEPUTIES. IT WASN'T ALL THE DEPUTIES, BUT YOU CAN'T REQUIRE MR. MCGHEE TO INCRIMINATE, YOU CAN'T SAY WELL HEY, THESE AREN'T THE SAME ONES IN THE RIOT GEAR, THERE'S NO WAY FOR HIM TO KNOW, BUT MR. CHUN WANTS TO IMPOSE THAT DUTY ON HIM, THE LAW DOESN'T.

ALSO, LADIES AND GENTLEMEN, BE MINDFUL OF THE GENERAL INSTRUCTION ON SELF DEFENSE, AND I'LL AGREE THAT IT GOES ONLY TO COUNTS 8 AND 9, SELF-DEFENSE AGAINST ASSAULT. IT IS LAWFUL FOR A PERSON WHO IS BEING ASSAULTED TO DEFENSE HIMSELF FROM ATTACK IF AS A REASONABLE PERSON AND YOU GOT TO BE REASONABLE, I WANTED TO BE REASONABLE, MR. MCGHEE SAID, BASED UPON WHAT HE WAS PERCEIVING, WHAT HE WAS GOING THROUGH, LADIES AND GENTLEMEN, SO HE HAS A REASONABLE BASIS, HE HAS GROUND FOR BELIEVING AND DOES BELIEVE THAT BODILY INJURY IS ABOUT TO BE INFLICTED UPON HIM, IN DOING SO, THAT PERSON MAY USE ALL FORCE AND MEANS WHICH HE BELIEVES TO BE REASONABLY NECESSARY AND WHICH WOULD APPEAR TO A REASONABLE PERSON IN THE SAME OR SIMILAR CIRCUMSTANCES TO BE NECESSARY TO PREVENT THE INJURY WHICH APPEARS TO BE IMMINENT.

MR. MCGHEE TALKED ABOUT IT. HE TALKED ABOUT THE THREATS, HE TALKED ABOUT WHAT HE HAD SEEN EARLIER, AND HE TALKED ABOUT WHEN THEY WERE COMING ON

THE ROW. HE SAID HE THOUGHT IT WAS THE RECKONING, SO HE STARTED THROWING. BUT THEN WHAT HAPPENS? HE SAYS "IF THEY GET CLOSE, WHEN I KNOW THEY'RE ON THE ROW, I'M NOT TRYING TO HIT THEM."

HE SAYS "WELL, WERE YOU TRYING TO THROW IT OVER THEM?"

AND HE SAYS, "I WAS TRYING TO THROW, BUT I DIDN'T THINK THEY WERE THAT CLOSE. AND HE SAYS WELL, LOOK AT THE VIDEO, SOME OF THEM ARE SAILING OVER THEIR HEAD."

MR. MCGHEE, FROM HIS CELL, DIDN'T HAVE THE BENEFIT OF THE VIDEO, LADIES AND GENTLEMEN. WE'RE LOOKING AT THIS THREE AND A HALF YEARS LATER. FROM HIS CELL, WHAT CAN HE SEE, WHAT DOES HE KNOW? HE TOLD YOU WHAT HE SAW, HE TOLD YOU WHAT HE KNEW, HE TOLD YOU HOW HE REACTED, AND WHY HE REACTED.

HE TALKS ABOUT "HEY, WHEN THEY GOT AROUND CELL-3, I STOPPED THROWING." THE VIDEO BEARS THAT OUT. THERE IS A STOPPAGE, HE GOES TO THE BACK OF HIS CELL, PUTS UP HIS MATTRESS.

MR. MCGHEE SAID WHEN HE SAID "ARE YOU GOING HOOK UP?" HE SAYS "NO, I'M NOT GOING TO HOOK UP," BECAUSE HE SAID HE FELT HE WAS GOING TO BE BEATEN, ONCE AGAIN, THE RECKONING, AS HE INDICATED.

SERGEANT WILSON DESCRIBED BEING IN FRONT OF HIS CELL AND HE SAYS WELL, MR. MCGHEE STOOD THERE WITH THE MATTRESS UP TO HIS HEAD.

BELTRAN, PART OF THE EXTRACTION TEAM,

HE TRIED TO PAINT A PICTURE OF MR. MCGHEE STRUGGLING INSIDE THE CELL AND RESISTING, BUT THAT'S WHY I ASKED HIM ABOUT HIS REPORT, AND I TOOK HIM LINE BY LINE, AND I SAID DID YOUR REPORT SAY THIS, DID YOUR REPORT SAY THAT? AND TO EVERYTHING, HE SAID "YES, YES, YES."

SO THIS IS WHAT HIS REPORT SAID:

"I ENTERED FIRST WITH THE SHIELD AND PINNED MCGHEE TO THE CORNER OF THE CELL WHILE DEPUTIES FELDER, CABRERA, BAMRUNGPONG ACTED AS CAPTURE DEPUTIES."

"DID YOU SAY THAT?

"YES.

"IS THAT WHAT YOU WROTE?

"YES.

"AND DEPUTIES FELDER AND CABRERA GAINED HIS HANDS, I HANDED MY SHIELD TO THE PERSONNEL OUTSIDE OF THE CELL AND THEN BEGAN TO REMOVE EXCESS CLOTHING FROM AROUND MCGHEE'S HEAD, ARM AND NECK.

"DID YOU SAY THAT?

"YES, I DID.

"ONCE INMATE MCGHEE WAS TAKEN TO THE FLOOR AND HANDCUFFED, I SIGNALED CODE 4. DID YOU SAY THAT?

"YES.

"YOU PROCEEDED TO PLACE MCGHEE ON HIS FEET AND ESCORT HIM OUT OF THE CELL.

"DID YOU SAY THAT?

"YES, I DID.

"INMATE MCGHEE WAS TAKEN OUTSIDE THE MODULE WITHOUT FURTHER INCIDENT. DID YOU SAY THAT?

"YES, I DID.

I SAID "WELL, DID YOU, AT ANY POINT WHILE YOU WERE IN THERE, HEAR MR. MCGHEE SAY HEY, MY LEG, MY LEG, I GOT A HURT LEG, I GOT A BAD LEG?

"I DIDN'T HEAR THAT."

BUT YOU KNOW ON THE VIDEO, YOU HEAR THAT, LADIES AND GENTLEMEN, SO YOU JUST THINK ABOUT THE CREDIBILITY OF WHAT'S TAKING PLACE.

LADIES AND GENTLEMEN, A LOT OF QUESTIONS PUT TO MR. MCGHEE ABOUT MAKING A COMPLAINT, MR. CHUN HAS ARGUED THAT WHEN HE TOOK THE STAND, ALL HE DID WAS COMPLAIN. NOW WHAT HE DID WAS EXPLAIN THE ONGOINGS OF WHAT HE WITNESSED, WHAT HE PERCEIVED, WHAT HE HAD BEEN THROUGH. THAT'S WHAT HE DID, LADIES AND GENTLEMEN.

BUT YOU GOT TO TAKE IT A STEP FURTHER. HE EVEN SAID FROM HIS TESTIMONY ON THE STAND, THERE'S GOING TO BE RETALIATION, AND HE TALKED ABOUT WHY HE DIDN'T FILE A COMPLAINT. HE TALKED ABOUT HOPING FOR A MIRACLE. HE TALKED ABOUT HOPING THERE WOULD BE NEGOTIATION.

NOW, LADIES AND GENTLEMEN, WHY DIDN'T HE COMPLAIN, IF ALL THESE THINGS WERE GOING ON, WHY DIDN'T HE COMPLAIN?

WELL, YOU THINK ABOUT ANOTHER

SITUATION WHERE A PERSON DOESN'T COMPLAIN, A BATTERED SPOUSE. LADIES AND GENTLEMEN, THEY'RE BATTERED AND BEATEN, BUT THEY STAY, HOPING IT'S GOING GET BETTER, THEY DON'T FEEL THEY HAVE A PLACE GO TO.

WELL, MR. MCGHEE DIDN'T HAVE A PLACE TO GO, HE WAS IN JAIL. HE WAS HOPING IT WOULD GET BETTER, BECAUSE THE COMPLAINT MAKES IT WORSE. ATTEMPTS BY THREAT OR VIOLENCE TO PREVENT OR DETER AN EXECUTIVE OFFICER, THESE DEPUTIES, FROM PERFORMING THEIR DUTIES.

ASK YOURSELF, LADIES AND GENTLEMEN, IF GONZALEZ WAS GETTING BEATEN AND YOU THROW THINGS AT DEPUTIES TO STOP IT, ARE YOU DETERRING THE DEPUTIES FROM A LAWFUL ACT? NO.

IF, LADIES AND GENTLEMEN, BECAUSE OF THE THREATS OF WHAT IS GOING TO HAPPEN TO YOU, YOU THROW THINGS DOWN THE ROW, ARE YOU DETERRING DEPUTIES? NO, LADIES AND GENTLEMEN, YOU'RE TRYING TO STOP THEM FROM BEATING YOU, THAT'S YOUR MIND-SET, THAT'S YOUR INTENT.

DO YOU THINK ANYBODY WANTS TO EXPEDITE OR WELCOME A BEATING, I DON'T THINK SO. NOW, GOT TO REMEMBER, LADIES AND GENTLEMEN, YOU GOT TO REMEMBER MCGHEE'S PERCEPTION FROM INSIDE THAT CELL-3 AND THREE AND A HALF YEARS AGO, THAT'S WHAT YOU HAVE TO TALK ABOUT.

YOU ALSO HAVE TO REALIZE WHAT MR. MCGHEE'S WAS TALKING ABOUT. THERE WAS NO PLAN,

THERE WAS NOTHING IMPLIED, THERE WAS NO STATEMENT SAYING YOU DO THIS, YOU DO THAT. THINK ABOUT THE TESTIMONY. HE TALKED ABOUT THROWING BLINDLY. GOT TO THINK ABOUT WHAT MR. MCGHEE WAS HEARING, WHAT WAS HE TRYING TO DO. WAS HE TRYING TO HIT THOSE DEPUTIES, LADIES AND GENTLEMEN, WAS HE TRYING TO KEEP THEM AT BAY. WAS HE REASONABLE IN FEARING THAT A BEATING WAS ON ITS WAY.

SOMETHING ELSE HE TOLD YOU. HE SAID WHEN THERE'S NO VIDEO, LADIES AND GENTLEMEN, THERE IS NO HOLDS BARRED, AND HE KNEW NOTHING OF A VIDEO. ALL HE THOUGHT ABOUT WAS THE RIOT DEPUTIES ARE COMING TO BEAT US. HE WAS ASKED, "WELL, WHAT YOU DID, WAS IT UNREASONABLE?"

MR. MCGHEE'S RESPONSE: "THE WHOLE SITUATION, FROM BEGINNING TO END WAS UNREASONABLE."

NOW, LADIES AND GENTLEMEN, I SHARE WITH YOU A LITTLE BIT OF HISTORY, FROM APPROXIMATELY 1947 TO 1955, THERE WAS A YOUNG OFFICER, WORKING OUT OF NEWTON STATION, HIS NAME CLAY JACKE, MY FATHER.

ONE DAY, OFFICER JACKE IS RETURNING TO THE STATION IN A PATROL CAR, AND HE SEES A FELLOW OFFICER OFF TO THE SIDE AND HIS MOTORCYCLE IS BROKEN DOWN, SO HE GOES OVER TO PICK HIM UP, THEY BOTH GO TO THE STATION, AS THEY'RE DRIVING, HE SEES THE OFFICER PULL OUT HIS PAD AND START TO WRITE.

HE SAID "WHAT ARE YOU DOING?" THE OTHER OFFICER SAYS "WELL, YOU JUST RAN THE STOP

SIGN."

MY FATHER SAID YOU'RE CRAZY, "I DIDN'T DO ANYTHING."

SO THEY JAW-JACK BACK AND FORTH, AND THEY GET TO THE STATION.

THE CAPTAIN SAYS, "WHAT'S GOING ON HERE?"

ONE OFFICER SAYS "WELL, HEY, HE RAN A STOP SIGN.

"OFFICER JACKE, WHAT DID YOU DO?

HE SAID "I DIDN'T, I JUST PICKED HIM UP, CAME TO THE STATION, I WAS OBEYING TRAFFIC."

WHAT DID THE CAPTAIN DO AFTER LISTENING TO EVERYTHING, HE TORE UP THAT TICKET.

AND I'M GOING TO ASK YOU TO FIGURATIVELY TEAR UP THOSE GUILTY VERDICT FORMS. BECAUSE LADIES AND GENTLEMEN, YOU ARE GUIDED NOT ONLY BY THE FACTS, YOU'RE GUIDED BY THE LAW, YOU'RE GUIDED BY A REQUIREMENT THERE MUST BE PROOF BEYOND A REASONABLE DOUBT OF EACH AND EVERY ELEMENT AND IT CANNOT BE MINIMIZED, THE BURDEN CANNOT BE LESSENED.

LADIES AND GENTLEMEN, THINK ABOUT REASONABLE WHEN IT COMES TO THE TESTIMONY OF THE DEPUTIES, THINK ABOUT REASONABLE. THOSE NOT GUILTY VERDICTS ARE THERE FOR A REASON, USE THEM.

NOW, YOU MIGHT SAY WELL HEY, YOU KNOW, MR. MCGHEE CAN'T USE DEFENSE OF OTHERS WITH RESPECT TO THIS FIRST, THIS FIRST CONSPIRACY, AND THIS

CONSPIRACY IS ONGOING, COVERS A LOT OF ELEMENTS, COVERS A LOT OF OVERT ACTS.

WELL, LADIES AND GENTLEMEN, HE'S NOT CHARGED THERE WITH ASSAULT, JUST TOSSING SOMETHING, HE'S CHARGED WITH CONSPIRACY, SO CONSPIRACY REQUIRES THOSE SPECIFIC INTENTS I TALKED ABOUT.

THE SPECIFIC INTENT TO AGREE AND THE SPECIFIC INTENT TO COMMIT THAT CRIME.

WHAT WAS MCGHEE'S SPECIFIC INTENT, LADIES AND GENTLEMEN, NOT TO COMMIT A CRIME, BUT TO STOP THE BEAT-DOWN, SO YOU THINK ABOUT THAT.

AND LADIES AND GENTLEMEN, THERE WAS SOMETHING IN THE VIDEO, AND I ASKED SERGEANT WILSON, "DID YOU HEAR THAT?

"I DIDN'T HEAR IT.

SERGEANT WILSON, DID YOU HEAR THAT THEN?" WE PLAYED IT AGAIN.

"DID YOU HEAR IT?

"NO."

SO IT'S ABOUT AT THE 42-MINUTE MARK. THAT'S WHAT IS ON THERE, LADIES AND GENTLEMEN, AND IT KIND OF DESCRIBES WHAT TOOK PLACE AT THE BEGINNING AND WHAT WAS GOING ON TO THE END. SO WHEN IT COMES DOWN TO FACTS, AND THAT'S WHAT YOU GOT TO BE GUIDED BY, FACTS, LADIES AND GENTLEMEN, NOT JUST A BADGE, YOU GOT TO LOOK AT IT WITH AN INDEPENDENT MIND, DELIBERATING WITH THE OTHER JURORS, THIS IS WHAT I SAW, NOT THIS FLAG POLL, AND DON'T LET A PERSON SAY

THIS.

EXPRESS YOURSELF, BECAUSE YOUR JOB REQUIRES IT. AND IF YOU EXPRESS YOURSELF AND YOU LOOK AT THE FACTS AND YOU LOOK AT THEM CLOSELY AND ONCE AGAIN, YOU EMBRACE REASONABLE DOUBT, YOU HAVE ONLY ONE CHOICE.

MR. CHUN HAS CALLED MR. MCGHEE MANY THINGS. IF YOU CALL HIM ANYTHING, YOU CALL HIM THIS, YOU CALL HIM NOT GUILTY.

THANK YOU.

THE COURT: THANK YOU, MR. JACKE.

MR. CHUN: I CAN START.

THE COURT: OKAY, WHY DON'T YOU.

MR. CHUN: LET ME DEAL WITH THE BEACH ANALOGY FIRST, BEACH BALL. SURE IF 10 PEOPLE ARE KICKING A BEACH BALL OVER THERE, 10 PEOPLE KICKING A BEACH BALL OVER THERE, AND OVER THERE, IT'S SILLY TO SAY THEY'RE ACTING WITH AN CONSPIRACY. IF THREE PEOPLE STAND SHOULDER TO SHOULDER WITH A BEACH BALL AND START THROWING IT AT THE SAME TIME, THAT'S A DIFFERENT SITUATION.

NOW, WHICH IS CLOSER TO THE FACTS OF THIS CASE. OKAY, IT'S NOT OH, IT'S NOT JUST A GOOD IDEA, I'LL PLAY WITH MY BEACH BALL OVER HERE, I'LL PLAY OVER HERE, THEY'RE DOING THE SAME THING, THEY HAVE THE SAME TARGET.

NOW, LET ME -- FIRST OF ALL, IF WE'RE AT THE POINT WHERE -- MCGHEE IS LIKE A BATTERED

WOMAN. I HAVE NEVER HEARD ANYTHING SO INSULTING TO REAL VICTIMS OF DOMESTIC VIOLENCE THAN TO SAY THAT THAT MAN OVER THERE IS LIKE A BATTERED WOMAN, THAT'S THE ANALOGY, I MEAN IF YOU BELIEVE THAT THIS GUY WAS LIKE A BATTERED WOMAN, UNBELIEVABLE.

NOW, LET'S TALK ABOUT RED HERRINGS, AND WE'LL GET TO, AT THE END OF THE DAY -- I MEAN THERE'S SOME STUFF THAT IS JUST FLAT OUT WRONG. I MEAN THERE ARE SOME THINGS HE SAYS THAT ARE JUST FLAT OUT WRONG, WE'LL GET TO THEM.

JUST FOR EXAMPLE, HE SAYS THAT MORALES SAID THAT CORTEZ WAS, FROM THE SHOWER, DOING A HOOK SHOT, REMEMBER THAT? HE DIDN'T SAY THAT. I'LL SHOW YOU RIGHT HERE, HE LISTED "ON THE FIRST FLOOR CORTEZ WAS A THROWER. IN FACT, HE LEFT OUT CORTEZ ON THE SECOND FLOOR AND THAT WOULD MAKE SENSE BECAUSE IF HE'S IN THE SHOWER, LIKE HE'S POINTING OUT, HE WOULDN'T HAVE A VERY GOOD ANGLE. LOOK AT THIS, THIS IS THE EXHIBIT HE DID, HE ABSOLUTELY, AND I DON'T THINK IT'S INTENTIONAL, MISSTATED THE EVIDENCE, CORTEZ IS THROWING FIRST FLOOR, NOT THE SECOND FLOOR.

OKAY, LOOK AT PEOPLE'S 1, THAT'S THE EXHIBIT WE CREATED. HE ABSOLUTELY MISSTATED THE EVIDENCE TO YOU, AND I DON'T THINK IT WAS INTENTIONAL, BUT THAT'S WHAT HE WAS SAYING, ON THE SECOND FLOOR, HE WAS KIND OF THROWING IT AROUND LIKE A HOOK SHOT.

ALL RIGHT, LET'S TALK ABOUT SOME RED

HERRINGS HERE. FIRST OF ALL, WHAT YOU HAVE TO REALIZE IS THIS. THERE'S SOME TALK BY MR. JACKE ABOUT SOME DISCREPANCIES HERE AND THERE, AND THEY'RE VERY MINOR DISCREPANCIES, WHAT YOU HAVE TO REALIZE, DISCREPANCIES, JUST BECAUSE THEY'RE DISCREPANCIES, YOU DON'T THROW OUT A WITNESS' TESTIMONY.

INSTRUCTION 2.2 TELLS YOU DISCREPANCIES IN A WITNESS' TESTIMONY OR BETWEEN A WITNESS' TESTIMONY AND THAT OF OTHER WITNESSES, IF THERE WERE ANY, DO NOT NECESSARILY MEAN THAT WITNESS SHOULD BE DISCREDITED. FAILURE OF RECOLLECTION IS COMMON. INNOCENT MIS-RECOLLECTION IS NOT UNCOMMON. TWO PERSONS WITNESSES AN INCIDENT OR A TRANSACTION WILL OFTEN SEE OR HEAR IT DIFFERENTLY.

YOU SHOULD CONSIDER WHETHER A DISCREPANCY RELATES TO AN IMPORTANT MATTER, OR ONLY TO SOMETHING TRIVIAL. LET ME JUST GIVE YOU A REAL LIFE EXAMPLE. THIS IS A RHETORICAL QUESTION.

WHEN IS THE LAST TIME YOU WENT TO DISNEYLAND, WHAT RIDES DID YOU DO, IN WHAT ORDER DID YOU DO RIDES, AT WHAT TIME DID YOU DO THOSE RIDES.

HE HAS A BIG THING ABOUT TIME, WHAT TIME DID YOU DO THAT RIDE? WHAT WAS THE NEXT RIDE YOU DID, AND THEN WHAT WAS THE TIME THAT YOU DID THAT? IT'S NOT THAT EASY.

GIVE YOU ANOTHER EXAMPLE, I GAVE YOU THE OPENING STATEMENT, WHAT COLOR TIE WAS I WEARING? WHAT TIME DID I START MY OPENING STATEMENT? I'M NOT

TALKING ABOUT OPENING ARGUMENT, OPENING STATEMENT, YOU KNOW WHEN I FIRST ADDRESSED YOU. WHAT TIME DID I END MY OPENING STATEMENT?

NOW, IF WE ASK -- TOOK A POLL OF ALL YOU GUYS, YOU WOULD PROBABLY GET IT WRONG, AND THAT WAS ONLY WHAT, A WEEK AGO. AND IF YOU WERE TO TESTIFY UP THERE ABOUT WHAT TIE I WAS WEARING AND WHAT TIME I STARTED AND WHAT TIME I STOPPED, AND WE PUT ALL OF YOU ON, AND ALL OF YOU TRUTHFULLY SAID YOU SAW ME DOING IT, YOU SAW ME DOING THE OPENING STATEMENT, BUT YOU GOT MAYBE SOME DISCREPANCIES ABOUT TIME AND COLOR OF TIE, THE DEFENSE ATTORNEY VERSION WOULD BE TO GET UP THERE AND SAY, SEE THEY'RE ALL LYING, THEY DIDN'T SEE THE PROSECUTOR MAKING AN OPENING STATEMENT, BECAUSE YOU SEE HOW INCONSISTENT, OKAY, ESPECIALLY WITH THINGS LIKE TIME, THREE AND A HALF YEARS LATER.

NEITHER SIDE IS REQUIRED TO CALL AS WITNESSES ALL PERSONS WHO MAY HAVE BEEN PRESENT AT ANY OF THE EVENTS DISCLOSED BY THE EVIDENCE OR WHO MAY APPEAR TO HAVE SOME KNOWLEDGE OF THESE EVENTS. NEITHER SIDE IS REQUIRED TO PRODUCE ALL OBJECTS OR DOCUMENTS MENTIONED OR SUGGESTED BY THE EVIDENCE.

WE DIDN'T TOUCH ON THIS TOO MUCH AND YOU KNOW WHY, BECAUSE LADIES AND GENTLEMEN, I'M NOT GOING TO CRITICIZE THEM FOR DOING THIS, BUT YOU KNOW, THERE ARE ABOUT, WHAT ABOUT 20 INMATES IN HERE, 25 INMATES IN HERE, ALL POTENTIAL WITNESSES FOR THE

DEFENSE, NONE OF THEM WERE CALLED, BUT THEY DON'T HAVE TO, JUST LIKE THE PEOPLE DON'T HAVE TO CALL ALL OF THE POLICE OFFICERS INVOLVED, YOU DON'T HAVE TO HOLD THIS AGAINST EITHER SIDE.

TESTIMONY CONCERNING ANY FACT BY ONE WITNESS WHICH YOU BELIEVE IS SUFFICIENT FOR PROOF OF THAT FACT, THAT'S RELATING TO IBARRA, TALKS ABOUT HOW IBARRA IS THE ONLY ONE THAT HEARD THIS AND SO FORTH.

EVEN IN A CRIMINAL CASE, TESTIMONY BY ONE WITNESS IS SUFFICIENT. FANTOM VIDEO OF GONZALEZ. I MEAN HE SAYS, WELL, TAKE GONZALEZ' WORD FOR IT, THERE'S A VIDEO OF HIM, OKAY. AND THOMPSEN DIDN'T SAY THERE WAS A VIDEO OF GONZALEZ. HE JUST DIDN'T KNOW WHETHER THAT WAS FOLLOWED IN THIS CASE.

IF YOU LOOK AT THE END OF THIS VIDEO, WHAT'S HAPPENED IS AFTER THEY PULLED EVERYBODY OUT OF A-ROW, EVERYBODY PRETTY MUCH HAS ALL THIS PEPPER SPRAY IN THERE. AND SO WHAT YOU'LL HEAR ONE OF THE DEPUTIES SAY AT THE END, INSTEAD OF DOING EACH INDIVIDUAL PERSON, WHAT HE'S SAYING IS, IS THERE ANYBODY THAT DOESN'T NEED TO GO TO THE INFIRMARY, BECAUSE IT'S SO MUCH PEPPER SPRAY IN THERE. THAT'S WHAT HE SAID.

THERE MAY BE AN EXPLANATION ABOUT WHY IT IS. WHY ARE WE TALKING ABOUT THE FANTOM VIDEO OF GONZALEZ, WHICH THERE NO EVIDENCE THAT IT REALLY EXISTS BECAUSE HE ADMITS THAT HE HAS NO VISIBLE INJURIES, LIKE HE MAKES IT SOUND LIKE ON THAT VIDEO,

YOU SEE ALL THESE INJURIES TO GONZALEZ AND THE PROSECUTION IS HIDING IT, BUT GONZALEZ HIMSELF, IS ADMITTING THAT HE HAD NO INJURIES, OKAY.

JUST BECAUSE SOMEBODY SAYS LOUDLY, USES BUZZ WORDS LIKE "HIDING" AND "EVIDENCE" AND THINGS LIKE THAT DOESN'T MEAN THERE'S ANYTHING TO IT, OKAY. BECAUSE IF YOU REALLY THINK THROUGH IT AND, YOU KNOW, WHEN PEOPLE DO THINGS LIKE THAT, WHEN PEOPLE TRY TO ACCUSE OTHER PEOPLE IN A COURTROOM OF HIDING EVIDENCE AND IT TURNED OUT WHEN YOU THINK ABOUT, IT'S A BUNCH OF "WHO WE," WHAT DO YOU THINK, DON'T YOU KIND OF FEEL A LITTLE GYPPED HERE.

PICTURES OF BROKEN PORCELAIN ON THE SECOND FLOOR, HE WANTS PICTURES OF IT. I MEAN HOW WOULD THAT HELP. FIRST OF ALL, MC MULLEN AND MORALES TOLD YOU THEY DON'T KNOW HOW MANY PIECES GOT THROUGH THE BARS, THEY DID RECOVER THIS PIECE. I MEAN THIS IS BETTER THAN A PICTURE. BUT HOW DOES THAT HELP. BROKEN SINK IS NOT ENOUGH TO SUPPLY THE NUMBERS OF PIECES.

WELL, LADIES AND GENTLEMEN, FIRST OF ALL, IT IS, BECAUSE THE NUMBERS ARE WHY NOT, GONZALEZ SEES ONE, MC MULLEN SEES 10, VIDEO SHOWS 10 TO 12.

THE COURT: WE'RE GOING TO STOP AT THIS POINT.

MR. CHUN: OKAY.

TOMORROW AT 1:30?

THE COURT: TOMORROW AT 1:30.

LADIES AND GENTLEMEN, WE'RE GOING TO RECESS AT THIS TIME, AND WE'LL SEE YOU TOMORROW AGAIN AT 1:30 TO CONCLUDE THIS ARGUMENT. I'VE GOT FIVE MINUTES OF INSTRUCTIONS, AND THE CASE WILL BE YOURS.

HAVE A NICE AFTERNOON.

(THE JURORS HAVE EXITED THE COURTROOM.)

THE COURT: ALL RIGHT, WE ARE IN RECESS AT THIS TIME.

(AT 1:05 P.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE ADJOURNED UNTIL FRIDAY, AUGUST 1ST, 2008 AT 1:30 P.M.)

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(THE NEXT PAGE NUMBER IS 2701.)

CASE NUMBER: **BA331315**
CASE NAME: PEOPLE V. **TIMOTHY MCGHEE**
LOS ANGELES, CA; FRIDAY, AUGUST 1, 2008
DEPARTMENT NO. 102 HON. DAVID S. WESLEY
REPORTER: PHYLLIS YOUNG, CSR NO. 9122
TIME: 1:50 P.M.

APPEARANCES:

THE DEFENDANT, TIMOTHY MCGHEE, BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL CLAY JACKE, II, ATTORNEY AT LAW; HOON CHUN, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: WE'RE BACK ON THE RECORD IN PEOPLE VERSUS TIMOTHY MC GHEE. HE'S PRESENT WITH COUNSEL, MR. CLAY JACKE, AND MR. HOON CHUN FOR THE PEOPLE.

ANYTHING TO TAKE UP BEFORE I BRING IN THE JURY?

MR. CHUN: NO, YOUR HONOR, I DON'T THINK SO.

THE COURT: OKAY, CAN WE BRING IN THE JURY.

(THE JURORS ARE ENTERING THE COURTROOM.)

THE COURT: THE RECORD SHOULD REFLECT ALL OF

THE JURORS AND ALTERNATE JUROR ARE PRESENT, AND MR. CHUN WAS ADDRESSING THE JURY.

MR. CHUN, YOU MAY PROCEED.

MR. CHUN: GOOD AFTERNOON.

THE JURORS COLLECTIVELY: GOOD AFTERNOON.

MR. CHUN: GOOD AFTERNOON.

ALL RIGHT, WHEN I WAS LAST ADDRESSING YOU, I WAS JUST IN FOR A FEW MINUTES AND WE WERE TALKING ABOUT WHAT I CALL RED HERRING, WE'LL DO THIS IN A MORE STRUCTURED WAY IN A SECOND, BUT I JUST WANTED TO KNOCK THESE FEW POINTS OFF RIGHT OFF THE BACK.

THERE WAS A SUGGESTION THAT THE SINK IS NOT BIG ENOUGH TO SUPPORT THE NUMBER OF PORCELAIN PIECES ATTRIBUTED TO MCGHEE. WHEN YOU TAKE A COUNT, YZABAL SAID IT WAS ONE THAT HE SAW. MC MULLEN SAID THAT HE SAW 10 OR AT LEAST 10, THAT'S ALL WE CAN SAY ABOUT THAT.

ON THE VIDEO, YOU SEE APPROXIMATELY 10 TO 12. AND THEN WITH YZABAL -- I'M SORRY, WITH IBARRA, I DON'T THINK WE GOT A NUMBER, JUST SOME NUMBER, BECAUSE WE DON'T KNOW WHAT THAT IS. SO WE'RE DEALING WITH 23, 24, 25, SOMETHING IN THAT NEIGHBORHOOD, AROUND 25, LET'S SAY, WOULD BE A FAIR ESTIMATE. BUT LOOK AT THE SIZE OF THE SINK, WE'RE TALKING ABOUT 25 PIECES. THEY MAY OR MAY NOT BE SMALLER OR LARGER THAN THE PIECE THAT WAS RECOVERED. WHY COULDN'T A SINK LIKE THIS BREAK INTO MORE THAN 25

PIECES.

IN ADDITION, LADIES AND GENTLEMEN, EVERYTHING WE RECORDED, THROUGH MORALES' TESTIMONY, THAT ROW WAS S.'S, THAT'S ALL -- I PUT "S" THERE ON THE THIRD ROW JUST TO INDICATE AFTER THE EVENTS, HOW MANY SINKS WERE BROKEN, THERE WERE SEVEN SINKS THAT WERE BROKEN, ALL IN A ROW. AND ONE THING THAT YOU LEARNED FROM MORALES IS THAT IN JAIL, IT'S NOT LIKE YOUR NEIGHBOR, WHERE YOU HAVE TO GO OUT YOUR DOOR, KNOCK ON THEIR DOOR TO SHARE SOME SUGAR OR FLOWER OR WHATEVER.

IN JAIL, THE CELLS ARE VERY CLOSE APART, THEY'RE BARS IN FRONT, AND INMATES FREQUENTLY PASS ITEMS ALONG TO EACH OTHER.

SO CERTAINLY, SIZE OF SINK BY ITSELF IS NOT ANY REASON TO CALL THESE DEPUTIES LIARS, THAT'S WHAT THE DEFENSE WANTS YOU TO SAY, IT'S JUST AN ABSOLUTE REASON NOT TO DO THAT.

LET ME ALSO EXPLAIN WHAT I WAS TRYING TO SAY ABOUT THE COMMENT BY THE DEFENSE ATTORNEY, THE HOOK-SHOT COMMENT. WE LATER LEARNED, OF COURSE, OR WE LEARNED THROUGH THE COURSE OF THIS, THAT WALTER CORTEZ IN CELL 19, HE DID THROW, BUT THIS IS WHERE HE WAS HOUSED, NOT NECESSARILY WHERE HE WAS.

IT APPEARS HE MAY HAVE BEEN QUITE LIKELY IN THE SHOWER, AND I JUST WANT TO POINT OUT LIKE HOW THAT CAME OUT. THE DEFENSE ATTORNEY MAKES IT SOUND LIKE HE PRIED THIS OUT OF THE DEPUTIES AS

SOME KIND OF ADMISSION THEY DIDN'T REALLY WANT TO MAKE. HOW DID IT REALLY COME OUT, DO YOU REMEMBER? OKAY, IT WAS THOMAS WILSON, AND THOMAS WILSON SAID THAT HE WENT HOME ON HIS OWN TIME, HE LOOKED AT A COPY OF THE DVD ON HIS OWN BECAUSE THE ISSUE HAD BEEN RAISED AND HE PAINSTAKINGLY ACCOUNTED FOR EACH INMATE, AND BY PROCESS OF ELIMINATION, ON HIS OWN TIME, FIGURED OUT THAT WALTER CORTEZ MUST HAVE BEEN IN THE SHOWER.

OKAY, HE DID THAT ON HIS OWN. NOBODY ORDERED HIM TO DO IT. HE DID IT ON HIS OWN BECAUSE HE WAS TRYING TO GET AT THE TRUTH. BUT IN ANY EVENT, SO WHAT YOU HAVE IS WALTER CORTEZ REALLY SHOULD BE MOVED OVER HERE, AND HE'S IN THE FIRST ROW, THAT WAS TO REPRESENT, AND WE RECORDED WHO WAS THROWING WHEN THEY WERE ON THE FIRST TIER, ON THE FIRST ROW.

THEN I ASKED MORALES, WHO WAS THROWING IN THE SECOND ROW, BECAUSE HE RECORDED THAT IN HIS REPORT RIGHT AFTERWARDS, AND HE SAID EVERYBODY BUT WALTER CORTEZ. SO PERHAPS MY COLLEAGUE, MR. JACKE MISREMEMBERED THIS. HE WAS TRYING TO MAKE IT A POINT THAT IF THIS GUY WAS IN THE SHOWER, HOW COULD HE THROW UP AT THE SECOND ROW, HE HAD TO BE JABBAR USING A HOOK SHOT, THAT'S WHAT HE WAS TRYING TO SAY.

FACTUALLY, THAT'S NOT CORRECT BECAUSE THE UPPER TIER ONLY COVERS ABOUT THREE AND A HALF FEET OF THE SHOWER. REMEMBER, THAT'S WHAT THE TESTIMONY WAS.

SECONDLY, AND MORE IMPORTANTLY, THE TESTIMONY IS THAT HE WAS THROWING AT THEM WHEN THEY WERE ON THE FIRST FLOOR, NOT ON THE SECOND FLOOR. OKAY, SO THAT WAS MAYBE NOT WORTH GOING TO DO ALL THAT, BUT THAT WAS THE POINT WE'RE TRYING TO MAKE.

ALL RIGHT, NOW, LET'S GO THROUGH THIS IN A MORE ORDERLY WAY. LOOK, THE BIG PICTURE IN THIS CASE, THERE'S SOMETHING WRONG WITH THE PICTURE THAT THE DEFENSE IS TRYING TO PORTRAY. BUT EVEN BEYOND THAT, LOOK, THE BIG PICTURE IN THIS CASE IS WHAT YOU GOT IS ON VIDEOTAPE, THE DEFENDANT IS THROWING PORCELAIN SHARDS AT DEPUTIES, AND IT IS UNDISPUTED THAT THE DEPUTIES THAT HE THREW AT, THE RIOT SQUAD, THEY'RE NOT EVEN ACCUSED OF HAVING DONE ANYTHING TO HIM. HE DOESN'T EVEN TRY TO ACCUSE THEM OF THREATENING HIM OR OF BEATING ANYBODY, OKAY. THEY'RE NOT EVEN ACCUSED OF THAT. THE ACCUSATIONS OF THAT ARE AS TO THE FIRST SHIFT DEPUTIES, NOT TO THE RIOT SQUAD. AND THERE'S SOMETHING WEIRD, THERE'S SOMETHING WRONG WITH THIS PICTURE.

THEY'RE SAYING THAT THE P.M. SHIFT DEPUTIES, THE FIRST SHIFT DEPUTIES, 2:00 TO 10:00 P.M., WERE THE AGGRESSIVE AND THREATENING ONES, THEY'RE SAYING THOSE ARE THE GUYS WHO WERE JUST SO HOT TO TROT, TO GO IN THERE, SPRAY PEOPLE, PULL THEM OUT, BEAT UP PEOPLE, BUT IF SO, THERE'S THIS BIG INCONSISTENCY. THEY DIDN'T DO ANY OF THAT.

IF THE P.M. SHIFT WAS SO EAGER TO GO

IN AND BEAT UP AND TAKE RETALIATION, WHICH IS THE ACCUSATION, I MEAN, THERE'S NO DISPUTE THAT THEY HAD PLENTY OF JUSTIFICATION, BECAUSE EVEN DEFENDANT HIMSELF ADMITS, ALTHOUGH HE SAYS HE DIDN'T THROW, HE SAYS YEAH, I COULD HEAR, GUYS WERE THROWING PORCELAIN. I ADMIT THAT WE WERE VANDALIZING OUR SINKS. THEY HAD PLENTY OF JUSTIFICATION, THE FIRST SHIFT PEOPLE, TO GO IN AND DO EVERYTHING THAT THEY WANTED TO DO, BUT THEY DIDN'T.

WHAT WAS THE TESTIMONY, WHICH IS UNDISPUTED. IBARRA SAID WE DIDN'T GO IN, WE JUST WERE HOPING THAT THESE GUYS WOULD CALM DOWN. THEY SHOWED RESTRAINT. ACTIONS SPEAK LOUDER THAN ANYONE'S WORDS. THE ACTIONS WERE RESTRAINT BY THE P.M. DEPUTIES. THAT, YOU KNOW. AND YET THEY WANT TO PORTRAY THIS PICTURE OF THE P.M. SHIFT GUYS AS BEING BLOOD THIRSTY, WANTING TO GO IN.

NOW, YOU MAY ASK YOURSELF, WHY IS THAT? BECAUSE YOU SEE, THE EARLY MORNING SHIFT DEPUTIES ARE THE ONES THAT DID EVENTUALLY GO IN. BUT UNFORTUNATELY FOR THE DEFENDANT, THEY'RE ON VIDEOTAPE, AND YOU GET TO SEE HOW PROFESSIONAL THEY ARE. SO HE DOESN'T WANT THAT FIGHT.

HE DOESN'T WANT TO HAVE TO ATTACK THE CONDUCT OF THE SECOND SHIFT DEPUTIES, BECAUSE HE KNOWS THAT'S A LOSING BATTLE. BECAUSE YOU SEE THEM ON THAT VIDEOTAPE, AND THEY'RE ACTING VERY PROFESSIONALLY, THEY'RE DOING WHAT THEY NEED TO DO.

AND SO WHAT DOES HE DO, THE CLASSIC GAME, WELL, IT'S STUFF THAT YOU DON'T SEE ON THE VIDEOTAPE.

WELL, LET ME TELL YOU ABOUT THE FIRST SHIFT DEPUTIES, THE ONES THAT AREN'T VIDEOTAPED, AND HE TRIES TO ATTACK THEM. BUT THE PROBLEM WITH THAT IS IT DOESN'T MAKE ANY SENSE. THEY'RE SO BLOOD-THIRSTY AGGRESSIVE, BUT THEY JUST SAT AROUND WAITING. THEY SAT AROUND WAITING, WHEN THEY HAD PLENTY OF JUSTIFICATION. CERTAINLY, THEY HAD TO GO IN.

THE LAW OF CONSPIRACY, LET'S GO OVER THAT BECAUSE THAT'S AS TO COUNT 1 AND 2. THERE IS NO DISPUTE THAT NO EXPRESS AGREEMENT IS NEEDED. IT'S ALSO THE LAW THAT YOU CAN INFER A COMMON INTENT BY DIRECT TESTIMONY OR BY CIRCUMSTANTIAL EVIDENCE, COMMON INTENT, THAT THEY'RE DOING THE SAME THING, AT THE SAME TIME WITH THE SAME PURPOSE. OKAY, SAME PURPOSE.

NOW, HERE, ON COUNT 1 AND 2, HE KEEPS TALKING ABOUT RODOLFO GONZALEZ, RODOLFO GONZALEZ, AND A COUPLE OF THINGS WRONG WITH THAT. IT DOESN'T SUPPORT A SELF-DEFENSE CLAIM.

REMEMBER, THE JUDGE HAD YOU CROSS OUT DEFENSE OF OTHERS, BECAUSE IT'S ONLY SELF-DEFENSE THAT APPLIES, BUT THAT ONLY APPLIES TO COUNTS 8 AND 9, IT DOESN'T APPLY TO THOSE COUNTS. LOOK AT THE INSTRUCTION 5.30, THE LAST PARAGRAPH, AND IT SAYS -- I'LL WAIT TILL YOU GET THERE, THE LAST SENTENCE OF

5230, THE LAST PARAGRAPH. OKAY, I DON'T HAVE MY COPY HERE, SO I'M GOING DO THIS FROM MEMORY, I HOPE I GET IT RIGHT.

I BELIEVE WHAT IT SAYS IS THE DEFENSE OF SELF-DEFENSE, IF IT APPLIES AT ALL, APPLIES ONLY TO COUNTS 8 AND 9. I THINK THAT'S PRETTY CLOSE TO EXACTLY WHAT IT SAYS, OKAY. YOU MAY WANT TO CIRCLE THAT, YOU MAY WANT TO TAKE NOTE OF THAT, OKAY.

SO WHEN HE KEEPS TALKING ABOUT RODOLFO GONZALEZ, FIRST OF ALL, REMEMBER THE JUDGE HAD YOU CROSS OUT DEFENSE OF OTHERS, OKAY.

SECONDLY, THIS IS NOT REALLY IN SELF-DEFENSE, REMEMBER? RIGHT THERE, YOU JUST READ IT. IT ONLY APPLIES TO COUNTS 8 AND 9, FROM THE DEFENSE ATTORNEY'S ARGUMENT, YOU WOULDN'T HAVE KNOWN THAT, I MEAN IT'S JUST SORT OF ALL MISH-MASHED TOGETHER AND SO FORTH. I'M NOT SAYING HE DID THAT INTENTIONALLY, BUT THAT WAS WHAT HAPPENED.

THE ARGUMENT HAS TO BE NO CONSPIRACY, AND THE ARGUMENT HAS TO BE, IT'S JUST A COINCIDENCE THAT THESE GUYS ARE DOING THIS ALL TOGETHER. WE HAD EVIDENCE OF AN EXPRESS AGREEMENT FROM IBARRA, "GAS THE DEPUTIES," AND THEN PEOPLE WILL START DOING WHAT HE SUGGESTS. THAT'S DOING SOMETHING WITH COMMON INTENT.

IF I SAY, IF I SUGGEST SOMETHING AND YOU TAKE IT UP, AND I DO IT AS WELL, NOW WE'RE ACTING TOGETHER, OKAY, WITH A COMMON PURPOSE, THAT'S A

CONSPIRACY. THAT ALONE IS ENOUGH, BUT THERE'S MORE EVIDENCE. THERE'S THIS STATEMENT THAT IBARRA HEARD IN THE PIPE CHASE, WE CAN BREAK THE SINKS AND USE THE PIECES TO THROW AT DEPUTIES. AND REYES, THE ONE THAT SEEMS TO BE HIS CHIEF COCONSPIRATOR, REMEMBER YOU ONLY HAVE TO FIND ONE OTHER PERSON THAT HE CONSPIRED WITH.

REYES, AGAIN, SAYS OKAY, AND AGAIN, HE WAS ONE OF THE PEOPLE THAT TOOK UP THE INVITATION IN THE FIRST PLACE. OKAY, NOW THIS IS WHAT HE SAYS ABOUT REYES. HE READS FROM A REPORT FROM REYES, AND HE SAYS "WELL, REYES NEVER SAID ANYTHING ABOUT MCGHEE URGING ANYBODY TO BREAK SINKS."

AND THEN REMEMBER ON REDIRECT, I CAME BACK, AND I ASKED IBARRA, WELL, LISTEN IBARRA, DIDN'T YOU ALSO HAVE A REPORT THAT I BELIEVE HE SAID HE DICTATED IT TO ARGUETA AS BEST HE CAN REMEMBER, I ASKED ABOUT THAT REPORT. AND IN THAT REPORT, THE QUOTE IS MCGHEE URGED OTHERS TO BREAK SINKS. SO THAT IS IN THERE. MCGHEE URGED OTHERS TO BREAK SINKS. IT'S NOT LIKE THIS IS SOMEHOW MADE UP BEFORE TRIAL. THIS WAS DOCUMENTED A LONG TIME AGO.

AND DOES IT REALLY MATTER IF IT WAS DOCUMENTED IN THE REPORT HE WROTE OR A REPORT THAT WAS DICTATED BY HIM TO ANOTHER, WHAT DOES IT MATTER. OKAY, BUT AGAIN, IN ARGUMENT, HE LEAVES THIS OUT, OKAY, HE DOESN'T TELL YOU ABOUT THIS THING.

ANOTHER THING HE TRIED TO SAY, WELL,

LOOK IT WON'T, YOU'VE GOT TO BE KIDDING ME. IBARRA JUST HAPPENED TO WALK INTO THE PIPE CHASE AT THE TIME THIS THING WAS SAID. HOW CONVENIENT. HE SAYS, "OKAY," IMPLYING THAT IBARRA JUST WALKED IN ONCE TO THE PIPE CHASE AND JUST HAPPENED ALONG UPON THIS STATEMENT AND THAT WASN'T THE TESTIMONY, AND HE SHOULD KNOW BETTER BECAUSE IT CAME OUT IN CROSS-EXAMINATION OF IBARRA. MR. JACKE WAS HERE, AND HE ASKED IBARRA, HE KEPT ON ASKING ABOUT HIS FAVORITE TOPIC, TIME, TIME, TIME, TIME.

"WHEN DID YOU GO INTO THE PIPE CHASE AND HEAR THIS STATEMENT, WHEN, WHEN, WHAT TIME?" AND IBARRA FROM THERE, TOLD MR. JACKE, AND THIS IS WHY HE SHOULD KNOW BETTER.

HE TOLD MR. JACKE, "I CAN'T TELL YOU THE EXACT TIME, BECAUSE I WAS IN THE PIPE CHASE SEVERAL DIFFERENT TIMES," OKAY. SO HE WAS IN AND OUT, IN AND OUT TRYING TO GAIN INTELLIGENCE ON WHAT THEY WERE DOING. IT'S NOT LIKE HE JUST HAPPENED TO WALK IN AND THE ONE TIME HE WALKED IN, THIS STATEMENT WAS MADE. HE WAS IN AND OUT SEVERAL TIMES.

THE OTHER POINT MADE ABOUT THE STATEMENT IS MR. JACKE SAYS, WELL, COME ON NOW, HE COULD HAVE SPOKEN QUIETLY TO REYES. SO WHY WOULD HE SAY IT LOUD ENOUGH FOR SOMEONE TO HEAR IN THE PIPE CHASE, AND HERE'S THE ANSWER TO THAT.

FIRST OF ALL, IT ASSUMES THAT THIS PERSON, DEFENDANT, AND MR. REYES ARE ACTING WITH

DISCRETION. BUT IF THEY WERE DISCRETE, THEY WOULDN'T BE BREAKING THEIR SINKS AND THROWING IT IN FRONT OF DEPUTIES, NOW, WOULD THEY?

THIS IS NOT THE TYPE OF CRIME THAT YOU COMMIT WITH THE IDEA THAT YOU'RE GOING TO GET AWAY WITH IT. I CAN UNDERSTAND IF WE'RE TALKING ABOUT A BANK ROBBERY, WHERE YOU AND I WANT TO TALK QUIETLY ABOUT WE'RE GOING TO GO TO THAT BANK THEN WE'RE GOING TO ESCAPE, WE'RE GOING TO WEAR MASKS AND NO ONE IS GOING TO KNOW WE DID IT, THAT I CAN UNDERSTAND TALKING QUIETLY ABOUT.

THIS IS A CRIME, WHY WOULD YOU KEEP IT SECRET? IN ABOUT FIVE SECONDS, EVERYONE IN THAT AREA IS GOING TO HEAR THE SINKS BREAKING, YOU'RE GOING TO BE THROWING THEM AT THE DEPUTIES, WHICH MEANS BY DEFINITION, THEY'RE GOING TO BE WITNESSES TO WHAT YOU'RE DOING. WHY WOULD YOU BE SECRET ABOUT SOMETHING THE WHOLE PURPOSE OF WHICH IS NOT TO BE SECRET. THE WHOLE PURPOSE OF WHICH IS TO WAIL AGAINST THE DEPUTIES. MAKE YOUR STATEMENT OF OUTRAGE, OR WHATEVER YOU'RE DOING, OKAY.

THIS IS NOT SOMETHING THAT YOU WOULD -- WHY WOULD YOU BE SECRET ABOUT THAT? BECAUSE YOU'RE ABOUT TO DO THIS VERY PUBLICLY IN FRONT OF DEPUTIES, YOU CAN'T POSSIBLY BE THINKING THAT THEY'RE NOT GOING TO GET IT, THEY'RE NOT GOING TO KNOW THAT YOU BROKE YOUR SINK, YOUR SINK IS GOING TO BE BROKEN.

SO THIS IDEA, OH, NO, IF THEY WERE

GOING TO SAY SOMETHING LIKE THIS, THEY WOULD SAY IT QUIETLY, WHY, WHY BOTHER. NOTHING ABOUT THIS CRIME IS QUIET AND PRIVATE.

NOT ONLY THE TESTIMONY OF IBARRA ABOUT THE EXPRESS AGREEMENT, YOU ALSO HAD THE TESTIMONY OF DEPUTY YZABAL, AND I WANT YOU TO REMEMBER HOW THIS CAME OUT, IT'S NOT LIKE I TOLD YZABAL WHAT TO SAY. I HAD FINISHED QUESTIONING. I HAD SAT DOWN. I THOUGHT I WAS FINISHED.

AND IT WAS ON CROSS-EXAMINATION THAT THE DEFENSE WAS QUESTIONING, "OH, WHO ELSE DID YOU SEE THROWING?

AND YZABAL SAID "THE ONES THAT I SAW IN PARTICULAR AND THAT I COULD RECOGNIZE WERE" GUESS WHO, AND WHO. OH WHAT A COINCIDENCE, THE SAME PERSON THAT IBARRA INDEPENDENTLY IDENTIFIES, THESE TWO GUYS, AGAIN, THEIR NAMES KEEP COMING UP, AND HE SAYS I SAW THEM THROWING IN UNISON.

THE DEFENSE ATTORNEY STOPS QUICKLY AND QUICKLY SITS DOWN. AND AT THAT POINT, I'M GOING "WHAT DO YOU MEAN IN UNISON," AND HE TOLD YOU THEY SPOKE IN UNION, "FUCK THE DEPUTIES, FUCK THE JURAS," AND THEY THREW IN UNISON.

THIS IS HOW HE TRIES TO ARGUE AGAINST YZABAL, BUT THE BIG PICTURE NOW IS THERE ARE TWO INDEPENDENT WITNESSES TELLING YOU THAT THESE GUYS ARE ACTING IN CAHOOTS TOGETHER, IN CONSPIRACY TOGETHER.

INDEPENDENT WITNESSES. HE'S TALKING

ABOUT TIME DISCREPANCIES. NOW YZABAL SAID FIVE TO 6:00 P.M., I'M NOT SURE WHAT TIME. HE'S ASKING THE GUY, YOU KNOW, WHAT TIME WAS IT, THREE AND A HALF YEARS AGO, AND HE'S DOING HIS BEST AND HE SAYS FIVE TO 6:00 P.M., I'M NOT SURE.

WELL, OKAY, AND THEN, AND HE DOESN'T RECALL WHETHER OR NOT THERE WAS AN INMATE IN THE HALLWAY, BUT HE REMEMBERS LIKE THERE WERE LOTS OF PEOPLE MILLING ABOUT THE HALLWAY, BECAUSE HALF THE DEPUTIES AROUND WERE WALKING AROUND, HALF THE DEPUTIES ASSIGNED TO THE 3300 MODULE, BECAUSE THERE WAS THIS RIOT. AND SO HE DOESN'T RECALL. BUT IT'S NOT HIS JOB TO RECALL WHETHER FRANCISCO GONZALEZ WAS THERE OR NOT.

BUT EVEN BEYOND THAT, EVEN TAKING THIS FIVE TO 6:00 P.M. ESTIMATE AND TAKING IT AT FACE VALUE, I DON'T KNOW WHY WE SHOULD, IT'S THREE YEARS LATER AND THE GUY IS TELLING US HE'S NOT SURE. EVEN THAT, THE CONVERSATION BETWEEN THOMPSEN AND GONZALEZ ON THAT BENCH IN THE HALLWAY WAS AT 5:45. AND IT WAS HARDLY A LONG CONVERSATION BECAUSE GONZALEZ DIDN'T WANT TREATMENT AND DIDN'T WANT TO MAKE A STATEMENT, IT WAS SOMETHING LIKE, OKAY, WHAT INJURIES DO YOU HAVE, OKAY, DO YOU HAVE ANY OTHER INJURIES, OKAY, DO YOU WANT MEDICAL TREATMENT, NO. HOW LONG DID THAT TAKE?

A COUPLE OF MINUTES AT TOPS?

SO THIS IS NOT A DISCREPANCY, EVEN IF

YOU TAKE IT AT FACE VALUE, OKAY.

BUT AGAIN, YOU KNOW, WE DON'T WANT TO PLAY THE GAME OF IF THERE IS SOME TRIVIAL DISCREPANCY THAT CAN JUST BE EXPLAINED AS POSSIBLE MISREMEMBERING, WE DON'T CALL PEOPLE LIARS BECAUSE OF THAT, JUST LIKE IF WE PUT YOU ALL UP ON THE WITNESS STAND AND START ASKING YOU WHAT TIME DID THE D.A. SAY THIS, WHAT WAS HE WEARING WHEN HE SAID THIS, AND YOU GOT IT WRONG AND THERE ARE DISCREPANCIES BETWEEN YOU, WE WOULDN'T WANT TO TRY TO CALL YOU LIARS, OH, YOU MUST NOT HAVE SEEN THE D.A. COME ON, THAT'S JUST NOT A REASONABLE WAY OF DOING THINGS.

THE DEFENSE ATTORNEY SAYS "OH, HE WAS RELUCTANT TO ADMIT HE WAS IN THE AREA."

EXCUSE ME! HE ASKED HIM THREE AND A HALF YEARS LATER, "WHAT WAS YOUR EXACT ASSIGNMENT?" AND HE'S TRYING TO REMEMBER HIS EXACT ASSIGNMENT. HE'S NOT SAYING HE WASN'T IN THE AREA. IT'S JUST WAS HE ASSIGNED TO THE FIRST FLOOR, SECOND FLOOR, OKAY, AND HE EVEN TRIES TO BE HELPFUL WHEN HE TELLS THE DEFENSE ATTORNEY, WELL, IF YOU LOOK AT THIS CERTAIN DOCUMENT, IT WOULD RECORD EXACTLY WHAT MY ASSIGNMENT WAS.

OKAY, AND HE ENDS UP SAYING, I THINK I WAS IN THIS AREA THAT WAS 30 FEET AWAY, OKAY, SO WHY IS THIS RELUCTANCE, YOU KNOW, TO ADMIT SOMETHING.

NOW, AGAIN, THERE WERE THESE CREDIBILITY TESTS THAT YOU HAVE WITH WITNESSES.

YZABAL -- YOU KNOW HE KEEPS TALKING ABOUT HOW "THE DEPUTIES ARE GOING TO RETALIATE, THE DEPUTIES ARE GOING TO RETALIATE."

HERE HE IS, THE DEFENDANT, AND HE'S LIKE ACCUSED YZABAL OF MAKING THREATS, BLAH, BLAH, BLAH, AND SO FORTH, AND YZABAL HAS THIS OPPORTUNITY, IN COURT, IF HE WAS ONE OF THOSE KIND OF GUYS, I ASKED HIM, SO HOW MANY PIECES DID YOU SEE, WAS IT JUST ONE PIECE, OR MORE?

NOW YOU THINK IF YZABAL REALLY WANTED TO GET AT MCGHEE, HE WOULD LAY IT ON REALLY THICK, AND SAY OH, IT WAS AT LEAST THREE OR FOUR PIECES THAT HE THREW AND HE THREW IT RIGHT IN MY DIRECTION AND BLAH, BLAH, BLAH, BLAH, HE DOESN'T DO THAT. REMEMBER THAT EXPRESSION ON HIS FACE AND SAYS REALLY I CAN ONLY SAY THAT I SAW THAT ONE PIECE, THAT'S ALL, BECAUSE HE'S BEING STRAIGHT, AND WHERE IS THIS SO-CALLED RETALIATION THAT HE'S TALKING ABOUT, OKAY.

YOU GOT THE AGREEMENT FROM THE CIRCUMSTANCES OF THE ASSAULT, AND I'VE MOVED WALTER CORTEZ FROM HERE TO HERE FOR PURPOSE OF OUR EXHIBIT TO ILLUSTRATE. THIS IS WHO MORALES REPORTED IN HIS REPORT DID THE THROWING, CORTEZ IN THE SHOWER, AND THEN CELLS A-3, 4, 5, AND PAY ATTENTION TO THIS AGAIN, 6 AND 7, THEY'RE THROWING NOW AT THE P.M. SHIFT TOO. THOSE TWO ARE THROWING AGAIN, 6 AND 7 MAND AND THEN CELL 8.

ALL RIGHT, NOW YOU LOOK AT THIS

PATTERN, LOOK WHERE THEY ARE WHEN THEY'RE THROWING. THEY JUST HAPPEN TO BE IN THE SAME AREA OF ALL OF THE THROWERS? WHY NOT FARTHER DOWN HERE. LOOK IT'S ALL WHITE HERE, THE RED, WHICH IS THE THROWERS ARE ALL HERE, OKAY, IS THAT JUST A COINCIDENCE, COMMON LOCATION, COMMON ACTION, COMMON TIME, BEACH BALL ANALOGY, LET'S USE THAT BEACH BALL ANALOGY.

YES, YOU'RE ON A BEACH, YOU SEE PEOPLE PLAYING OVER THERE, OVER THERE, OVER THERE. THAT'S NOT A CONSPIRACY, THAT'S NOT EVIDENCE OF ANYTHING. BUT LET ME GIVE YOU AN ANALOGY.

IF YOU SAW THEN INSTEAD OF THAT PICTURE, THREE PEOPLE, THEY ALL HAD BEACH BALLS AND THEY ALL WENT TO A LIFE GUARD STATION, AND THEY ALL SAID FUCK THE LIFE GUARD AND THREW THE BEACH BALL AT THE LIFE GUARD, DO YOU THINK THEY'RE ACTING IN UNISON TOGETHER? WHICH IS THE FACTS OF OUR CASE.

THEY'RE IN THEIR CELLS, THEY'RE NEXT TO EACH OTHER, AND THEY'RE YELLING AT LEAST A-6 AND A-7 ARE YELLING "FUCK THE DEPUTIES" AND THROWING TOGETHER.

OKAY.

YOU KNOW IT WOULD BE A DIFFERENT STORY IF CELL A-8 WAS, YOU KNOW, JUST THROWING THE PORCELAIN ON THE FLOOR LIKE PLAYING SOME WEIRD GAME, YOU KNOW ANOTHER ONE WAS JUST THROWING IT UP AND DOWN AND CATCHING IT, BUT THROWING AT THE SAME TIME AND YELLING AT THE SAME TIME, I MEAN WHAT BETTER EVIDENCE

DO YOU HAVE OF A CONSPIRACY, COMMON INTENT.

YOU HAVE TO ACCEPT THE REASONABLE AND REJECT THE UNREASONABLE. IT'S NOT A POSITION, AN APPROPRIATE POSITION FOR A JUROR TO SAY WELL, I THINK IT'S POSSIBLE THAT -- IT'S GOT TO BE REASONABLE. IN ORDER TO CONSTITUTE REASONABLE DOUBT, IT'S GOT TO BE REASONABLE.

THERE IS A CONSPIRACY, WE TALKED ABOUT THAT.

LET'S TALK ABOUT REBUTTAL, COUNT 4.

DEFENDANT ADMITS THROWING TO DETER IBARRA. THIS IS NOT EXACTLY SELF-DEFENSE, BUT BECAUSE FOR COUNT 4, OBSTRUCTION, ANY PENAL CODE 69 OBSTRUCTION COUNT, ANYTHING WHERE DUTY IS REQUIRED, YOU CAN LOOK AT INSTRUCTION 7.50, OKAY, 7.50 IS WHAT WE'RE DEALING WITH.

IT SHOULD BE ROUGHLY IN NUMERICAL ORDER. WHEN YOU LOOK AT THE DEFINITION OF INSTRUCTION, YOU'LL SEE THAT YOU HAVE TO BE INTENDING -- THE END OF INSTRUCTIONS IS REALLY HELPFUL TO START WITH BECAUSE IT TELLS YOU EXACTLY THE ELEMENTS THAT HAVE TO BE PROVED. IT WILL SAY "IN ORDER TO PROVE THIS CRIME, THE FOLLOWING ELEMENTS MUST BE PROVED." THAT'S A REALLY HELPFUL PLACE TO START.

ELEMENT THERE IS DETERRING AN OFFICER FROM DOING THEIR DUTY, YOU SEE THAT WORD "DUTY," AND IT'S ONLY AS TO COUNTS 4, 5 AND 8, WHICH ARE THE

OBSTRUCTION COUNTS. WHEN I HAVE TO PROVE DUTY AND IT'S MY DUTY TO PROVE DUTY, I HAVE TO PROVE THAT LAWFUL FORCE WAS USED, OKAY. THAT'S HOW THIS COMES IN, AND THAT'S WHY WE'RE TALKING ABOUT EXCESSIVE FORCE HERE. IT'S NOT BECAUSE OF SELF-DEFENSE, IT'S BECAUSE OF THE WORD DUTY ON COUNT 4.

ADMITS HE AND OTHERS WERE THROWING, AND YOU MUST BELIEVE THAT UNLAWFUL BEATING BY IBARRA. HE MAKES THIS BIG DEAL ABOUT THIS COMMENT, YOU STARTED THIS SHIT. WELL, YOU KNOW, WHO STARTED, IT'S ALMOST LIKE A KIDS PLAYGROUND THING, RIGHT, YOU ALWAYS HAVE BROTHER AND SISTER OR LITTLE KID SAYING YOU STARTED, NO, YOU STARTED IT, THAT'S REALLY NOT THE ISSUE IN THIS CASE, OKAY.

LET'S BE CLEAR HERE. NOBODY IS DISPUTING THAT THIS STARTED BECAUSE SOMETHING HAPPENED BETWEEN RODOLFO GONZALEZ AND THE DEPUTIES, OKAY. THERE'S NO QUESTION THIS RIOT STARTED FOR SOME REASON, AND YES SOMETHING HAPPENED.

THE ISSUE FOR YOU IS NOT WHETHER THERE WAS SOME FORCE USED AGAINST GONZALEZ, BECAUSE I'M SURE FROM THE PROSPECTIVE OF INMATES, ANY TIME YOU USE ANY FORCE, THEY'RE GOING TO BE SAYING, OH, YOU STARTED IT, OKAY. BUT REMEMBER, DEPUTIES GET TO USE SOME MEASURE OF FORCE, BECAUSE THIS ISN'T YOUR LIVING ROOM, OKAY, THIS IS A JAIL, A HIGH SECURITY AREA IN THE JAIL, THEY HAVE TO BE PERMITTED TO USE SOME FORCE.

IF A GUY IS DRINKING PRUNO, AND YOUR RUSE TO TRY TO GET HIM OUT QUIETLY ISN'T WORKING, WELL, WAIT A SECOND, ARE YOU TELLING ME THAT THE DEPUTIES SHOULD JUST GO, COULDN'T TRICK HIM, WELL, WE'LL JUST TRY NEXT TIME, OKAY, YOU GOT US, KEEP DRINKING YOUR PRUNO, GO AHEAD AND GET DRUNK, PASS THAT PRUNO AROUND, AND THAT'S OKAY, WE'LL HAVE LIKE A WHOLE ROW OF DRUNK INMATES, BECAUSE YOU KNOW, WE CAN'T TRICK THEM, YOU KNOW, NO, OF COURSE NOT, THAT'S RIDICULOUS, THAT'S NOT REASONABLE.

SO YES, IT'S REASONABLE TO USE SOME FORCE AT THAT POINT WHEN GONZALEZ DOESN'T COME OFF, YOU KNOW, JUST WILLINGLY. SO WHAT'S REASONABLE, WELL REASONABLE IS TO BE ABLE TO PULL HIM OFF, THAT'S WHAT IBARRA SAYS, OKAY.

WHAT'S UNREASONABLE, WELL, I MEAN I GOT TO CONCEDE, IF WHAT GONZALEZ AND MCGHEE ARE SAYING, WELL, NO, THAT'S UNREASONABLE, YOU JUST CAN'T POUND ON THE GUY, AND IF HE KEEPS RESISTING AND KICKING AT YOU, YOU CAN USE MACE OR PEPPER SPRAY TO NEUTRALIZE IT, ESPECIALLY IF YOU'RE BEING PELTED BY OTHER INMATES ALL AROUND WITH THE FRUIT AND STUFF, BUT YOU JUST CAN'T START OFF BY POUNDING ON THE GUY.

SO THE QUESTION IS DO YOU BELIEVE, AND THEY'RE NOT ARGUING REALLY THAT IF YOU BELIEVE IBARRA, THAT WHAT HE DID WAS EXCESSIVE. THEY'RE SAYING DON'T BELIEVE IBARRA, AND I'M NOT ARGUING THAT IF YOU BELIEVE GONZALEZ AND MCGHEE THAT IT'S ANYTHING

BUT EXCESSIVE, IT'S WHO DO YOU BELIEVE, OKAY, THAT'S THE ISSUE ON COUNT 4, WHO DO YOU BELIEVE?

AND THE PROBLEM WITH THE TESTIMONY, THE STORY OF GONZALEZ AND MCGHEE IS THAT IT'S CONTRADICTED BY THE LACK OF INJURIES. AND HE -- THEY KEEP WANTING TO TALK ABOUT BRUISING, DARKER COMPLEXION. FIRST OF ALL, I DON'T KNOW WHAT THAT MEANS. FIRST OF ALL, YOU SAW GONZALEZ, HE'S NOT THAT DARKLY COMPLECTED, I'M SORRY, I DON'T KNOW THAT HE'S NOT THAT MUCH MORE DARKLY COMPLECTED THAN I AM, I DON'T KNOW. BUT WHY IS THAT GOING TO PREVENT BRUISING.

BRUISING IS JUST ONE OF THE FORMS OF INJURIES, VISIBLE INJURIES YOU GET WHEN YOU'RE SUPPOSEDLY POUNDED ON LIKE THAT, STOMPED IN THREE DIFFERENT PLACES, ACCORDING TO GONZALEZ, BY MULTIPLE DEPUTIES. I MEAN COME ON, WE'RE TALKING ABOUT THERE IS A CUT. IS THERE ANY BLEEDING? IS THERE ANY SCRAPES? IT'S NOT JUST ESCAPE FROM BRUISING, IT'S ESCAPE FROM CUTS, IT'S ESCAPE FROM ABRASIONS, THINK ABOUT WHENEVER YOU FALL TO THE GROUND AND YOU SKIN YOUR KNEE, OKAY, SCRAPE YOUR KNEE, ALL THAT STUFF, NONE OF THAT, ABSOLUTELY NONE OF THAT.

THAT'S WHAT WE'RE TALKING ABOUT, BUT THEY JUST WANT TO -- I DIDN'T USE THE WORD BRUISING, I DIDN'T ASK HIM, MR. GONZALEZ, DID YOU HAVE ANY BRUISES. I ASKED HIM DID YOU HAVE ANY VISIBLE INJURIES, BUT THEY WANT TO TURN THIS INTO OH, IT'S

ABOUT BRUISING AND ABOUT WHETHER BRUISES WOULD SHOW.

YOU CAN CHANGE UP ALL THE QUESTIONING YOU WANT, YOU CAN'T DO THAT THOUGH, OKAY, THE QUESTIONING WASN'T ABOUT THAT.

THIS IS THE PROBLEM WITH FRANCISCO GONZALEZ' TESTIMONY. THESE WERE HIS WORDS, AFTER HE TALKS ABOUT HOW HE'S MOSTLY IN JAIL, NINE MONTHS OUT OF THE YEAR. I SAID, "ESSENTIALLY YOU'RE A CAREER CRIMINAL, SIR, AREN'T YOU?" WHAT WAS HIS ANSWER?

"YEAH."

FOLKS, I MEAN BOTTOM LINE, YOU GOT AN OFFICER THERE, HE TESTIFIED WELL. HE HELD UP UNDER CROSS-EXAMINATION, HE SEEMED LIKE AN HONEST GUY, AND THEY WANT YOU TO CALL HIM A LIAR, BASED ON THE WORD OF A "CAREER CRIMINAL."

MORE SPECIFICALLY, 1995, THIEF. 1997, THIEF. STEALING PEOPLE'S PROPERTY.

IS THAT SOMEBODY WHO YOU WANT TO TRUST, A THIEF.

WE'RE NOT FINISHED. DOMESTIC VIOLENCE. I DON'T KNOW IF IT WAS HIS WIFE OR WHATEVER, BUT COMMON PARLANCE, WIFE BEATER, OKAY, OR MAYBE MORE, SPOUSAL ABUSER.

1999, FELONY ASSAULT, LET'S JUST STOP FOR A MOMENT. THERE'S THE DEPUTIES, YOU KNOW, AND THEN THERE'S THIS GUY WHO'S THERE, HE TELLS YOU HE'S THERE BECAUSE HE WAS INVOLVED IN AN EARLIER RIOT, HE'S BEEN CONVICTED OF FELONY ASSAULT, AND THEY WANT

YOU TO BELIEVE THAT BETWEEN THE DEPUTIES AND HIM, THIS GUY IS THE VICTIM, THIS GUY IS THE PASSIVE ONE. OH, HE'S NOT THE AGGRESSOR, OH, THAT FELONY ASSAULT, THAT RIOT HE WAS INVOLVED IN EARLIER, JUST KIND OF HOPEFULLY YOU GUYS WON'T PAY ATTENTION TO THAT TOO MUCH.

NARCOTIC CELLS, DRUG DEALER, DRUG DEALER, THIEF, CAREER CRIMINAL, FELONY ASSAULT, ANOTHER DOMESTIC VIOLENCE, A VIOLENT DRUG-SELLING THIEF. THAT'S WHO THEY WANT YOU TO BELIEVE, EVEN THOUGH WHAT HE SAYS DOES NOT MATCH UP AND IS CONTRADICTED BY THE PHYSICAL EVIDENCE, NAMELY NO VISIBLE INJURIES.

I MEAN TO TRY TO PUT -- TEST TO SEE IF WE'RE REALLY BEING OBJECTIVE HERE, IF A POLICE OFFICER HAD GOTTEN UP THERE AND SAID THESE THREE, FOUR INMATES GOT ME DOWN ON THE GROUND, THEY WERE BEATING ME AND STOMPING ON ME, AND THEN THEY DRAGGED ME OVER HERE AND THEY BEAT ME AND THEY STOMPED ME AND THEY DRAGGED ME OVER THERE AND THEY BEAT ME AND THEY STOMPED ME, AND THE DEFENSE ATTORNEY WAS ASKING THIS COP, "OH, WELL, DID YOU HAVE ANY VISIBLE INJURIES?

UH, NO.

DID YOU GET MEDICAL CARE?

UH, NO.

DID YOU ACTUALLY REFUSE MEDICAL CARE?

MAYBE, I DON'T REMEMBER.

DID YOU SEEK MEDICAL CARE?

UH, NO.

IF I PUT ON A WITNESS LIKE THAT ON THE COPS' SIDE, I MEAN WOULDN'T YOU BE LOOKING AT ME -- I MEAN YOU OUGHT TO BE, LOOKING AT ME LIKE WHAT ARE YOU DOING.

WELL, THEY DID, ON THE DEFENSE SIDE.

WELL, I'M JUST TRYING TO POINT OUT THAT YOU'VE GOT TO BE FAIR, OKAY. I MEAN HONESTLY IF I PUT ON A COP THAT TESTIFIED LIKE THAT, WOULDN'T YOU BE GOING, THIS IS RIDICULOUS?

YOU OUGHT TO BE REACTING THE SAME WAY, EVEN THOUGH DEFENSE CALLED THEM. HE HAS A BIAS, HE'S HIS BOYHOOD FRIEND, THAT'S UNDISPUTED, HE CAME FORWARD TWO DAYS AGO WHILE WE WERE IN THE MIDDLE OF TRIAL. HE'S BEEN CHARGED WITH THIS, YOU KNOW, SINCE NOVEMBER OF 2007 AND HE COMES FORWARD TWO DAYS AGO, WHAT DOES THAT TELL YOU, EVEN THOUGH HE'S HIS BOYHOOD FRIEND, HE'S IN A PRIOR RIOT. NO COMPLAINT.

AND YOU KNOW, ALL THESE GUYS, I LOVE IT HOW THEY TRY TO PORTRAY THEMSELVES AS, YOU KNOW, THESE SHRINKING VIOLETS THAT ARE AFRAID TO SNEEZE IN FRONT OF THE DEPUTIES, BECAUSE IF THEY SNEEZE THE WRONG WAY, THE DEPUTIES ARE GOING TO TAKE THEM SOMEWHERE AND BEAT THEM.

WELL, AGAIN, ACTIONS SPEAK LOUDER THAN WORDS, IT'S REALLY EASY TO GO SIT ON THIS CHAIR AND SAY WORDS LIKE THE DEPUTIES BEAT ME. YOU GUYS HAVE SEEN ALL THE MOVIES. YOU THINK THESE GUYS DON'T KNOW

WHAT MOVIES YOU'VE PROBABLY SEEN, NO, THEY BEAT YOU ALL THE TIME, IT'S EASY TO SAY THAT, BUT ACTIONS SPEAK LOUDER THAN WORDS.

LOOK AT THAT SHIRT INCIDENT, THE DEFENDANT TOO, EACH OF THEM. THE SHOCKING REQUESTS OF DEPUTIES IN THE CASE OF BOTH DEFENDANT AND HIS FRIEND, MR. GONZALEZ, OOH THE SHOCKING IMPOSITION IS, PUT ON YOUR SHIRT LIKE EVERYBODY ELSE.

DO THEY REACT LIKE A SHRINKING VIOLET, OOH, OOH, YEAH, I BETTER PUT THAT SHIRT ON BECAUSE I DON'T WANT TO GET A BEATING? NO, THEY GO, I'M NOT GOING TO PUT ON MY SHIRT, YOU KNOW.

THE DEFENDANT SAYS YOU DON'T PUT ANY FEAR IN ME. THESE ARE NOT PEOPLE WHO ARE AFRAID TO COMPLAIN, AND ESPECIALLY WITH THE DEFENDANT, DOES HE SEEM SHY ABOUT COMPLAINING? I MEAN EVERY OTHER SENTENCE, HE'S TRYING TO FEED INTO WHATEVER STEREOTYPES YOU MIGHT HAVE, AND TRYING TO BE MANIPULATIVE AND ACCUSE DEPUTIES AND PROSECUTORS, AND EVERYBODY ELSE, OF HIDING AND TRYING TO DO ALL THIS MISCONDUCT.

ONE PERSON IN THIS COURTROOM WAS REALLY FREE WITH HIS ACCUSATIONS, THE DEPUTIES WERE NOT.

MC MULLEN SAYS, WHEN ASKED "DID YOU SEE WHO ACTUALLY THREW THE PIECE THAT HIT YOUR HAND?" AND HE SAID "I HONESTLY CAN'T." HE'S NOT FREE WITH HIS ACCUSATIONS.

AND YZABAL, "WAS THERE ONE PIECE OR MORE? I REALLY ONLY SAW THE ONE PIECE LEAVE HIS HAND." BUT THERE IS ONE PERSON WHO IS NOT LIKE THAT WHO IS VERY FREE ABOUT COMPLAINING, ONLY ONE WITNESS THAT TESTIFIED WHO WAS SO EAGER TO COMPLAIN ABOUT ANYTHING AND EVERYTHING, WINE, WINE, WINE, ABOUT ANYTHING AND EVERYTHING. WHO WAS THAT, DO I HAVE TO SAY HIS NAME?

I'M NOT GOING TO TALK ABOUT THIS ATTORNEY ON PROBATION. I WAS JUST POINTING OUT THAT HIS ONLY EXPLANATION FOR TURNING AROUND IS BECAUSE SUPPOSEDLY HE DIDN'T HAVE AN ATTORNEY ON HIS PAROLE, BUT HE ALSO ADMITTED THAT HE WAS ON PROBATION AND HE HAD JUST BEEN INVOLVED IN A RIOT, SO WHY WOULD HE BE SO SURPRISED THERE WAS AN ATTORNEY VISIT, AND THE RELEVANCE OF THIS IS BECAUSE HIS ONLY EXPLANATION FOR TURNING AROUND ISN'T AS IBARRA TESTIFIED MCGHEE TOLD HIM "HEY, WHAT ARE YOU DOING WALKING OFF WITHOUT MY PERMISSION," HE JUST DECIDED THAT ON HIS OWN, BUT HIS EXPLANATION DOESN'T MAKE SENSE BECAUSE YOU DO GET AN ATTORNEY ON PROBATION. PROBABLY NOT WORTH ALL THAT VERBIAGE.

FOR THEM TO SOMEHOW TALK ABOUT THIS FATHOM VIDEO THAT EXISTS, AGAIN, YOU WATCH THE END OF THE VIDEO, AND YOU'LL SEE THAT, LIKE THE DEPUTIES MENTIONED SOMETIMES WHAT THEY DO AND SOMETIMES INDIVIDUAL INMATES ARE ASKED, ARE YOU INJURED. THERE'S SOME OTHER SECTION OF THE JAIL WHICH WAS

INVOLVED IN THIS WHERE THEY DO THAT.

BUT HERE AT THE END, THEY APPEAR, BECAUSE THERE WAS SO MUCH PEPPER SPRAY THAT HAD TO BE USED WITH THE WAY THESE GUYS RESISTED, THAT IT'S ALL IN THEIR LUNGS, THEY'RE JUST TAKING EVERYBODY FOR TREATMENT. AND ONE OF THE DEPUTIES SAYS "IS THERE ANYBODY WHO DOESN'T NEED TREATMENT?"

SO IT'S A DIFFERENT SITUATION, THAT'S WHY MAYBE IT'S BEING HANDLED DIFFERENTLY. BUT THEY TRY TO SAY THERE'S THIS FATHOM VIDEO, BUT WHAT'S THE RELEVANCE OF THAT BECAUSE HE ADMITS THERE'S NO VISIBLE INJURIES, SO WHY WOULD WE BE INTERESTED IN A VIDEOTAPE OF HIM WITH NO INJURIES, NO MEDICAL TREATMENT SOUGHT. I DON'T CARE IF HE DOESN'T RECOLLECT THOMPSEN, HE DOESN'T RECOLLECT IF THE GUY OFFERED HIM TREATMENT OR NOT. OKAY, I'M NOT TRYING TO HARP ON SOME FAILURE TO RECOLLECT, I'M WILLING TO ASSUME THAT. BUT WHAT ABOUT NO MEDICAL TREATMENT SOUGHT. I ASKED HIM "DID YOU EVER SEEK MEDICAL TREATMENT?" AND HE SAID "NO;" THAT'S THE IMPORTANT POINT.

SUPPOSEDLY STOMPED LIKE THAT, THIS CAREER CRIMINAL, WITH THAT RECORD, THIEF, ASSAULTER, DRUG DEALER, THAT'S WHO THEY SAY YOU SHOULD BELIEVE OVER IBARRA. YOU SHOULD INCLUDE IBARRA IS A LIAR AND THIS STELLAR PERSON WHO CAME FORWARD TWO DAYS AGO, HIS FRIEND, OH YOU SHOULD BELIEVE HIM, AND ALL I HAVE TO ASK YOU IS, IS THAT REASONABLE? BECAUSE THAT'S

YOUR DUTY TO BE REASONABLE, NOT BIASED, NOT TRYING TO FAVOR ONE SIDE, NOT ENGAGING IN THIS IS THE STEREOTYPES THAT I HAD BEFORE I CAME INTO THIS CASE, AND BY GOLLY, I'M JUST GOING TO STICK TO IT.

WHEN YOU COMPARE THE TWO TESTIMONIES, IT'S REASONABLE TO BELIEVE IBARRA, IT'S NOT REASONABLE TO BELIEVE THAT GONZALEZ CHARACTER, AND THAT'S WHY I'M ASKING TO HAVE A VERDICT OF GUILTY.

I SHOULD MENTION SOMETHING, THE VERDICT FORMS ARE POTENTIALLY SOMEWHAT CONFUSING ON ONE THING, AND IT'S ONLY BECAUSE OF WHAT I SAID. AS I'VE INDICATED ON CONSPIRACY, YOU ONLY NEED TO FIND ONE OVERT ACT IN ORDER TO RETURN A VERDICT OF GUILTY, THAT IS TRUE.

IN THIS CASE, WHAT WE'RE DOING THOUGH IS ASKING YOU TO MAKE A FINDING AS TO EACH OVERT ACT, SO THERE'S GOING TO BE LIKE FIVE ON COUNT 1, I BELIEVE, OR SIX, I CAN'T REMEMBER, AND TWO ON COUNT 2, SO YOU MAKE A FINDING, TRUE OR NOT TRUE.

BUT AS LONG AS YOU FIND TRUE ON ANY ONE, TRUE ON ANY ONE, YOU FEEL IN THE GUILTY VERDICT FORM. I DON'T WANT YOU TO GET CONFUSED AND BELIEVE THAT YOU HAVE TO FILL IN TRUE ON EVERY ONE. THAT'S NOT TRUE. YOU HAVE TO FIND TRUE ON ANY ONE OVERT ACT, OKAY.

SO ON THE VERDICT FORM, YOU WILL SEE OVERT ACT 1, TRUE OR NOT TRUE; OVERT ACT 2, TRUE OR NOT TRUE, OKAY. EVEN IF YOU JUST FIND ONE OF THOSE

YOU, ENTER THE GUILTY VERDICT FORM. I JUST WANT TO MAKE THAT CLEAR, IT'S CONFUSING BECAUSE OF THE WAY I TALKED YESTERDAY. COUNTS 5, 6, AND 7, THESE ARE THE MC MULLEN AND MORALES COUNTS, OKAY.

NOW, WE'RE GETTING INTO EVENTS THAT HAVE NOTHING TO DO WITH PEOPLE THAT EITHER HE OR GONZALEZ ARE COMPLAINING ABOUT, THESE ARE THE P.M. SHIFT, SECOND SHIFT DEPUTIES. THEY'RE NOT EVEN ACCUSED OF DOING ANYTHING WRONG.

I MEAN THESE GUYS JUST CAME ON DUTY, OKAY. I MEAN, LOOK, IMAGINE LIKE SOMEBODY COMES HOME ONE DAY AND AS SOON AS THEY OPEN THEIR DOOR, THE PERSON -- OR COMES TO A HOUSE, THE PERSON INSIDE STARTS THROWING STUFF AT THEM AND SHOOTING AT THEM AND THEY HAVEN'T DONE ANYTHING, WHAT ARE YOU DOING THAT FOR, AND THEN THEY SAY, OH, WELL, YOU KNOW WHAT, SOMEBODY WHO WORE SIMILAR CLOTHING YOU TO WAS HERE EARLIER, AND WAS DOING STUFF THAT I DIDN'T LIKE. OKAY, AND I -- YOU KNOW, I DON'T KNOW, I JUST FELT LIKE IT, BECAUSE YOU WEAR SIMILAR CLOTHING, AND I ASSOCIATE YOU GUYS WITH THE SAME GROUP.

WELL, THANK YOU VERY MUCH. BUT YOU KNOW, WE DON'T LIVE IN A COUNTRY WHERE WE ENGAGE IN THAT KIND OF THINKING LIKE IF YOU BELONG TO A CERTAIN GROUP AND SOMEBODY IN THAT GROUP DOES SOMETHING I DON'T LIKE, WELL, I'M GOING TO TAKE IT OUT ON SOMEBODY ELSE IN THAT GROUP. I MEAN THINK ABOUT THE IMPLICATIONS OF THAT, THAT'S WHY THERE ARE SOMETIMES

PROBLEMS IN OUR CITY, BECAUSE PEOPLE ENGAGE IN THAT KIND OF THINKING.

NOW, ON COUNTS 5, 6, AND 7, AS WELL AS ANY COUNT OTHER THAN CONSPIRACY, YOU'RE LIABLE IF YOU'RE A CONSPIRATOR OR AIDING AND ABETTING. DON'T FORGET AIDING AND ABETTING PRINCIPALS. OKAY, COUNTS 1 AND 2 REQUIRE YOU TO FIND THE CONSPIRACY. EVERYTHING AFTER COUNT 2, 4, 5, 6, 7, 8, 9, YOU CAN USE EITHER CONSPIRACY OR AIDING AND ABETTING, OKAY.

AIDING AND ABETTING, IT DOESN'T HAVE TO BE IN AGREEMENT, BUT AS LONG THERE'S KNOWLEDGE OF THE CRIME AND YOU INTEND TO COMMIT IT OR ENCOURAGE, AND BY ACT OR ADVICE, PROMOTE OR ENCOURAGE. TRANSLATED, DID YOU PARTICIPATE, DID YOU KNOWINGLY PARTICIPATE.

IF YOU THREW, THEN YOU'RE PARTICIPATING. IF THE OTHERS ARE THROWING AND YOU'RE THROWING, THEN YOU'RE PARTICIPATING. LET'S BE CLEAR WHAT THE DEFENSE IS ON MC MULLEN, MORALES, AND --

(THE DEFENDANT MADE A SOUND.)

THE COURT: MR. MCGHEE, NO COMMENTS FROM YOU. NO COMMENTS FROM YOU.

JURORS ARE ADMONISHED TO DISREGARD ANY ACTIONS OF MR. MCGHEE.

PLEASE PROCEED.

MR. CHUN: THANK YOU, YOUR HONOR.

LET'S BE CLEAR ABOUT WHAT THE DEFENSE IS AND WHAT IT'S NOT ON COUNTS 5, 6, AND 7, I'LL CALL THEM THE MORALES AND MC MULLEN COUNTS. WHENEVER YOU SEE MORALES AND MC MULLEN'S NAME, IT'S NOT SELF-DEFENSE AND IT'S NOT EXCESSIVE FORCE. WHY? BECAUSE MC MULLEN AND MORALES AREN'T EVEN ACCUSED OF USING ANY FORCE, BECAUSE YOU CAN'T ENGAGE IN THIS KIND OF GROUP THINKING, GROUP LABELING.

LIKE SOMEBODY IS A SHERIFF -- I MEAN FILL IN YOUR BLANK. IF YOU'VE GOT THE WORD "SHERIFF," FILL IN YOUR FAVORITE GROUP, WHATEVER THAT GROUP MIGHT BE, WHETHER IT BREAKS THE LAW ON A JOB, LIKE OCCUPATION, OR ETHNIC GROUNDS OR NATIONALITY OR WHATEVER.

YOU DON'T GET TO SAY WELL SOMEBODY ELSE IN THAT GROUP DID SOMETHING I DON'T LIKE, AND SO THEREFORE I'M GOING TO TAKE IT OUT ON YOU, EVEN THOUGH YOU'RE A DIFFERENT MEMBER OF THAT GROUP, YOU DON'T GET TO DO THAT.

THE DEFENSE HERE ISN'T ANY OF THOSE THINGS. THE DEFENSE HERE IS HE DIDN'T THROW. THAT'S THE ONLY ISSUE ON MC MULLEN, MORALES.

YOU KNOW, HE KEEPS WANTING TO TURN THIS INTO AN EXCESSIVE FORCE, SELF-DEFENSE, AND YOU SEE HOW LIMITED THOSE DOCTRINES APPLY IN THIS CASE, OKAY. THAT'S ALL HE TALKED ABOUT. BUT YOU SEE HOW IT DOESN'T APPLY TO MANY OF THESE THINGS, INCLUDING

MC MULLEN AND MORALES. HERE MC MULLEN AND MORALES, THE ONLY DEFENSE HERE IS HE DIDN'T THROW.

WHAT IS THE EVIDENCE HE DIDN'T THROW, WELL THERE'S MCGHEE. GONZALEZ CAN'T TELL US ANYTHING ABOUT THIS, BECAUSE EVERYONE AGREES HE'S OUT OF THERE BY THEN. WHO HAS THE BIGGEST BIAS IN THIS CASE TO LIE?

YOU KNOW SOMEBODY IN THIS COURTROOM IS REALLY FREE ABOUT THROWING AROUND THE WORD LIAR, YOU KNOW, BUT HE'S THE ONE WITH THE BIGGEST BIAS TO LIE. WHAT IS IT? IT'S A LINE FROM HAMLET, "ME THINKS NOW THOU PROTEST TOO MUCH." THE GUY TO SUSPECT THE MOST IS THE GUY WHO CRIES LIAR THE LOUDEST, "ME THINKS NOW THOU PROTEST TOO MUCH." HE'S THE ONE WITH THE BIGGEST BIAS. YOU KNOW HE'S GOT A CRIMINAL RECORD, AND THEY'RE SAYING BELIEVE HIM AND HIS SHOUTS, WHICH AREN'T EVIDENCE, OVER TWO DEPUTIES, MC MULLEN AND MORALES, YOU GOT TO SEE THEM TESTIFY.

YOU GOT TO EVALUATE THEM. DID THEY SEEM LIKE LIARS, DID THEY SEEM LIKE THEY WERE OUT TO GET MCGHEE? I MEAN IF THEY WERE, YOU WOULD THINK THAT TO MAKE HIM LOOK REAL BAD, OH YEAH, HE THREW THAT PIECE THAT HIT MC MULLEN.

AS IT TURNS OUT UNDER THE LAW OF BOTH CONSPIRACY, AS WELL AS AIDING AND ABETTING, IT DOESN'T MATTER. BUT STILL, IF THEY WANT TO MAKE HIM LOOK BAD, YOU WOULD THINK THEY WOULD TRY TO SAY OH, HE THREW THAT PIECE. UNDER AIDING AND ABETTING AND

CONSPIRACY, IT DOESN'T MATTER, BECAUSE YOU'RE RESPONSIBLE FOR EVERYTHING THAT'S DONE BY THE GUYS YOU'RE DOING IT WITH.

BUT STILL, YOU THINK THEY WOULD SAY THAT ABOUT HIM, BUT THEY DON'T, THEY DON'T. THEY DON'T GO OUT OF THEIR WAY TO GET HIM.

CAN YOU SAY THE SAME FOR HIM, THIS DEFENDANT. HE SEEMS TO BE GOING OUT OF HIS WAY TO SAY ANYTHING AND EVERYTHING ABOUT DEPUTIES, PEOPLE IN LAW ENFORCEMENT. WE'LL GET TO AT THE END, SOME OF THESE ATTITUDES THAT EXPLAIN WHY HE DOES THAT.

MORALES, TESTIMONY, HE WAS POSITIVE MCGHEE WAS THROWING ON THE FIRST FLOOR AND THE SECOND FLOOR. HOW CAN HE BE SO POSITIVE, BECAUSE THE VERY DAY HE WROTE A REPORT.

YOU KNOW, IT'S NOT LIKE IT'S A MYSTERY TO HIM, IT'S NOT LIKE A STREET SITUATION WHERE, YOU KNOW, IT'S VERY FLUID, THINGS JUMP OUT AT YOU, THINGS HAPPEN, YOU KNOW. THESE ARE GUYS THAT ASSIGNED TO WORK THIS AREA OF THE JAIL, THEY KNOW THE PEOPLE THERE. THEY KNOW THE LOCATIONS WHERE THEY'RE LOCATED.

THE SIZE OF THE SINK IS CONSISTENT, SAID THAT'S WHY YOU SHOULD DISBELIEVE HIM. A BRIEF VIEW, BUT HE KNEW MCGHEE AND HE DOCUMENTED IT.

CAN YOU REALLY MAKE AN IDENTIFICATION IN A BRIEF MOMENT? YES, YOU CAN, AND LET ME GIVE YOU AN EXAMPLE, EVERYBODY HAS HAD THIS EXPERIENCE, YOU'RE

WALKING IN A HALLWAY AND THERE'S AN OPEN DOOR, EVERYBODY DOES THIS, FOR SOME REASON WHEN THERE'S AN OPEN DOOR IN THE HALLWAY, PEOPLE JUST NATURALLY LOOK, AND LET'S SAY ALL THESE PEOPLE THAT YOU KNOW AT WORK, AND YOU WALK BY THE HALLWAY, AND THERE'S AN OPEN DOOR AND YOU LOOK, AND YOU PASS BY, WHAT KIND OF LOOK DID YOU GET, ACTUALLY YOU GOT EVEN A SHORTER LOOK THAN MORALES AND MC MULLEN, BUT YOU CAN EASILY SAY HEY, THAT WAS JOE AND WENDY, I SAW THEM TALKING, RIGHT?

OH, THAT'S JOE AND WENDY TALKING, HEY JOE, HEY WENDY, EVERYBODY HAS DONE THAT EVERYDAY. WHAT I'M POINTING OUT IS WHEN YOU KNOW SOMEBODY, ALL RIGHT, IT IS VERY EASY TO, IN A VERY SHORT SPACE OF TIME, RECOGNIZE AND MAKE AN IDENTIFICATION, IT HAPPENS ALL THE TIME.

I TALKED ABOUT THE JABBAR HOOK SHOT, SO I'M NOT GOING TO GO THROUGH THAT AGAIN, BUT IT'S NOT JUST MORALES, IT'S MC MULLEN, AND I DON'T KNOW, IT DIDN'T MAKE ME TERRIBLY HAPPY TO HEAR MC MULLEN SAY DID YOU READ MORALES' REPORT BEFORE YOU TOOK THE STAND? NOT REALLY, HE WAS UNDER OATH, SO HE SAID IT, AND THIS CAME OUT FROM THE DEFENSE ATTORNEY TOO, "SO YOU'RE TESTIFYING JUST FROM YOUR OWN RECOLLECTION? THAT'S RIGHT."

FIRST FLOOR, HE HAD A BRIEF VIEW, BUT AGAIN, HE KNEW MCGHEE, IT'S LIKE HEY, INSTEAD OF THERE'S JOE AND WENDY, THERE'S MCGHEE GOING.

NOW, MY COLLEAGUE HERE, I DON'T THINK

HE DID THIS INTENTIONALLY, BUT HE TRIED TO SAY WELL HE -- MR. MC MULLEN SAID HE TOOK NO EVASIVE ACTION. NO, THAT'S NOT WHAT HE SAID. HE SAID -- THIS IS CROSS-EXAMINATION. AGAIN, HE OUGHT TO KNOW BETTER BECAUSE THIS WAS ON HIS CROSS-EXAMINATION. HE SAID -- AND HE WAS MOVING, THE DEFENSE ATTORNEY WAS MOVING FROM SIDE TO SIDE LIKE THIS, AND HE SAID WERE YOU MOVING SIDE TO SIDE, AND MC MULLEN SAID, "NO, NOT LIKE THAT. I MEAN OF COURSE, I WAS YOU KNOW, TRYING TO AVOID THE THINGS, BUT I WASN'T MOVING LIKE THAT." THAT'S ALL HE SAID.

AND IN ARGUMENT THOUGH, DEFENSE ATTORNEY MAKES IT SOUND LIKE YEAH, HE SAID, HE JUST STOOD THERE LIKE THIS, LIKE A ROBOT. NO, HE DID NOT SAY THAT. OKAY, YOU SAW THE TESTIMONY, THAT'S NOT WHAT HE SAID. HE SAID HE TRIED TO TAKE EVASIVE ACTION, BUT NO, IT WASN'T LIKE THAT, MOVING SIDE TO SIDE LIKE THAT.

AND THEN HE SAYS -- HE MAKES FUN OF MC MULLEN'S TESTIMONY, HE SAYS OH, YEAH, MC MULLEN COULD TELL THE EXACT NUMBERS, HE WAS COUNTING THEM OFF.

AGAIN, WE CAN'T JUST MISSTATE EXACTLY WHAT WITNESSES SAY FOR THE PURPOSE OF MAKING FUN OF THEM. I ASKED HIM, BECAUSE I RECOGNIZE, HE'S NOT POUNDING, SO WHAT IS THE MINIMUM NUMBER YOU'RE COMFORTABLE WITH, WHAT IS THE MINIMUM ESTIMATE THAT YOU'RE COMFORTABLE WITH? HE SAID 10 FOR MCGHEE, I

BELIEVE IT WAS FIVE TO 10 FOR REYES, AND FIVE FOR TRUJILLO IN CELL 8.

HE DID NOT TESTIFY, AS MY COLLEAGUE TRIED TO SUGGEST, THAT HE WAS UNSURE WHERE THE THROWING CAME FROM, HE DID NOT SAY THAT. HE WAS UNSURE ABOUT THE PIECE THAT HIT HIM, LET'S JUST BE CLEAR ABOUT THAT, HE'S JUST UNSURE ABOUT THE PIECE THAT HIT HIM.

I DON'T HAVE TO PROVE THAT THE PIECE THAT HIT HIM CAME FROM HIS HAND. NO. ONE, BECAUSE DO I NEED TO PROVE THERE WAS ACTUAL CONTACT AND FORCE? NO, I DON'T HAVE TO PROVE INJURY FOR ASSAULT. YOU CAN MISS, RIGHT.

TWO, AIDING AND ABETTING, EVERYONE IS RESPONSIBLE FOR WHAT EVERYBODY ELSE DOES IN THE GROUP. ONE FOR ALL AND ALL FOR ONE.

THE BIG PICTURE, LOOK AT THIS, PUT THE TESTIMONY TOGETHER. IBARRA AND YZABAL CORROBORATE THAT HE WAS THROWING PORCELAIN BEFORE THE MC MULLEN AND MORALES INCIDENTS. MC MULLEN AND MORALES SAY YEP, HE WAS THROWING AT ALL. AND AFTERWARDS, ON THE VIDEOTAPE, YOU SEE MCGHEE AND REYES, AGAIN, MCGHEE AND REYES, THOSE TWO, THROWING TOGETHER.

DOESN'T THAT TEND TO CORROBORATE, IF YOU GOT TESTIMONY FROM TWO DEPUTIES, HONEST GUYS, THAT SAY POSITIVE HE WAS THROWING, AND THEN BEFORE YOU LOOK AT THE PICTURE, YEAH, HE WAS THROWING. AFTERWARDS, YOU LOOK AT THE PICTURE, HE'S THROWING.

DOESN'T THAT TEND TO CORROBORATE?

REMEMBER WITH THE LAW OF ASSAULT, IMPERVIOUS DEFENSE IS IRRELEVANT. POSITION YOURSELF BEHIND BARS OR WEARING RIOT GEAR IS IRRELEVANT, OKAY, THERE WAS NO ARGUMENT ABOUT THAT FROM THE DEFENSE.

I'M JUST TELLING YOU IF YOU GET BACK THERE AND ONE OF THE JURORS SAYS HOW COULD HE HAVE CAUSED GREAT BODILY INJURY BECAUSE HE WAS BEHIND THIS BAR OR WEARING THIS PROTECTIVE GEAR, PLEASE REMIND THEM ABOUT INSTRUCTION 9.02, JUDGE VIOLENCE, DEFENDANT'S ACTION, NOT THE EFFECTIVENESS OF THE DEFENSE.

IF YOU FOLLOW COUNTS 5, 6, AND 7, THESE ARE THE MC MULLEN AND MORALES COUNTS. THE ARGUMENT IS THAT HE'S NOT THROWING, IT'S SHOWN THAT HE'S THROWING BEYOND A REASONABLE.

COUNTS 8 AND 9, THESE ARE RIOT SQUAD COUNTS, IT'S OBSTRUCTION AS TO ALVAREZ, THE VIDEOGRAPHER; WILSON, THE TEAM LEADER; COLEMAN, THE PEPPER GUN GUY; AND BELTRAN, OBSTRUCTION AS TO HIM BECAUSE HE WASN'T IN AMONG THE ORIGINAL GUYS, BUT HE WENT INTO THE CELL, AND HE SAID MCGHEE RESISTED.

COUNT 9 WAS AS TO ALL THOSE GUYS, EXCEPT FOR BELTRAN, BECAUSE BELTRAN WAS NOT -- COUNT 9 IS THE ASSAULT, REMEMBER THE PORCELAIN, BUT BELTRAN WAS NOT PART OF THE ORIGINAL GROUP.

AGAIN, THE WAY THE VERDICT FORMS LOOK, ON THESE MULTIPLE VICTIM COUNTS, YOU HAVE LIKE ALL

THESE VICTIMS LIKE IN PARENTHESES, AND YOU JUST CIRCLE HOWEVER MANY YOU AGREE ON. IT'S JUST LIKE CONSPIRACY, YOU DON'T HAVE TO AGREE AS TO ONE, YOU DON'T HAVE TO AGREE AS TO ALL, EVEN IF YOU JUST CIRCLE ONE, YOU CAN STOP CIRCLING IF YOU WANT, BUT YOU CAN ALSO GO ON AND CIRCLE AS MANY AS YOU WOULD LIKE.

LIABLE OF EITHER OF THOSE THINGS, HERE THE CLAIM IS EXCESSIVE FORCE AND SELF-DEFENSE AND THOSE CONCEPTS FOR COUNTS 8 AND 9 ARE RELATED. CAN'T USE EXCESS -- CAN'T USE ANY FORCE OR ANY WEAPON UNLESS EXCESSIVE FORCE BY LAW ENFORCEMENT.

THERE IS NO SELF-DEFENSE UNLESS LAW ENFORCEMENT FIRST ENGAGES IN EXCESSIVE FORCE. ONCE THEY DO THAT, THEN THE SITUATION IS LOOK, YOU KNOW, IT'S ON, NOW IT'S JUST LIKE ANY OTHER SITUATION AND THE GENERAL RULES OF SELF-DEFENSE APPLY. BUT TO GET INTO THAT ROOM, REMEMBER EXCESSIVE FORCE IS THE DOOR, YOU GOT TO OPEN THAT DOOR, THE POLICE HAVE TO USE EXCESSIVE FORCE. BUT ONCE THEY DO, THEN YOU'RE IN THE ROOM OF SELF-DEFENSE AND THE REGULAR RULES APPLY, NOW YOU KNOW, ALL THOSE RULES, YOU DON'T HAVE TO RETREAT, APPARENT DANGER IS ENOUGH, ALL THAT, BLAH, BLAH, BLAH, ALL THAT APPLIES.

EVEN IF YOU'RE IN THAT ROOM, YOU CAN'T USE SELF-DEFENSE, BECAUSE YOU HAVE TO BE AFRAID AND YOUR FEAR MUST BE REASONABLE, WHICH MEANS THAT YOU CAN'T SET UP YOUR OWN STANDARDS.

OKAY, I MEAN THINK ABOUT IT. IF ACTUAL FEAR WAS ALL THAT WAS REQUIRED, THEN EVERY NUT BAG WOULD HAVE A LICENSE TO SHOOT AND KILL ANYBODY IN THE WORLD.

OKAY, BECAUSE OH, THAT COURT REPORTER'S -- THAT THING IN FRONT OF THE COURT REPORTER IS A LASER BEAM, AND SHE'S TRYING TO KILL ME, OKAY I'M GOING TO SHOOT HER, OKAY, I'M JUST A NUT BAG, BUT I HONESTLY BELIEVE THIS, THAT'S OKAY? NO, NO, IT HAS TO BE REASONABLE, AN OBJECTIVE STANDARD, AND YOU CAN SAY WHAT ARE YOU TALKING ABOUT, THAT'S SO UNREASONABLE, OKAY.

AND WHAT'S UNREASONABLE HERE OF COURSE, AND THIS IS ONLY IF WE GET INTO THE DOOR, IS THAT THE RIOT SQUAD GUYS HAVE NOTHING TO DO WITH ANY OF THE COMPLAINTS THAT MR. MCGHEE HAS, AND HE HAS NO REASON TO BELIEVE THAT ANY OF THE GUYS IN THE RIOT SQUAD ARE ANY OF THE GUYS HE'S COMPLAINING ABOUT. WHAT REASON DOES HE HAVE TO BELIEVE THAT, I ASKED HIM THAT, EVEN HIM WITH HIS GLIB ANSWERS, HIS OWN ANSWERS, "WELL, THEY'RE WEARING THE SAME UNIFORM," WELL SO DOES EVERYBODY ELSE WHO WORKS IN THAT JAIL. THAT'S REASONABLE?

YOU THINK YOU OUGHT TO BE ABLE TO TAKE A SOCK AT A COP BECAUSE ONCE, YOU KNOW, SOME TIME AGO, ANOTHER GUY WHO WORE THE SAME UNIFORM DID SOMETHING TO YOU? REALLY? WHY DON'T WE TRANSLATE THAT INTO ALL OTHER JOBS, ANY OTHER JOB WHERE

SOMEBODY WEARS A UNIFORM, THIS -- WELL, LIKE FOR EXAMPLE, I WORKED AT A FAST FOOD JOINT ONCE, YOU KNOW, WORE A UNIFORM.

WHAT, SOMEBODY OUGHT TO BE ABLE TO HIT ME BECAUSE SOMEBODY ELSE IS WEARING THE SAME UNIFORM DID SOMETHING TO HIM, IS THAT REASONABLE, REASONABLE. AND LET'S TALK ABOUT ACTUAL FEAR FOR A SECOND. DOES ANYBODY REALLY BELIEVE THAT YOU CAN PUT A SCARE INTO THIS DEFENDANT?

I MEAN, HE CAN BARELY CONTROL HIMSELF IN COURT, OKAY. I MEAN YOU GET A LITTLE BIT OF AN IDEA WHAT THIS GUY IS LIKE IN CUSTODY, BECAUSE EVEN IN COURT WHEN HE SHOULD BE ON HIS BEST BEHAVIOR AND HE'S GOT TO MAKE A GOOD IMPRESSION, DO YOU SEE HIM CONTROLLING HIMSELF? LOOK AT THE GLARES, LOOK AT THIS, DOES HE LOOK LIKE SOMEBODY YOU COULD EASILY SCARE, DOES HE?

DOES THAT LOOK LIKE SOMEBODY WHO'S SCARED NOW? DID HE LOOK THAT WAY WHEN HE GOT ON THE WITNESS STAND. YOU KNOW MOST PEOPLE WHEN THEY'RE CAUGHT IN LIES, YOU KNOW, THERE'S SOME KIND OF REACTION.

THIS GUY IS LIKE WHAT, NO, THAT'S NOT MY FACE, NO, NO, NO, THAT'S NOT MY FACE, NO, NO, WHAT. ABSOLUTELY NO INTIMIDATION, YOU GOT TO GIVE THIS GUY CREDIT FOR THAT. BUT FOR PURPOSES OF SELF-DEFENSE, YOU GOT TO BE AFRAID.

NOW, AGAIN, WE TALKING ABOUT ASSUMING

WE'RE ENTERING THIS ROOM, AND IN A MOMENT, WE'RE GOING TO TALK ABOUT WHY HE CAN'T ENTER THE ROOM IN THE FIRST PLACE. ALSO SELF-DEFENSE, YOU CAN'T BE THE AGGRESSOR, JUST WHAT HE ADMITTED TO YOU, HE'S WAS THE AGGRESSOR OF THE RIOT SQUAD. HE THREW FIRST.

IN FACT, HE HAS TO ADMIT THAT BECAUSE THAT'S ON THE VIDEOTAPE AND THEN THE STUFF COMES OUT, THE PEPPER BALLS, HE DOESN'T STOP THROWING, THAT'S WHY THE PEPPER BALL KEEPS GOING, AND HE DOESN'T SUBMIT, THAT'S WHY THE PEPPER SPRAY KEEPS GOING. CAN'T COMMIT A QUARREL WITHOUT EXPECTATION OF FIGHTING.

THIS MEANS YOU CAN'T GO LOOKING FOR A FIGHT, YOU STRIP ALL THIS. THESE GUYS, FOR WHATEVER REASON, DIDN'T LIKE WHAT HAPPENED WITH GONZALEZ, OKAY, AND SOMETHING HAPPENED WITH GONZALEZ. THE ONLY QUESTION WAS, WAS IT EXCESSIVE FORCE. WE KNOW THAT HE WAS PULLED OFF, WE KNOW THEY RESISTED, WE KNOW THAT HE WAS MACED WHEN HE REFUSED TO GO, WE KNOW THAT OCCURRED WHEN DEPUTIES ARE BEING PELTED, AND IT'S UP TO YOU TO DECIDE WHETHER THAT'S EXCESSIVE OR NOT. AND THEN IN RESPONSE TO THAT, YOU KNOW, WHAT'S GOING ON, THEY WANT A RIOT, THEY WANT TO PROTEST.

YOU SEE THERE'S A DIFFERENT BETWEEN SELF-DEFENSE AND PROTEST. THEY WANT TO SHOW THE DEPUTIES WE'RE BOSS HERE, WE CAN DRINK OUR PRUNO, YOU CAN'T DO ANYTHING ABOUT IT, DON'T TAKE OUR PRUNO AWAY, THAT'S WHAT THIS IS ABOUT.

OKAY, YOU CAN'T CREATE A FIGHT, YOU CAN'T GO LOOKING FOR A FIGHT. THIS IS ALL, AGAIN, IF YOU'RE IN THE ROOM. BUT IN ORDER TO GET INTO THE ROOM, EVEN GET INTO THE ROOM, LET'S LOOK AT 9.26, PLEASE, TOGETHER, BECAUSE IT'S THE ONE SELF-DEFENSE INSTRUCTION THAT THEY RUN AWAY FROM, BUT IT'S THE ONLY ONE SPECIFIC TO POLICE OFFICERS. EVERYTHING ELSE IS ALL THE GENERAL STUFF AND YEAH, THAT APPLIES ONCE YOU GET INTO THE ROOM. HOW DO WE GET INTO THE ROOM, THROUGH THIS DOOR OF 9.26.

I BELIEVE IT'S THE SECOND PARAGRAPH, I'M SORRY, I DON'T HAVE IT WITH ME RIGHT NOW. 9.26 IS RIGHT AFTER 5.30. 5.30 IS IN NUMERICAL ORDER AND THEN YOU'VE GOT 9.26. ARE YOU THERE? I BELIEVE IT'S THE SECOND PARAGRAPH. ANYWAY, IT'S THIS PARAGRAPH I'M TALKING ABOUT.

THE FIRST PARAGRAPH TELLS YOU THAT A POLICE OFFICER CAN USE LAWFUL FORCE TO MAKE A DETENTION. LET'S READ IT TOGETHER. "WHEN A PEACE OFFICER IS MAKING A DETENTION, AND THE PERSON BEING DETAINED HAS KNOWLEDGE OR, BY REASONABLE EXERCISE OF REASONABLE CARE, SHOULD HAVE KNOWLEDGE THAT HE IS BEING DETAINED BY A PEACE OFFICER" -- THAT FIRST CLAUSE, DOES IT APPLY? YES, BECAUSE HE ADMITTED HE KNEW THEY WERE COMING IN TO HANDCUFF HIM AND TAKE HIM OUT.

"IT'S THE DUTY" -- THAT'S TRUE, WHICH IT IS, BECAUSE HE ADMITTED IT -- "IT IS THE DUTY OF

THE PERSON" -- THAT'S THE PERSON BEING DETAINED -- "TO REFRAIN FROM USING FORCE OR ANY WEAPON TO RESIST THE DETENTION, UNLESS UNREASONABLE FORCE OR EXCESSIVE FORCE IS BEING USED TO MAKE THE DETENTION. NOT ANTICIPATED TO BE USED, "IS BEING USED," AND ON YOUR COPIES, IF YOU WANT, THIS IS ENTIRELY UP TO YOU, UNDERLINE THE WORDS, "IS BEING USED TO MAKE THE DETENTION."

YOU CAN'T HAVE A STRIKE FIRST POLICY TOWARDS THE COPS, OKAY. IT'S JUST A RULE, AND YOU THINK ABOUT IT, IT'S A SENSIBLE RULE. IT'S NOT -- THE COPS CAN'T DO THEIR JOB IF IT'S GOING TO BE OPEN SEASON ON THEM.

AND REMEMBER THESE RIOT SQUAD GUYS, HE DOESN'T EVEN COMPLAIN ABOUT THEM. HE HAS NO IDEA THAT ANY OF THEM -- ANY OF THE GUYS HE'S COMPLAINING ON IS ON THE RIOT SQUAD, BECAUSE THAT WAS SEVERAL HOURS EARLIER.

HECTOR CABRERA, HE'S ON THE OBSTRUCTION COUNT AT THE END, AND THE DEFENSE ATTORNEY IS TRYING TO SAY THAT WELL, HE SHOULD BE DISBELIEVED.

HECTOR CABRERA TESTIFIED THAT MCGHEE FORCEFULLY RESISTED, AND THEN HE GOES TO A REPORT AND SAYS THAT SOMEHOW IT'S NOT EVEN CONSISTENT. NO, WHAT HECTOR CABRERA SAYS IS THAT THE DEPUTIES GRABBED HIS ARMS, ETCETERA. HE DOESN'T GO INTO THE DETAILS OF WHY THEY'RE GRABBING THEIR ARMS, THAT HE TESTIFIED

FOR YOU. JUST SO IT'S CLEAR, REPORTS ARE WRITTEN SO THAT PEOPLE CAN REMEMBER, BUT IT'S NOT LIKE THEY HAVE TO WRITE DOWN EVERY SINGLE THING, AS LONG AS THEY'RE TESTIFYING TRUTHFULLY. THIS ISN'T A REPORT-WRITING EXERCISE, THIS ISN'T A GRADE ON HOW WELL A REPORT IS WRITTEN, THIS IS ABOUT WHETHER YOU BELIEVE A WITNESS, OKAY.

AND THE OTHER THING THAT CORROBORATES HECTOR CABRERA IS THE VIDEOTAPE. YOU SEE HOW VIOLENT HE WAS. THIS IS A MAN WHO KEEPS THROWING PORCELAIN, DESPITE MULTIPLE PEPPER PELLETS BEING SHOT AT HIM. HOW MANY PEPPER PELLETS WOULD IT TAKE FOR ANY OF US TO JUST SAY, THAT'S ENOUGH, OKAY. THIS GUY KEEPS COMING BACK TO THE FRONT OF HIS CELL, AGAIN AND AGAIN AND AGAIN, AND HE KEEPS THROWING AT THE DEPUTIES, THE THING THAT'S BRINGING THE PEPPER SPRAY ON HIM. AND HE SAYS HE'S SCARED.

HE THINKS ALL HE HAS TO DO IS GET ON THAT WITNESS STAND, LOOK AT YOU, TURN TO YOU, SMILE, AND SAY I WAS SCARED. IS THERE ANYTHING ABOUT HIM THAT MAKES YOU THINK HE WAS SCARED? IN FACT, IF YOU NOTICE, THERE'S ONE THING THAT HE WILL NEVER SHOW, BECAUSE HE DOESN'T FEEL IT, IS FEAR. THIS IS A MAN WITHOUT FEAR.

HERE'S THE PROBLEMS WITH HIS TESTIMONY. FIRST OF ALL, THEY'RE ASKING YOU TO BELIEVE OVER THE WORD OF OFFICERS. I MEAN HOW MANY POLICE OFFICERS WOULD HAVE HAD TO LIE FOR YOU TO

BELIEVE THIS GUY, AND HERE'S A GUY WHO HAS CONVICTION FOR -- OR IS FOUND GUILTY OF ASSAULT WITH A SHOTGUN, A SHOTGUN, ONE OF THOSE THINGS, YOU KNOW, THAT BLASTS OUT PELLETS. THIS ISN'T JUST SHOOTING OFF A SHOT -- IT'S ASSAULT, MEANING ASSAULT ON A PERSON WITH A SHOTGUN, SHOOTING A SHOTGUN AT SOMEBODY.

AN ASSAULT ON A PEACE OFFICER. SOUND FAMILIAR TO ANY CHARGES WE HAVE IN THIS CASE. THIS IS SOMEBODY WHO HATES LAW ENFORCEMENT. WE'LL TALK ABOUT HIS RAP LYRICS IN JUST A SECOND. HIS EXPLANATION IS REAL INTERESTING.

YOU KNOW I GOT TO HAND IT TO THIS GUY. THIS GUY IS VERY SMART, REAL QUICK. HE SAYS, WELL, YOU CAN'T TAKE THAT STUFF SERIOUSLY, I'M JUST WRITING IT TO MAKE MONEY, I'M GOING TO BECOME A RAP STAR OR IS HOPING TO, AND I ASKED HIM WELL DID YOU GET AN AGENT? NO. RECORDING CONTRACT, TRY TO DO ALL THAT? NO, NO.

AND HERE WHERE IT SAYS FUGITIVE ON THE RUN. WELL, HOW DID YOU EXPECT TO BECOME LIKE THIS RAP STAR IF YOU'RE A FUGITIVE ON THE RUN, LIVING UNDER A FALSE NAME?

WITHOUT MISSING A BEAT, HE SAID "OH, I KNEW THE CHARGES WERE ALL FALSE AND ONE DAY I WOULD BE CLEARED, AND I COULD MAKE THIS RECORD." THINK ABOUT THIS, IF YOU'RE A FUGITIVE ON THE RUN, YOU WANT TO AVOID GOING TO COURT, THAT'S THE WHOLE PURPOSE, YOU DON'T WANT TO CLEAR YOUR NAME, YOU'RE HOPING YOU

NEVER GET CAUGHT. YOU'RE HOPING YOU NEVER FACE THE DAY WHEN YOU'RE EITHER SET TO CLEAR OR NOT CLEAR YOUR NAME. THAT EXPLANATION DOESN'T MAKE ANY SENSE.

PLUS, OF ALL THE THINGS YOU COULD WRITE ABOUT AS A RAP STAR, YOU KNOW THOSE RAP STARS, THEY HAVE ALL THESE LYRICS, A LOT OF THINGS ABOUT GIRLS AND WOMEN AND THE KIND OF THINGS THEY SAY ABOUT THAT, FAST CARS WHATEVER. WHY DOES HE CHOOSE TO WRITE ABOUT LAW ENFORCEMENT AND ALL THESE HATEFUL THINGS ABOUT LAW ENFORCEMENT, WHICH WE'LL LOOK AT IN JUST A SECOND.

REMEMBER, HE TALKED ABOUT THREATS, YOU KNOW, I MEAN WHAT DO YOU DO AS A PROSECUTOR, WITHOUT NAMING NAMES, HE DOESN'T NAME ANY NAMES. OH, THERE'S ARE ALL THESE PRIOR INCIDENTS WITH ALL OF THESE UNNAMED PRIOR DEPUTIES, NO, YOU CAN'T LOOK IT UP BECAUSE THERE'S NO PAPER RECORDS, THERE'S NO COMPLAINTS ABOUT IT.

WHAT THE HECK AM I SUPPOSED TO DO ABOUT THAT, WHAT IS ANYBODY SUPPOSED TO DO WITH THAT? WHAT CALL IN ALL OF THE THOUSANDS OF DEPUTIES THAT WORK IN COUNTY JAIL AND ASK THEM IF THEY KNOW ABOUT THIS INCIDENT THAT NEVER OCCURRED?

OKAY, WE JUST HAVE HIS WORD FOR IT. HOW CLEVERLY HE'S MADE IT SO THAT WE CAN ONLY TAKE HIS WORD FOR IT. BUT THEN WHEN HE DOES GIVE A NAME, YZABAL, I CALLED IN YZABAL. WHEN HE DOES GIVE A NAME, YOU SEE WHAT HAPPENS. WHAT IS THIS GUY TALKING

ABOUT, THREATS. I MEAN WHEN YOU FIRST HEARD THAT WITH THE -- THEY MADE SOME ANIMAL SOUNDS AND THIS AND ALL THAT, WERE YOU GUYS THINKING WOW, THE DEPUTIES DO THAT?

AND THEN WE CALLED THE DEPUTY HE ACCUSES OF ALL THESE THREATS, AND HE SAYS WHAT ARE YOU TALKING ABOUT? AND IF YOU THINK ABOUT IT, WHY WOULD A DEPUTY DO THAT OVER A LOUD SPEAKER, KNOWING HE COULD GET IN TROUBLE AND ANY ONE OF VARIOUS INMATES, WHO PROBABLY DON'T LIKE THE INMATES VERY MUCH, COULD GET THEM IN TROUBLE, WHY WOULD THEY DO THAT.

AND THEN HE TALKS ABOUT THE BIG PEPPER SPRAY. I JUST LOVED IT WHEN HE LOOKED AT YOU GUYS AND SAID OH, YEAH, IT'S THIS BIG THING, THIS FIRE EXTINGUISHER THING. YOU SHOULD SEE HOW MUCH SPRAY THIS THING PUTS OUT. THEN HE LEARNED WHAT, IT WAS IN THE OFFICERS' CAGE, AND THE REALITY THERE'S NO SUCH THING IN THE OFFICERS' CAGE. IT'S LOCKED AWAY IN THE ARMORY, OOPS.

SEE WHAT I'M TALKING ABOUT, THERE ARE CERTAIN PEOPLE WHO CAN CONTROL THEMSELVES AND OTHER PEOPLE WHO CANNOT, WHO CANNOT, DESPITE EVERYTHING, DESPITE THE SETTING, DESPITE WHAT THE JUDGE SAYS, DESPITE EVERYTHING, THEY JUST CAN'T CONTROL THEMSELVES. THEY CAN'T STOP STARING, THEY CAN'T STOP GLARING, THEY CAN'T SHOW ANY FEAR.

"I ONLY THREW AT THE WALL. I ONLY

THREW AT THE WALL IN FRONT OF MY CELL, I DIDN'T THROW AT THE DEPUTIES."

WELL, YOU WOULD HAVE TO DISBELIEVE IN THE DEPUTIES. YOU WOULD HAVE TO DISBELIEVE IBARRA, YOU WOULD HAVE TO DISBELIEVE YZABAL, YOU WOULD HAVE TO DISBELIEVE MORALES AND MC MULLEN ON THE WORD OF THIS GUY WITH A CONVICTION WITH ASSAULT WITH A SHOTGUN AND ASSAULT ON A PEACE OFFICER, REALLY, THAT'S REASONABLE?

YOU HAVE TO ALSO DISBELIEVE YOUR OWN EYES BECAUSE OF THE VIDEO. THE HOSE DEPUTIES, MC MULLEN AND MORALES WERE AT THE SIDE. OH, THEY WEREN'T WHERE THEY COULD BE THROWN AT, THEY WERE AT THE SIDE, SOMEWHERE BEHIND WHERE MY CELL WAS. MC MULLEN TOLD YOU HOW RIDICULOUS THAT WOULD BE, BECAUSE THE WALKWAY UP ON TOP IS REAL CLOSE, AND THESE ARE HIGH SECURITY INMATES. YOU DON'T WANT TO TURN YOUR BACK ON THEM. YOU DON'T WANT TO GO TO THAT SIDE.

AND YOU WOULD HAVE TO BELIEVE HERE THAT MC MULLEN AND MORALES ARE BOTH LYING, AGAIN, TO BELIEVE THIS GUY, THAT THEY'RE JUST MAKING ALL THIS STUFF UP. BUT I JUST DON'T UNDERSTAND SOMETHING. IF THEY'RE JUST GOING TO MAKE STUFF UP TO GET HIM, FIRST OF ALL, ALL THESE GUYS, WHY? WHY WOULD THEY BE TRYING TO GET AT POOR MR. MCGHEE. WHAT DO THEY HAVE AGAINST HIM.

AND IF THEY WERE JUST MAKING STUFF UP,

WHY WOULDN'T THEY SAY THEY SAW THE SHARD LEAVE HIS HAND, I DON'T NEED TO PROVE THAT, BUT WHY WOULDN'T THEY SAY THAT. "I DID NOT PREPARE TO THROW." SEE HE COULDN'T ADMIT HE'S PREPARED TO THROW, RIGHT, BECAUSE THEN HE WOULD HAVE TO ADMIT THAT HE'S THROWING AT THE DEPUTIES.

BUT, LADIES AND GENTLEMEN, BECAUSE WE HAVE TO NOW ADD A COUPLE OF FACTS TO WHAT HE HAD TO HAVE DONE, IF HE DIDN'T PREPARE TO THROW, HE HAD A HANDKERCHIEF, THAT'S WHY THE HEAD PORTION THAT KEEPS COMING INTO THE FRAME AND OUT THE FRAME, THAT'S WHY IT'S SO LONG, HANDKERCHIEF ON TOP, HANDKERCHIEF ON THE BOTTOM, WHAT WOULD BE THE PURPOSE OF THE HANDKERCHIEF ON THE BOTTOM? PEPPER SPRAY, HE'S TRYING TO KEEP AS MUCH OF IT FROM GOING INTO HIS MOUTH AND NOSE.

HE'S TRYING TO USE IT AS BEST HE CAN, LIKE A KIND OF FILTER. THAT'S WHAT WE'RE GOING TO SEE ON THE VIDEO IN JUST A SECOND. THAT'S WHY THAT AREA IS SO LONG. PUT ANOTHER WAY, WHAT ELSE COULD IT BE THAT KEEPS MOVING JUST WHEN HIS ARM COMES OUT, KEEPS MOVING INTO THE GAP JUST WHEN HIS ARM COMES OUT. YOU'LL SEE THAT.

NOW, THIS IS WHAT HAS TO HAVE HAPPENED FOR HIM NOT TO PREPARE, AND HE SAYS ALSO THAT HE SAW THEM ENTER THE SOLID DOOR. THE SOLID DOOR IS BEFORE EVEN ANY OF THE GATED BARS, RIGHT, WAY BACK THERE, AND HE SAYS HE SAW THEM THERE, AND THEN HE DID WHAT

HE DID AND STARTED THROWING WHILE THE DEPUTIES WERE STILL AT THE SOLID DOOR.

FIRST OF ALL, THE VIDEOTAPE SHOWS THAT NOBODY WAS BEING THROWN AT THAT FAR BACK. BUT IN ADDITION, THINK ABOUT THIS USING COMMON SENSE, IF HE'S RIGHT AND HE DIDN'T PREPARE AND HE HAD TO PREPARE ON THE MOMENT, THIS IS NOW WHAT WE KNOW HE HAD TO HAVE DONE. THE PORCELAIN PIECES ARE IN BACK BY THE SINK, HE SEES THE DEPUTIES ARE AT THE SOLID DOOR, HE HAS TO GO BACK, PICK UP A PIECE, GOT TO GET SOMETHING TO PROTECT MY HANDS, SOCK, ONE; SOCK, TWO; HANDKERCHIEF, HANDKERCHIEF, ALL THAT TIME, AND THE DEPUTIES ARE STILL AT THE SOLID DOOR? WHY? AND YOU'LL SEE IN THE VIDEO THEY MOVE IN, AND I WAS TRYING NOT TO HIT THE DEPUTIES, OH, COME ON, YOU KNOW, IT WOULD BE ONE THING IF IT WAS JUST ONE THROW.

I THINK IF YOU TRY TO COUNT IT, IT'S ABOUT A DOZEN, MAYBE 10, 12 THROWS, I'M NOT CRITICIZING HIM FOR THE AMOUNT OF THROWS. NOW, SEE THAT'S AN ACCIDENT, I DIDN'T DO THAT ON PURPOSE, DO YOU SEE WHAT AN ACCIDENT LOOKS LIKE, OKAY, THAT IS A THROW, OKAY, THAT IS THROWING IT AT SOMEBODY, OKAY.

"I ONLY BEGAN THROWING WHEN THE DEPUTIES WERE AT THE SOLID DOOR." WE'LL PROVE THIS IS AN ABSOLUTE LIE BY WATCHING THE VIDEO.

"I WAS AFRAID." YOU KNOW, FROM EVERYTHING YOU KNOW ABOUT THIS GUY, HE WAS NOT AFRAID, INCLUDING WHAT'S SHOWN ON THAT VIDEOTAPE.

OH, THIS IS THE BEST ONE, ACLU, I THOUGHT -- THIS IS HIS THOUGHT PROCESS, REMEMBER, IT'S LIKE SEVEN HOURS AFTER THE RODOLFO GONZALEZ INCIDENT HAS OCCURRED, MAYBE ABOUT SIX AND A HALF HOURS AFTER THEY BREAK THEIR SINKS. AND IN THOSE HOURS, HOURS, IT'S ABOUT A FULL DAY OF -- ABOUT THE AMOUNT OF TIME YOU SPEND IN THE COURTROOM EACH DAY, WHEN YOU TAKE AWAY BREAKS AND ALL THAT OTHER STUFF.

IN ALL THAT TIME, THE GAME PLAN BEFORE ME -- BECAUSE THIS IS NOT SOMETHING OFF THE SPOT THAT HE HAD TO THINK ABOUT -- WAS OKAY, I'M GOING TO THROW THIS STUFF AT THE DEPUTIES. AND I'M GOING TO THROW IT AND I'M GOING TO RIOT, AND I'M GOING TO THROW THIS STUFF AT THE DEPUTIES, BECAUSE THEN THE ACLU -- THE DEPUTIES WILL CALL THE ACLU. COME ON, REALLY, YOU THINK THAT'S THE WAY THIS INMATE THINKS? LET'S GET THE ACLU INVOLVED.

AND THEN I ASK HIM, WHY HE DOESN'T HE GIVE UP AT THE END WHEN BELTRAN IS GOING IN, WHY DOES HE RESIST BELTRAN. AND THEN HE SAYS "WELL, EVEN THEN I THOUGHT MAYBE THE ACLU WAS GOING TO COME," EVEN AFTER THE DEPUTIES ARE THERE, AND THEY PULLED OFF EVERYONE ON THE ROW. THAT'S HIS STORY.

YOU KNOW, YOU GOT TO HAND IT TO THE GUY, THE GUY STICKS TO HIS STORY, YEAH, THAT'S WHAT HAPPENED, BUT IT'S NOT BELIEVABLE, IT DOESN'T MAKE ANY SENSE.

THE COURT: WE'RE GOING TO TAKE A BREAK,

PLEASE, AT THIS POINT.

LADIES AND GENTLEMEN, RETURN TO THE JURY ROOM AFTER ABOUT A 10-MINUTE BREAK.

(THE JURORS ARE EXITING THE COURTROOM.)

(A BREAK WAS TAKEN.)

(THE NEXT PAGE NUMBER IS 2851.)

CASE NUMBER:	BA331315
CASE NAME:	PEOPLE VS. TIMOTHY MC GHEE
LOS ANGELES, CALIFORNIA;	FRIDAY, AUGUST 1, 2008
DEPARTMENT 102	HON. DAVID S. WESLEY, JUDGE
OFFICIAL REPORTER:	SHERRY R. QUENGA, CSR 6709
TIME:	3:40 P.M.

APPEARANCES:

THE DEFENDANT BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL H. CLAY JACKE, II, ATTORNEY AT LAW; HOON CHUN, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: ALL RIGHT. WE'RE BACK ON THE RECORD IN THE CASE OF PEOPLE VERSUS TIMOTHY MC GHEE. HE'S PRESENT WITH COUNSEL MR. JACKE. MR. CHUN FOR THE PEOPLE. ALL OF THE JURORS AND THE ALTERNATE JUROR ARE PRESENT.

AND YOU MAY PROCEED.

MR. CHUN: THANK YOU.

(PAUSE IN THE PROCEEDINGS.)

PEOPLE'S REBUTTAL ARGUMENT (RESUMED) +

MR. CHUN: IT LOOKS LIKE EVERYBODY IS READY.

SO WE WERE TALKING ABOUT ALL THE THINGS THAT ARE UNREASONABLE AND WRONG ABOUT AND, QUITE FRANKLY, FALSE ABOUT THE DEFENDANT'S TESTIMONY. AND WE WERE TALKING ABOUT THIS ACLU THING. ANOTHER WAY TO LOOK AT THIS IS PICTURE HIM SIX-AND-A-HALF HOURS AFTER THEY'VE BROKEN THEIR SINKS APPROXIMATELY -- OR IS IT -- I MIGHT BE WRONG. YEAH, SIX-AND-A-HALF, FIVE-AND-A-HALF HOURS, WHATEVER IT IS, SEVERAL HOURS AFTER THEY'VE BROKEN THEIR SINKS. AND HE'S HAD ALL THAT TIME TO THINK ABOUT IT.

AND THIS IS THE VISION, THE IMAGE THAT HE HAS IN HIS MIND, THAT WHAT HE'LL DO IS THAT HE WILL PUT ON SOCKS ON HIS HANDS, MASKS WITH HANDKERCHIEFS OR WHATEVER THE CLOTH IS ON HIS BODY, THAT HE WON'T EVEN TOSS THESE AT THESE DEPUTIES. HE'LL SORT OF JUST TOSS STUFF IN THE AIR, THESE PORCELAIN IN THE AIR. PICTURE IN HIS MIND THAT IN HIS MIND, HE'S PICTURING THE RIOT SQUAD DEPUTIES, HELMETS, RIOT GEAR VESTS, SHIELDS, PEPPER BALL GUN. AND THAT ONCE HE SORT OF TOSSES A FEW PIECES OF PORCELAIN AT THEM, THEY'RE ALL GOING TO GO, WHOA.

LET'S CALL IN THE ACLU AT MIDNIGHT. AND THEY'RE GOING TO GET ON THE PHONE, GO BACK TO THEIR OFFICE AT MIDNIGHT, INFORMATION, PLEASE, WHAT'S THE PHONE NUMBER FOR ACLU AT MIDNIGHT? OR THEY'RE

GOING TO RUN INTO THE PRIEST'S OFFICE AND SAY, FATHER, FATHER -- IN THEIR RIOT GEAR AND THEIR SHIELDS AND STUFF -- AND, FATHER, FATHER, WE DON'T KNOW WHAT TO DO. A FEW PIECES OF PORCELAIN GOT TOSSED OUR WAY. TELL US WHAT TO DO. OH, COME ON. HE REALLY THOUGHT THAT. YOU KNOW, ON THE ONE HAND, HE WANTS YOU TO THINK HE'S LIKE THAT. BUT, ON THE OTHER HAND, HE KEEPS TELLING YOU ABOUT SUPPOSEDLY HOW -- HOW AGGRESSIVE DEPUTIES ARE.

THEN WE GET TO THE PARTS OF HIS TESTIMONY THAT ARE JUST RIDICULOUS. I MEAN NOT ONCE DURING ALL THE TIMES THAT HE'S THROWING DOES HE SEE ANY DEPUTIES. OKAY. YOU KNOW, IF HE HAD JUST THROWN ONCE, I MEAN, YOU KNOW, MAYBE HE COULD SELL THIS STORY. BUT TEN TIMES? LIKE HURLING PIECES AT THE DEPUTIES.

WE'RE ABOUT TO SEE A VIDEO IN A SECOND WHERE YOU'LL SEE, LIKE, BETWEEN THE GAP BETWEEN WHERE HIS DOOR -- AND I GUESS IT'S BECAUSE OF THE HINGE AND THE CELL BARS, YOU'LL SEE THIS LITTLE GAP WHERE HIS HEAD -- AND, LIKE I SAID, PROBABLY WITH THE HANDKERCHIEFS MAKING IT LONGER -- KEEPS COMING IN AND OUT JUST AS HE'S THROWING, OKAY. AND I'LL ASK YOU TO KEEP AN EYE OUT FOR THAT WHEN WE GET TO IT.

HE ALSO SAYS -- I MEAN YOU HAVE TO BELIEVE THIS GUY IS DEAF AND BLIND BECAUSE HE ALSO SAYS HE DOESN'T SEE SIXTEEN DIFFERENT INMATES ARE PAST HIS CELL AND HAVE TO BE WALKED OUT PEACEFULLY WITH

HANDS BEHIND THEIR BACK BECAUSE THEY SUBMIT ACTUALLY. AND HE'S GOT -- HE'S SAYING -- BECAUSE HE WANTS TO SAY EVEN WHEN BELTRAN CAME IN, I RESISTED, BUT, YOU KNOW, I -- EVEN THEN I DIDN'T KNOW THIS WAS ENDING PEACEFULLY. SO HE'S -- SO HE HAS TO SAY HE DIDN'T SEE A SINGLE ONE OF 16 INMATES PARADED PAST HIS CELL PEACEFULLY IN HANDCUFFS. NOT EVEN ONE. DOES THAT SOUND REASONABLE? DOES THAT MAKE ANY SENSE?

AND WE HAVE THE VIDEO THAT JUST CONTRADICTS EVERYTHING. WE'LL GET TO THAT IN A MOMENT.

I TALKED ABOUT HIS HATRED OF LAW ENFORCEMENT. I DON'T WANT TO DWELL ON THIS TOO MUCH. THESE ARE HIS WORDS, YOU CAN READ THEM FOR HIMSELF -- FOR YOURSELVES. YOU DON'T NEED MY READING IT. YOU DON'T NEED MY INFLECTION. JUST READ IT FOR YOURSELF.

OKAY. LET'S DO THE NEXT ONE.

THIS IS THE NEXT ONE.

SWEET AND TO THE POINT. THIS IS A GUY WHO WANTS YOU TO BELIEVE NOW THAT HE WAS AFRAID, THAT HE'S THE VICTIM IN ALL OF THIS.

IN A MOMENT, WE'RE ABOUT TO LOOK AT THIS VIDEO. AND WHEN WE GET TO THE PART WHERE HE'S THROWING, JUST LOOK FOR THIS SECTION HERE. YOU SEE THIS? THAT'S HIS HEAD. I DON'T KNOW WHY HE THINKS THAT SAYING THAT THIS -- THESE ARE HANDKERCHIEFS ON HIS HEAD SOMEHOW MEANS HIS HEAD ISN'T THERE. BECAUSE IF THE HANDKERCHIEFS OR WHATEVER THEY ARE, THE CLOTHS,

ARE ON HIS HEAD, THAT HAS TO MEAN THAT HIS HEAD IS THERE. SO I DON'T -- I DON'T GET THIS. BUT IT'S KIND OF A VERBAL GAME THAT HE'S PLAYING.

OKAY. RIGHT HERE, RIGHT HERE, JUST -- YOU'LL WATCH IT KEEPS COMING OUT AND THEN IN. AND SO I'LL ASK YOU TO LOOK AT THAT. THAT'S HIS HEAD. IT LOOKS, LIKE, KIND OF EYEBROWS OR SOMETHING LOOKING OVER. IT'S A LITTLE HARD TO SEE. A LITTLE BIT BETTER WHEN YOU SEE IT LIVE. YOU'LL SEE IT KEEP MOVING IN AND OUT. YOU'LL SEE IT BECAUSE OTHERWISE WHAT IS THIS, RIGHT?

OKAY. SO AS YOU PLAY THE VIDEO -- AND WE'RE GOING TO PLAY THIS VIDEO FROM WHEN THEY START, THEY'RE MARCHING DOWN TO THE OUTER SOLID DOOR. AND THEY OPEN THE OUTER SOLID DOOR. AND THE FIRST THING I WANT TO WATCH -- ASK YOU TO WATCH OUT FOR IS WHEN DOES THE PORCELAIN START FLYING? HE SAYS HE DOESN'T EVEN START -- HE STARTS THROWING WHEN THEY'RE AT THE SOLID DOOR. BUT YOU'LL SEE, NO, THEY'RE AT THE BAR GATES AND WELL INTO THE BAR GATES WHEN THE PORCELAIN STARTS FLYING.

WATCH FOR THE NUMBER OF TIMES THAT FACE APPEARS IN THAT GAP. AND HE ADMITS THAT WHEN HIS FACE IS IN THAT GAP, HE CAN SEE. BUT HIS TESTIMONY WAS HE NEVER THREW IT WHILE SEEING IT.

WATCH FOR HOW THE PORCELAIN APPEARS AIMED AT DEPUTIES AND HOW HARD HE'S THROWING. IT'S NOT JUST -- I REALLY DIDN'T PLAN THAT OUT, FOLKS.

IT'S NOT JUST A BOBBLE, IT'S NOT JUST A TOSS. IT'S A POSITIVE THROW.

AND WATCH FOR CELLS A-6 AND A-7, THE TWO PARTNERS, MC GHEE AND REYES. MC GHEE AND REYES, THE TWO NAMES THAT KEEP COMING UP IN ALL OF THIS, THE ONES THAT CONSPIRED FROM THE BEGINNING TO THE END. WATCH FOR THAT AS THEY THROW.

ALL RIGHT. IF I CAN ASK MR. SHAPIRO.

OKAY. HERE THEY ARE WALKING TO THE OUTER GATE.

(A PORTION OF A VIDEO RECORDING WAS PLAYED.)

MR. CHUN: OKAY. HERE THEY ARE ENTERING.

YOU SEE THEY'RE NOT AT THAT GATE -- THAT DOOR VERY LONG. HE'S TAKING THAT TIME, HE DOES ALL THAT, PUTTING ON SOCKS, ALL THIS STUFF. BUT THEY WEREN'T THERE THAT LONG. NO THROWING AT...

OPEN ONE BAR GATE.

NOW THE THROWING STARTS.

THEY'RE NOT AT THE SOLID DOOR WHEN THE THROWING STARTS.

DID YOU SEE THAT MOVE RIGHT THERE?

THERE. DID YOU SEE THAT? THAT WAS HIS HEAD THAT JUST MOVED IN AND OUT.

THERE AGAIN. DO YOU SEE THAT?

OKAY. DO YOU SEE THAT? THE HEAD

MOVING IN AND OUT.

OKAY. I'D LIKE MR. SHAPIRO IN PARTICULAR TO GO TO 30 MINUTES AND AROUND 58 SECONDS. I THINK HE'S TRIED TO PRACTICE THIS TO SHOW YOU THAT HEAD MOVING IN AND OUT.

DID YOU SEE THAT PIECE?

OKAY. DID YOU SEE THAT?

THERE. DID YOU SEE THAT? DID YOU SEE HOW THAT HEAD MOVED IN?

OKAY. AND IT'S OUT NOW.

AGAIN, PLEASE. ONE MORE TIME.

THERE, THERE. DID YOU SEE IT AGAIN? OKAY. IT KEEPS MOVING IN AND OUT.

OKAY. COULD WE SEE THAT ONE MORE TIME, PLEASE?

OKAY. THERE IT IS.

OKAY. DO YOU SEE HOW IT SLIDES IN AND OUT?

THERE. DO YOU SEE IT?

OKAY. THE HEAD, YOU CAN SEE IT APPEARING AT THE EDGE THERE.

OKAY. AND YOU'LL HAVE IT BACK THERE AND YOU CAN PLAY WITH IT AS YOU WILL.

THERE'S ONE PORTION AT AROUND 31 MINUTES OR 30:58.

THERE YOU'LL SEE IT AGAIN.

OKAY. WHAT ELSE IS THAT?

YOU'LL SEE IT RIGHT THERE. OKAY.

RIGHT THERE.

ALL RIGHT. EVEN ASIDE FROM THE VIDEO, LADIES AND GENTLEMEN, DOES IT MAKE COMMON SENSE THAT YOU WOULDN'T BE SEEN WHEN YOU'RE THROWING THAT MANY PIECES, OKAY.

ALL RIGHT. IF WE COULD GO BACK TO THE ARGUMENT CHART, PLEASE.

AND WE'RE GOING TO LEAVE A COMPUTER AVAILABLE FOR YOU FOLKS. AND HOPEFULLY SOMEBODY KNOWS HOW TO USE WINDOWS MEDIA PLAYER. OKAY. WE HOPE. THIRTY MINUTES AND 58 SECONDS, SOMEWHERE AROUND THERE. JUST PLAY AROUND WITH IT, PLEASE, IF YOU WANT WHEN YOU'RE BACK THERE.

I TOLD YOU ABOUT THE OTHER PART OF THE VIDEO WHERE YOU CAN SEE HOW VIOLENT HE IS. THIS IS THE GUY WHO WANTS YOU TO BELIEVE, REMEMBER, THAT HE'S SCARED.

(A PORTION OF A VIDEO RECORDING WAS PLAYED.)

MR. CHUN: HIS NEIGHBOR TRUJILLO IS TAKEN OUT OF CELL 8. THEN YOU CAN SEE MC GHEE REACTING IN SOME WAY.

OKAY. REMEMBER THE LAW. IT'S THE DUTY OF THE PERSON FROM -- TO REFRAIN FROM USING FORCE OR ANY WEAPON TO RESIST THE DETENTION UNLESS UNREASONABLE OR EXCESSIVE FORCE IS FIRST USED. 9.26, YOU ALL

LOOKED AT IT, YOU ALL UNDERLINED IT, IT'S BEING USED. YOU GOT TO HAVE THAT FIRST AS A DOORWAY EVEN INTO SELF-DEFENSE. HE'S NOT EVEN IN THE ROOM. AND EVEN IF YOU PUT HIM IN THE ROOM SOMEHOW PAST THIS, SELF-DEFENSE DOESN'T APPLY. AGGRESSOR CANNOT USE SELF-DEFENSE.

AND LET'S TALK ABOUT -- NOW, DEPUTIES -- THE DEPUTIES, WERE THEY USING EXCESSIVE FORCE WHEN THEY WENT IN, THE RIOT SQUAD? LET'S ADDRESS THAT. HOW CAN WE SAY THIS FORCE WAS EXCESSIVE? WHAT'S UNREASONABLE ABOUT THIS? LOOK, THEY'VE GOT INMATES BREAKING THEIR SINKS AND THROWING PIECES. NOBODY COULD SAY THAT -- REASONABLY THAT THE DEPUTIES SHOULD JUST LET THAT JUST GO ON.

IN FACT, IF ANYTHING, THEY PROBABLY LET IT GO ON A BIT TOO LONG, OKAY. BECAUSE THEY WERE -- THE FIRST SHIFT GUYS WERE TRYING TO JUST WAIT THIS OUT. THE SECOND SHIFT -- AND LEAVE THE PROBLEM FOR THE SECOND SHIFT GUYS. BUT LOOK AT WHAT'S BEEN GOING ON. THE INMATES HAVE BEEN THROWING, THEY HAVE BROKEN THEIR SINKS AND WERE THROWING SHARDS. THE SHARDS WERE SO SHARP, THAT EVEN THROWING THEM, MR. MC GHEE ADMITS, COULD CAUSE CUTS TO THE HANDS. THESE ARE REALLY DANGEROUS THINGS. GORDON MC MULLEN HAD ALREADY BEEN STRUCK BY ONE OF THESE PIECES. THANK GOODNESS THE INJURY WASN'T WORSE.

AND MC GHEE KNEW HE WAS GOING TO BE DETAINED AND HE ADMITS THAT HE THREW FIRST. COMING

INTO PLAY 9.26, HE'S GOT TO GET THROUGH THE DOOR. HE'S GOT TO SHOW EXCESSIVE FORCE. LOOK AT ALL THE THINGS THAT WERE GOING ON WHEN THE RIOT SQUAD WENT IN. AND ARE WE REALLY PREPARED TO SAY, BECAUSE THIS IS ALL THEY DID, THAT THEY WORE PROTECTIVE RIOT GEAR, THAT'S EXCESSIVE? WHAT'S EXCESSIVE ABOUT THAT? IT SOUNDS LIKE, YOU KNOW, PRUDENT PLANNING TO USE RIOT -- HAVE RIOT GEAR ON. THEY'RE THROWING SHARDS LIKE THAT, I HOPE THEY'RE WEARING HELMETS. QUITE FRANKLY, IT DOESN'T LOOK LIKE THEY WERE WEARING ENOUGH PROTECTION.

PEPPER GUN, WHAT'S EXCESSIVE ABOUT THAT? PARTICULARLY WHEN, AS DEFENDANT MC GHEE ADMITS, IT WASN'T EVEN USED UNTIL HE FIRST THREW AT THEM IN THEIR DIRECTION. WHAT ABOUT THE FACT THAT THE PEPPER GUN WAS SHOT REPEATEDLY? WELL, HE KEPT THROWING, SO WHAT ARE THEY SUPPOSED TO DO? WHAT'S UNREASONABLE ABOUT WHAT THEY DID? THERE'S NOTHING UNREASONABLE. YOU DIDN'T EVEN HEAR DEFENSE ATTORNEY TRY TO ARGUE THAT WHAT THEY DID, THE RIOT SQUAD DID, WAS UNREASONABLE.

LADIES AND GENTLEMEN, THEY ACTED AS THEY SHOULD, THE RIOT SQUAD GUYS. YOU SAW IT ON VIDEOTAPE FOR YOURSELF. YOU'RE GOING TO HAVE THE VIDEOTAPE FOR YOURSELF. YOU'RE GOING TO SEE THE NUMBER OF TIMES HE THROWS. IT'S QUITE CLEAR. IT'S NOT JUST TOSSING IT UP IN THE AIR, HE'S THROWING AT THEM. AND I ASK THAT YOU FIND A VERDICT OF GUILTY AS TO COUNTS 8 AND 9 AS WELL.

ALL RIGHT. I'M SURE EVERYBODY IS RELIEVED TO HEAR I'M FINISHED. THE CASE IS GOING TO BE YOURS. AND WE TRUST THAT YOU'RE GOING TO LOOK AT THIS CASE, GIVE IT A FAIR LOOK, LOOK AT THE EVIDENCE, AND COME TO THE RIGHT DECISION IN THIS CASE WHICH IS GUILTY ON ALL THOSE COUNTS. THANK YOU VERY MUCH.

THE COURT: THANK YOU, MR. CHUN.

ALL RIGHT. LADIES AND GENTLEMEN, YOUR CONCLUDING INSTRUCTIONS, THERE'S ONE I'M GOING TO CORRECT. AS WE GET TO IT, THEN I'LL HAVE YOU CORRECT IT WHEN WE GET TO IT. SO WHY DON'T YOU FOLLOW ALONG WITH ME. WE'LL START AT 17.30.

I HAVE NOT INTENDED BY ANYTHING I HAVE SAID OR DONE OR ANY QUESTIONS THAT I MAY HAVE ASKED OR BY ANY RULING I MAY HAVE MADE TO INTIMATE OR SUGGEST TO YOU WHAT YOU SHOULD FIND TO BE THE FACTS OR THAT I BELIEVE OR DISBELIEVE ANY WITNESS. IF ANYTHING I HAVE DONE OR SAID HAS SEEMED TO SO INDICATE, YOU WILL DISREGARD IT AND FORM YOUR OWN CONCLUSION.

THE PURPOSE OF THE COURT'S INSTRUCTIONS IS TO PROVIDE YOU WITH THE APPLICABLE LAW SO THAT YOU MAY ARRIVE AT A JUST AND LAWFUL VERDICT. WHETHER SOME INSTRUCTIONS APPLY WILL DEPEND

H. CLAY JACKE, II (SB#108734)
Attorney at Law
880 W. First St.
Suite 302
Los Angeles, CA 90012
(213) 617-8128

Attorney for Defendant
TIMOTHY McGHEE

FILED
LOS ANGELES SUPERIOR COURT
JUL 17 2008
JOHN A. CLARKE, CLERK
By M. Munns DEPUTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
TIMOTHY McGHEE,
Defendants.

CASE NO. BA331315

NOTICE OF MOTION TO CONTINUE

DATE: 07-21-08
TIME: 8:30 A.M.
DEPT: 104

TO THE ABOVE-ENTITLED PLAINTIFF AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, AND/OR THEIR REPRESENTATIVES:

PLEASE TAKE NOTICE that on the 21st day of July, 2008, at the hour of 8:30 a.m., in Department 104 of the above-entitled court, or as soon thereafter as counsel can be heard, the defendant, TIMOTHY McGHEE, pursuant to Penal Code section 1050, will move the court for a continuance of the above-entitled matter.

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Said motion will be based on the grounds that counsel requests additional time for investigation and preparation, including, but not limited to, locating and interviewing 21 potential witnesses. At the time of the incident, such witnesses were in custody at the Los Angeles County jail. The information provided regarding these potential witnesses included their *then* booking numbers and housing locations; any other personal information, such as date of birth, were not provided. Such information must be subpoenaed.

Defendant McGhee faces multiple life sentences based on the charged offenses. While much of the offending conduct was captured on videotape, the ends of justice demands and zealous representation requires, that these witnesses be interviewed. Counsel will reveal the defense theory of the case in camera, if so requested. However, the Defendant cannot be effectively represented by me, without such investigation being completed as I am informed and thus believe that these witnesses will aid in the defense of this case.

Dated this 17th day of July, 2008.

H. CLAY JACKE, II
Attorney for Defendant

DECLARATION OF DANIEL HINES

I, Daniel Hines, declare:

1. In January of 2005, I was housed in a cell a few cells away from Tim McGhee's in the 3300A row at Men's Central Jail. I didn't know McGhee beforehand and I didn't stay in touch with him after.

2. I remember an incident that happened when an inmate, who I knew as "Sleepy," was being escorted to the attorney room by the Sheriff's deputies. I heard Sleepy tell the deputies he didn't want to go to the attorney room. I heard the deputies tell him, "You're going," and I saw one of them push Sleepy into the wall. Sleepy was handcuffed and was therefore unable to protect himself when the guards became violent with him. The deputies dragged Sleepy down the tier. Some of the other inmates and I started yelling at the deputies to put Sleepy back in his cell. Then, someone threw something at the deputies. Some of the inmates had been drinking, so things escalated quickly. We just went crazy when we saw how Sleepy was being treated.

3. What happened on our tier was completely spontaneous. I never heard anyone command the inmates to break their sinks. Tim McGhee wasn't a shot caller and he didn't order anybody to do anything.

4. The deputies left the tier but told us they'd be back. When they came back, they came to each cell on the tier. One by one, each inmate was asked if he was ready to come out. If the inmate said no, he was shot with pepper balls by the deputies. I was shot with pepper balls approximately 56 times. After I was shot, the deputies dragged me out like a rag.

5. The other inmates and I were dragged out and lined up in a hallway outside the tier. I believe that Tim was the last to be extracted, even though my cell came after his. When the deputies dragged Tim out, his face was red and swollen. It looked like they had been very rough with him.

D.H.

6. Either that day or the next, each inmate who was involved in the extraction was brought individually into a room with a Sergeant and about two other officers. When it was my turn to answer questions about what I had seen on the tier, the Sergeant essentially told me what I was supposed to say. He said, "You didn't see nothing, right? You know what's going to happen if you say you did." I agreed because I was afraid I would get beaten up by the deputies if I disagreed. The deputies made it sound like Tim had started the whole thing. That wasn't true.

7. In 2007 and 2008, I think I was out of prison. I had regular contact with my parole officer and could have easily been contacted through him. Nobody from McGhee's defense team ever came to speak with me. If they had, I would have been willing to talk to them about this incident. I would have been willing to testify on McGhee's behalf.

8. On May 28, 2013, I was contacted by a staff member of the Office of the Federal Public Defender. The public defender investigator explained to me that their office represents Tim McGhee in federal court proceedings reviewing his conviction. I have read and reviewed this two-page declaration.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed this 17th day of June, 2013, in Whittier, California.

Daniel Hines

Declaration of Erick Morales

I, Erick Morales, declare as follows:

1. In 2005, I was on the same tier at Men's Central Jail as Tim McGhee. I only knew him for the two years we were on the tier together.
2. In January of 2005, I saw the deputies bringing a prisoner to a visit. I saw the deputies arm in a chokehold around the prisoners neck.
3. The inmates became upset and started yelling and throwing things at the deputies. This was spontaneous. No one person started it. Tim McGhee didn't start it or tell anyone else what to do. Whatever we did, we did on our own. There wasn't a shot caller on our tier.
4. In 2007 and 2008, I was in prison. It would have been easy to find me.
5. If anyone from McGhee's defense team had contacted me, I would have been willing to talk to them and to testify, if needed. Until today, nobody had ever contacted me about this.
6. On July 23, 2013, an investigator from the Office of the Federal Public Defender's came to speak with me. The investigator

E.M.
E.M.

explained to me that their office was representing Tim McGhee in his appeal.

I declare under penalty of perjury that the above is true and correct to the best of my recollection.

Dated this 23rd day of July, 2013, in Coalinga, California, Pleasant Valley State Prison.

Erick Morales

Erick Morales

DECLARATION OF GERARDO REYES

I, Gerardo Reyes, declare:

1. In January of 2005, I was housed in the cell next to Tim McGhee's in the 3300A row at Men's Central Jail. I didn't know McGhee before being housed next to him, and I didn't stay in touch with him after.

2. I remember an incident that began when sheriff's deputies came to our tier to bring Rodolfo Gonzalez, "Rudy," out of his cell. I specifically remember Deputy Orosco being involved in the incident. One of the deputies said that Rudy had an attorney visit.

3. Because of what I had heard about Rudy's prior problems with deputies, I thought that the deputies were lying about the attorney visit. I had heard that Rudy was previously involved in a riot at Wayside Jail while serving time for a parole violation, and that some deputies may have been injured during that incident. Now that Rudy was incarcerated again for another parole violation, I thought that the deputies were lying about the attorney visit and were trying to retaliate against Rudy for the Wayside incident by taking him to the hole.

4. Some of the other inmates and I asked the deputies where they were really taking Rudy. We said we knew he wasn't going to an attorney visit. When Rudy tried to go back to his cell, the deputies grabbed him and dragged him out of the tier. I personally saw the deputies drag Rudy away. I did not see Rudy resist or fight the deputies. He was cuffed when they dragged him away.

5. I was upset about the way the deputies handled the situation with Rudy. First they lied about where they were taking him, then they dragged him out. I grabbed an apple and threw it at the deputies. Other inmates on the tier started throwing things too. I believe I was the first inmate to break my sink. Previously, I had noticed a loose metal knob on my sink. When I ran out of things to throw at the deputies, I remembered the loose knob. I put it in a sock and used

G.R.

that to break my sink. Tim McGhee and I did not make any agreement to break our sinks; I just decided to do it.

6. McGhee was not a shot caller. He didn't start the incident, lead it, or tell anyone what to do during it. McGhee did not tell me to break my sink or to do anything else. In jail, if a deputy messes with any one of the inmates, the rest are going to jump in to help the inmate. That's just what we do.

7. I was not charged with or tried for any crime having to do with my involvement in the January 2005 incident.

8. The deputies seemed to particularly dislike Tim McGhee. In my experience, when the deputies did random cell searches they threw things around and made a mess of the cell. But the deputies took it further with McGhee. I remember a specific time when the deputies went into McGhee's cell to do a random search. They threw his personal photographs on the ground and stepped on them, leaving behind boot prints. The deputies also spit loogies onto the floor of his cell. I know this because I was in the cell next door, and I remember hearing McGhee get upset with the deputies. I had never heard of the deputies doing this to anyone else on the tier.

9. In 2007 and 2008 I was incarcerated and would have been easy to find. Nobody from McGhee's defense team ever came to speak with me. If they had, I would have been willing to talk to them about this incident. I would have been willing to testify on McGhee's behalf.

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G.R.

10. On June 19, 2013, I was contacted by a staff member of the Office of the Federal Public Defender regarding Tim McGhee. The public defender investigator explained to me that their office represents Tim McGhee in federal court proceedings reviewing his conviction. I have read and reviewed this three-page declaration.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed this 7 day of July, 2013, in Crescent City, California.

Gerardo Reyes.
Gerardo Reyes

G.R.
G.R.
007

Declaration Of Timothy Trujillo

I, Timothy Trujillo, Declare:

(1) In January Of 2005, I Was Housed In The Cell Adjacent To Timothy McGhee's In 3300 A-Row At Men's Central Jail. I Didn't Know Mr. McGhee Beforehand And I Didn't Stay In Touch With Him After.

(2) I Participated In An Incident (Cell Extraction) That Occurred Which Stem From Sheriffs Deputies Physically Assaulting And Using Excessive Force On A Man Whom At The Time Was Unable To Defend Himself Because He Was Handcuffed.

(3) Upon Personal Observation Of The Assault I Wanted The Deputies To Stop So I Began Throw Personal Property Such As Bars Of Soap, A Container Of Grease, And Even Food Items (Apples).

(4) Out Of Anger And Protest I Even Began Breaking Things In My Cell Such As My Sink, Desk, And Light Fixture.

(5) Not At Any Time Ever Did Mr. McGhee Or Anyone For That Matter Tell Or Order Anyone On The Row To Participate In The Incident Nor Was Anyone Told To Break And/Or Cause Damage To Anything In Their Cell. Mr McGhee Was Just A Regular Guy Like Everyone Else On The Row He Did Not Possess Any Leadership Over Anyone.

(6) When The Deputies Came Back To Do The Extraction I Was Shot With Pepper Balls And Was Beaten Up Several

TIMES AS THEY PROMISED. I WAS BEAT IN MY CELL AND THEN BEAT AGAIN IN THE HALLWAY WHILE I WAS HANDCUFFED. STILL IT WAS NOT OVER I WAS BEATEN AGAIN WHEN BROUGHT BACK TO MY CELL.

(7) SUBSEQUENTLY [redacted] ALL OF MY PERSONAL PROPERTY AND MATRESS WAS GONE. I WAS TOLD I WOULD NOT BE GETTING MY THINGS BACK. I WAS WITHOUT A MATTRESS FOR SEVERAL WEEKS.

(8) MAY, 16TH 2013, I WAS CONTACTED BY A STAFF MEMBER OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER. THE PUBLIC DEFENDER INVESTIGATOR EXPLAINED TO ME THAT THEIR OFFICE REPRESENTS TIMOTHY MCGHEE IN FEDERAL COURT PROCEEDINGS REVIEWING HIS CONVICTION AND ASKED IF I WOULD BE WILLING TO SPEAK WITH THEM AND GIVE MY RECOLLECTION OF THE INCIDENT. I AGREED!

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA AND THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION WAS EXECUTED THIS 25TH DAY OF JUNE, 2013, IN TEHACHAPI, CALIFORNIA

X T. Trujillo

TIMOTHY TRUJILLO

DECLARATION OF JAY REDDIX

I, Jay Reddix, declare:

1. In January of 2005, I was housed in the 3300A row at Men's Central Jail. Tim McGhee was also housed on that row. I didn't know McGhee before then, and I didn't stay in touch with him after. I recall a cell extraction that occurred around that time.

2. I remember laying on my bed when I heard a commotion. I stood up and looked out of my cell to see what the commotion was about. I saw two deputies dragging another inmate down the tier. The inmate was handcuffed. While they were dragging him, other deputies were poking him with their sticks. I watched the inmate fall and saw the deputies continue to drag him off the tier. I watched the deputies beat this inmate all the way out of the tier.

3. While this was happening, I heard other inmates on the tier yelling at the deputies to stop what they were doing. People started throwing things.

4. A few hours later there was a cell extraction. First, the deputies asked the inmates to volunteer to come out. When I looked out and saw the deputies in full riot gear, wearing masks and holding shields, I didn't want to come out. Based on prior experience, I felt certain that when I did come out, the deputies would beat me. The deputies had beaten me in that jail before and I thought it would happen again.

5. When nobody volunteered to leave their cells, the deputies began shooting gas balls into each cell. They shot into mine as well. After that, I volunteered to leave my cell. I had to crawl out of my cell backwards, into the waiting arms of about five deputies. They picked me up and dragged me off the tier.

6. At no point did I hear any of the inmates tell anyone else to break their sinks or to throw things at the deputies. It's my opinion that the deputies started

J.R.

this incident.

7. I was able to communicate with all of the other inmates housed on our tier. If there was a shot caller, I would have known. There was not a shot caller on the tier. Tim McGhee was not a shot caller.

8. In 2007 and 2008 I was in prison and would have been easy to find. Nobody from McGhee's defense team ever came to speak with me. If they had, I would have been willing to talk to them about this incident. I would have been willing to testify on McGhee's behalf.

9. On July 16, 2013, I was contacted by a staff member of the Office of the Federal Public Defender regarding Tim McGhee. The public defender investigator explained to me that their office represents Tim McGhee in federal court proceedings reviewing his conviction. I have read and reviewed this two-page declaration.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed this 21 day of ~~July~~ AUG JR, 2013, in Palmdale, California.

Jay Reddix 8-21-13 JR.

Jay Reddix

DECLARATION OF ROBERT ROYCE

I, Robert Royce, declare:

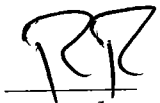
1. I have been employed as a private investigator since 1994. Prior to that, I worked in law enforcement in Huntington Beach, California.

2. When Timothy McGhee was facing capital charges in Los Angeles County Superior Court, the court appointed me to work as the defense investigator on that death penalty case. Later, when a separate, noncapital case was brought against Mr. McGhee, I was appointed to work as the defense investigator on that case as well. The noncapital case involved charges arising from a disturbance at Men's Central Jail, where Mr. McGhee had been held while awaiting his capital trial.

3. Mr. McGhee was represented by two court-appointed attorneys in the capital case: Clay Jacke and Frank Peters. Initially, Mr. McGhee represented himself in the noncapital matter. In advance of trial, he requested the appointment of counsel. He was briefly represented by a different attorney than the ones who represented him in the capital case, however that attorney was replaced by Mr. Jacke, who ultimately represented Mr. McGhee throughout the noncapital trial. I had worked with Mr. Jacke on many cases since 1994, prior to working with him on Mr. McGhee's cases.

4. I did not encounter difficulties interacting with Mr. McGhee, either when he was representing himself or when he had counsel. I found him very forthcoming about the jail case.

5. Mr. McGhee gave me the names of 7-10 people he thought would have had the best view of the incident that started the jail disturbance. I was able to locate the names of other potential witnesses from the reports of the incident that the sheriff's deputies wrote. When preparing for the noncapital trial, my plan was to locate as many witnesses as possible, then go interview them.



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6. Because many of the potential witnesses in the jail case were inmates, I had to follow particular procedures in order to visit and interview them. To visit the witnesses who were still being held in the county jail, I needed the attorney (in this case, Mr. Jacke) to obtain a court order. To visit the witnesses who had been transferred to state prisons, I needed to provide the prison with a written request from the attorney. Additionally, if the prison was located outside Los Angeles County, I needed the attorney to obtain a travel order signed by the judge.

7. I located many of the potential witnesses from the jail incident by contacting the California Department of Corrections (CDC). Exhibit A to this declaration shows my faxed request for inmate locations and the CDC's response. According to the dates on the fax, I sent the request on June 9, 2008, and I received the CDC's response on June 11, 2008. I told Mr. Jacke more than once what I would need in order to visit the potential witnesses in this case, but nothing ever came of it.

8. Although I have a busy practice, I would have had the time and been willing to do the necessary travel and witness interviews for the McGhee case. The only reason I did not do so was because Mr. Jacke never gave me the necessary authorizations. I told Mr. Jacke about the witnesses I had located, and I don't know why he did not authorize me to follow through on this investigation.

9. I rarely attended court appearances with Mr. Jacke. I have been informed that on the day Mr. McGhee's trial commenced, Mr. Jacke represented to the judge that I had been unable to locate any inmate witnesses. I was not in court with Mr. Jacke at that time.

10. Ultimately, I only interviewed one witness in connection with Mr. McGhee's noncapital case. He was the witness who ended up testifying at the trial, and my interview took place shortly before he testified. As far as I know, Mr. Jacke relied solely on my interview and did not speak to that witness prior to

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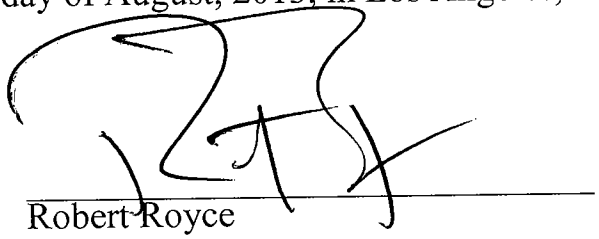
putting him on the stand.

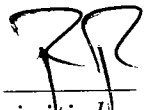
11. Approximately 70% of my business involves investigation for criminal cases; the rest is primarily investigation for civil rights cases. Because of my work on the civil rights cases, I have extensive experience investigating allegations of excessive force and other abuses by law enforcement. I understood this to be a potential issue in Mr. McGhee's noncapital case, and I was ready to use my contacts and experience to investigate potential impeachment material on the deputies involved in the jail incident, but Mr. Jacke did not pursue this avenue of investigation.

12. On July 22, 2013, I met with an attorney and an investigator from the Office of the Federal Public Defender to discuss my work on Timothy McGhee's noncapital case. They explained to me that their office represents Tim McGhee in federal court proceedings reviewing his conviction. I have read and reviewed this three-page declaration.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed this 29 day of August, 2013, in Los Angeles, California.



Robert Royce



initials

EXHIBIT A
TO DECLARATION OF ROBERT ROYCE

FAX COVER SHEET

TO	PEGGY
COMPANY	CDC
FAX NUMBER	19163220500
FROM	ROBERT ROYCE
DATE	2008-06-09 02:01:17 GMT
RE	REQUEST FOR CDC #'S AND LOCATIONS

COVER MESSAGE

PEGGY,
COULD YOU PLEASE PROVIDE ME WITH THE CDC NUMBERS AND HOUSING LOCATIONS FOR THE INMATES LISTED ON THE ATTACHED DOCUMENT.
AS ALWAY, THANK YOU FOR YOUR HELP

To: CDC – Attention Peggy

Date: June 8, 2008

Re: People v. Timothy Mcghee

From: Robert Royce /
Defense Investigation Group, Inc.

I have attached a list of people that may be witnesses to a crime that occurred in LA County Jail. I am trying to locate them, so they can be interviewed.

Please provide the CDC locations and CDC #'s for each of the following people.

Thank you very much for your assistance!

FAX BACK PHONE NUMBER 909 / 498-0404

Sincerely,

Robert Royce
Private Investigator
Contractor for Los Angeles County

PEOPLE v TIMOTHY MCGHEE

NAME	DOB	CDC #	LOCATION
REYES, GARARDO Gerardo	12/14/73	FD1750	PSP
MORALES, FRANCISCO	11/11/77	F19920	CAL
TAFOYA, RUDY	1/31/67	V74478	SATF
MORALES, ERICK ERIK	9/21/78	V81729	SVSP
TRUJILLO, TIMOTHY	12/5/78	P32319	SATF
GUDINO, ADRIAN	10/5/80	T10018	SVSP
SAPIEN, ANTONIO	9/04/77	V87673	Reg 4
CASTRO, SERGIO	10/2/71		NF
MORONES, CHRISTIAN	10/21/79	T04393	COR
TOBIAS, BRIAN	11/2/76	V58880	PSP
CORTEZ, WALTER	11/2/71		NF
CISNEROS, EDWARD	4/8/80		NF
RUIZ, FELIPE	12/3/70	T36680	Reg 3

FAX BACK # (909) 498-0404

PEOPLE v TIMOTHY MCGHEE

GONZALES, RAY	12/5/71 12/8/71	V69534	SVSP
TRIGUEROS, JAUN Juan	4/25/71	K26653	Discharged 5-20-08
MONTES, ROY	1/10/78	P97422	PSP
BENAVENTE, PAUL	4/16/73	P96359	Fol-C
HINES, DANIEL	6/11/56	C75863	CIM
VALENZUELA, DANIEL	11/4/58	V69976	LAC-RC
NEWELL, JONATHON	9/11/83	V83521	HDP

FAX BACK # (909) 498-0404

REF.# 5[illegible]-2005-0108-OC

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT

A TRADITION OF SERVICE

INCIDENT REPORT

DATE 1-8-05 PAGE 1 OF 15

ACTION: ☒ ACTIVE ☐ INACTIVE ☐ PENDING	NON-CRIMINAL	# OF ADULT ARRESTS	# OF SUBJECT DETENTIONS	URN # 0 (RETENTION) 05 (YEAR) 00024 (SEQUENTIAL) 5100 (REPORTING DISTRICT) 057 (STAT CODE)
	☐	0	0	

CLASSIFICATION 1 / LEVEL / STAT CODE: Assault with a Deadly Weapon on a Peace Officer (porcelain) / 245 (c) P.C. / F/ 057

SEX OFFENSE - VICTIM INFO? YES ☐ NO ☒

CLASSIFICATION 2 / LEVEL / STAT CODE: Possession of Weapon by Prisoner (metal pipe), 4502 (a) P.C. / F / 151

DOMESTIC VIOLENCE ☐ NON-PERSONAL (GUN, KNIFE, ETC) ☐ PERSONAL (HANDS, FEET, FIST, ETC)

CLASSIFICATION 3 / LEVEL / STAT CODE: Vandalism / 594 (b) (1) / F/ 263 *Additional Charges on Page 2*

DATE, TIME, DAY OF OCCURRENCE: 1-7-05, 2245 Hours, Friday

PRINTS REQUESTED ☐ COMPLETED ☐ BY: TIME:

INJURY ☐ Major ☐ Minor ☐ None

LOC. OF OCCURRENCE: 441 S Bauchet St. Los Angeles, 90012 (Module 3100/3300)

BUS. NAME: Men's Central Jail

☐ NON-CRIMINAL

CODE: V-VICTIM W-WITNESS I-INFORMANT R-REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
V	1 of 2	McMullen	Gordon	J	M	W		Adult	

RES. ADDR.: LA County Sheriff Deputy | CITY: #292825 | ZIP: | VICTIM OF OFFENSE(S) (CLASSIFICATION) #: 1 | RES. PHONE (Area Code): | Day Phone

BUS. ADDR.: 441 S. Bauchet St. | CITY: Los Angeles | ZIP: 90012 | ENGLISH SPEAKING ☒ YES ☐ NO | BUS. PHONE (Area Code): (213) 974-4908 | Day Phone

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
V	2 of 2	Morales	Joseph	P	M	H		Adult	

RES. ADDR.: LA County Sheriff Deputy | CITY: #486791 | ZIP: | VICTIM OF OFFENSE(S) (CLASSIFICATION) #: 1 | RES. PHONE (Area Code): | Day Phone

BUS. ADDR.: 441 S. Bauchet St. | CITY: Los Angeles | ZIP: 90012 | ENGLISH SPEAKING ☒ YES ☐ NO | BUS. PHONE (Area Code): (213) 974-4908 | Day Phone

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age

RES. ADDR.: | CITY: | ZIP: | VICTIM OF OFFENSE(S) (CLASSIFICATION) #: | RES. PHONE (Area Code): | Day Phone

BUS. ADDR.: | CITY: | ZIP: | ENGLISH SPEAKING ☐ YES ☐ NO | BUS. PHONE (Area Code): | Day Phone

(21)

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V-SUSPECT /VICTIM SJ /V -SUBJECT /VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	1 of 22	Reyes	Gerardo	N.M.I.	None

RES. ADDR.: 418 Drew St. | CITY: Los Angeles | ZIP: 90012 | RES. PHONE (Area Code): None Given

BUS. ADDR.: Unemployed - L.A. County Jail Inmate | CITY: | ZIP: | BUS. PHONE (Area Code): None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	508	210	12-14-73	31

CHARGE: 245 (c) P.C., 4502 (a) P.C., 404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C. | WHERE DETAINED OR CITE #: MCJ

AKA: | MONIKER: Criminal | BOOKING #: 6909744

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	2 of 22	Morales	Francisco	A	D3328326

RES. ADDR.: 521 S. La Verne | CITY: Los Angeles | ZIP: 90012 | RES. PHONE (Area Code): None Given

BUS. ADDR.: Unemployed - L.A. County Jail Inmate | CITY: | ZIP: | BUS. PHONE (Area Code): None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	509	170	11-11-77	27

CHARGE: 245 (c) P.C., 404 (b) P.C., 404.6 P.C. | WHERE DETAINED OR CITE #: MCJ

AKA: | MONIKER: Droopy | BOOKING #: 7943274

VEHICLE # / SUSPECT / VICTIM	STATUS ☐ IMPOUNDED ☐ STORED ☐ OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR

REGISTERED OWNER: | IDENTIFYING FEATURES: | CHP 180 SUBMITTED: ☐ YES ☒ NO | GARAGE NAME & PH.

BY DEP.	EMPLOYEE #	VACATION DATES	DEP.	EMPLOYEE #	VACATION DATES
Morales, Joseph	486791	None Pending			

STATION	UNIT / CAR #	SHIFT	APPROVED	EMPLOYEE #	DATE	TIME
MCJ	3000 Prowl	EM	SGT. ARNALDO	002357	01-16-05	0001

VICTIM DESIROUS OF PROSECUTION ☒ YES ☐ NO | ASSIGNMENT: JIU

D NOTIFICATION REQ: ☐ YES ☒ NO | DEP. | DATE / TIME | SPECIAL REQUEST DISTRIBUTION: QSJ

SUSP / SUBJ RELEASE APPROVED BY | TIME | PCD SUBMITTED: ☐ YES ☒ NO | TT B/C BY | DATE | TIME | SECTY.

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(4) INPUT-LARCIS

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT

INCIDENT REPORT CONTINUATION

URN: 005-00024-5100-057

CLASSIFICATION # / LEVEL / STAT CODE
Vandalism / 594 (2) (A) PC / M / 261
Riot / 404 (b) P.C. / M / 214
Incitement to Riot / 404.6 (a) / M / 214

VEHICLE #	SUSPECT STATUS / VICTIM	☐ IMPOUNDED ☐ STORED ☐ OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER			IDENTIFYING FEATURES			CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.	

CODE: V-VICTIM W-WITNESS I-INFORMANT R-REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V-SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	3 of 22	Tafoya	Rudy	N.M.I.	C3466792

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
9 Geronimo Ln.	Carson		(310) 834-3114

BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	509	200	1-31-67	37

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C.	MCJ

AKA	MONIKER	BOOKING #
		7745640

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	4 of 22	Morales	Erick	I	O8813289

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
1264 Locost St.	Stayton		None Given

BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	509	160	9-21-78	26

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C.	MCJ

AKA	MONIKER	BOOKING #
		7747361

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	5 of 22	McGhee	Timothy	J	None

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
431 Laclede	Los Angeles	90012	None Given

BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	511	190	4-27-73	31

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C.	MCJ

AKA	MONIKER	BOOKING #
	Eskimo, Huero	7596556

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COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT

INCIDENT REPORT CONTINUATION

URN: 005-00024-5100-057

CLASSIFICATION #	/ LEVEL / STAT CODE

CLASSIFICATION #	/ LEVEL / STAT CODE

CLASSIFICATION #	/ LEVEL / STAT CODE

VEHICLE #	SUSPECT STATUS		LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
#	VICTIM ☐ STORED	☐ IMPOUNDED ☐ OUTSTANDING						

REGISTERED OWNER	IDENTIFYING FEATURES	CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.

CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.		CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:		RES. PHONE (Area Code)		Day Phone	
BUS. ADDR.		CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO		BUS. PHONE (Area Code)		Day Phone	
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.		CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:		RES. PHONE (Area Code)		Day Phone	
BUS. ADDR.		CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO		BUS. PHONE (Area Code)		Day Phone	
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.		CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:		RES. PHONE (Area Code)		Day Phone	
BUS. ADDR.		CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO		BUS. PHONE (Area Code)		Day Phone	

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	6 of 22	Trujillo	Timothy	J	None Given

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
PO Box 8101	San Luis Obispo	93409	(310) 548-4300
BUS. ADDR.	**CITY**	**ZIP**	**BUS. PHONE (Area Code)**
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Blu	506	185	12-5-78	26

CHARGE		WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C.		MCJ
AKA	**MONIKER**	**BOOKING #**
	Ghost	8102843

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	7 of 22	Gudino	Adrian	N.M.I.	8140658

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
336 Richburn St.	La Puente	91744	(626) 810-7538
BUS. ADDR.	**CITY**	**ZIP**	**BUS. PHONE (Area Code)**
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Grn	510	180	10-5-80	24

CHARGE		WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C., 594 (2) (A) P.C.		MCJ
AKA	**MONIKER**	**BOOKING #**
		8140658

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	8 of 22	Sapien	Antonio	N.M.I.	B4585820

RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)
7543 Lindsey Ave	Pico Rivera	90660	(562) 801-0049
BUS. ADDR.	**CITY**	**ZIP**	**BUS. PHONE (Area Code)**
Unemployed - L.A. County Jail Inmate			None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	603	220	9-4-77	27

CHARGE		WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C., 594 (2) (A) P.C.		MCJ
AKA	**MONIKER**	**BOOKING #**
	Scrappy, Lucky	8123701

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(6) ~~011329~~ 029

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

VEHICLE # / SUSPECT STATUS / VICTIM	IMPOUNDED / STORED / OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER	IDENTIFYING FEATURES	CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.				

CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	9 of 22	Castro	Sergio	N.M.I.	A9289731
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
5062 E. 60th Pl.	Maywood	90270	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Bro	602	210	10-2-71	33

CHARGE	WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C., 594 (2) (A) PC	MCJ
AKA	MONIKER / BOOKING #
	Soldier / 8101448

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	10 of 22	Morones	Christian	N.M.I.	B8452786
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
6503 Northside Dr.	Los Angeles	90012	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Bro	510	185	10-21-79	24

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (2) (A) P.C.	MCJ
AKA	MONIKER / BOOKING #
-	/ 7757920

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	11 of 22	Tobias	Brian	N.M.I.	None Given
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
1032 W. 123 St.	Los Angeles	90012	(323) 777-2688		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	W		Bro	Haz	509	206	11-2-76	28

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C., 594 (2) (A) P.C.	MCJ
AKA	MONIKER / BOOKING #
	/ 8402269

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

VEHICLE # / #	SUSPECT STATUS / VICTIM	☐ IMPOUNDED ☐ STORED ☐ OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER			IDENTIFYING FEATURES			CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.	

CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	12 of 22	Cortez	Walter	A	None
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
517 Rampart	Los Angeles	90012	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	510	165	11-2-71	34

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C.	MCJ
AKA:	MONIKER: Chumpacabra / BOOKING #: 5796550

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	13 of 22	Cisneros	Edward	R	None
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
1152 1/2 Whittier Blvd	Whittier	90603	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	600	150	4-8-80	24

CHARGE	WHERE DETAINED OR CITE #
245 (c) P.C., 404 (b) P.C., 404.6 P.C.	MCJ
AKA:	MONIKER: / BOOKING #: 8272202

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	14 of 22	Ruiz	Felipe	N.M.I.	D3895365
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
357 S. McDonnel	Los Angeles	90012	(323) 263-8869		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	509	130	12-3-70	34

CHARGE	WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C.	MCJ
AKA:	MONIKER: Harpo / BOOKING #: 8385467

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

VEHICLE # / SUSPECT STATUS / VICTIM	IMPOUNDED / STORED / OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER	IDENTIFYING FEATURES	CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.				

*CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE& No.)
S	15 of 22	Gonzales	Ray	N.M.I.	None
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
710 S. Duncan Ave,	Los Angeles	90022	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bln	Bro	508	200	12-5-71	33

CHARGE	MONIKER	WHERE DETAINED OR CITE #	BOOKING #
404 (b) P.C., 404.6 P.C.	Duke	MCJ	7218164

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	16 of 22	Trigueros	Juan	C	None
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
620 N. Berendo	Los Angeles		None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Blk	Bro	509	180	4-25-71	33

CHARGE	MONIKER	WHERE DETAINED OR CITE #	BOOKING #
404 (b) P.C., 404.6 P.C.	Dead eyes	MCJ	8290343

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE& No.)
S	17 of 22	Montes	Roy	A	B7393593
RES. ADDR.	CITY	ZIP	RES. PHONE (Area Code)		
340 S La Feyette	Los Angeles	90012	None Given		
BUS. ADDR.	CITY	ZIP	BUS. PHONE (Area Code)		
Unemployed - L.A. County Jail Inmate			None		

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Grn	506	150	1-10-78	26

CHARGE	MONIKER	WHERE DETAINED OR CITE #	BOOKING #
404 (b) P.C., 404.6 P.C.		MCJ	8171764

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

VEHICLE # / #	SUSPECT STATUS / VICTIM	IMPOUNDED / STORED / OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER		IDENTIFYING FEATURES				CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.	

CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE& No.)
S	18of21	Benavente	Paul	L.	None
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
419 W. Broadway	Long Beach				None Given
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate					None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Bro	504	180	4-16-73	31

CHARGE	WHERE DETAINED OR CITE #
404(b)P.C., 404.6 P.C.	MCJ
AKA: MONIKER: Shorty	BOOKING # 7832953

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	19of21	Hines	Daniel	D	N8655763
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
14536 Dinard Av.	Norwalk	90650			None Given
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate					None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Bro	507	200	6-11-56	48

CHARGE	WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C., 594(b)(1)P.C.	MCJ
AKA: MONIKER:	BOOKING # 8043979

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE& No.)
S	20of21	Valenzuela	Daniel	N.M.I.	None
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
3027 Ashbury St.	Los Angeles	90012			None Given
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate					None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	H		Bro	Bro	504	170	11-4-58	46

CHARGE	WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C., 594 (b) (1) P.C.	MCJ
AKA: MONIKER:	BOOKING # 8043979

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

CLASSIFICATION # / LEVEL / STAT CODE

VEHICLE # / #	SUSPECT STATUS / VICTIM	IMPOUNDED / STORED / OUTSTANDING	LICENSE (STATE & No.)	YEAR	MAKE	MODEL	BODY TYPE	COLOR
REGISTERED OWNER		IDENTIFYING FEATURES				CHP 180 SUBMITTED: ☐ YES ☒ NO	GARAGE NAME & PH.	

CODE: V-VICTIM W-WITNESS I-INFORMANT R- REPORTING PARTY P-PARTY

CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				
CODE	# of	LNAME	FNAME	MNAME	SEX	RACE	ETHNIC ORIGIN	DOB	Age
RES. ADDR.	CITY	ZIP	VICTIM OF OFFENSE(S) (CLASSIFICATION) #:	RES. PHONE (Area Code)	Day Phone				
BUS. ADDR.	CITY	ZIP	ENGLISH SPEAKING ☐ YES ☐ NO	BUS. PHONE (Area Code)	Day Phone				

CODE: S-SUSPECT SJ-SUBJECT M-PATIENT S/V -SUSPECT / VICTIM SJ / V - SUBJECT / VICTIM

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
S	21 of 21	Newell	Jonathon	N.M.I.	None
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
14640 Halldale St.	Gardena				(310) 769-6897
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)
Unemployed - L.A. County Jail Inmate					None

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age
M	W.		Blk	Bro	510	170	9-11-83	21

CHARGE	WHERE DETAINED OR CITE #
404 (b) P.C., 404.6 P.C.	MCJ
AKA:	MONIKER: JD / BOOKING #: 7945130

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age

CHARGE	WHERE DETAINED OR CITE #
AKA:	MONIKER: / BOOKING #:

CODE	# of	LNAME	FNAME	MNAME	DRIVER'S LICENSE (STATE & No.)
RES. ADDR.	CITY	ZIP			RES. PHONE (Area Code)
BUS. ADDR.	CITY	ZIP			BUS. PHONE (Area Code)

SEX	RACE	ETHNIC ORIGIN	HAIR	EYES	HGT.	WGT.	DOB	Age

CHARGE	WHERE DETAINED OR CITE #
AKA:	MONIKER: / BOOKING #:

76C30OG-SH-R-49A (Rev. 10/99)

11 011334

DATE	TIME RECEIVED	TAG #	URN #	PAGE
1-8-05	2245 Hours	N/A	005-00024-5100-057	9 OF 15

INPUT / CHECKED NCIC, CII, ETC.:	EVIDENCE HELD:	EVIDENCE ENTERED IN: PATROL (Ledger/Page #) 21/181 NARCOTICS (Ledger/Page #) SAFE (Ledger/Page #)	BY
☐ YES ☒ NO	☒ YES ☐ NO		Morales, Joseph #486791

EVIDENCE HELD:
☐ BLOOD ☐ BULLET ☐ BULLET CASING ☐ CHECKS ☐ CLOTHES ☐ CREDIT CARDS ☐ ELECTRONIC EQUIPMENT ☐ FINGERPRINTS
☐ FOOTPRINTS ☐ FRAUD DOCUMENTS ☐ GSR ☐ HAIR ☐ JEWELRY ☐ MISCELLANEOUS ☐ MONEY ☐ NARCOTICS
☐ OTHER PRINTS ☐ PAINT ☐ PHOTOGRAPHS ☐ RAPE KIT ☐ RECEIPTS ☐ TOOLS ☐ URINE ☐ VEHICLE IMPOUNDED
☐ VEHICLE PARTS ☒ WEAPONS ☐

PROPERTY CODE: S-STOLEN R-RECOVERED L-LOST F-FOUND E-EMBEZZLED D-DAMAGED EV-EVIDENCE
(Use all applicable Codes; for example, if property is both Stolen and Recovered, Code is S/R)

RELEASED TO

CODE	ITEM #	QUAN.	DESCRIPTION (Include kind of article, trade name, identifying numbers, physical description, material, color, condition, age and present market value)	SERIAL #	VALUE
D	1	5	Seven porcelain sinks valued at $479.00 each		$3353.00
D	2	5	Five metal tables valued at $179.00 each		$895.00
EV	1	1	One envelope containing one 13 inch metal pipe		
EV	2	1	One envelope containing one 3 inch broken porcelain piece		

PART I STATISTICAL INFORMATION

PROPERTY					
TYPE OF PROPERTY	STOLEN	RECOVERED	TYPE OF PROPERTY	STOLEN	RECOVERED
CLOTHING/FURS	$	$	JEWELRY	$	$
CONSUMABLE GOODS	$	$	LIVESTOCK	$	$
CURRENCY/NOTES	$	$	LOCAL STOLEN VEHICLES	$	$
FIREARMS	$	$	MISCELLANEOUS	$	$
HOUSEHOLD GOODS	$	$	OFFICE EQUIPMENT	$	$
			TV/RADIO/STEREO	$	$

VICTIM OF SEX CRIMES REQUEST FOR CONFIDENTIALITY

PURSUANT TO SECTION 293(a) OF THE CALIFORNIA PENAL CODE, YOU ARE INFORMED THAT YOUR NAME WILL BECOME A MATTER OF PUBLIC RECORD, UNLESS YOU REQUEST THAT IT REMAIN CONFIDENTIAL AND NOT BE A PUBLIC RECORD, PURSUANT TO SECTION 6254 OF THE GOVERNMENT CODE.

I, _____ HEREBY (DO) (DO NOT) ELECT TO EXERCISE MY RIGHT TO PRIVACY.

SCREENING FACTORS

YES	NO		YES	NO	
☒	☐	1. SUSPECT IN CUSTODY	☒	☐	7. GENERAL SUSPECT DESCRIPTION
☒	☐	2. SUSPECT NAMED/KNOWN	☐	☒	8. GENERAL VEHICLE DESCRIPTION
☒	☐	3. UNIQUE SUSPECT IDENTIFIERS	☐	☒	9. UNIQUE M.O. OR PATTERN
☐	☒	4. VEHICLE IN CUSTODY	☒	☐	10. SIGNIFICANT PHYSICAL EVIDENCE
☐	☒	5. UNIQUE VEHICLE IDENTIFIERS	☐	☒	11. TRACEABLE STOLEN PROPERTY
☐	☒	6. WRITER / REVIEWER DISCRETION	☐	☒	12. MULTIPLE WITNESSES

On the indicated date, I was assigned as the 3000 floor Prowler. When I reported to my assigned work area, I was informed by deputy personnel that a major disturbance had begun in Module 3100/3300, prior to the beginning of my shift. I was told that several inmates had begun to throw objects at deputies, had flooded their rows with water, and had vandalized their cells. For further information, refer to URN # 405-00023-5100-057.

Morales?

My partner, Deputy McMullen (#292825), and I, went to Module 3100/3300 to further investigate the disturbance. As we entered the module, several unknown inmates on 3300 Able Row, (later identified as S/1 Reyes, Gerardo #6909744, S/2 Morales, Francisco #7943274, S/3 Tafoya, Rudy #7745640, S/4 Morales, Erick #7747361, S/5 McGhee, Timothy #7596556, S/6 Trujillo, Timothy #8102843, and S/12 Cortez, Walter #5796550) began cursing at us and started throwing broken porcelain, fruit, and other objects at us. We dodged these objects to avoid being struck. Deputy McMullen and I went upstairs to get out of the way of the objects being thrown at us. From upstairs, I noticed that both Able and Baker Rows were littered with trash and flooded with water and other debris. We heard the inmates on the rows banging unknown objects on their cell gates and yelling profanities at deputy personnel. I saw S/1 Reyes (from 3300 A6) holding a large metal pipe in his hands and banging it on his cell gate.

Deputy McMullen and I began to smell smoke and saw multiple fires on 3300 Able Row. The fires were set by igniting combustible materials ranging from blankets and linen, to reading material. Deputy McMullen took out the fire hose from the 3300 upper security cage and responded to Charlie Row, which is directly above Able Row. From Charlie Row, Deputy McMullen began to extinguish the fires on 3300 Able Row. As he was extinguishing the fires, I saw S/1 Reyes, S/2 Morales, S/3 Tafoya, S/4 Morales, S/5 McGhee, and S/6 Trujillo throw large porcelain pieces at him from their cells. I saw Deputy McMullen get hit above his right hand with a piece of porcelain that S/1 Reyes threw at him. I took the fire hose from Deputy McMullen and began to extinguish the remaining fires on 3300 Able Row. As I was extinguishing the fires, a large piece of porcelain narrowly missed hitting me in my face.

After extinguishing the fires, I immediately notified Sgt. Arnaldo (#002351) of the incident.

Sgt. Arnaldo and Lt. Martin (#235125) responded to Module 3100/3300 for further investigation. After evaluating the escalating disturbance in the modules, Sgt. Arnaldo and Lt. Martin sought and obtained approval from the MCJ Unit Commander, Captain Clark (#154962) to activate the Emergency

Response Teams, as well as the Extraction Team.

Under the direction of Sgt. Wilson (#225755), ERT #1 proceeded down 3300 Able Row in an effort to stop the disturbance. As ERT #1 entered the row, S/1 Reyes, S/4 Morales, and S/5 McGhee began to throw broken porcelain pieces from their cell sinks at deputy personnel. ERT #1 shield deputies deflected the porcelain that was thrown at them with their shields. All the inmates on 3300 Able Row shouted profanities at ERT #1 as it entered the row.

All the inmates on the row were ordered to put their hands through their respective cell gate tray slots and submit to handcuffing. The majority of the inmates on the row complied, except for S/1 Reyes, S/2 E. Morales, S/3 Tafoya, S/4 F. Morales, S/5 McGhee, S/8 Trujillo, and S/12 Cortez. They refused to be handcuffed and ignored the commands of deputy personnel. They shouted profanities and covered themselves with their cell mattresses and with towels tied around their faces. This was to negate the effects of the O.C. spray and the pepperball. Sgt. Wilson directed the ERT #1 pepper ball and Oleoresin Capsicum (OC) deputies to deploy their tactical weapons into each of their cells. The tactical weapons had a positive effect on S/2 Morales, S/3 Tafoya, S/4 F. Morales, S/8 Trujillo, and S/12 Cortez. These inmates were handcuffed and escorted to the 3000 floor hallway. The tactical weapons had a negative effect on S/1 Reyes and S/ 5 McGhee, who still refused to be handcuffed. Sgt. Fredendall (#279923) directed the extraction team to enter S/1 Reyes' and S/5 McGhee's cell and handcuff them. The extraction team was successful and S/1 Reyes and S/5 McGhee were handcuffed and escorted to the 3000 floor hallway. For further information, refer to the attached supplemental reports.

Under the direction of Sgt. Thomas (#292882), ERT #2 was directed to proceed to 3100 Baker Row and remove the inmates from that row. The inmates were ordered to put their hands through their cell gate tray slot and submit to handcuffing. Several inmates (later identified as S/10 Morones #7757920, S/11 Tobias #8402269, S/13 Cisneros #8272202, S/14 Ruiz #8385467, S/15 Gonzalez #7218164, S/16 Trigueros #8290343, and S/17 Montes 8171764) refused to be handcuffed. They shouted profanities and covered themselves with their cell mattresses and with towels tied around their faces. S/13 Cisneros began throwing unknown objects at deputy personnel through his cell gate and repeatedly shouted "fuck that!" Sgt. Thomas directed the ERT 2 pepper ball and OC deputies to deploy their tactical weapons into each of their cells. The tactical weapons had a positive effect and the inmates were handcuffed and escorted to the 3000 floor hallway. For further information, refer to the attached supplemental reports.

While ERT #2 was still in the process of removing the inmates from 3100 Baker Row, unidentified inmates in 3300 Baker Row set several fires by burning a variety of combustible material from their cells. Deputies Jove #475352, Morean #472761 and Perry #445775 responded to the row and extinguished the fire, by dousing the flames with water from the fire hose. During that time, Deputy Jove was overcome by smoke inhalation and had to be removed from the row for treatment.

Once 3100 Baker Row was secured, Sgt. Wilson directed ERT #1 to proceed to 3300 Baker Row to remove the inmates from that row. The inmates were ordered to put their hands through their cell gate tray slot and submit to handcuffing. Three inmates (later identified as S/7 Gudino #8140658 and S/18 Benavente #7832953 and S/21 Newell #7945130) refused to comply with the orders given to them and would not allow ERT 1 deputies to handcuff them. S/7 Gudino and S/18 Benavente also covered themselves with their cell mattresses and with towels tied around their faces. Sgt. Wilson directed the ERT 1 pepper ball and O.C. deputies to deploy their tactical weapons into these inmates' cells. The tactical weapons had a positive effect and they were handcuffed and escorted to the 3000 floor hallway. S/21 Newell was in the 3300 Baker Row shower and ignored deputies requests to submit to handcuffing. Sgt. Wilson directed the ERT #1 pepper ball and O.C. deputies to deploy their tactical weapons into the Baker Row shower. The tactical weapons had a positive effect and S/21 Newell was handcuffed and escorted to the 3000 floor hallway. The remaining inmates on the row were also escorted to the 3000 floor hallway without further incident. For further information, refer to the attached supplemental reports.

Under the direction of Sgt. Wilson and Sgt. Thomas, ERT #1 and ERT #2 were utilized to systematically remove inmates from 3100 Denver Row and 3300 Charlie and Denver Rows. The inmates on these rows complied with deputies orders and submitted to handcuffing. They were escorted to the 3000 floor hallway without further incident.

The Los Angeles City Fire Dept., Engine # 4, under the command of Captain Ciemens, responded to the 3000 floor hallway at 0030 hours. They rendered medical aid to Deputy Jove. M.C.J. personnel utilized large fans to remove any permeating smoke from Module 3100/3300.

Twin Towers ERT #1 responded to the 3000 floor hallway at 0200 hours to provide additional security during the disturbance.

Once the disturbance was quelled, deputy personnel conducted a search of each cell for contraband and to assess the damage to the cells. During a search of 3300 Able Row, it was discovered that the cells belonging to S/1 Reyes, S/3 Tafoya, S/4 Morales, S/5 McGhee, S/6 Trujillo, S/19 Hines, and S/20 Valenzuela had broken sinks. The sinks were completely destroyed and the porcelain pieces from the sinks (EV 2) were used by the inmates housed in these cells against deputy personnel. These sinks were not broken prior to the disturbance. A 13 inch metal pipe (EV 1) was also recovered from S/1 Reyes' cell.

During a search of 3300 Baker Row, it was discovered that the cells belonging to S/7 Gudino, S/8 Sapien and S/10 Castro had broken metal tables. S/10 Morones and S/11 Tobias, from 3100 Baker Row had also broken their metal tables. These metal tables were not broken prior to the disturbance.

The inmates who were exposed to O.C. spray and to the pepperball were treated by nursing personnel from the Men's Central Jail Clinic.

Digital photographs were taken of the damaged cells for evidentiary purposes. (Submitted with this report.) The metal pipe (EV-1) and the broken ceramic (EV-2) that struck Dep. McMullen were booked into evidence.

S/1 Reyes is currently incarcerated for the charge of 187(A) PC and his next pending court date is 1-19-05 per the SI01 screen. S/1 Reyes was rehoused in Module 3301.

S/2 Morales is currently incarcerated for the charge of 12021 (A) PC and his next pending court date is 1-11-05 per the SI01 screen. S/2 Morales was rehoused in Module 3301.

S/3 Tafoya is currently incarcerated for the charge of 207 (A) PC and his next pending court date is 1-26-05 per the SI01 screen. S/3 Tafoya was rehoused in Module 4600.

S/4 Morales is currently incarcerated for the charge of 187(A) PC and his next ending court date is 2-9-05 per the SI01 screen.

S/5 McGhee is currently incarcerate for the charge of 187(A) PC and his next pending court date is 2-3-05 per the SI01 screen. S/5 McGhee was rehoused in Module 1700.

S/6 Trujillo is currently incarcerated as a court returnee and his next court date is 2-8-05 per the SI01 screen.

S/7 Gudino is currently incarcerated for the charge of 187 (A) PC and his next pending court date is 1-18-05 per the SI01 screen.

S/8 Sapien is currently incarcerated for the charge of 11377 (A) HS and his next pending court date is 1-25-05.

S/9 Castro is currently incarcerated for the charge of A187 (A) PC and has no pending court date per the SI01 screen.

S/10 Morones is currently incarcerated for the charge of 187 (A) PC and has no pending court date per the SI01 screen.

S/11 Tobias is currently incarcerated as a court returnee and his next pending court date is 1-31-05 per the SI01 screen.

S/12 Cortez is currently incarcerated for the charge of 236 PC and his next pending court date is 1-12-05 per the SI01 screen.

S/13 Cisneros is currently incarcerated for the charge of 211 PC and his next pending court date is 1-20-05 per the SI01 screen. S/13 Cisneros was rehoused in Module 3300.

S/14 Ruiz is currently incarcerated for the charge of 11351.5 HS and his next pending court date is 1-18-05 per the SI01 screen. S/14 Ruiz was rehoused in Module 3300.

S/15 Gonzalez is currently incarcerated for the charge of 3056 PCPVF and his next pending court date is 2-18-05 per the SI01 screen. S/15 Gonzalez was rehoused in Module 3300.

S/16 Trigueros is currently incarcerated for the charge of 69 PC and he has no pending court date per the SI01 screen. S/16 Trigueros was rehoused in Module 3300.

S/17 Montes is currently incarcerated for the charge of 11350(A) HS and his next court date is 1-19-05, per the SI01 screen.

S/18 Benavente is currently incarcerated for the charge of 187(A) PC and his next pending court date is 2-9-05, per the SI01 screen.

S/19 Hines is currently incarcerated for the charge of 3056 PC and has no pending court date, per the SI01 screen.

S/20 Valenzuela is currently incarcerated for the charge of 11378.5 HS and has no pending court date, per the SI01 screen.

S/21 Newell is currently incarcerated for the charge of 187(A) PC and his next court date is 2-16-05.