No. _____

IN THE

# Supreme Court of the United States

JASON GREEN,

*Petitioner,*

v.

WARREN L. MONTGOMERY,

*Respondent.*

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

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## INDEX TO APPENDIX

FILED

MAY 31 2023

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

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JASON GREEN,<br><br>Petitioner-Appellant,<br><br>v.<br><br>WARREN L. MONTGOMERY, Warden,<br><br>Respondent-Appellee. | No. 21-56166<br><br>D.C. No.<br>2:18-cv-06443-JLS-SHK<br><br>MEMORANDUM* |

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| LYNETTE PENNINGTON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>JANEL ESPINOZA, Acting Warden of the Central California Women's Facility; DERRAL G. ADAMS, Warden,<br><br>Respondents-Appellees. | No. 21-56174<br><br>D.C. No.<br>2:17-cv-07004-JLS-SHK |

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 8, 2023
Pasadena, California

Before: KLEINFELD, WATFORD, and COLLINS, Circuit Judges.

Jason Green and Lynette Pennington appeal the district court's dismissals of their habeas petitions, in which they argue that certain tactics employed by the prosecution violated their rights to due process.

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review the district court's decisions de novo and decide whether the state court's decision falls afoul of the standards set forth in § 2254(d). *Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). We decide it does not, so we affirm.

As a preliminary matter, we reject Green and Pennington's argument that the California Court of Appeal's decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The court did not base its decision on a factual determination that "the prosecutor's dismissal and refiling was not motivated by the improper purpose of *forum shopping*" (emphasis added). Rather, it decided as a matter of law that a defendant's right to due process does not prohibit the prosecution from forum shopping, "even if the purpose of the refiling was to avoid an adverse ruling."

Next, Green and Pennington also fail to establish that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Their burden is heavy, as the state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Green and Pennington did not identify a Supreme Court decision clearly holding that prosecution forum-shopping violates due process. The three Supreme Court cases they cite recognized different aspects of a state prosecution that may contravene due process: in *Chambers v. Mississippi*, it was state evidentiary rules that arbitrarily excluded the confession of a true murderer, 410 U.S. 284, 302 (1973); in *Donnelly v. DeChristoforo*, misrepresentation of evidence by the prosecution, 416 U.S. 637, 646 (1974); and in *Lisenba v. California*, the prosecution's use of a coerced confession, 314 U.S. 219, 236–37 (1941). But none of them concerned prosecution forum-shopping. To the extent that Green and Pennington cite *Chambers* and *Lisenba* for the proposition that a prosecutor's actions might offend due process even though permitted under state law, we agree

but hold below that the state court's decision is consistent with that clearly established rule.

Without the support of a clearly on-point Supreme Court precedent, Green and Pennington's argument boils down to the claim that their cases fit the general principle that prosecutorial misconduct violates due process when it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. But state courts are only required to extend an abstract principle to a new scenario when the principle "so obvious[ly]" applies "that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Harrington*, 562 U.S. at 103). Here, we decide that fairminded jurists may disagree on whether the alleged misconduct meets the Supreme Court's demanding standard. Consequently, the state court's refusal to extend existing law does not constitute an unreasonable application of federal law.

Lastly, Green and Pennington are mistaken in arguing that the California Court of Appeal held that because the prosecution's forum-shopping practice was permitted by state law, it necessarily satisfied the federal Constitution's due-process requirement. This argument reads the state court's statement out of context. The court did decide that the prosecution complied with state law in

refiling charges against Green and Pennington. Nevertheless, it also considered whether the conduct violated their rights to due process under the federal Constitution, and gave independent and adequate reasons for holding that it did not.

**AFFIRMED.**

Filed: 11/15/16

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN



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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JASON GREEN,<br><br>Defendant and Respondent. | B256776<br><br>(Los Angeles County<br>Super. Ct. No. BA396890) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LYNETTE PENNINGTON,<br><br>Defendant and Respondent. | B259139<br><br>(Los Angeles County<br>Super. Ct. No. BA396890) |

APPEALS from judgments of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed as modified.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Jason Green.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Lynette Pennington.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

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Jason Green and Lynette Pennington appeal from the judgments entered after a jury convicted them of conspiracy to murder Garry Dean, their codefendant, and found true a special criminal street gang enhancement allegation. Pennington was also found guilty, along with Dean, of the second degree murder of Alton Batiste.[1] Green and Pennington both contend the prosecutor engaged in prejudicial misconduct when he dismissed the case after receiving an adverse pretrial ruling and refiled it in a different district, a claim we rejected in Dean's appeal. (See *People v. Dean* (Apr. 25, 2016 (as mod. May 16, 2016), B253077) [nonpub.] at pp. 16-20.) Green further contends the trial court committed prejudicial error by admitting evidence of uncharged murders, by denying his motions to sever his trial from that of his codefendants and by improperly imposing a five-year prior serious felony sentence enhancement. Pennington also challenges the trial court's ruling admitting evidence of the uncharged murders and contends the evidence was insufficient to convict her of Batiste's murder or the conspiracy to murder Dean. We affirm

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[1] Pennington, Green and Dean were charged in the same information and tried together. Dean's case was heard by one jury; Pennington's and Green's by a second jury. We reversed Dean's conviction based on errors committed by the court and prosecutor during closing argument that do not affect the appeals of Pennington and Green. (*People v. Dean* (Apr. 25, 2016) (as mod. May 16, 2016), B253077) [nonpub.].)

both judgments but modify Green's sentence to correct the statutory basis for his prior serious felony sentence enhancement and the sentences of both defendants to correct the statutory fines imposed.[2]

## FACTUAL AND PROCEDURAL BACKGROUND[3]

1. *Overview of the Murders of Alton Batiste, Travon Powers and Dawan Banks*

The complicated facts presented at trial, as well as the evidentiary rulings and arguments of counsel at the center of Green's and Pennington's appeals, arise from three, perhaps related, murders.

a. *Alton Batiste.* At approximately 1:30 a.m. on September 23, 2002 a van crashed into the divider on the Santa Monica Freeway in West Los Angeles. Dean, a member of the Center Park Bloods, was one of the individuals in the van. Pennington, also a member of the Center Park Bloods, was the driver of the van, which was registered to Robert Burke, her incarcerated boyfriend. Batiste, severely injured by knife wounds, was in the van when it crashed. He died nine days later.

b. *Travon Powers.* Several hours before the van crash Batiste had been in a car with Powers, a member of Centinela Park Family, also a Bloods-affiliated criminal street gang. Powers's body was found shortly before midnight on September 22, 2002 in Center Park, the neighborhood claimed by the Center Park Bloods. The car, which belonged to Powers's

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[2] After briefing was completed in this appeal, Green's appellate counsel filed directly with this court a petition for a writ of habeas corpus asserting a claim of ineffective assistance of counsel. That petition will be separately addressed by the court.

[3] With one exception, the evidence presented to Green and Pennington's jury was the same as that presented to Dean's. (See fn. 5, below.) We repeat our summary of the evidence from Dean's appeal here, modestly revised, to focus on the arguments made by Green and Pennington.

girlfriend, Tessy Kennedy, had crashed into a low fence nearby; blood stains were found on its front seats. According to Kennedy, Powers and Batiste had left an Inglewood motel together in her car around 10:20 that evening to look for drugs.

c. *Dawan Banks*. Powers's murder occurred several days before he was scheduled to testify at a preliminary hearing to identify three members of the Neighborhood Pirus, another Bloods-affiliated gang, as the individuals who had shot at Powers and Banks, also a Centinela Park Family member, in February 2002. Banks was killed; and, although Powers escaped, his finger was shot off.

The prosecution's theory was that Powers had been killed because he intended to testify against three Bloods gang members and that Batiste, who had been with Powers, had likely been killed by Dean and Pennington because he had been a witness to Powers's murder. An alternate possibility suggested by Dean's defense counsel was that Batiste had been stabbed in Kennedy's car and was simply being transported to the hospital in the van in which Dean was riding when it crashed. In connection with that theory, Dean's counsel questioned the source of the blood found on the front seats of Kennedy's car.

2. *The Murder of Alton Batiste*

In the early morning of September 23, 2002 a witness seated in a car overlooking the Santa Monica Freeway in West Los Angeles saw a van travel across the freeway lanes, hit the freeway divider and come to a stop. An African-American man wearing a light-colored shirt got out of the van, followed by another African-American man wearing a red shirt. The witness later identified Dean as the man in the red shirt. Dean and the second man pulled an individual out of the van and carried him across the lanes to the shoulder of the freeway. The first two men returned to the van, pulled out what could have been a small person or a duffel bag and carried it to the side of the freeway. The two uninjured men wandered around, looking confused. The man in

the light-colored shirt walked halfway up the embankment above the shoulder of the freeway and then returned to the van. The witness called the police emergency hotline.

By the time emergency personnel arrived, the two men had disappeared. The witness directed them to the injured man on the side of the freeway, who was later identified as Batiste. Batiste was lying on his back in a pool of blood. He was moving, although incoherent, and was transported to UCLA Medical Center. California Highway Patrol Officer Arthur Dye inspected the van. According to Dye, the rear passenger door of the van was inoperable. The front interior of the van was covered in blood; and, although the driver's side windshield was cracked, there was no glass in the van or any blood or hair on the windows. Blood was smeared on the dashboard in front of the passenger seat, and a red jersey soaked in blood lay in front of the passenger seat. The passenger seat was bent forward toward the steering wheel, and both the steering wheel and the key in the ignition were bent to the side. A purse on the floor of the van contained Pennington's checkbook and California identification card. Dye also found a key from an Inglewood motel in the fast lane of the freeway next to the van. Dye ordered the van towed from the freeway.

After CHP officers had arrived, the witness saw Dean using a pay phone near the intersection of National Boulevard and Westwood Boulevard and pointed him out. Dean wore a red jersey, dark pants and red Converse sneakers. Small drops of blood were on Dean's shirt and shoes, and he had a bloodstained red bandana wrapped around his right hand. Dean told the officers he had been in the van collision and was using the pay phone to call for help.[4] Although he initially told the officers he had been in the rear passenger seat, he later said he was in the

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[4] All tapes of emergency calls concerning the incident were lost. The initial dispatch reported three to four Black men had emerged from the van, not including Batiste, who was carried from the van.

front seat.[5] He provided his name, address and telephone number at the officers' request. When asked about the injured passenger, Dean answered, "He's not my friend. I don't even know the guy." When Dean complained about pain in his hand and said he felt ill and dizzy, one of the officers called an ambulance. The officers left after receiving a radio call about another traffic collision.

Officer Dye went to UCLA Medical Center after leaving the accident scene and learned Batiste had suffered several puncture wounds.[6] The other officers returned to the pay phone but could not locate Dean. The case was assigned to Los Angeles Police Detective Joel Price for investigation.

3. *LAPD's Investigation of Batiste's Murder*

Later in the morning on September 23, 2002 Pennington sought medical treatment at a Gardena hospital, complaining of pain in her left shoulder and a laceration above her left eye. She reported she had been punched in the face by a man and had lost consciousness. After treating and discharging her, the hospital reported the assault to the police. Pennington told the police she had been carjacked that night while driving Burke's van. Detective Price spoke with Pennington two days later after learning she had reported the van stolen. According to Price, Pennington was vague about the details but claimed she had been carjacked between 12:30 and 1:00 a.m. She said she had been

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[5] Dean's jury, but not Green and Pennington's, heard testimony that Dean had identified the driver of the van as his girlfriend, "Nette."

[6] Batiste suffered three stab wounds to his forehead that were forceful enough to penetrate his skull. Batiste also suffered stab wounds to the right front of his torso that penetrated his chest wall, diaphragm and liver and cuts to his right external jugular vein, trachea and esophagus. He had fractures of the eye socket and nose from blunt force trauma, scrape marks on his left shoulder and forearm that looked like road rash and abrasions on his knuckles. He died on October 2, 2002.

punched in the head, lost consciousness and was concerned she had been sexually assaulted. She did not explain why she waited to obtain treatment or to report the van as stolen. On September 26, 2002 Pennington called the yard where the van had been towed to ask if she could retrieve her belongings. She said her boyfriend, Burke, owned the van and asked when it would be released to her. At the time, no one at LAPD had told Pennington the van had been impounded.

On October 1, 2002 Detective Price accompanied an LAPD criminalist to the towing yard to search the Burke van. Price observed the van's rear door was hinged (rather than sliding) but fully operable and saw drops of blood inside the doorframe. The criminalist found 27 stains that tested presumptively positive for blood and collected the bloodstained red shirt, the purse, some keys on a chain, a sneaker with red stripes, two cameras, a phone and a phone battery. DNA profiling on various stains recovered from the van were linked to Batiste, Pennington and Dean.[7] A stain from the upholstery of the front passenger seat matched Batiste's profile; Dean and Pennington were excluded as contributors. A swab from the steering wheel was primarily attributed to Batiste, but Pennington could not be excluded. A stain on the middle bench seat contained primarily Dean's DNA but Pennington could not be excluded. A stain from the carpet between the middle and rear bench seats contained Dean's DNA. None of the tested stains contained a mix of Dean and Batiste's DNA. The drops in the interior doorjamb of the rear passenger door, as well as stains on the exterior of the door, were never tested.

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[7] None of the swatches tested matched Green's DNA, although he could not be excluded as a contributor to a sample drawn from the red shirt. As the criminalist testified, the source of the DNA was not necessarily blood; it could have been saliva, sweat or any other DNA cell source.

In January 2003 Detective Price, who had unsuccessfully searched for the Batiste murder weapon in October 2002, returned to the freeway embankment with a CalTrans crew that cut the vegetation to facilitate the search. A seven-inch kitchen knife was found near the location described by the witness to the collision. Forensic tests did not recover any trace of fingerprints or blood from the knife.

4. *The Possible Powers Connection*

Early in the investigation Detective Price learned the Inglewood Police Department (IPD) wanted to question Batiste, who remained in a coma, about the Powers murder, which had occurred an hour or so before the van collision. Kennedy told Inglewood police she and Powers had gone at Batiste's invitation to an Inglewood motel that night to party with Batiste and his girlfriend. A few days earlier an IPD officer had relocated Powers to a downtown Los Angeles hotel and warned him not to return to Inglewood before the hearing. When Powers and Kennedy arrived at the motel, there was no party. Powers and Batiste then left together in Kennedy's car but did not return. According to Kennedy, Powers, known as "Lil J-Rock," had a reputation as a snitch. After a shooter who yelled "J-Rock" shot and killed a Rolling Crips gang member, Powers, who was supposed to "take the rap," was "green-lighted," or targeted, by Bloods-affiliated gangs because he told the police another Bloods gang member was known as "Big J-Rock." Big J-Rock was later convicted of murder for the shooting. Kennedy also testified Powers had told her Batiste's sister was dating one of the Neighborhood Piru gang members who had shot at Powers and killed Banks. Batiste's wife told Price that Batiste had received several phone calls from that person.

5. *The Wiretap Evidence*

Shortly after Batiste's death on October 2, 2002, LAPD and IPD detectives jointly obtained an order authorizing wiretaps on telephone numbers linked to the deaths of Batiste and Powers.

The numbers included Pennington's landline and cell phone and the number Dean had given the officer the night of the crash.[8] A Los Angeles County jail number was added when detectives realized Pennington was receiving numerous calls from someone known as "B-Lok," eventually identified as Green, who had been incarcerated following his negotiated plea to a charge of assault with a firearm for shooting at Tyrone Ravenel, another Inglewood gang member. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. (Detective Price believed that the moniker Shady Blood, which the gang expert testified would indicate someone in the gang is dirty, dishonest or a snitch, referred to Dean and that the other gang members were conferring about killing Dean.) Pennington told Green she had spoken with CKay the previous evening and he had said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Green told Pennington not to talk on the phone and agreed that lives were at stake. He said, "On Blood, this gonna be handled," and indicated he would have to trust CKay. After that call Pennington called other gang members to set up a meeting.

A wiretapped conversation on December 5, 2002 between Dean and Pennington revealed that Dean also believed his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington where she had heard this information, and Pennington replied she had been hearing it "a whole lot." Dean denied talking and said he wanted to know who

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[8] Dean told Detective Price the number belonged to his girlfriend. The same number was listed in a phone book found in Pennington's purse under the name "Skoobee Red." On October 8, 2002 Price interviewed Pennington again about the carjacking and showed her a photographic lineup containing a picture of Dean. Pennington denied knowing anyone in the lineup.

was putting "mud" on him. When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing.

In a December 19, 2002 call Pennington told Green she would be visiting him the next day at the county jail. Green told her he had his "little flash cards" ready, and Pennington said she had hers as well. After listening to the call, Detective Price asked county jail deputies to seize any writings between Green and his visitor.[9] The next day Los Angeles County Sheriff's deputies monitored Pennington's visit with Green and approached him after she left. Green attempted to put several small pieces of paper in his mouth but failed when the deputies grabbed his hand. The deputies retrieved several pieces of paper, which Price reconstructed. The first note, written by Green, read, "The business is: To find out exactly where that nigga is at. . . . I'm sure you know by now. Shady in the Queen streets tellin' niggas I did that shit. On Bloods. Babe, that nigga got to be X'd quick." A second page read, "The business is: Ckay, Bo-Legs & Chip get'in Shady—Now! . . . As far as any pillow talkin Shady did, that would be considered 'hearsay' . . . in the court of law. So we'll get the hoe when we can. We need Shady X'd now!!! Like yesterday." The third page read, "Shady is trying to fuck us off for some reason! I assume because (he fucked up from the very start!) when he gave your name. Now he can't stop telling." The reverse side gave instructions on contacting a Bloods prison gang shot caller "to get his ass down here immediately . . . ." Later that day Green was recorded telling another girlfriend that the assault

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[9] Visitor conversations were monitored, and jail rules prohibited the exchange of information in writing during visits.

charge for which he had been incarcerated was like a "speeding ticket" in comparison to "other bullshit" that was happening. He also expressed concern he was in custody when he should be preparing for his future with a lawyer such as "Shapiro" or "Johnny Cochran."

Meanwhile, after Dean was jailed for a probation violation, Detective Price met with him twice to warn him his life was in danger and to seek his cooperation. Dean denied being involved in, or knowing anything about, the freeway collision or the murders of Powers and Batiste. He also denied he had been the person questioned at the phone booth the night of the accident even after he was told he had been identified by the CHP officers.

6. *The Initial Filing and Dismissal of Charges*

An information filed on March 1, 2010 in the West District (Airport Branch) of the Los Angeles County Superior Court charged Dean and Pennington with one count of first degree murder (Pen. Code, § 187, subd. (a))[10] and Pennington and Green with one count of conspiracy to murder Dean (§§ 182, subd. (a)(1), 187, subd. (a)). As to both the murder and conspiracy charges, the information alleged the crimes had been committed to benefit a criminal street gang. (§ 186.22, subd. (b)(4).)

While the case was pending in the West District, several pretrial motions were heard by Judge James Dabney, who had deemed trial to have commenced on April 23, 2012. On April 25, 2012 Judge Dabney heard argument on the People's request to present evidence related to the murder of Powers and the shooting (attempted murder) of Ravenel. To establish that Batiste had been killed because he had witnessed Powers's murder and that Green wanted Dean dead because he feared Dean would implicate him in the murder of Powers, the prosecutor proposed introducing the following evidence: (1) Two men were seen running from the scene of Powers's murder, one wearing a white shirt and one

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[10] Statutory references are to this code unless otherwise stated.

wearing a red shirt. Photographs developed from the camera found in the crashed van showed Green wearing a bright red jersey and throwing gang signs in Center Park. (2) A Bryco nine-millimeter handgun with an intact serial number was found in Kennedy's car after Powers was killed. The gun was loaded with rounds manufactured by the Fiocchi and Federal companies. Two expended Fiocchi rounds were found at the scene of Powers's murder. When Green and Pennington were detained leaving an apartment a few weeks after the murders of Powers and Batiste, the police found a gun box in the apartment with the same serial number as the gun found in the car, as well as a partially filled tray of nine-millimeter ammunition that included Fiocchi and Federal rounds. (3) The casings found at the scenes of the Powers and Ravenel shooting were fired from the gun found in Kennedy's car. (4) Powers was killed because he twice had provided information to the police, once when he told investigators there was more than one J-Rock, a comment that led to the other J-Rock's conviction of murder, and later when he was scheduled to testify at the preliminary hearings of the three Neighborhood Pirus charged with shooting him and killing Banks. (5) Powers and Batiste had left the Inglewood motel together the night of their murders.

All defendants opposed admission of the evidence proposed by the People, arguing there was no evidence the gun linked to Green had, in fact, been used to kill Powers[11] or that any of the defendants had been present at the Powers shooting. Defense counsel argued the People were simply seeking to bolster the weak Batiste case with inflammatory and prejudicial evidence from the uncharged murders. (See Evid. Code, § 352.) Judge Dabney agreed and ordered the People not to mention the gun evidence or the Ravenel shooting. He indicated he was still

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[11] The only bullet recovered from Powers's body was damaged and yielded no usable identifying marks.

undecided about allowing evidence Powers had been murdered only hours before the van collision but instructed the prosecutor to assume that evidence would not be admissible.

After consulting with his supervisors, the prosecutor elected to dismiss the case: "[T]he People are unable to proceed . . . [and] will move to dismiss and immediately refile. I've informed counsel of our intention to file and to have the defendants arraigned tomorrow." Although the prosecutor did not mention the statutory ground for the dismissal, the minute order stated, "The People announce unable to proceed. On [the People's] motion, case is dismissed pursuant to section 1385."[12]

*7. Refiling of the Case in the Central District*

Instead of refiling the case in the West District, the prosecutor refiled it that same afternoon in the Central District under a new case number.[13] Green promptly moved to transfer the case to the West District, arguing the prosecutor had engaged in improper forum shopping after receiving an adverse evidentiary ruling from Judge Dabney in violation of defendants' right to a speedy trial and applicable dismissal statutes.[14]

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[12] In accepting the People's request to dismiss, the court rejected a defense request the case be refiled under the same number "because [the People are] not dismissing and refiling under section 1387. . . . That's not the nature of the refiling here."

[13] The new information added an allegation Pennington had personally used a deadly or dangerous weapon in the commission of the offense, but the allegation was dismissed at trial.

[14] Counsel for all three defendants vigorously participated in the hearings addressing the defense motions related to prosecutorial misconduct and the People's effort to introduce evidence related to the Powers and Banks murders. Accordingly, none of these pretrial issues was waived for purposes of this appeal.

The motion was heard on June 20, 2012 by Judge George Lomeli. Asked the basis for the dismissal, the prosecutor asserted the People had moved to dismiss pursuant to section 1382, rather than section 1385, because they were unable to proceed at that time based on the court's rulings. Pressed by the court, the prosecutor, who acknowledged it had been his case, stated he could not identify any missing evidence or witnesses that might have justified dismissal under section 1382 without reviewing his notes. Judge Lomeli then asked, "Can you represent to this court that it was done or not done because the rulings were going against you?" The prosecutor answered, "I can say that was a factor in the People's decision; that because of the evidentiary rulings, there were going to be many . . . facts that were not going to be presented to the jury that went to the guilt of the defendants." Concerned, Judge Lomeli said, "Well, I've got to tell you that that doesn't sit well with the court. In terms of using that as a tactical . . . strategy, if you will, because rulings were going against you . . . , I hope that isn't the case. . . . I'm going to rule without prejudice. And if counsel can provide a more accurate record—I hope that isn't a factor, that you announced unable to proceed because rulings were going against you. I've never seen anything like that. . . . But hearing what you have to say, that it is a possible factor, that's disturbing. I will allow you an opportunity to further brief that part of it . . . ." As to the defendants' requested transfer back to the West District, Judge Lomeli ruled the case had been properly filed in the Central District because certain of the conversations relevant to the conspiracy had occurred at the county jail[15] and previous rulings

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[15] Los Angeles Superior Court, Local Rules, rule 2.3(a)(3) requires the filing of a criminal complaint in the judicial district where the offense was alleged to have occurred and, within that district, at the courthouse serving the area where the offense allegedly occurred. However, when more than one offense is alleged to have been committed and the offenses were committed

were "irrelevant and non-binding." He repeated, however, he was not ready to rule on whether the prosecution had used the dismissal to gain a tactical advantage.

Following several continuances, Dean moved to dismiss the case based on prosecutorial misconduct and forum shopping. In opposition the prosecutor argued the People had originally dismissed the case to perform additional DNA testing and to transcribe additional conversations. The motion was heard by Judge Michael Abzug. When asked why the case had been dismissed, the prosecutor acknowledged the case was dismissed in part for reevaluation after the adverse evidentiary ruling. Judge Abzug concluded that, absent some showing of concrete prejudice, the prosecutor had acted within his discretion to dismiss and refile. Moreover, the possibility of a ruling more favorable to the People was speculative at this juncture. In denying the motion Judge Abzug found the dismissal had been motivated by the adverse ruling but was not made "to 'circumvent' it."

8. *Pretrial and Trial Proceedings*

a. *Judge Lomeli's pretrial rulings*

The case was assigned to Judge Lomeli for trial. After extensive argument over the admissibility of evidence relating to the Powers murder, Judge Lomeli ruled the evidence that Powers had been killed because of his intention to testify against three Bloods gang members, that he was in the company of Batiste when he was killed and that Batiste may have been killed because he was a witness to the Powers murder was admissible against all three defendants. Further, any evidence Dean had provided to the police about the murder of Powers was admissible against each defendant. Judge Lomeli concluded this evidence was relevant to the defendants' motives for the killing of Batiste and the conspiracy to kill Dean and would provide jurors with some

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in different districts, the rule permits the complaint to be filed in any district where one of the offenses was allegedly committed.

context for the charges. The People's request to introduce evidence relating to the firearm and ammunition linked to Green and Green's use of the gun to shoot Ravenel was denied because there was no definitive proof that weapon had been used to kill Powers and none of the defendants had been charged with his murder. The court also denied Green's motions to sever his trial from those of his codefendants and to sever trial of the conspiracy charge from the murder charge.

b. *The People's case*

At trial the People first presented evidence of the crash of Burke's van on the freeway, the condition of the van at the scene, the CHP officers' encounter with Dean and Batiste's injuries. IPD detectives then testified about their efforts to protect Powers before the preliminary hearing for the Neighborhood Piru gang members charged with shooting Banks and Powers's murder. Kennedy testified she and Powers had met with Batiste and his wife at the Inglewood motel and acknowledged she had made certain statements, which she characterized as having been based on rumors, to an IPD officer about Powers's gang history. IPD Officer Kerry Tripp testified as an expert witness about Inglewood gangs. According to Tripp, Inglewood was generally a Bloods-dominated city. The Center Park Bloods or CPB, to which Dean, Pennington and Green all belonged, was a small gang allied with other Bloods gangs, including the Neighborhood Pirus, the Inglewood Family and its spin-off, the Centinela Park Family. Tripp also testified that a gang member who cooperates with police and provides information about other gang members (a "snitch") could be killed and that an order-to-kill (a "green light") had been put out on Powers before his death. Based on a hypothetical that included facts mirroring the evidence about Powers's reputation as a snitch and subsequent murder and Batiste's interaction with Powers before Batiste was found stabbed, Tripp opined the killing of Batiste had benefitted the CPB gang.

In addition to the forensic testing of items and material from the van, the clothing Batiste had worn the night of the collision and the blood-soaked shirt found inside the van were tested for DNA. A partial DNA profile from the back of Batiste's shirt matched Dean's DNA profile. The profile itself was very rare.[16] Another partial profile of an unknown male was found on the inside back collar of the bloody red shirt that also bore Batiste's DNA. Dean's DNA profile was excluded from all stains tested on the red shirt.

William Chisum, a retired criminalist and blood-pattern expert, reviewed evidence taken from the van and concluded Batiste had been sitting in the front when he was stabbed by a person sitting behind him. Chisum opined Batiste was not stabbed until he was seated in the van and, because his blood was found on the steering wheel, the collision probably resulted from a struggle after Batiste was attacked. Chisum believed the damage to the seats, which were pushed forward to the left, was caused by someone pushing forward on the seat. Dean's bloody handprint on the middle seat was most likely made when he was leaning into the van while standing outside.

9. *The defense case*

None of the defendants testified. Marc Taylor, a forensic scientist called by Dean, reviewed the reports and photographs in the case and concluded it was not possible to determine whether the stabbing of Batiste had occurred in the van or the cause of the collision. The impact of hitting the freeway divider could have injured the van's occupants and derailed the front seat when a rear passenger was thrown into it by the collision. Taylor also explained no DNA mixture had been found, despite the fact such

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[16] The People's DNA expert testified only one in 22 quintillion unrelated individuals would be expected to share this profile; only one in one sextillion individuals in the African-American population would have it.

mixtures are usually present when a person cut his own hand while stabbing another person.

10. *The Verdicts and Sentencing*

Dean and Pennington were each convicted of second degree murder. The jury found the criminal street gang enhancement allegation true but was unable to agree on the deadly weapon allegation against Dean, which the court dismissed in the interest of justice.[17]

Green and Pennington were each convicted of conspiracy to commit murder, again with true findings on the criminal street gang enhancement allegation. During trial the People had amended the information to allege—and Green admitted—he had previously suffered a prior serious felony conviction within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667 subds. (b)-(i)). The information also alleged the same offense was a prior serious or violent felony conviction within the meaning of section 667, subdivisions (b)-(i). The trial court sentenced Green to an aggregate indeterminate term of 35 years to life, calculated as 15 years to life for conspiracy to commit murder, doubled pursuant to the three strikes law, plus five years for the enhancement under "section 667(b)." Pennington was sentenced to consecutive terms of 15 years to life on each count for an aggregate indeterminate sentence of 30 years to life in state prison.

Both Pennington and Green were ordered to pay a $40 court operations assessment and a $30 criminal conviction assessment on each count. Pennington was ordered to pay a $300 restitution fine, and the court imposed and stayed a $300 parole revocation

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[17] Dean was charged with, and admitted, he had suffered a prior serious felony conviction and was sentenced to an aggregate term of 35 years to life in state prison: 15 years to life on count 1, doubled pursuant to the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), plus five years for the serious prior felony conviction (§ 667, subd. (a)(1)).

fine. Green was ordered to pay a $300 restitution fine, with an imposed and stayed $300 parole revocation fine.[18]

## DISCUSSION

1. *The Trial Court Did Not Err in Denying the Defense Motions To Dismiss the Case or Transfer to the West District Because of the Prosecutor's Alleged Forum Shopping*

Pennington and Green contend the prosecutor's refiling of the case in the Central District, rather than the West District, constituted either outrageous government conduct or prosecutorial misconduct in violation of their federal due process rights and state law. We address these contentions jointly.

a. *Governing law*

"A court's power to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution." (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1002, citing *Rochin v. California* (1952) 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183].) Under the standard first enunciated in *Rochin*, the conduct must have "'shocked the conscience' and [been] so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." (*Breithaupt v. Abram* (1957) 352 U.S. 432, 435 [77 S.Ct. 408,

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[18] The Attorney General concedes the minute orders entered following sentencing of Green and Pennington, as well as the abstracts of judgment, erroneously identify the amount of the restitution fine (§ 1202.4) and (stayed) parole revocation fine (§ 1202.45) as $280 each instead of $300, the minimum fine applicable when they committed the offenses. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189-1190.) Accordingly, we modify the written judgments to reflect restitution and stayed parole revocation fines of $300 for each appellant. Upon issuance of the remittitur the superior court is directed to correct the abstracts of judgment to reflect these modifications and to forward a copy of the corrected abstracts to the Department of Corrections and Rehabilitation.

1 L.Ed.2d 448]; see *U.S. v. Smith* (9th Cir. 1991) 924 F.2d 889, 897 ["[f]or a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice"].)

When prosecutorial misconduct "impairs a defendant's constitutional right to a fair trial, it may constitute outrageous governmental conduct warranting dismissal." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841.) ""A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd,* at p. 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd,* at p. 61.) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)[19]

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[19] There is disagreement among the cases as to the standard of review applicable to allegations of outrageous governmental

b. *The prosecutor's alleged forum shopping did not constitute misconduct sufficient to warrant dismissal or a new trial*

Green and Pennington contend the prosecutor engaged in misconduct when he was allowed to dismiss the case pursuant to section 1385 and, instead of refiling it in the West District where it most likely would have been reassigned to Judge Dabney, filed it in the Central District, resulting in assignment to a new judge. According to Green and Pennington, this gamesmanship, even if otherwise permitted by the local rules, was improperly motivated by the desire to obtain a better in limine ruling on the scope of evidence the People could present at trial and thus constituted misconduct within the meaning of the principles discussed.

Unquestionably, forum shopping by a prosecutor is viewed with disfavor, and several provisions of the Penal Code were adopted to curtail its use. One of the primary purposes of section 1387, for instance, which limits the number of times a prosecutor may dismiss and refile a criminal complaint, is the prevention of forum shopping by prosecutors. (See, e.g., *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018 ["[s]ection 1387 . . . curtails prosecutorial harassment by placing limits on the number of times charges may be refiled . . . [and] also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop," citations omitted]; *People v. Traylor* (2009) 46 Cal.4th 1205, 1209 ["[i]n particular, the statute guards against prosecutorial 'forum shopping'—the persistent refiling of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer"].)

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conduct. (Compare *People v. Uribe, supra,* 199 Cal.App.4th at pp. 855-856 [independent review]; *People v. Guillen, supra,* 227 Cal.App.4th at pp. 1006-1007 [following *Uribe*] with *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 445-446 [abuse of discretion].) We need not address that question in light of our conclusion the prosecutor's conduct in this case did not "shock the conscience" or offend traditional notions of fair play.

More directly, when a defendant has successfully moved under section 1538.5 to suppress evidence obtained as the result of an unlawful search or seizure, any subsequent motion made after a dismissal pursuant to section 1385 must be heard by the same judge who originally granted the motion if that judge is available. (See *People v. Rodriguez* (2016) 1 Cal.5th 676, 679 ["[a] judge may be found unavailable for purposes of section 1538.5(p) only if the trial court, acting in good faith and taking reasonable steps, cannot arrange for that judge to hear the motion"]; *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 807 [§ 1538.5's legislative history "'makes it clear the Legislature intended . . . to prohibit prosecutors from forum shopping.' [Citation.] To allow the prosecutor to make a judge unavailable to rehear the suppression motion simply by filing a peremptory challenge under Code of Civil Procedure section 170.6 would permit this prohibited forum shopping and 'essentially eviscerate[] the provisions of subdivision (p).'"]

Pennington and Green correctly assert a trial court should generally refrain from reconsidering and overruling an order of another court. As this court explained in *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), "[F]or reasons of comity and public policy . . . , trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Id.* at pp. 992-993, fns. omitted; see *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1293 [quoting *Riva*];

see also *People v. Williams* (2006) 40 Cal.4th 287, 300 [citing *Riva* and the general rule]; *In re Alberto* (2002) 102 Cal.App.4th 421, 424-425, 427 [new judge was without authority to increase amount of defendant's bail; "even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court"].)

In *Riva* the defendant successfully moved to exclude certain statements he had made to the police on the ground they had been obtained in violation of his right to counsel. After Riva's first trial ended in a mistrial, he renewed the motion before a different judge, who denied the motion. (*Riva, supra,* 112 Cal.App.4th at p. 988.) We concluded the statements were admissible and the judge at the second trial was not bound by the ruling of the first judge. We analogized proceedings after a mistrial to a new trial following reversal on appeal, a situation the Supreme Court has held "'permits [the] renewal and reconsideration of pretrial motions and objections to the admission of evidence.'" (*Riva,* at p. 991-992, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 849 [allowing relitigation of admissibility of a confession at second trial following reversal of judgment on appeal].) Also, like in limine motions, motions to suppress are "intermediate, interlocutory rulings subject to revision even after the commencement of trial." (*Riva,* at p. 992; see *Mattson,* at pp. 849-850 ["Absent a statutory provision precluding relitigation, a stipulation by the parties, or an order by the court that prior rulings made in the prior trial will be binding at the new trial, objections must be made to the admission of evidence (Evid. Code, § 353), and the court must consider the admissibility of that evidence at the time it is offered. [Citations.] *In limine* rulings are not binding."].) We concluded, "it is difficult to see why a new trial after a mistrial should be treated differently in this respect from a new trial after a reversal on appeal." (*Riva,* at p. 992.)

The circumstances presented here—dismissal of an action pursuant to section 1385 and refiling of the charges—closely resemble the proceedings after a mistrial at issue in *Riva*. As Judge Lomeli observed, the dismissal of the case by Judge Dabney vacated all preceding orders; there were no orders to which the general rule of comity continued to apply. Thus, Green and Pennington do not dispute Judge Lomeli had the authority to rule anew on the prosecutor's in limine motion. (Cf. *People v. Saez* (2015) 237 Cal.App.4th 1177, 1185 ["[t]o avoid the effects of [a pretrial § 995] ruling, the People could have either appealed it or filed a new accusatory pleading that would have required a new preliminary hearing, but they did neither," citations omitted].) Writing on a blank slate, some of Judge Lomeli's rulings tracked those made originally by Judge Dabney, but his rulings during trial evolved with the testimony of witnesses, reinforcing the similarity of the in limine rulings in this case to those of concern in *Riva*.

To be sure, in *Riva* we were not confronted with an allegation of forum shopping by the prosecutor,[20] as we are here. While we view the prosecutor's rationale for refiling the case in the Central District with skepticism, both Judge Lomeli and

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[20] Justice Johnson, writing for this court in *Riva*, distinguished the decision in *Schlick v. Superior Court* (1992) 4 Cal.4th 310 on the ground "[t]he prosecutor's conduct in *Schlick* amounted to blatant forum shopping, a factor not present in the case before us." (*Riva, supra*, 112 Cal.App.4th at p. 990.) In *Schlick* the Supreme Court construed an earlier version of section 1538.5 to bar the People from relitigating a motion to suppress when an adverse result had led to the dismissal of the complaint under section 1385. The decision in *Schlick* was based on the text of former section 1538.5, subdivision (d), which the Legislature amended after *Schlick* to narrow the circumstances under which a dismissal bars relitigation of such a motion. (See generally *People v. Rodriguez, supra*, 1 Cal.4th at pp. 688-690 [discussing amendments to § 1538.5; *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 876-880 [same].)

Judge Abzug declined to find he had refiled it there for an improper purpose. Likewise, we have found no case suggesting, let alone holding, a prosecutor's permissible refiling of a complaint in compliance with state law and local rules constitutes misconduct, even if the purpose of the refiling was to avoid an adverse ruling. If the essence of prosecutorial misconduct is prosecutorial error (see *People v. Centeno, supra,* 60 Cal.4th at pp. 666-667), we cannot brand a permissible refiling as misconduct sufficiently outrageous to warrant retrial. Similarly, we cannot conclude the prosecutor's conduct fell within the scope of outrageous governmental conduct warranting dismissal.

2. *The Trial Court Did Not Abuse Its Discretion in Allowing Evidence of the Powers and Banks Murders*

The legitimacy of Judge Lomeli's ruling on the scope of evidence to be allowed at trial forms the basis for several of the arguments raised by Green and Pennington on appeal. While Judge Dabney tentatively ruled the evidence related to the murders of Powers and Banks was unduly prejudicial and only tangentially related to the People's case, Judge Lomeli permitted the People to introduce evidence that Powers was with Batiste the night both were killed; that Powers had been killed in retaliation for his planned testimony against the Neighborhood Piru gang members who murdered Banks; that Batiste had possibly been killed because he witnessed Powers's murder; and that Green and Pennington conspired to kill Dean because they believed he had provided information about either or both of these murders.[21]

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[21] Judge Lomeli initially decided evidence related to Banks's murder or the motive for Powers's murder was inadmissible under Evidence Code section 352 but, after further argument, expanded his ruling to allow the People to show that Powers was murdered shortly before he was scheduled to testify against the Neighborhood Pirus who had shot him and killed Banks.

Like Judge Dabney, Judge Lomeli excluded the ballistics evidence proffered by the prosecutor.[22]

Green and Pennington argue that the trial court abused its discretion under Evidence Code sections 1101 and 352 by admitting this evidence and that Powers's statements to police officers and to his girlfriend about the death of Banks constituted inadmissible hearsay.

a. *Evidence of the Powers and Banks Murders Was Not Precluded by Evidence Code Sections 1101 and 352*

"'Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence that a person committed a crime, civil wrong, or other act may be admitted, however, not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or identity. (*Id.*, § 1101, subd. (b).)'"[23] (*People v. Leon* (2015) 61 Cal.4th 569, 597; accord, *People v. Harris* (2013)

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[22] During pretrial proceedings the prosecutor sought permission to introduce evidence the gun used by Green to shoot Ravenel and shell casings for rounds similar to those found in Green's possession were also found at the scene of Powers's murder, thereby attempting to link Green to Powers's murder. The trial court excluded the evidence because the bullets recovered from Powers's body were too damaged for ballistic identification and any inference that could be drawn from Green's statements about his potential liability for other crimes was speculative.

[23] Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

57 Cal.4th 804, 841.) "The conduct admitted under Evidence Code section 1101[, subdivision ](b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.] . . . Specifically, the uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*Leon,* at pp. 597-598.) "We review the trial court's decision whether to admit evidence, including evidence of the commission of other crimes, for abuse of discretion." (*Leon,* at p. 597; accord, *Harris,* at p. 841.)

Green and Pennington argue that evidence of the Powers and Banks murders should have been excluded as uncharged acts made inadmissible by Evidence Code section 1101, subdivision (a). However, as the Attorney General points out, the trial court admitted this evidence not for its probative value as to Green and Pennington's character, but as highly probative evidence of their motive and intent. (See, e.g., *People v. Riccardi* (2012) 54 Cal.4th 758, 815 ["Evidence that 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive' is generally admissible. [Citation.] Although motive is normally not an element of any crime that the prosecutor must prove, 'evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable.'"]; *People v. McKinnon* (2011) 52 Cal.4th 610, 655 [""because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence""]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129 ["we have frequently held that evidence of other offenses is cross-admissible to prove motive [citations] and in particular a motive to kill to prevent a witness from testifying"].)[24]

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[24] Green's reliance on *People v. Alcala* (1984) 36 Cal.3d 604 is misplaced. There, the trial court allowed the People to introduce evidence the defendant had on three previous occasions abducted

Judge Lomeli concluded evidence of the Bloods' motive to kill Powers was crucial to understanding the motive to kill Batiste: "You can't give this case to the jury without that [motive evidence]."

Although Judge Dabney's tentative ruling was equally within the realm of discretion accorded a trial court, we cannot conclude Judge Lomeli's decision to allow evidence of the motive for Powers's murder was an abuse of that same broad discretion.[25] In addition to providing a plausible motive for the murder of Batiste, this evidence was highly relevant to the criminal street gang enhancement allegation against Green, Pennington and Dean, who were members of the same Bloods gang. Evidence of

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and sexually abused young girls. The Supreme Court reversed under Evidence Code section 1101 because the prior crimes did not meet the strict requirements for similarity necessary for the admission of evidence of a consistent modus operandi to prove identity and were thus unduly prejudicial. (*Alcala*, at pp. 631-632.) In addition, the prosecutor's theory the accused's prior crimes may have increased his incentive to eliminate his victim as a witness, the Court explained, would permit the defendant's past criminal acts to be introduced at trial whenever the defendant was accused of premeditated murder during a subsequent offense: "The accused's mere status as an ex-criminal would place him under an evidentiary disability not shared by first offenders." (*Id.* at p. 635.) Here, evidence of the Banks and Powers murders was admitted to show that Batiste had been killed as part of a Bloods vendetta against Powers and did not purport to attribute responsibility for the Banks and Powers murders to Green or Pennington.

[25] "The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

the chain of murders was critical to proving the pattern of gang retribution—that is, Powers had been "green-lighted" by the Bloods because they believed he had pointed the police to Big J-Rock; Banks had been killed when the Neighborhood Pirus attempted to murder Powers; Powers was lured back to Inglewood and killed when he was in the company of Batiste, who was in turn killed because he likely witnessed Powers's murder. Dean was then targeted by Green and Pennington because they feared he would implicate them in the murder of Batiste or Powers. (See *People v. Armstrong* (2016) 1 Cal.5th 432, 457 [defendant's desire to avoid prosecution for murder provided motive for shooting victim's brothers and to torture another victim; admissibility of other crimes depended not on application of Evid. Code, § 1101, subd. (b), but "derive[d] from the fact and sequence of their commission"]; *People v. Cage* (2015) 62 Cal.4th 256, 274 ["[w]here other crimes or bad conduct evidence is admitted to show motive, '"an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself" [citation], the other crimes or conduct evidence may be dissimilar to the charged offenses provided there is a direct relationship or nexus between it and the current alleged crimes"].)

Green contends that, even if the evidence was not specifically relevant to his own character (as contemplated by Evidence Code section 1101), the evidence amounted to character assassination of Bloods-affiliated gangs and improperly tainted all three defendants with the broad brush of inflammatory gang evidence only remotely connected to the Center Park Bloods. (See *People v. Leon*, *supra*, 61 Cal.4th at p. 599 [even if evidence of uncharged crimes is relevant under Evid. Code, § 1101, subd. (b), before admitting the evidence, trial court must also find it has substantial probative value that is not largely outweighed by its potential for undue prejudice under Evid. Code, § 352].) Green argues this evidence was particularly prejudicial to him because

he was identified by the People's gang expert as a "shot caller" or leader within the gang.

It is precisely because of that testimony, however, seen in light of Green's own statements attempting to direct Dean's murder and his acknowledgement he faced potentially far greater criminal liability if he did not succeed in silencing Dean, that made the testimony about the Bloods' motive to murder Powers exceptionally probative.[26] As a shot caller Green stood in the position to direct the murder of his fellow gang member Dean; and his attempt to communicate with members of other Bloods-affiliated gangs to accomplish that murder demonstrated his ability to coordinate with those gangs for the commission of a crime. "The prejudice which exclusion of Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638; accord, *People v. Merriman* (2014) 60 Cal.4th 1, 60.) Here, the prejudice to Green resulted from the persuasiveness of the evidence, not from the possibility it could be misconstrued or evoke an irrational emotional bias against Green.

The trial court also acted within its discretion when it rejected Green's argument the gorier details of Batiste's killing would improperly inflame the jury against Green and should be excluded under Evidence Code section 352. This evidence was necessary to establish where Batiste had been killed; without that

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[26] Although evidence of Banks's murder was probably not necessary to establish the "green light" on Powers, there was no suggestion any of the defendants in this case killed Banks.

information the jury would have had an incomplete view of his murder and Dean and Pennington's culpability for it. Although the evidence did not link Green to the van (other than the generic testimony a third unidentified man was seen leaving the van and a criminalist's testimony about a DNA sample from the red shirt from which Green could not be excluded as a contributor) and he was not charged with Batiste's murder, Green was plainly motivated by those events to target Dean based on his fear Dean was talking to the police, whether the intent was to protect Pennington or himself.

In sum, although the trial court could have exercised its discretion in a different manner, we cannot conclude it abused its discretion by allowing evidence of the Banks and Powers murders.

b. *The admission of Powers's statements to police, even if erroneous, was harmless error*

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (Evid. Code., § 1200, subd. (b).) Green and Pennington contend the trial court erred in admitting hearsay statements made by Powers to the IPD to substantiate the Bloods' motive to kill him. IPD Detective Burton testified he interviewed Powers after he and Banks had been shot. Over defense objections Burton testified Powers said he and Banks had been sitting on a porch when three men approached. Powers yelled at Banks to run as the men began shooting at them. Powers showed Burton his bandaged hand and told him his finger had been shot off. In a subsequent interview Powers identified the three men who had shot at him and Banks and told Burton they were members of the Neighborhood Piru gang.

"Evidence of an out-of-court statement is . . . admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay

purpose is relevant to an issue in dispute. [Citations.] For example, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements." (*People v. Davis* (2005) 36 Cal.4th 510, 535-536; see *People v. Smith* (2009) 179 Cal.App.4th 986, 1003 [""[i]f a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence""].) "'A determination of relevance and undue prejudice lies within the discretion of the trial court, and a reviewing court reviews that determination for abuse of discretion.'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; accord, *People v. Jones* (2013) 57 Cal.4th 899, 956.)

The Attorney General contends Detective Burton's statements were properly admitted for the nonhearsay purpose of showing Powers had cooperated with police and would have been considered a snitch for doing so and to provide context for Detective Burton's testimony Powers had been scheduled to testify against the Neighborhood Pirus when he was murdered. According to the Attorney General, whether the Neighborhood Pirus were the shooters and whether the shooting occurred as described by Powers was irrelevant.

The Attorney General's explanation is valid to a point, but the identification of the shooters as members of a Bloods-affiliated gang—the truth of Powers's statements to Detective Burton—was certainly relevant to the People's theory of the case. At most, the statements constituted hearsay admissible to provide context, as the Attorney General suggests, for the fact that Powers was killed after he had been green-lighted for cooperating with the police. Even were we to assume the trial court erred in admitting the evidence, however, any error was harmless under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].) Detective Burton testified that Powers was scheduled to testify at

a preliminary hearing against the Neighborhood Pirus he had identified, thus establishing the Bloods' motive to kill him. Powers's earlier statements added little to that information and nothing that would cause additional prejudice to Green or Pennington. Accordingly, it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson,* at p. 836.)

c. *Green and Pennington have forfeited their objections to statements attributed to Powers about the J-Rock incident*

Green and Pennington also assert the trial court erred in admitting statements Powers purportedly made to his girlfriend Kennedy. The testimony cited, however, most of which was elicited by Dean's counsel on cross-examination without objection from Powers and Green, refers to Kennedy's statements to IPD detectives about the shooter who yelled "J-Rock" that she attributed to rumors she had heard about Powers. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1248 [a party may not ask relevant questions, then "prevent all cross-examination (or redirect examination) responding to the same point by successfully asserting that its own question was improper"]; *People v. Parrish* (2007) 152 Cal.App.4th 263, 274-276 [otherwise inadmissible testimonial statement of unavailable witness properly admitted under Evid. Code, § 356 to put witness's statement in context after defense elicited portion of statement that "viewed in isolation, presented a misleading picture"].)

Moreover, a belated objection to some of Kennedy's statements was sustained by the court but, otherwise, the issue has been forfeited by Green and Pennington's failure to object promptly to the statements. (See *People v. Williams* (2008) 43 Cal.4th 584, 620 [""questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal""]; see generally Evid. Code, § 353, subd. (a) ["[a]

verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].)

3. *The Trial Court Did Not Abuse Its Discretion in Denying Green's Motions To Sever His Trial*

Joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378-379; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) "When the statutory requirements are met, joinder is error only if prejudice is clearly shown." (*People v. Scott* (2011) 52 Cal.4th 452, 469, 354.) Section 954 permits joinder when two or more different offenses are charged in the same pleading if the offenses are either "connected together in their commission" or "of the same class." (See *People v. Armstrong, supra,* 1 Cal.5th at p. 455 ["[t]his 'statute permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant'"].) Similarly, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (§ 1098.)

In ruling on a severance motion, "'the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of defendant's other criminal activity to tip the balance and convict him.' [Citation.] We review the trial court's decision to deny a severance motion for abuse of discretion. [Citation.] To establish an abuse of discretion, the defendant must make a '"clear showing of prejudice."'" (*People v.*

*Armstrong, supra,* 1 Cal.5th at p. 456.) "'[W]e consider the record before the trial court when it made its ruling.'" (*Ibid.;* accord, *People v. Sanchez* (2016) 63 Cal.4th 411, 464.) "If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "'resulted in 'gross unfairness' amounting to a denial of due process.'"" (*People v. Avila* (2006) 38 Cal.4th 491, 575; accord, *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 150.)

a. *Joinder of the murder and conspiracy charges under section 954 was proper and did not unduly prejudice Green*

Joinder of the charges here—murder and conspiracy to commit murder—was proper under section 954 for two reasons: The murder of Batiste provided the motive for the subsequent conspiracy to murder Dean; and, as assaultive offenses, the two charges fell within the same class of crimes. (See, e.g., *People v. Jackson* (2016) 1 Cal.5th 269, 298-299 [rape and murder are properly joinable under § 954 as ""offenses of the same class of crimes,"" because both ""are assaultive crimes against the person""]; *People v. Zambrano, supra,* 41 Cal.4th at pp. 1129-1130 [murder and attempted murder are both assaultive crimes against the person, and as such are "offenses of the same class" expressly made joinable by § 954; evidence that offenses are similar is "not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one"]; *People v. Valdez* (2004) 32 Cal.4th 73, 119 [murder and escape charges were "'connected together in their commission'" because "the motive for the escape was to avoid prosecution" on the murder charge].)

When charges are properly joined under section 954, the trial court retains discretion to try them separately, but "'[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*People v. Armstrong, supra,*

1 Cal.5th at p. 455.) The framework for analyzing prejudice in this context is well established: "'Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled.' [Citation.] 'If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses."' [Citation.] Three factors are most relevant to this assessment: '(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense.'" (*People v. Jackson, supra,* 1 Cal.5th at p. 299; see *Armstrong,* at p. 456 ["if the evidence is cross-admissible, 'that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges'"].)

The trial court concluded the evidence relevant to the two crimes was cross-admissible with one exception: Dean's statement to the police the driver of the van had been his girlfriend, "Nette," which posed a potential violation of Pennington's Sixth Amendment right to confront and cross-examine witnesses as articulated in *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177], as well as the *Aranda/Bruton* rule.[27] The court resolved that potential

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[27] The *Aranda/Bruton* rule refers to *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. Both cases, which predate the Supreme Court's decision in *Crawford,* recognize that a defendant is deprived of his or her Sixth Amendment right to

violation by seating two separate juries, one to decide the charges against Green and Pennington and the other to decide the charge against Dean. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1208 ["the problem addressed in *Bruton* and *Aranda* may be solved by the use of separate juries for codefendants, with each jury to be excused at appropriate times to avoid exposure to inadmissible evidence"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 ["The use of dual juries is a permissible means to avoid the necessity for complete severance. The procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants."].)

As discussed, the trial court did not err in ruling the remaining evidence of the Banks and Powers murders was admissible against Green. Accordingly, any potential prejudice to Green was sufficiently dispelled, and severance of the murder and conspiracy charges was not required. We also reject Green's argument the evidence of those other crimes was unduly inflammatory compared to the conspiracy charge. As the Supreme Court recently explained, "the animating concern underlying this factor is not merely whether evidence from one offense is repulsive, because repulsion alone does not necessarily engender undue prejudice. [Citation.] Rather, the issue is ""whether strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime."' (*People v. Simon* (2016) 1 Cal.5th 98, 124; see *People v. Sandoval* (1992) 4 Cal.4th 155, 173 [defendant failed to show requisite prejudice

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confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant. In this situation the court must either grant separate trials, exclude the statement or excise all references to the nondeclarant defendant. (*Aranda,* at pp. 530-531; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.)

from joinder of other murder charges because any "inflammatory effect of defendant's gang membership as to the [other] case was neutralized by the fact that the victims were also gang members"].)

b. *Any error in the joinder of the three defendants under section 1098 was harmless*

Premised on many of the same principles as section 954, section 1098 requires a court to examine whether joinder of defendants (rather than charges) is appropriate in a particular case. Under section 1098, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.'" (*People v. Alvarez, supra*, 14 Cal.4th at p. 190; accord, *People v. Mackey* (2015) 233 Cal.App.4th 32, 99.)

In arguing the court erred in denying his motion to sever his trial from that of Dean and Pennington, Green relies primarily on *People v. Ortiz* (1978) 22 Cal.3d 38 (*Ortiz*), in which the Supreme Court interpreted section 1098 to mean "a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried." (*Ortiz*, at p. 43, fn. omitted.) Ortiz and an accomplice were accused of robbing a mini-mart and were jointly charged with two other codefendants, who, along with Ortiz's accomplice, were charged with robbing a drug dealer a few hours earlier. Reversing the trial court's denial of the defendant's motion to sever under section 1098, the Court emphasized the dangers of allowing a jury to hear evidence concerning a crime with which the defendant had no connection and found there was a reasonable probability he would have obtained a more favorable result at trial. (*Ortiz*, at pp. 47-48; see *People v. Burney* (2009) 47 Cal.4th 203, 237 ["[i]f we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial"].)

Several courts have recognized exceptions to the *Ortiz* rule. In *People v. Hernandez* (1983) 143 Cal.App.3d 936 (*Hernandez*) the court concluded a joint trial was appropriate for three defendants charged with different counts arising from the gang rape of a single victim: "We are convinced that the Supreme Court [in *Ortiz*] did not intend, in establishing a rule requiring separate trials of defendants not jointly charged, to include within the purview of that rule defendants charged with crimes arising out of a single set of circumstances. The evil sought to be avoided by *Ortiz* was the prejudicial impact of irrelevant evidence. In a joint trial of unrelated offenses, the jury would hear evidence concerning the conduct of [the] defendant's associates, which evidence would not have been admissible in a separate trial. [Citation.] Here, of course, evidence concerning the conduct of all of the victim's assailants would have been admissible in either a joint or separate trial. Furthermore, a requirement of separate trials could subject the victim and all witnesses to the ordeal of two complete trials, with no attendant benefit to [one of the codefendants]. We therefore conclude that the *Ortiz* holding does not extend to defendants charged with a crime or series of crimes committed as part of a single transaction." (*Hernandez,* at pp. 940-941, fn. omitted.) This holding was extended in *People v. Wickliffe* (1986) 183 Cal.App.3d 37, in which the court approved the joint trial of a defendant charged with driving under the influence and a codefendant charged with battery and assault where all of the crimes occurred during a joint operation of repossessing a vehicle. (*Id.* at pp. 40-41.)

Green is correct this case does not fall squarely within the "single transaction" exception to the *Ortiz* rule described in *Hernandez* and *Wickliffe*. Like the courts in those cases, however, we question whether the Supreme Court would adhere to the rigid line apparently described in *Ortiz* under the circumstances presented here. The defendants were members of the same gang, the two offenses were directly related to each other, and each offense

was allegedly committed for the benefit of the gang. The criminal street gang allegation provided the basis for much of the motive evidence admitted at trial. Moreover, Green was not entitled to a trial separate from that of Pennington under section 1098 because they were both charged with conspiracy to murder Dean, and severance of Pennington's murder charge was not required by section 954. Nor can Green identify any prejudice associated with the decision denying him a separate trial from Dean: By seating two juries, the trial court effectively eliminated any prejudice associated with trying Dean and Green together. Under these circumstances the trial court did not abuse its discretion by denying Green's section 1098 motion to sever.

Even if we were to conclude it was error to deny Green's motion to sever under section 1098, however, any error was harmless under the analysis presented in *Ortiz*. As *Ortiz* instructs, "The right to a separate trial is not so fundamental that its erroneous denial requires automatic reversal." (*Ortiz, supra,* 22 Cal.3d at p. 46.) The factors to be applied in determining whether a denial of severance was prejudicial "include whether a separate trial would have been significantly less prejudicial to defendant than the joint trial, and whether there was clear evidence of defendant's guilt." (*Ibid.*) We reverse "only upon a showing 'of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.'" (*Ibid.*; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41; *People v. Mackey, supra,* 233 Cal.App.4th at p. 100.) The evidence contained in the recorded telephone calls and handwritten notes Green showed to Pennington during her visit to the jail left no doubt as to his guilt on the conspiracy charge.

c. *Green's due process right to a fair trial was not violated*

Even if, as we conclude, the trial court did not abuse its discretion in denying severance pretrial, we must also determine "'whether events *after* the court's ruling demonstrate that joinder

actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.'" (*People v. Simon, supra*, 1 Cal.5th at p. 129.) "In determining whether joinder resulted in gross unfairness, we have observed that a judgment will be reversed on this ground only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*Id.* at pp. 129-130.) As discussed, the evidence of Green's culpability for the conspiracy to murder Dean was overwhelming. Consequently, there was no violation of his due process right to a fair trial.

4. *Substantial Evidence Supported Pennington's Convictions*

In considering Pennington's claims of insufficient evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval*

(2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The standard of review is the same in cases in which the People rely mainly on circumstantial evidence to prove one or more elements of their case. (*People v. Clark* (2016) 63 Cal.4th 522, 625; *People v. Tully* (2012) 54 Cal.4th 952, 1006-1007.) "'"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt."'" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 358; accord, *Clark*, at p. 626.)

a. *The murder conviction*

Pennington, who was convicted as the driver of the van of second degree murder on an aiding and abetting theory, contends there was insufficient evidence for the jury to conclude she shared Dean's intent to kill Batiste.

A person aids and abets the commission of a crime "when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1118.) "'[A]n aider and abettor's guilt "is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state." [Citation.]' [Citation.] Establishing aider and abettor liability 'requires proof in three distinct areas: (a) the direct perpetrator's actus

reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 146.) Direct evidence of the defendant's mental state is rarely available and may be shown with circumstantial evidence. (*Beeman*, at pp. 558-559.) "Mere presence at the crime scene is, by itself, not aiding and abetting, but it can be one factor among others that support conviction as an aider and abettor. [Citation.] 'Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense.'" (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1065; see *In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

The jury heard undisputed, albeit circumstantial, evidence Pennington was in the van when it crashed and direct evidence she was an active member, with Dean, of the Center Park Bloods. The jury also heard that Batiste was more than likely with Powers when Powers was killed (because he had talked to the police) and was then stabbed to death himself within hours, again, more than likely, in the van. Rather than attempt to obtain help for Batiste, Pennington, like Dean and the unknown third man in the van, disappeared. She lied to the police about the source of her injuries and claimed she had been carjacked. Soon after, she attempted to retrieve her purse and identification card from the impound facility. She then conspired with Green to kill Dean because he appeared to be talking to police about the incident. The wiretap evidence showed Pennington held an important position in a gang strongly allied to other Blood-affiliated gangs and confirmed her willingness to betray someone who considered her a friend for the benefit of the gang. The jury thus had ample

evidence—circumstantial and direct—from which to infer Pennington shared Dean's intent to kill Batiste.

b. *The conspiracy to commit murder conviction*

"'Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. [Citations.] A conspiracy requires (1) the intent to agree, and (2) the intent to commit the underlying substantive offense.' [Citation.] '"The punishable act, or the very crux, of a criminal conspiracy is the evil or corrupt agreement."' [Citation.] [¶] If the agreement between the conspirators is the crux of criminal conspiracy, then the existence and nature of the relationship among the conspirators is undoubtedly relevant to whether such agreement was formed, particularly since such agreement must often be proved circumstantially. '"The existence of a conspiracy may be inferred from the conduct, *relationship,* interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Homick* (2012) 55 Cal.4th 816, 870.)

Pennington contends she was a passive observer of Green's conspiratorial comments and never entered into an agreement with Green to kill Dean. The evidence, however, is plainly susceptible to the interpretation that the agreement to kill Dean was made in early December 2002, well before Pennington's jail visit when Green gave her instructions on how the murder should be accomplished, and that Pennington was an active participant in the planning. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. Pennington replied she had spoken with CKay the previous evening who agreed Dean was a problem and said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Recognizing the implication of that conversation, Green told Pennington not to talk on the phone and said, "On Blood, this gonna be handled," and indicated he would have to

trust CKay. After that call Pennington summoned a meeting of gang members to discuss how Dean would be handled. The plan reflected by this conversation was apparently discovered by Dean, who called Pennington and told her he had heard his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington who was putting "mud" on him, and Pennington replied she had been hearing it "a whole lot." When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing. Based on this evidence the jury could reasonably find the initial agreement to kill Dean began at this time, and Pennington went to the jail on December 20, 2002 to receive instructions on implementing the plan. Green's instructions included an exhortation that Dean must be killed immediately and a contact (Robby Tobby, a Bloods prison gang shot caller), who would be able to implement the plan.

Pennington additionally contends the alleged conspiracy never progressed beyond planning because no overt acts were taken to accomplish its purpose (the murder of Dean). An overt act is "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8, quoting *Chavez v. United States* (9th Cir. 1960) 275 F.2d 813, 817.) "This act need not 'constitute the crime or even an attempt to commit the crime which is the conspiracy's ultimate object. Nor is it required that such a step or act, in and of itself, be a criminal or unlawful act.'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) "[I]nternal discussions and arrangements between coconspirators can easily constitute overt acts in furtherance of the conspiracy." (*Id.* at p. 244 [alleged overt

acts consisted of "solicitation of additional conspirators," "requests for information regarding the victim and the plan," "payments to secure a coconspirator's assent to the conspiracy," and "numerous phone conversations laying out the manner in which the conspiracy would be carried out"]; accord, *People v. Sconce* (1991) 228 Cal.App.3d 693, 699 [alleged overt acts consisted of defendant's pointing out the intended victim to a coconspirator, coconspirator's solicitation of another conspirator, and defendant's inquiries of one coconspirator to "to take care of and kill" the victim]; see *Van Villas,* at p. 245 ["[i]f the conspirators partake, among themselves, in arrangements, discussions, and preparation in regard to and for the criminal act, then they have ventured beyond a mere criminal intention and forgone the opportunity afforded them by the overt act requirement: "'to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy'"].) As discussed in these cases, Pennington's ongoing discussions with Green and other gang members amply supported her conviction for conspiracy.

5. *The Five-year Sentence Enhancement for Green's Prior Serious Felony Conviction Was Properly Imposed*

The amended information filed September 10, 2013 alleged Green had previously been convicted of a serious or violent felony pursuant to Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i)—the three strikes law—and identified Green's April 2004 conviction for aggravated assault, Los Angeles Superior Court case no. YA053259 (assault with a firearm for the shooting of Tyrone Ravenel).[28] A separate paragraph in the amended information "further alleged . . . pursuant to Penal Code section(s) 667(b) through (i)" that Green had suffered a prior conviction of a serious or violent felony, again

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[28] The original information filed July 11, 2012 did not allege that Green had previously been convicted of a serious or violent felony.

citing case no. YA053259. At Green's sentencing hearing the People introduced evidence Green had suffered two prior convictions, the April 2004 conviction for the Ravenel assault and an October 2008 conviction for possession of a controlled substance under Health and Safety Code section 11350, subdivision (a) (Los Angeles Superior Court case no. YA071118). Green, who at that time had obtained permission to represent himself, did not appear to be aware the possession charge had not been alleged in the amended information and admitted both prior convictions. After an extended discussion during which the court referred to case no. YA053259 as the "alleged strike" and case no. YA071118 as the "one-year prior," the court sentenced Green to 15 years to life for conspiracy to commit murder, "doubled . . . for the aforementioned strike conviction in case no. YA053259, plus an additional five years under 667(b) for his aforereferenced prior, and the court referenced that case."

Section 667, subdivision (b), however, does not provide for a sentence enhancement. The sentence enhancement for a prior serious felony conviction in addition to the provisions of the three strikes law—the further allegation contained in the amended information—is found in section 667, subdivision (a)(1). Compounding what appears to have been a misstatement by the trial court (most likely precipitated by the incorrect citation in the amended information), the minute order from Green's sentencing hearing mischaracterizes the enhancement as a five-year sentence under section 667.5, subdivision (b), a mistake repeated in the abstract of judgment. Section 667.5, subdivision (b), authorizes only a one-year sentence enhancement for a prior prison term—an allegation not contained in the amended information—and may not be imposed when a sentence enhancement under section 667, subdivision (a)(1), is imposed for the same offense. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150.)

Green contends the sentence enhancement listed in the minute order and abstract of judgment was unauthorized and

must be stricken. The People contend the error should be addressed through remand to the superior court but note the same error was made at Dean's sentencing hearing and was corrected nunc pro tunc by the trial court to specify the correct basis for the five-year prior serious felony conviction enhancement—section 667, subdivision (a)(1).

We have the inherent authority to correct an unauthorized sentence (§ 1260; *People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical error at any time]). Remand is unnecessary here to correct what was merely an inadvertent miscitation by the trial court, which plainly intended to impose the sentence enhancement alleged in the amended information for a prior serious felony conviction. Accordingly, the judgment in Green's case is modified to reflect imposition of a five-year sentence enhancement pursuant to section 667, subdivision (a)(1), for the prior serious felony conviction alleged in the amended information.

## DISPOSITION

The judgment against Green is modified to provide that the five-year sentence enhancement was imposed under section 667, subdivision (a)(1), instead of subdivision 667.5, subdivision (b). The judgment is further modified to reflect the imposition of restitution fines of $200 and parole revocation fines (stayed) of $200 on each defendant. As modified, the judgments are affirmed. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JASON GREEN,

Petitioner,

v.

WARREN L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06443-JLS-SHK

**JUDGMENT**

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

IT IS HEREBY ADJUDGED that this action is DISMISSED with prejudice.

Dated: October 14, 2021

HONORABLE JOSEPHINE L. STATON
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JASON GREEN,

Petitioner,

v.

WARREN L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06443-JLS-SHK

**ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the relevant records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that the Petition be DENIED and that Judgment be entered dismissing this action with prejudice.

Dated: October 14, 2021

HONORABLE JOSEPHINE L. STATON
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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| JASON GREEN,<br>Petitioner,<br>v.<br>WARREN L. MONTGOMERY,<br>Respondent. | Case No. 2:18-cv-06443 JLS (SHK)<br><br>REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

This Report and Recommendation ("R&R") is submitted to the Honorable Josephine L. Staton, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

## I. SUMMARY OF RECOMMENDATION

On June 25, 2018, Petitioner Jason Green ("Petitioner"), proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus ("Petition" or "Pet."), pursuant to 28 U.S.C. § 2254, challenging his 2013 California state conviction for conspiracy to commit murder. The Petition raises seven grounds for relief. During the pendency of the matter, the Magistrate Judge appointed counsel to assist Petitioner with the briefing on the fifth ground raised in the Petition. Following an

analyses of the claims and the relevant caselaw, the Magistrate Judge concludes that Petitioner failed to demonstrate that the California state courts unreasonably denied any of these claims and recommends that the District Judge deny Petitioner's request for habeas relief on the merits, in its entirety, and dismiss the Petition with prejudice.

## II. PROCEDURAL HISTORY

In 2013, Petitioner was convicted in Los Angeles County Superior Court of conspiracy to commit the murder of Garry Dean, in 2002. Electronic Case Filing Number ("ECF No.") 19-3, 2 Clerk's Transcript ("CT") at 271[1]; Exh. A, California Court of Appeal's Opinion in The People v. Green, Case No. B256776 ("Cal. CoA Op.") at3 Petitioner was tried together with his co-defendant Lynette Pennington. Id. at 2. Pennington, in addition to being tried with Petitioner for conspiring to murder Dean, was also being tried with Dean for the murder of another person, Alton Batiste, which also occurred in 2002. Id. "Dean's case was heard by one jury; Pennington's and Green's by a second jury." Id. at 2,n.1.

Pennington was found guilty of second-degree murder for the killing of Batiste and also for conspiracy to commit the murder of Dean, and Dean was found guilty of second-degree murder for the killing of Batiste. Id. at 2. Ultimately, Dean's conviction was reversed on appeal because of error in closing argument. Id. at 2,n. 1. However, that error and subsequent decision with respect to Dean had no effect on Petitioner's or Pennington's case because Dean's case was heard by a separate jury. Id.

The jury also determined that Petitioner had committed the crime for the

[1] The referenced page numbers for the state record citations (including the Clerk's Transcript and the Reporter's Transcript), the state court filings and opinions lodged by Respondent, and the parties' filings in this Court (including the Petition, Answer, and Supplemental Briefing) will be the number assigned in those documents and not the page number associated with the document through the ECF system.

benefit of a criminal street gang. Id. After Petitioner admitted that he had a prior "strike" under California's Three Strikes law, the trial court sentenced him to 35 years to life in state prison. Id. at 363, 365-67.

Petitioner appealed to the California Court of Appeal, raising, among others, the claims corresponding to Grounds Five through Seven in the instant Petition. ECF No. 19-4, Lodg. No. 3. The state appellate court rejected the claims and affirmed the judgment in a decision explaining the reasons for the affirmance. ECF No. 19-7, Lodg. No. 6. Petitioner then filed a Petition for Review in the California Supreme Court, which was denied summarily. ECF Nos. 19-18, Lodg. No. 11 and 19-19, Lodg. No. 12.

At the same time as his appeal was proceeding, Petitioner filed a habeas corpus petition in the California Court of Appeal, raising the claim corresponding to Ground One of the Petition. ECF No. 19-8, Lodg. No. 7. That petition was denied summarily. ECF No. 19-17, Lodg. No. 10. Petitioner then filed a habeas petition in the California Supreme Court, raising the claims corresponding to Grounds One through Four of the federal Petition. ECF No. 19-20, Lodg. No. 13 at 17-35. The California Supreme Court denied the petition without comment or citation to authority. ECF No. 19-22, Lodg. No. 14.

In June 2018, Petitioner, proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus in this Court. ECF No. 1. In January 2019, Respondent filed an Answer and a supporting memorandum ("Answer"), arguing that each of the claims in the Grounds One through Seven of the Petition should be denied on the merits, and lodged the various related transcripts and state court filings and opinions. ECF Nos. 18-19. Thereafter, Petitioner filed a Traverse and an Amended Traverse. ECF Nos. 24, 28. On October 10, 2019, the Court appointed counsel for Petitioner and ordered further briefing on Ground Five of the Petition, related to prosecutorial misconduct. ECF No. 29. On June 1, 2020, with the assistance of counsel, Petitioner filed a Supplemental Brief ("Supp. Brief"), addressing the

claims of misconduct in Ground Five of the Petition. ECF No. 41.

## III. PETITIONER'S CLAIMS

The Petition raises the following seven grounds for relief:

1. Petitioner received ineffective assistance of counsel at trial in violation of his constitutional rights.

2. Pre-accusation delay in charging Petitioner violated his due process rights.

3. The seven-year delay in prosecuting Petitioner caused significant prejudice to his defense.

4. The lengthy delay in prosecuting Petitioner was unjustified and, therefore, in violation of his due process rights.

5. Outrageous governmental misconduct violated Petitioner's due process rights.

6. The trial court's denial of Petitioner's request for severance resulted in a fundamentally unfair trial.

7. The trial court's failure to exclude evidence of uncharged murders resulted in a fundamentally unfair trial.

ECF No. 1, Pet., Attach. Memo. at 13-38.

## IV. FACTUAL SUMMARY

Because Petitioner has not rebutted the correctness of the findings of fact made by the California Court of Appeal regarding Petitioner's appeal in state court by clear and convincing evidence, the Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court has made an independent evaluation of the record specific to those claims. The California Court of Appeal's Opinion is attached as Exhibit A to this R&R and the factual summary at pages 3 through 19 is

incorporated and adopted in this R&R. Exh. A, Cal. CoA Op. at 3-19.

## V. STANDARD OF REVIEW

The standards in the Anti-Terrorism and Effective Death Penalty Act of 1996 and 28 U.S.C. § 2254 govern this Court's review of Petitioner's grounds. As for the claims raised in Grounds Five through Seven of the Petition, because the California Supreme Court summarily denied these claims on direct review, this Court reviews the reasoning in the California Court of Appeal's decision denying these claims on appeal. See ECF Nos. No. 19-7, Lodg. No. 6 and 19-19, Lodg. No. 12; Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) (holding "that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "should then presume that the unexplained decision adopted the same reasoning"). Only if "fairminded jurists" would all agree that the state court's decision was wrong is Petitioner entitled to relief. See Harrington v. Richter, 562 U.S. 86, 102 (2011).

Grounds One through Four were presented to the state courts on collateral review. Both the California Supreme Court and the California Court of Appeal denied Petitioner's habeas claims without comment or citation. See ECF Nos. 19-17, Lodg. No. 10 and 19-22, Lodg. No. 14. Because there is no reasoned explanation for the denial of these claims, the Court will conduct an independent review of the record to determine whether the decision was objectively reasonable. In doing so, the Court will uphold the state court's decision so long as there is any reasonable basis in the record to support it. See Richter, 562 U.S. at 102 (holding that reviewing court "must determine what arguments or theories supported or . . . could have supported[ ] the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" existing Supreme Court precedent).

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## VI. DISCUSSION

### A. Habeas Relief Is Not Warranted With Respect To Petitioner's Claims That That His Trial Counsel Was Constitutionally Ineffective.

In Ground One, Petitioner claims that he received ineffective assistance of counsel at trial in violation of his constitutional rights. He contends that counsel (1) failed to call all necessary witnesses in his defense, (2) failed to present evidence that it was "impossible" for Petitioner to have placed the torn-up notes in the prison trash can, (3) failed to present evidence that a sheriff's deputy injured Petitioner after the jail visit from Pennington, (4) failed to demonstrate that the Petitioner did not speak with Robby Tobby on the phone, and (5) failed to review all of the evidence with Petitioner and unreasonably persuaded Petitioner not to testify in his own defense. ECF No. 1, Pet., Attach. Memo. at 14-22. He argues that without these errors there was a "reasonable chance" that he would not have been convicted at trial. Id. at 22-23.

#### 1. Applicable Federal Law

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner must establish two things: (1) counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) the deficient performance prejudiced the defense, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687-88, 694. A claim of ineffective assistance must be rejected upon finding either that counsel's performance was reasonable or that the alleged error was not prejudicial. Id. at 697; see also 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.").

Where, as here, the ineffective assistance of counsel claims have previously been adjudicated in state court, the Court's review is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Richter, 562 U.S. at 105 ("The standards created by Strickland and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so." (quoting Knowles, 556 U.S. at 123)).

**2. Failure To Call Witnesses**

According to Petitioner, on the day he was arrested in March 2008 for possession of a controlled substance, he was "drinking beer and conversing" with Dean, the person who Petitioner was convicted of conspiring to try and murder; Petitioner's ex-wife, Cynthia Grant; and her friend, Yolanda Ware. ECF No. 1, Pet., Attach. Memo. at 14-15. In 2015, Grant filed a declaration corroborating that information and stating that, although she had agreed to testify at Petitioner's trial, she was never called as a witness by Petitioner's trial counsel. ECF No. 19-14, Lodg. No. 7, Exh. 3 at 1-3. Petitioner contends that had counsel called Grant or Ware to introduce evidence that Petitioner "socialized" with Dean in 2008, it would have caused "considerable doubt" that he "seriously intended" to have Dean killed in 2002. ECF No. 1, Pet., Attach. Memo. at 15. The Magistrate Judge does not agree.

Despite Petitioner's arguments to the contrary, the evidence against Petitioner was compelling. In wiretapped phone conversations, Petitioner and Pennington discussed what the gang should do about Dean snitching on other gang members. Petitioner told Pennington that Dean was going to "be handled." Exh. A, Cal. CoA Op at 9. Later, during a jail visit from Pennington, Petitioner used "flash cards" to tell Pennington that Dean, referred to as "Shady" or "Shady Blood", needed to be "X'd now!!! Like yesterday." Id. at 10. Petitioner gave instructions to Pennington to contact a Bloods gang shot caller "immediately." Id. These events occurred in 2002, more than five years before Petitioner was arrested.

Even if Grant or Ware had been called as a witness to testify about the 2008 meeting between Petitioner and Dean, it is not likely that the outcome of the trial would have been different.

First, the fact that Petitioner socialized with fellow gang member Dean does not necessarily indicate that he did not want him killed, in 2002, after it was discovered that Dean was snitching on other gang members.[2] Second, and more likely, by 2008 Petitioner no longer intended to have Dean killed because he knew the police were investigating him for the murder plot or he realized that Dean never actually cooperated with the police by providing information to them about any of the prior murders. Even if Petitioner and Dean had made amends by 2008, it had little, if any, relevance to the alleged conspiracy in 2002. As such, counsel was not ineffective for failing to call Grant as a witness at trial. See Downs v. Hoyt, 232 F.3d 1031, 1041 (9th Cir. 2000) (finding counsel was not ineffective for failing to call witness that would have provided "very little, if any, benefit"); Pennington v. Spears, 779 F.2d 1505, 1507 (11th Cir. 1986) (rejecting ineffective assistance claim for failing to call witnesses that "possessed no relevant information").

**3. Failure To Present Evidence Regarding Torn-Up Notes**

At trial, Deputy Michael Haggerty testified that, immediately after Pennington's jail visit with Petitioner, he saw Petitioner "putting pieces of paper up to his mouth." ECF No. 19-35, 13 Reporter's Transcript ("RT") at 4253. Deputy Haggerty was able to stop him from "destroying" the papers and confiscated other torn-up papers "in his pocket, and a trash can that was adjacent, and the floor." Id. It was these writings that incriminated Petitioner directly in the conspiracy to have Dean murdered. According to Petitioner, however, it was "impossible" for him to have put the notes in the trash can after his visit with Pennington because the

[2] For example, in 2002, Pennington had a phone conversation with Dean pretending that she did not know who was "putting 'mud' on him"—i.e., claiming that he was a snitch—while helping to plot his murder with other gang members at the same time. See Exh. A, Cal. CoA Op at 9-10.

distance to the trash can was "too great" for him to have reached before being detained by Deputy Haggerty. ECF No. 1, Pet., Attach. Memo. at 16-17; ECF No. 19-9, Lodg. No. 7, Exh. 1 at 2-3.

Petitioner claims that he gave trial counsel evidence that would have "proved" Deputy Haggerty was lying. ECF No. 1, Pet., Attach. Memo. at 16. However, Petitioner points to nothing in his writings, declarations, and diagrams or in the testimony at trial that shows definitively that he could not have placed the torn-up notes in the trash can, as testified to by Deputy Haggerty. At best, there was conflicting evidence as to the location of the trash can and where Petitioner was detained by Deputy Haggerty, which trial counsel pointed out during his closing statement. See ECF No. 19-41, 19 RT at 6671-72. More importantly, regardless of whether parts of the incriminating notes were recovered from the trash can, Petitioner has not put forth any evidence suggesting that the torn-up notes were written by anyone other than Petitioner.

In fact, Petitioner stipulated at trial that the confiscated notes matched his handwriting. ECF No. 19-39, 17 RT at 5716-17. Consequently, even if Petitioner were able to prove that Deputy Haggerty recovered the notes only from his person and the floor, not the trash can, the notes would have been no less incriminating on their face. Thus, Petitioner has not shown that counsel was ineffective for failing to produce additional evidence surrounding this incident. See Gallego v. McDaniel, 124 F.3d 1065, 1077 (9th Cir. 1997) (rejecting claim that counsel was ineffective for failing to conduct an adequate investigation where the petitioner did not identify any information that had been uncovered in a subsequent investigation which, if known at the relevant time, would have changed the outcome of the proceeding); Villafuerte v. Stewart, 111 F.3d 616, 630 (9th Cir. 1997) (rejecting claim of ineffective assistance of counsel because the petitioner failed to demonstrate prejudice since he presented no evidence that "further investigation would have produced anything of assistance to the defense").

**4. Failure To Present Injury Evidence**

Petitioner claims that there was evidence that Deputy Haggerty used "excessive force" and injured him when the deputy attempted to stop Petitioner from putting the handwritten notes into his mouth after his jail visit with Pennington. ECF No. 1, Pet., Attach. Memo. at 17-18. He argues that if trial counsel would have collected and presented medical evidence of his injuries it would have impeached the deputy's testimony that he saw Petitioner writing notes to show Pennington during her visit and, afterwards, trying to destroy those notes by putting them into his mouth. Id. at 18.

This claim is entirely speculative. First, he offers no substantive evidence other than his own self-serving statements that Deputy Haggerty used excessive force in detaining Petitioner.[3] See ECF No. 19-9, Lodg. No. 7 at 4-5. Second, even if Petitioner was injured during the altercation, the incriminating nature of Petitioner's handwritten notes speaks for itself, as the contents of the notes indicated Petitioner wanted Pennington to contact a prison gang shot caller to have Dean killed. Thus, the prosecution was not relying on the credibility of Deputy Haggerty to convict Petitioner.

Even if the jury believed the deputy minimized or lied about his use of force against Petitioner, there is no reasonable possibility that the outcome of the trial would have come out differently. As such, Petitioner was not prejudiced by any failure of counsel to obtain and present his medical records. See Strickland, 466 U.S. at 687-88; Jaiceris v. Fairman, 290 F.Supp.2d 1069, 1081 (N.D. Cal. Nov. 5, 2003) (holding counsel was not ineffective for failing to impeach witness on "purely collateral matter").

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[3] At trial, Deputy Haggerty denied kicking or using excessive force to detain Petitioner and confiscate the torn-up notes in his possession. ECF No. 19-35, 13 RT at 4315-17.

**5. Failure To Present Evidence That The "Robert" Petitioner Spoke With Was Not "Robby Tobby"**

Petitioner claims that trial counsel was ineffective for not presenting evidence contradicting the prosecutor's claim that Petitioner was intercepted on a phone call speaking with Robby Tobby—a Bloods gang shot caller who was in custody in Alabama who Petitioner wanted to arrange Dean's killing. ECF No. 1, Pet., Attach. Memo. at 18. This claim, however, lacks a factual basis. One of the wiretapped phone calls played to the jury included a conversation between Petitioner and a man named "Robert." ECF No. 19-43, Supp. CT at 273-79. There is no evidence, however, that the prosecutor ever argued that the "Robert" in the phone call was Robert Smith—also known as Robby Tobby—the Bloods gang member housed in Alabama. See, e.g., ECF No. 19-40, 18 RT at 6374-76 and ECF No. 19-41, 19 RT at 6724-25.

Petitioner points to no evidence in the record suggesting otherwise. Nor is there anything explicit in the phone conversation with "Robert" that suggests that the person is Robby Tobby from Alabama. As such, there is no reason to believe the jury thought Petitioner had spoken directly with Robby Tobby about the need to kill Dean. In fact, the prosecutor argued to the jury that Petitioner was "*trying* to get in touch with Robby Tobby" to "get his ass down here immediately" to deal with Dean, not that he already had done so. ECF No. 19-40, 18 RT at 6380 (emphasis added). Thus, Petitioner has not demonstrated counsel was ineffective in failing to introduce evidence regarding the identity of "Robert" on the phone call. See Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (stating that conclusory allegations with no reference to the record or other evidence do not warrant habeas relief).

**6. Failure To Review Evidence Or Have Petitioner Testify**

Petitioner asserts that trial counsel did not listen to all the wiretapped phone calls prior to trial and failed to "review" all of the recordings with Petitioner. ECF No. 1, Pet., Attach. Memo. at 19. Even if true, however, he does not explain how

this affected the outcome of the trial. Petitioner speculates that the recordings played for the jury were "misleading because they were incomplete," but offers no evidence in support. Id. at 20. Nor does he suggest how reviewing each of the recordings with Petitioner prior to trial would have helped his case. See Murray v. Maggio, 736 F.2d 279, 282-83 (5th Cir. 1984) ("[B]revity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel."). In short, this claim is far too speculative to warrant habeas relief. See United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986) (holding "vague and speculative assertions" that counsel was ineffective do not meet Strickland burden).

Petitioner also claims that he intended to testify at trial—to explain the incriminating statements in the recorded phone calls and to give an "innocent explanation" for the handwritten notes found in the trash can—but counsel persuaded him not to because other damaging evidence could be introduced against him. ECF No. 1, Pet., Attach. Memo. at 19-21. To the extent that Petitioner is challenging counsel's strategic decision, that decision is virtually unchallengeable. See Hutchins v. Garrison, 724 F.2d 1425, 1436 (4th Cir. 1983) ("Counsel's advice not to testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance.").

Moreover, in this case, after hearing the trial court's ruling on what impeachment evidence would be allowed if Petitioner were to testify at trial and consulting with trial counsel, Petitioner explicitly told the court that was Petitioner "not tak[ing] the stand." ECF No. 19-39, 17 RT at 5744-46, 5749. Specifically, the trial court indicated that if Petitioner took the stand the prosecutor would be able to bring in a prior plea or conviction for assault with a deadly weapon and that Petitioner ran the risk of opening the door to other, potentially criminal activity, involving a weapon. Id. at 5745. Thus, Petitioner has failed to demonstrate that he did not testify in his own defense because counsel "misrepresented the facts."

ECF No. 1, Pet., Attach. Memo. at 21.

Petitioner also does not indicate what he would have testified to or provide any sort of "innocent explanation" as to the incriminating evidence against him. Finally, had Petitioner taken the stand, he would have been subject to substantial impeachment from his status as a gang leader and his prior conviction for assault with a deadly weapon, as well as the possibility that his testimony would "open the door" to his involvement in the other gang killings. See ECF No. 19-39, 17 RT at 5745. As such, Petitioner has not demonstrated that counsel's advice not to testify amounted to ineffective assistance. See Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000) (finding neither deficient performance nor prejudice where counsel's suggestion that petitioner not to testify was based on "very good reason" that petitioner could be impeached).

Accordingly, the Court finds that the state court's rejection of Petitioner's ineffective assistance of counsel claims was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on Ground One.

**B. Habeas Relief Is Not Warranted With Respect To Petitioner's Claim That Pre-Trial Delay Violated Due Process.**

In Grounds Two through Four, Petitioner claims that pre-accusation delay in charging Petitioner with the conspiracy to commit murder violated his due process rights. ECF No. 1, Pet., Attach. Memo. at 23-25. He argues that the seven-year delay in prosecuting Petitioner caused a loss of relevant records and impacted his ability to call exculpatory witnesses. Id. at 25-27. Further, he argues that the delay in charging Petitioner was "without any justification." Id. at 28. Accordingly, he contends that the case against him must be dismissed. Id. at 31.

**1. Background**

In late 2002, Petitioner, Pennington, and Dean were captured in a series of

recorded phone calls discussing the previous killings of several gang members and whether Dean was—or could be—providing information to police about Petitioner's and Pennington's role in those murders. In December 2002, Petitioner was caught showing "flash cards" to Pennington during a jailhouse visit that suggested Dean needed to be killed immediately. Petitioner, however, was not charged in the conspiracy to have Dean killed until August 2009, nearly seven years later.[4] ECF No. 19-51, Lodg. No. 24.

Prior to the start of trial, in 2012, Petitioner moved to have the case dismissed due to unreasonable delay in prosecuting Petitioner in violation of due process. See ECF No. 19-2, 1 CT at 57. He argued that evidence had been lost since the events of 2002 and, as such, he had been prejudiced. Id. at 57-58. The prosecution opposed the motion. Id. at 58-62. The trial court denied the dismissal motion, finding that there was no intentional delay "to gain a tactical advantage" and the "bare allegation that memories ha[d] faded and helpful witnesses [could] not be found" did not establish sufficient prejudice to violate due process. ECF No. 19-50, Lodg. No. 23 at 7-8.

**2. Federal Law And Analysis**

Pre -accusation delay may violate an individual's right to due process of law. United States v. Lovasco, 431 U.S. 783, 788-89 (1977); Kulcsar v. Asuncion, 763 F.App'x 606, 606-07 (9th Cir. 2019) (unpublished). A defendant must, however, "prove actual, non-speculative prejudice from the delay." United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007) (internal quotation marks omitted). This is a "heavy burden" for a defendant and one that is rarely met. See United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1992). It is not enough to assert that the memories of witnesses have faded over time. See Prantil v. California, 843

[4] The prosecution later dismissed the original complaint on April 25, 2012, and refiled the exact same charges on the same day. ECF No. 19-45, Lodg. No. 18 at 1-9. The reasons for that are discussed extensively in the subsequent section addressing Petitioner's claim in Ground Five.

F.2d 314, 318-19 (9th Cir. 1988); see also United States v. Moran, 759 F.2d 777, 782 (9th Cir. 1985) ("[P]rotection from lost testimony generally falls solely within the ambit of the statute of limitations."). Only if a defendant demonstrates actual prejudice should a reviewing court weigh "the length of the delay . . . against the reasons for the delay" to determine whether due process has been violated. Corona-Verbera, 509 F.3d at 1112.

Petitioner asserts that he was prejudiced by the seven-year delay because, in the interim, the prosecution lost evidence surrounding the December 20, 2002 jail visit by Pennington. ECF No. 1, Pet., Attach. Memo. at 26. At trial, Detective Joel Price testified that an audio recording of the visit between Petitioner and Pennington had been lost and he was unable to locate it. ECF No. 19-36, 14 RT at 4827, 4939. Detective Price, however, listened to the tape before it had been lost and testified that there was not "much conversation at all" on it. Id. at 4827-28, 4830. Petitioner makes no claim that anything on the lost recording would have exculpated him.

Instead, Petitioner argues that he "lost the ability to identify, let alone locate, interview and call . . . percipient witnesses to the interaction between Petitioner and Pennington." ECF No. 1, Pet., Attach. Memo. at 26. Petitioner, however, fails to explain why the lost recording of the conversation was necessary to prepare a proper defense. The relevant details of when and where the meeting took place were known by Petitioner and, thus, there was no impediment to investigating and locating any percipient witnesses. Further, the incriminating evidence from the December 20th meeting with Pennington was Petitioner's use of—and attempt to destroy—"flash cards" that he prepared indicating that Dean needed to be killed, rather than any verbal conversation during the visit. Petitioner has not identified any potential witnesses that would have undermined that incriminating evidence or adequately demonstrated why they could not be located due to the lost tape.

Petitioner also contends that the delay caused the loss of any written reports

by other prison officials who "witnessed" Deputy Haggerty "assault Petitioner in the back hallway" after his visit from Pennington. ECF No. 1, Pet., Attach. Memo. at 26. Petitioner has not identified any specific reports that were lost as a result of the time delay and, more importantly, has not offered any evidence that any such reports would have been relevant to assess the authenticity of the documentary evidence presented against Petitioner, i.e. the flash cards used to communicate with Pennington, or how it would have otherwise supported Petitioner's defense. See United States v. Mills, 641 F.2d 785, 788 (9th Cir. 1981) (holding that to show prejudice from pre-indictment delay "[t]he proof must be definite, not speculative").

Finally, Petitioner's generalized claims relating to the "fading" of witnesses' memories over time does not demonstrate that he was prejudiced at trial. See Barker v. Wingo, 407 U.S. 514, 521 (1972) (noting that delay between crime and trial does not "per se prejudice the accused's ability to defend himself" because prosecution bears burden of proof and its case may be weakened by delay). The Supreme Court has made clear that there can be no due process violation without prejudice from the delay. See Lovasco, 431 U.S. at 790 (holding proof of prejudice is a "necessary but not sufficient element of a due process claim"). Because Petitioner has not made a showing that he suffered actual prejudice in this case, the court need not consider the reasons for the delay. See Hoover v. Ndoh, 797 F.App'x 295, 298 (9th Cir. 2019) ("A court need not address the prosecution's reasons for the delay unless the defendant first establishes actual prejudice.") (unpublished); United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995) (holding because the defendant's "assertion of prejudice is too speculative . . . [o]ur inquiry is therefore at an end"). Accordingly, because the state court reasonably found no due process violation for the pre-accusation delay, Petitioner's habeas claims in Grounds Two through Four are denied.

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**C. Habeas Relief Is Not Warranted With Respect to Petitioner's Claim That His Due Process Rights Were Violated By Outrageous Governmental Conduct Or Prosecutorial Misconduct.**

In Ground Five, Petitioner contends that his conviction must be dismissed because of prosecutorial misconduct and outrageous governmental conduct. ECF No. 1, Pet., Attach. Memo. at 31-34; ECF No. 41, Supp. Brief.

**1. Background**

The California Court of Appeal's extensive recitation of the pre-trial record is, for the most part, not in dispute by the parties. See Exh. A., Cal. CoA Op. at 11-16. The initial charges against Petitioner and his co-defendants were filed in the West District of the Los Angeles Superior Court. Id. at 11. Judge James Dabney heard several pre-trial motions, including a request by the prosecutor to introduce the following evidence:

> (1) Two men were seen running from the scene of Powers's murder, one wearing a white shirt and one wearing a red shirt. Photographs developed from the camera found in the crashed van showed [Petitioner] wearing a bright red jersey and throwing gang signs in Center Park. (2) A Bryco nine-millimeter handgun with an intact serial number was found in Kennedy's car after Powers was killed. The gun was loaded with rounds manufactured by the Fiocchi and Federal companies. Two expended Fiocchi rounds were found at the scene of Powers's murder. When [Petitioner] and Pennington were detained leaving an apartment a few weeks after the murders of Powers and Batiste, the police found a gun box in the apartment with the same serial number as the gun found in the car, as well as a partially filled tray of nine-millimeter ammunition that included Fiocchi and Federal rounds. (3) The casings found at the scenes of the Powers and Ravenel shooting were fired from the gun found in Kennedy's car. (4) Powers was killed because he twice had provided information to the police, once when he told

> investigators there was more than one J-Rock, a comment that led to the other J.Rock's conviction of murder, and later when he was scheduled to testify at the preliminary hearings of the three Neighborhood Pirus charged with shooting him and killing Banks. (5) Powers and Batiste had left the Inglewood motel together the night of their murders.

Id. at 11-12.

The prosecutor argued this evidence was necessary to establish that Batiste had been killed because he witnessed the murder of Powers and could implicate the defendants. Id. at 11. Judge Dabney ruled that the evidence of the guns and the attempted murder of Tyrone Ravenel by Petitioner was inadmissible but was "undecided about allowing evidence Powers had been murdered only hours before the van collision." Id. at 12-13. Thereafter, the prosecutor elected to dismiss the case and immediately refiled it in the Central District of the Los Angeles County Superior Court, where it received a new case number. Id. at 13.

Defendants' counsel moved to have the case transferred back to the West District to be heard by Judge Dabney, arguing that the prosecutor was engaging in "improper forum shopping." Id. Judge George Lomeli held a hearing, during which the prosecutor admitted that his decision to dismiss and refile was, in part, "because of the [adverse pre-trial] evidentiary rulings" by Judge Dabney. Id. at 14. Judge Lomeli indicated he was concerned and disturbed by the admission but, nevertheless, denied the request to have the case transferred back to the West District because it had been "properly filed in the Central District." Id. In so ruling, Judge Lomeli noted the previous evidentiary rulings were "irrelevant and non-binding." Id. at 14-15.

In a later proceeding, defendants moved to dismiss the case based on prosecutorial misconduct and forum shopping. Id. at 15. Judge Michael Abzug heard the motion, during which the prosecutor again acknowledged that the case

was initially dismissed, in part, because of the "adverse evidentiary ruling" by Judge Dabney. Id. Judge Abzug denied the motion, finding that the prosecutor had "acted within his discretion to dismiss and refile" and that the defendants had not demonstrated any prejudice "at this juncture." Id.

Eventually, the case was assigned to Judge Lomeli for trial. Id. Judge Lomeli considered the admissibility of evidence relating to the Powers murder and ruled as follows:

> [E]vidence that Powers had been killed because of his intention to testify against three Bloods gang members, that he was in the company of Batiste when he was killed and that Batiste may have been killed because he was a witness to the Powers murder was admissible against all three defendants. Further, any evidence Dean had provided to the police about the murder of Powers was admissible against each defendant. Judge Lomeli concluded this evidence was relevant to the defendants' motives for the killing of Batiste and the conspiracy to kill Dean and would provide jurors with some context for the charges. The People's request to introduce evidence relating to the firearm and ammunition linked to [Petitioner] and [Petitioner's] use of the gun to shoot Ravenel was denied because there was no definitive proof that weapon had been used to kill Powers and none of the defendants had been charged with his murder.

Id. at 15-16.

**2. California Court Of Appeal Opinion**

On appeal, the California Court of Appeal rejected Petitioner's claim that dismissing and refiling the case in a different district of the Superior Court "constituted either outrageous government conduct or prosecutorial misconduct" under state or federal law. Exh. A, Cal. CoA Op. at 19. The state appellate court acknowledged that "forum shopping by a prosecutor is viewed with disfavor." Id. at 21. For that reason, state law "limits how many times a prosecutor may dismiss

and refile a criminal complaint" and generally disallows a trial court "from reconsidering and overruling an order of another court." Id. at 21-22.

In People v. Riva, 112 Cal.App.4th 981 (2003), however, the court held that, after a mistrial, a new judge was not bound by evidentiary rulings issued by the first judge because such rulings are "subject to revision even after the commencement of trial." Exh. A, Cal. CoA Op at 23 (internal quotation marks omitted). The California Court of Appeal found the circumstances at issue here "closely resemble[d]" the circumstances at issue in Riva:

> As Judge Lomeli observed, the dismissal of the case by Judge Dabney vacated all preceding orders; there were no orders to which the general rule of comity continued to apply. Thus, [Petitioner] and Pennington do not dispute Judge Lomeli had the authority to rule anew on the prosecutor's in limine motion. Writing on a blank slate, some of Judge Lomeli's rulings tracked those made originally by Judge Dabney, but his rulings during trial evolved with the testimony of witnesses, reinforcing the similarity of the in limine rulings in this case to those of concern in Riva.
>
> To be sure, in Riva we were not confronted with an allegation of forum shopping by the prosecutor, as we are here. While we view the prosecutor's rationale for refiling the case in the Central District with skepticism, both Judge Lomeli and Judge Abzug declined to find he had refiled it there for an improper purpose. Likewise, we have found no case suggesting, let alone holding, a prosecutor's permissible refiling of a complaint in compliance with state law and local rules constitutes misconduct, even if the purpose of the refiling was to avoid an adverse ruling. If the essence of prosecutorial misconduct is prosecutorial error, we cannot brand a permissible refiling as misconduct sufficiently outrageous to warrant retrial. Similarly, we cannot conclude the prosecutor's conduct fell within the scope of outrageous governmental conduct warranting dismissal.

Id. at 24-25 (citations and footnote omitted).

**3. Federal Law And Analysis**

A defendant's due process rights are violated if prosecutorial misconduct renders a trial "fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 183 (1986); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (stating that prosecutorial misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process"). Determining whether a prosecutorial misconduct entitles a defendant to a new trial is a two-step inquiry; did the prosecutor "engage[] in misconduct" and, if so, did the misconduct so infect the trial to render it fundamentally unfair. Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982).

Similarly, the Due Process Clause bars outrageous governmental conduct that violates fundamental fairness or is shocking to the universal sense of justice. See Rochin v. California, 342 U.S. 165, 172 (1952) (finding conduct that "shocks the conscience" violates due process of law); see also Breithaupt v. Abram, 352 U.S. 432, 436-47 (1957) (noting that "brutal" conduct of state that "offends [a] sense of justice" violates a defendant's due process rights) (internal quotation marks omitted). Both standards—prosecutorial misconduct and outrageous governmental conduct—require a showing of prejudice in order to obtain habeas relief. See Darden, 477 U.S. at 181-83 (analyzing due process violation against the "weight of the evidence"); Lovasco, 431 U.S. at 790 ("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim."); see also Karis v. Calderon, 283 F.3d 1117, 1128 (9th Cir. 2002) (holding prosecutorial misconduct claim required a showing of "actual prejudice").

As for Petitioner's claim of prosecutorial misconduct, it was rejected because the state appellate court found that the dismissal and refiling of the case was

permissible under state law. California has a "two-dismissal rule." People v. Superior Court (Martinez), 19 Cal.App.4th 738, 744 (1993). Generally, California Penal Code § 1387 establishes that "[t]wo dismissals of a felony action bars further prosecution." Miller v. Superior Court, 101 Cal.App.4th 728, 739 (2002); see also People v. Hatch, 22 Cal.4th 260, 270 (2000) (holding "[t]wo dismissals … bar[s] retrial on felony charges except in limited circumstances").[5] Petitioner concedes as much, noting that California "Penal Code §§ 1385 and 1387 contemplate a procedure for dismissal and refiling" of felony charges. ECF No. 41, Supp. Brief at 8. Nor does Petitioner contend that the refiling was improperly made in the Central District of the Superior Court, as opposed to the original venue in the West District.[6]

The Court is bound to accept the California Court of Appeal's ruling that the prosecutor's actions complied with California state law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). Thus, Petitioner has not demonstrated, under state law, that the prosecutor's action of dismissing and refiling the case was outside the rules or an improper method to secure a conviction. See United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993) ("The prosecutor's job isn't just to win, but to win fairly, staying well within the rules."); see also Berger v. United States, 295 U.S. 78, 88 (1935) (stating that a prosecutor has a "duty to refrain from improper methods" that may lead to a wrongful conviction).

Petitioner argues that, even if statutorily allowed, the prosecutor's forum

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[5] In fact, under certain circumstances, California law allows for a third refiling of a violent felony. See Cal. Pen. Code § 1387.1.

[6] The California Court of Appeal noted that the local rules allowed for the filing of a complaint in "any district where one of the offenses was allegedly committed." Exh. A, Cal. CoA Op. at 14 n.15. Judge Lomeli ruled the case was properly filed in the Central District because "conversations relevant to the conspiracy" had occurred in that district. Id. at 14.

shopping to obtain a more favorable evidentiary ruling violates due process because it "offends a universal sense of justice." ECF No. 41, Supp. Brief at 7. He contends that the state court's decision denying the claim was an unreasonable application of the United States Supreme Court's decisions in Rochin and Donnelly. Id. at 8-9.

In Rochin, police officers illegally entered Rochin's residence because they suspected that Rochin, a known narcotics addict, was selling narcotics. 341 U.S. at 166. Upon entering, the officers saw Rochin put two capsules in his mouth and violently tried to prevent him from swallowing them by physically "extract[ing] the capsules." Id. When their efforts proved unsuccessful, they took Rochin to a doctor who pumped his stomach against his will. Id. The Supreme Court held that the methods used by the police to recover the capsules, which contained morphine, were "too close to the rack and screw" to be lawful under the Due Process Clause of the Constitution. Id. at 172-74.

In Donnelly, the Supreme Court examined an ambiguous, but "potentially … misleading and prejudicial," statement made by the prosecutor about the defendant during closing argument. 416 U.S. at 645. After considering the "entire proceedings," the Supreme Court held that the prosecutor's remark did not so infect the trial with unfairness as to make the conviction a denial of due process. Id. at 643, 645.

Neither of these cases dealt with a claim of forum shopping or contained factual circumstances that provides any meaningful guidance in the instant case. Moreover, Petitioner points to no Supreme Court authority explaining when a prosecutor's attempts at forum shopping would amount to outrageous governmental conduct that constitutes a due process violation. Although, in other legal contexts, the Supreme Court has sought to discourage parties from forum-shopping, see, e.g., United States v. Leon, 468 U.S. 897, 918 (1984) (expressing concern for "magistrate shopping" in search warrant applications); Hanna v.

Plumer, 380 U.S. 460, 468 (1965) (observing that one of the aims of federal courts in applying diversity jurisdiction is the "discouragement of forum-shopping"), the Court has not discovered any clear authoritative pronouncements on this subject relating to a criminal procedural rule that allows the dismissal and refiling of a criminal case. Notably, albeit in a case from fifty years ago, the Ninth Circuit has rejected a challenge that California Penal Code § 1387 is unconstitutional. See Allen v. Schneckloth, 431 F.2d 635, 635-36 (9th Cir. 1970).

Without a clear holding from the Supreme Court, there is no basis for finding that the state court's rejection of the claim involved an unreasonable application of clearly established federal constitutional law. See Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law."); see also Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotation marks omitted)).

The Magistrate Judge's decision should not be read to countenance the prosecutor's use of the "two-dismissal" rule to attempt to obtain a more favorable evidentiary ruling and it is in fact very troubling. Generally, one trial judge should not be allowed to reconsider or overrule the order of another trial judge. See Riva, 112 Cal.App.4th at 991 (noting the "important public policy reasons behind this rule," including discouraging forum shopping, conserving judicial resources, and preventing case interference). The issue before the Court, however, is whether the prosecutor's actions were so outrageous or shocking to have violated constitutional norms of fundamental fairness and justice. In that light, the Court notes that this is not a case in which the prosecutor manipulated the procedural rules in an attempt to

admit clearly impermissible evidence.

The California Court of Appeal agreed with Judge Lomeli that evidence of the Powers and Banks murders was "highly probative" of the defendants' motive and intent in killing Batiste and was "highly relevant" to prove the criminal street gang allegations. Exh. A, Cal. CoA Op. at 27-28. Though Judge Dabney's tentative ruling—excluding this evidence as too prejudicial and tangential—was "equally within the realm of discretion accorded a trial court," the state appellate court held there was no error in ultimately admitting the evidence, as it was unquestionably probative of issues in the case. Id. As such, the admission of the evidence itself did not violate due process. See Estelle v. McGuire, 502 U.S. 62, 70 (1991) (holding that, so long as the evidence "was relevant to an issue in the case," its admission does not violate due process).

In fact, had Judge Dabney himself reversed his tentative ruling on the admission of the evidence and later allowed it at trial, there would have been no cause for concern at all. See People v. Castello, 65 Cal.App.4th 1242, 1248 (1998) ("A court's inherent powers are wide" and "include authority to rehear or reconsider rulings."). Thus, at its essence, Petitioner's complaint is that the prosecutor's use of California Penal Code §1387 allowed a different trial judge to reconsider Judge Dabney's ruling. That claim involves only a claim of state law error. See Rivera v. Long, No. 12-CV-00192 LJO, 2013 WL 5302714, at *15 (E.D. Cal. Sept. 19, 2013) ("Petitioner argues that the judge acted in violation of his authority in issuing an order contrary to a previously made order by a different judge in the same matter. Such a claim is for an alleged violation of state law, and not reviewable by way of a federal habeas corpus petition.") (citations omitted). For these reasons, the Court concludes that the prosecutor's actions in this instance did not rise to the level of a due process violation.

Petitioner also claims he is entitled to relief because the state court's rejection of his claim was based on an unreasonable factual determination. ECF No. 41,

Supp. Brief at 9. He argues that Judge Abzug's ruling, denying a pre-trial motion to dismiss based on forum shopping, was clear error because the prosecutor dismissed and refiled the case "to re-think and reorganize it," rather than simply to circumvent Judge Dabney's evidentiary ruling. Id.

A court makes an unreasonable determination of the facts if it "plainly misapprehend[s] or misstate[s] the record in making [its] findings." Milke v. Ryan, 711 F.3d 998, 1008 (9th Cir. 2013) (internal quotation marks omitted). In rejecting Petitioner's claim of error, however, the California Court of Appeal's decision did not rely on Judge Abzug's finding that the case was not refiled for an improper purpose:

> [W]e have found no case suggesting, let alone holding, a prosecutor's permissible refiling of a complaint in compliance with state law and local rules constitutes misconduct, *even if the purpose of the refiling was to avoid an adverse ruling.*

Exh. A, Cal. CoA Op. at 25 (emphasis added). Therefore, even if Judge Abzug's conclusion was unreasonable, it did not impact the appellate court's decision. Accordingly, Petitioner is not entitled to habeas relief. See Shammam v. Paramo, 664 F.App'x 629, 631 (9th Cir. 2016) (rejecting claim of habeas relief based on an unreasonable determination of the facts where the state court decision "d[id] not rely" on the erroneous finding) (unpublished).

Finally, Petitioner cannot obtain habeas relief on this claim because he has not demonstrated that there is a reasonable probability of a more favorable outcome even had the prosecutor not been allowed to refile the case in another court. See Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (stating that habeas relief is only available if the constitutional error had a "substantial and injurious effect or influence" on the jury verdict or trial court decision). Petitioner argues that had the case been tried before Judge Dabney, the jury would not have heard about the murders of other Blood gang members that preceded the charged crimes against

Petitioner. ECF No. 41, Supp. Brief at 12-13. However, this conclusion is speculative.

During the pre-trial motion on the evidence, Judge Dabney told the prosecutor that he would not allow the gun and ballistics evidence tied to the Powers and Ravenel shootings,[7] but was undecided about whether he would allow evidence that Powers was killed shortly before the freeway killing of Batiste. ECF No. 19-44, Lodg. Doc. 17 at 27-28, 31, 33-34, 35. Judge Dabney told the prosecutor he should "assume" that the evidence would not be admissible in deciding whether to dismiss and refile the case at a later time. Id. at 34-35. If the prosecutor chose to proceed with the case, Judge Dabney indicated he would hold a hearing to determine whether to allow evidence that "Powers ended up getting shot and killed." Id. at 35. Because the prosecutor elected to dismiss and refile the case in a different district, Judge Dabney was never required to ultimately rule on the issue. Thus, Petitioner cannot demonstrate definitively that this evidence would have been precluded had the matter not been dismissed and refiled in a different court.

Furthermore, none of the evidence related to the earlier killings was intended to directly implicate Petitioner in the conspiracy to kill Dean. Instead, that evidence was solely offered as evidence of the gang members' motive and intent to kill any potential witnesses who might implicate Petitioner and Pennington in past crimes. Exh. A, Cal. CoA Op at 27. Although certainly incriminating, it was not necessary to prove any element of the charged crimes themselves. See People v. Myers, 198 Cal.App.2d 484, 497 (1961) ("[P]roof of a motive for an alleged crime is permissible and often is valuable, but never is essential.").

Here, the most powerful evidence against Petitioner in the conspiracy to have Dean killed was Petitioner's own handwritten notes and telephone conversations with Pennington while in prison, not the evidence of the uncharged murders of

[7] This gun and ballistics evidence also was excluded from Petitioner's trial by Judge Lomeli.

other gang members. In wiretapped phone conversations, Petitioner and Pennington discussed what the gang should do about Dean snitching on other gang members. Petitioner told Pennington that Dean was going to "be handled." Exh. A, Cal. CoA Op at 9. Later, during a jail visit from Pennington, Petitioner used "flash cards" to tell Pennington that Dean needed to be "X'd quick." Id. at 10. This evidence, which directly implicated Petitioner in the plan with Pennington to have Dean killed, would have been admitted and considered by the jury regardless of the other evidentiary rulings. Therefore, in light of this highly incriminating evidence, this Magistrate Judge cannot conclude that the outcome would have been different, even if the contested evidence regarding the prior murders were excluded, and, therefore, finds that Petitioner has not demonstrated sufficient prejudice to warrant habeas relief.

For these reasons, the California Court of Appeal's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Petitioner is not entitled to federal habeas relief on Ground Five.

**D. Habeas Relief Is Not Warranted With Respect to Petitioner's Claim That He Should Not Have Been Tried Jointly With Co-Defendants Dean And Pennington.**

In Ground Six, Petitioner claims that the trial court's denial of his request for severance resulted in a fundamentally unfair trial in violation of his right to due process. ECF No. 1, Pet., Attach. Memo. at 34-35. He contends that being tried with Dean and Pennington "unfairly associate[ed] him with the murder of Batiste and allow[ed] the jury to consider otherwise inadmissible evidence" related to the murders of several gang members. Id.

**1. Background**

Prior to trial, Petitioner moved to sever his case from his co-defendants because he was not charged with the Batiste murder, arguing that there would be conflicting defenses at trial and that he would be unfairly prejudiced by evidence of

the murders of other gang members. See ECF Nos. 19-1, Supp. CT at 26-41 and 19-2, 1 CT at 105-12. The trial court rejected the request, finding that the evidence of the Batiste murder and the conspiracy to murder Dean was sufficiently compartmentalized that there would be no "spillover" effect that would prejudice Petitioner or impinge on his right to present a defense. See ECF No. 19-24, 2 RT at A15-A21. The trial court did, however, order that Petitioner and Pennington's case be heard by a separate jury from Dean to ensure that Dean's hearsay statements implicating Pennington in the murder of Batiste would be heard only by Dean's jury. See id. at A15.

**2. The California Court Of Appeal Opinion**

The California Court of Appeal agreed that joinder of the murder and conspiracy to commit murder charges was proper because "[t]he murder of Batiste provided the motive for the subsequent conspiracy to murder Dean; and, as assaultive offenses, the two charges fell within the same class of crimes." Exh. A, Cal. CoA Op. at 35. The state appellate court found that the evidence related to the Batiste murder charge would have been cross-admissible in a separate trial against Petitioner and that the trial court mitigated the risk of any inadmissible evidence against Pennington and Petitioner by ordering a separate jury to hear the case against Dean. Id. at 36-37.

Similarly, the court concluded that the evidence of the Banks and Powers murders was also admissible against Petitioner for the same reasons and was not "unduly inflammatory compared to the conspiracy charge." Id. at 37. Finally, the court determined that Petitioner suffered no prejudice from the joint trial because the "evidence contained in the recorded telephone calls and handwritten notes [Petitioner] showed to Pennington during her visit to the jail left no doubt as to his guilt on the conspiracy charge." Id. at 40. Therefore, the California Court of Appeal concluded that because there was "overwhelming" evidence of Petitioner's guilt there could have been "no violation of his due process right to a fair trial." Id.

at 41.

**3. Federal Law And Analysis**

Petitioner's claim that his constitutional rights were violated by the trial court's refusal to grant him a separate trial from co-defendants Pennington and Dean fails to warrant habeas relief for several reasons. First, and most significantly, the state court's decision denying relief could not have been contrary to or unreasonable applications of clearly established federal law because there is no clearly established federal law regarding the misjoinder of co-defendants. See Runningeagle v. Ryan, 686 F.3d 758, 774 (9th Cir. 2012) ("[T]here is no clearly established federal law requiring severance of criminal trials in state court even when the defendants assert mutually antagonistic defenses[.]"); see also Grajeda v. Scribner, 541 F. App'x 776, 778 (9th Cir. 2013) ("The Supreme Court has not held that a state or federal trial court's denial of a motion to sever can, in itself, violate the Constitution.") (unpublished).

Although the Supreme Court has observed in a footnote that "misjoinder would rise to the level of a constitutional violation . . . if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," United States v. Lane, 474 U.S. 438, 446 n.8 (1986), the Ninth Circuit has held that the Supreme Court's statement was dictum and, therefore, did not constitute clearly established law for purposes of federal habeas review. See Runningeagle, 686 F.3d at 776-77; Collins v. Runnels, 603 F.3d 1127, 1132 (9th Cir. 2010). Similarly, in Zafiro v. United States, 506 U.S. 534, 539 (1993), the Supreme Court held federal district courts should grant severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." The Ninth Circuit, however, subsequently ruled that Zafiro analyzed "only the Federal Rules of Criminal Procedure applicable to federal district courts" and, therefore, was not binding on state trial courts. See Collins, 603 F.3d at 1131-32 ("By its own wording,

Zafiro only applies to federal and not state court trials."); see also Hedlund v. Ryan, 854 F.3d 557, 571 (9th Cir. 2017) ("Zafiro does not apply to § 2254 cases."). Accordingly, neither Lane nor Zafiro established clear Supreme Court authority upon which Petitioner can rely to obtain federal habeas relief.

Moreover, even if the standards set forth in Lane and Zafiro were applicable here, Petitioner has not shown the trial court's refusal to order a separate trial for Petitioner violated his constitutional rights by preventing the jury from making a reliable judgment about his guilt or innocence. As the California Court of Appeal found, the evidence of the Batiste murder, as well as the uncharged murders of Banks and Powers, would have been admissible against Petitioner even in a separate trial because it demonstrated motive in the conspiracy to murder Dean (i.e., to stop him from 'snitching' on Petitioner and Pennington) and to support the gang enhancement (i.e., that the gang planned to have Dean killed to protect other gang members from going to jail). See Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000) ("[C]ross-admissibility dispels the prejudicial impact of joining all counts in the same trial.").

Furthermore, this was not an instance where the prosecution attempted to bolster a weak case against Petitioner with inflammatory evidence of other criminal behavior. See, e.g., id. (finding joinder proper because the prosecution did not attempt to join "a strong evidentiary case with a much weaker case in the hope that the cumulation of the evidence would lead to convictions in both cases"). Here, there was strong evidence that Petitioner and Pennington conspired to have Dean killed from recorded phone conversations between the two of them and Petitioner's own handwritten notes on the day Pennington visited him in jail. Thus, the failure to sever the charges did not have a "substantial and injurious effect of influence in determining the jury's verdict." Id. For all these reasons, Petitioner's claim in Ground Six does not merit habeas relief.

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**E. Habeas Relief Is Not Warranted With Respect to Petitioner's Claim Of Evidentiary Error.**

In Ground Seven, Petitioner claims that the admission of evidence of the Banks, Powers, and Batiste murders was improper because it was "not relevant" to the conspiracy to commit murder charge against him. ECF No. 1, Pet., Attach. Memo. at 36. He further argues that the evidence "was more prejudicial . . . than probative" and, as such, should have been excluded. Id. at 37. Finally, he contends that the admission of hearsay statements made by Powers before his death violated Petitioner's Sixth Amendment Confrontation Clause rights. Id. at 38.

**1. The California Court Of Appeal Opinion**

In rejecting Petitioner's claims on appeal, the California Court of Appeal noted that the evidence of the gang murders—none of which Petitioner was charged with committing—was, nevertheless, "highly probative evidence" of his "motive and intent" in the conspiracy to have Dean killed. Exh. A, Cal. CoA Op. at 27. Thus, the state appellate court concluded that the string of murders of fellow gang members was relevant and admissible against Petitioner:

> [T]his evidence was highly relevant to the criminal street gang enhancement allegation against [Petitioner], Pennington and Dean, who were members of the same Bloods gang. Evidence of the chain of murders was critical to proving the pattern of gang retribution—that is, Powers had been "green-lighted" by the Bloods because they believed he had pointed the police to Big J–Rock; Banks had been killed when the Neighborhood Pirus attempted to murder Powers; Powers was lured back to Inglewood and killed when he was in the company of Batiste, who was in turn killed because he likely witnessed Powers's murder. Dean was then targeted by [Petitioner] and Pennington because they feared he would implicate them in the murder of Batiste or Powers.

Id. at 28-29.

The state appellate court also rejected Petitioner's claim that the evidence was too prejudicial to be admitted against him because there was testimony that Petitioner was a "shot caller" in the gang:

> It is precisely because of that testimony, however, seen in light of [Petitioner's] own statements attempting to direct Dean's murder and his acknowledgement he faced potentially far greater criminal liability if he did not succeed in silencing Dean, that made the testimony about the Bloods' motive to murder Powers exceptionally probative. As a shot caller [Petitioner] stood in the position to direct the murder of his fellow gang member Dean; and his attempt to communicate with members of other Bloods-affiliated gangs to accomplish that murder demonstrated his ability to coordinate with those gangs for the commission of a crime. . . . Here, the prejudice to [Petitioner] resulted from the persuasiveness of the evidence, not from the possibility it could be misconstrued or evoke an irrational emotional bias against [Petitioner].

Id. at 30 (footnote omitted).

Finally, the state appellate court found that any error in allowing Detective Burton to testify that, before Powers was killed, Powers told the detective that he had been chased and shot at by three members of the Neighborhood Piru gang was harmless[8]:

> Detective Burton testified that Powers was scheduled to testify at a preliminary hearing against the Neighborhood Pirus he had identified, thus establishing the Bloods' motive to kill him. Powers's earlier statements added little to that information and nothing that would cause additional prejudice to [Petitioner] or Pennington. Accordingly, it is not reasonably probable that a result

[8] According to Detective Burton, Powers told him that Powers and Banks had been sitting on a porch when three members of the Neighborhood Piru gang approached and "began shooting at them." Exh. A, Cal. CoA Op. at 31. Powers said that he and Banks ran away, but he had his finger "shot off" in the attack. Id.

> more favorable to [Petitioner] would have been reached in the absence of the error.

Id. at 32-33 (internal quotation marks omitted).

**2. Federal Law And Analysis**

A state court's evidentiary rulings are not reviewable in federal habeas corpus proceedings unless they infringe on a specific federal constitutional or statutory right or deprive a defendant of a fundamentally fair trial as guaranteed by due process. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998) ("We have no authority to review alleged violations of a state's evidentiary rules in a federal habeas proceeding. Our role is limited to determining whether the admission of evidence rendered the trial so fundamentally unfair as to violate due process." (internal citation omitted)). An evidentiary ruling only implicates due process if there are no permissible inferences that the jury could have drawn from the evidence. Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

Despite Petitioner's arguments to the contrary, evidence of the string of murders of fellow Bloods gang members was clearly relevant to demonstrate Petitioner's motive to have Dean killed for being a potential snitch. Not only did the evidence show the gang's culture of retribution against its own members, but it gave credence to the prosecution's theory at trial that Petitioner and Pennington were sincere in their threats to have Dean killed because they believed he could link them to those murders. As such, the admission of the evidence did not violate due process. See Estelle, 502 U.S. at 70 (finding no possible due process violation because the evidence was "relevant to an issue in the case").

As for Petitioner's contention that the evidence should have been excluded because it was overly prejudicial, that, too, is baseless. The Supreme Court has never held that, on its own, the admission of "overtly prejudicial evidence constitutes a due process violation." Holley v. Yarborough, 568 F.3d 1091, 1101

(9th Cir. 2009). In any event, there was no implication at trial that Petitioner was personally involved in the murders of Banks, Powers, or Batiste. Rather, that evidence, coupled with other evidence demonstrating that Petitioner was a "shot caller" in the gang, simply gave context to Petitioner's own recorded statements and writings that Dean was to be killed. Thus, on a record like this – where the evidence is both relevant and not "overtly prejudicial," the Court has no basis for finding that a due process violation occurred.

Finally, regarding the admission of Powers' hearsay statements by Detective Burton, the Court agrees that they are harmless. Confrontation Clause violations are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding a Confrontation Clause violation is subject to harmless error analysis). Thus, Petitioner is entitled to federal habeas relief only if the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637. Here, Petitioner was not directly charged or implicated in the initial shooting of Powers or his subsequent murder. Thus, Powers' hearsay statements about being shot at by other gang members did not prejudice Petitioner. Furthermore, Detective Burton was properly allowed to testify that, prior to being murdered, Powers was scheduled to testify against other Blood gang members. It was this fact—not the details of any shooting provided by Powers himself before his death—that evidenced the gang's propensity to eliminate any members who "snitched" and, in turn, provided a similar motive for Petitioner to conspire to have Dean killed. Thus, the California Court of Appeal reasonably determined that any error in allowing the hearsay testimony of Powers was not prejudicial, and the claim in Ground Seven does not warrant habeas relief.

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## VII. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) Approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: October 16, 2020

HON. SHASHI H. KEWALRAMANI
United States Magistrate Judge

## 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 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.

# EXHIBIT A

Filed: 11/15/16

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN



| | |
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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JASON GREEN,<br><br>Defendant and Respondent. | B256776<br><br>(Los Angeles County<br>Super. Ct. No. BA396890) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LYNETTE PENNINGTON,<br><br>Defendant and Respondent. | B259139<br><br>(Los Angeles County<br>Super. Ct. No. BA396890) |

APPEALS from judgments of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed as modified.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Jason Green.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Lynette Pennington.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

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Jason Green and Lynette Pennington appeal from the judgments entered after a jury convicted them of conspiracy to murder Garry Dean, their codefendant, and found true a special criminal street gang enhancement allegation. Pennington was also found guilty, along with Dean, of the second degree murder of Alton Batiste.[1] Green and Pennington both contend the prosecutor engaged in prejudicial misconduct when he dismissed the case after receiving an adverse pretrial ruling and refiled it in a different district, a claim we rejected in Dean's appeal. (See *People v. Dean* (Apr. 25, 2016 (as mod. May 16, 2016), B253077) [nonpub.] at pp. 16-20.) Green further contends the trial court committed prejudicial error by admitting evidence of uncharged murders, by denying his motions to sever his trial from that of his codefendants and by improperly imposing a five-year prior serious felony sentence enhancement. Pennington also challenges the trial court's ruling admitting evidence of the uncharged murders and contends the evidence was insufficient to convict her of Batiste's murder or the conspiracy to murder Dean. We affirm

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[1] Pennington, Green and Dean were charged in the same information and tried together. Dean's case was heard by one jury; Pennington's and Green's by a second jury. We reversed Dean's conviction based on errors committed by the court and prosecutor during closing argument that do not affect the appeals of Pennington and Green. (*People v. Dean* (Apr. 25, 2016) (as mod. May 16, 2016), B253077) [nonpub.].)

both judgments but modify Green's sentence to correct the statutory basis for his prior serious felony sentence enhancement and the sentences of both defendants to correct the statutory fines imposed.[2]

## FACTUAL AND PROCEDURAL BACKGROUND[3]

1. *Overview of the Murders of Alton Batiste, Travon Powers and Dawan Banks*

The complicated facts presented at trial, as well as the evidentiary rulings and arguments of counsel at the center of Green's and Pennington's appeals, arise from three, perhaps related, murders.

a. *Alton Batiste.* At approximately 1:30 a.m. on September 23, 2002 a van crashed into the divider on the Santa Monica Freeway in West Los Angeles. Dean, a member of the Center Park Bloods, was one of the individuals in the van. Pennington, also a member of the Center Park Bloods, was the driver of the van, which was registered to Robert Burke, her incarcerated boyfriend. Batiste, severely injured by knife wounds, was in the van when it crashed. He died nine days later.

b. *Travon Powers.* Several hours before the van crash Batiste had been in a car with Powers, a member of Centinela Park Family, also a Bloods-affiliated criminal street gang. Powers's body was found shortly before midnight on September 22, 2002 in Center Park, the neighborhood claimed by the Center Park Bloods. The car, which belonged to Powers's

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[2] After briefing was completed in this appeal, Green's appellate counsel filed directly with this court a petition for a writ of habeas corpus asserting a claim of ineffective assistance of counsel. That petition will be separately addressed by the court.

[3] With one exception, the evidence presented to Green and Pennington's jury was the same as that presented to Dean's. (See fn. 5, below.) We repeat our summary of the evidence from Dean's appeal here, modestly revised, to focus on the arguments made by Green and Pennington.

girlfriend, Tessy Kennedy, had crashed into a low fence nearby; blood stains were found on its front seats. According to Kennedy, Powers and Batiste had left an Inglewood motel together in her car around 10:20 that evening to look for drugs.

c. *Dawan Banks*. Powers's murder occurred several days before he was scheduled to testify at a preliminary hearing to identify three members of the Neighborhood Pirus, another Bloods-affiliated gang, as the individuals who had shot at Powers and Banks, also a Centinela Park Family member, in February 2002. Banks was killed; and, although Powers escaped, his finger was shot off.

The prosecution's theory was that Powers had been killed because he intended to testify against three Bloods gang members and that Batiste, who had been with Powers, had likely been killed by Dean and Pennington because he had been a witness to Powers's murder. An alternate possibility suggested by Dean's defense counsel was that Batiste had been stabbed in Kennedy's car and was simply being transported to the hospital in the van in which Dean was riding when it crashed. In connection with that theory, Dean's counsel questioned the source of the blood found on the front seats of Kennedy's car.

2. *The Murder of Alton Batiste*

In the early morning of September 23, 2002 a witness seated in a car overlooking the Santa Monica Freeway in West Los Angeles saw a van travel across the freeway lanes, hit the freeway divider and come to a stop. An African-American man wearing a light-colored shirt got out of the van, followed by another African-American man wearing a red shirt. The witness later identified Dean as the man in the red shirt. Dean and the second man pulled an individual out of the van and carried him across the lanes to the shoulder of the freeway. The first two men returned to the van, pulled out what could have been a small person or a duffel bag and carried it to the side of the freeway. The two uninjured men wandered around, looking confused. The man in

the light-colored shirt walked halfway up the embankment above the shoulder of the freeway and then returned to the van. The witness called the police emergency hotline.

By the time emergency personnel arrived, the two men had disappeared. The witness directed them to the injured man on the side of the freeway, who was later identified as Batiste. Batiste was lying on his back in a pool of blood. He was moving, although incoherent, and was transported to UCLA Medical Center. California Highway Patrol Officer Arthur Dye inspected the van. According to Dye, the rear passenger door of the van was inoperable. The front interior of the van was covered in blood; and, although the driver's side windshield was cracked, there was no glass in the van or any blood or hair on the windows. Blood was smeared on the dashboard in front of the passenger seat, and a red jersey soaked in blood lay in front of the passenger seat. The passenger seat was bent forward toward the steering wheel, and both the steering wheel and the key in the ignition were bent to the side. A purse on the floor of the van contained Pennington's checkbook and California identification card. Dye also found a key from an Inglewood motel in the fast lane of the freeway next to the van. Dye ordered the van towed from the freeway.

After CHP officers had arrived, the witness saw Dean using a pay phone near the intersection of National Boulevard and Westwood Boulevard and pointed him out. Dean wore a red jersey, dark pants and red Converse sneakers. Small drops of blood were on Dean's shirt and shoes, and he had a bloodstained red bandana wrapped around his right hand. Dean told the officers he had been in the van collision and was using the pay phone to call for help.[4] Although he initially told the officers he had been in the rear passenger seat, he later said he was in the

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[4] All tapes of emergency calls concerning the incident were lost. The initial dispatch reported three to four Black men had emerged from the van, not including Batiste, who was carried from the van.

front seat.[5] He provided his name, address and telephone number at the officers' request. When asked about the injured passenger, Dean answered, "He's not my friend. I don't even know the guy." When Dean complained about pain in his hand and said he felt ill and dizzy, one of the officers called an ambulance. The officers left after receiving a radio call about another traffic collision.

Officer Dye went to UCLA Medical Center after leaving the accident scene and learned Batiste had suffered several puncture wounds.[6] The other officers returned to the pay phone but could not locate Dean. The case was assigned to Los Angeles Police Detective Joel Price for investigation.

3. *LAPD's Investigation of Batiste's Murder*

Later in the morning on September 23, 2002 Pennington sought medical treatment at a Gardena hospital, complaining of pain in her left shoulder and a laceration above her left eye. She reported she had been punched in the face by a man and had lost consciousness. After treating and discharging her, the hospital reported the assault to the police. Pennington told the police she had been carjacked that night while driving Burke's van. Detective Price spoke with Pennington two days later after learning she had reported the van stolen. According to Price, Pennington was vague about the details but claimed she had been carjacked between 12:30 and 1:00 a.m. She said she had been

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[5] Dean's jury, but not Green and Pennington's, heard testimony that Dean had identified the driver of the van as his girlfriend, "Nette."

[6] Batiste suffered three stab wounds to his forehead that were forceful enough to penetrate his skull. Batiste also suffered stab wounds to the right front of his torso that penetrated his chest wall, diaphragm and liver and cuts to his right external jugular vein, trachea and esophagus. He had fractures of the eye socket and nose from blunt force trauma, scrape marks on his left shoulder and forearm that looked like road rash and abrasions on his knuckles. He died on October 2, 2002.

punched in the head, lost consciousness and was concerned she had been sexually assaulted. She did not explain why she waited to obtain treatment or to report the van as stolen. On September 26, 2002 Pennington called the yard where the van had been towed to ask if she could retrieve her belongings. She said her boyfriend, Burke, owned the van and asked when it would be released to her. At the time, no one at LAPD had told Pennington the van had been impounded.

On October 1, 2002 Detective Price accompanied an LAPD criminalist to the towing yard to search the Burke van. Price observed the van's rear door was hinged (rather than sliding) but fully operable and saw drops of blood inside the doorframe. The criminalist found 27 stains that tested presumptively positive for blood and collected the bloodstained red shirt, the purse, some keys on a chain, a sneaker with red stripes, two cameras, a phone and a phone battery. DNA profiling on various stains recovered from the van were linked to Batiste, Pennington and Dean.[7] A stain from the upholstery of the front passenger seat matched Batiste's profile; Dean and Pennington were excluded as contributors. A swab from the steering wheel was primarily attributed to Batiste, but Pennington could not be excluded. A stain on the middle bench seat contained primarily Dean's DNA but Pennington could not be excluded. A stain from the carpet between the middle and rear bench seats contained Dean's DNA. None of the tested stains contained a mix of Dean and Batiste's DNA. The drops in the interior doorjamb of the rear passenger door, as well as stains on the exterior of the door, were never tested.

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[7] None of the swatches tested matched Green's DNA, although he could not be excluded as a contributor to a sample drawn from the red shirt. As the criminalist testified, the source of the DNA was not necessarily blood; it could have been saliva, sweat or any other DNA cell source.

In January 2003 Detective Price, who had unsuccessfully searched for the Batiste murder weapon in October 2002, returned to the freeway embankment with a CalTrans crew that cut the vegetation to facilitate the search. A seven-inch kitchen knife was found near the location described by the witness to the collision. Forensic tests did not recover any trace of fingerprints or blood from the knife.

4. *The Possible Powers Connection*

Early in the investigation Detective Price learned the Inglewood Police Department (IPD) wanted to question Batiste, who remained in a coma, about the Powers murder, which had occurred an hour or so before the van collision. Kennedy told Inglewood police she and Powers had gone at Batiste's invitation to an Inglewood motel that night to party with Batiste and his girlfriend. A few days earlier an IPD officer had relocated Powers to a downtown Los Angeles hotel and warned him not to return to Inglewood before the hearing. When Powers and Kennedy arrived at the motel, there was no party. Powers and Batiste then left together in Kennedy's car but did not return. According to Kennedy, Powers, known as "Lil J-Rock," had a reputation as a snitch. After a shooter who yelled "J-Rock" shot and killed a Rolling Crips gang member, Powers, who was supposed to "take the rap," was "green-lighted," or targeted, by Bloods-affiliated gangs because he told the police another Bloods gang member was known as "Big J-Rock." Big J-Rock was later convicted of murder for the shooting. Kennedy also testified Powers had told her Batiste's sister was dating one of the Neighborhood Piru gang members who had shot at Powers and killed Banks. Batiste's wife told Price that Batiste had received several phone calls from that person.

5. *The Wiretap Evidence*

Shortly after Batiste's death on October 2, 2002, LAPD and IPD detectives jointly obtained an order authorizing wiretaps on telephone numbers linked to the deaths of Batiste and Powers.

The numbers included Pennington's landline and cell phone and the number Dean had given the officer the night of the crash.[8] A Los Angeles County jail number was added when detectives realized Pennington was receiving numerous calls from someone known as "B-Lok," eventually identified as Green, who had been incarcerated following his negotiated plea to a charge of assault with a firearm for shooting at Tyrone Ravenel, another Inglewood gang member. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. (Detective Price believed that the moniker Shady Blood, which the gang expert testified would indicate someone in the gang is dirty, dishonest or a snitch, referred to Dean and that the other gang members were conferring about killing Dean.) Pennington told Green she had spoken with CKay the previous evening and he had said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Green told Pennington not to talk on the phone and agreed that lives were at stake. He said, "On Blood, this gonna be handled," and indicated he would have to trust CKay. After that call Pennington called other gang members to set up a meeting.

A wiretapped conversation on December 5, 2002 between Dean and Pennington revealed that Dean also believed his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington where she had heard this information, and Pennington replied she had been hearing it "a whole lot." Dean denied talking and said he wanted to know who

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[8] Dean told Detective Price the number belonged to his girlfriend. The same number was listed in a phone book found in Pennington's purse under the name "Skoobee Red." On October 8, 2002 Price interviewed Pennington again about the carjacking and showed her a photographic lineup containing a picture of Dean. Pennington denied knowing anyone in the lineup.

was putting "mud" on him. When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing.

In a December 19, 2002 call Pennington told Green she would be visiting him the next day at the county jail. Green told her he had his "little flash cards" ready, and Pennington said she had hers as well. After listening to the call, Detective Price asked county jail deputies to seize any writings between Green and his visitor.[9] The next day Los Angeles County Sheriff's deputies monitored Pennington's visit with Green and approached him after she left. Green attempted to put several small pieces of paper in his mouth but failed when the deputies grabbed his hand. The deputies retrieved several pieces of paper, which Price reconstructed. The first note, written by Green, read, "The business is: To find out exactly where that nigga is at. . . . I'm sure you know by now. Shady in the Queen streets tellin' niggas I did that shit. On Bloods. Babe, that nigga got to be X'd quick." A second page read, "The business is: Ckay, Bo-Legs & Chip get'in Shady—Now! . . . As far as any pillow talkin Shady did, that would be considered 'hearsay' . . . in the court of law. So we'll get the hoe when we can. We need Shady X'd now!!! Like yesterday." The third page read, "Shady is trying to fuck us off for some reason! I assume because (he fucked up from the very start!) when he gave your name. Now he can't stop telling." The reverse side gave instructions on contacting a Bloods prison gang shot caller "to get his ass down here immediately . . . ." Later that day Green was recorded telling another girlfriend that the assault

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[9] Visitor conversations were monitored, and jail rules prohibited the exchange of information in writing during visits.

charge for which he had been incarcerated was like a "speeding ticket" in comparison to "other bullshit" that was happening. He also expressed concern he was in custody when he should be preparing for his future with a lawyer such as "Shapiro" or "Johnny Cochran."

Meanwhile, after Dean was jailed for a probation violation, Detective Price met with him twice to warn him his life was in danger and to seek his cooperation. Dean denied being involved in, or knowing anything about, the freeway collision or the murders of Powers and Batiste. He also denied he had been the person questioned at the phone booth the night of the accident even after he was told he had been identified by the CHP officers.

6. *The Initial Filing and Dismissal of Charges*

An information filed on March 1, 2010 in the West District (Airport Branch) of the Los Angeles County Superior Court charged Dean and Pennington with one count of first degree murder (Pen. Code, § 187, subd. (a))[10] and Pennington and Green with one count of conspiracy to murder Dean (§§ 182, subd. (a)(1), 187, subd. (a)). As to both the murder and conspiracy charges, the information alleged the crimes had been committed to benefit a criminal street gang. (§ 186.22, subd. (b)(4).)

While the case was pending in the West District, several pretrial motions were heard by Judge James Dabney, who had deemed trial to have commenced on April 23, 2012. On April 25, 2012 Judge Dabney heard argument on the People's request to present evidence related to the murder of Powers and the shooting (attempted murder) of Ravenel. To establish that Batiste had been killed because he had witnessed Powers's murder and that Green wanted Dean dead because he feared Dean would implicate him in the murder of Powers, the prosecutor proposed introducing the following evidence: (1) Two men were seen running from the scene of Powers's murder, one wearing a white shirt and one

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[10] Statutory references are to this code unless otherwise stated.

wearing a red shirt. Photographs developed from the camera found in the crashed van showed Green wearing a bright red jersey and throwing gang signs in Center Park. (2) A Bryco nine-millimeter handgun with an intact serial number was found in Kennedy's car after Powers was killed. The gun was loaded with rounds manufactured by the Fiocchi and Federal companies. Two expended Fiocchi rounds were found at the scene of Powers's murder. When Green and Pennington were detained leaving an apartment a few weeks after the murders of Powers and Batiste, the police found a gun box in the apartment with the same serial number as the gun found in the car, as well as a partially filled tray of nine-millimeter ammunition that included Fiocchi and Federal rounds. (3) The casings found at the scenes of the Powers and Ravenel shooting were fired from the gun found in Kennedy's car. (4) Powers was killed because he twice had provided information to the police, once when he told investigators there was more than one J-Rock, a comment that led to the other J-Rock's conviction of murder, and later when he was scheduled to testify at the preliminary hearings of the three Neighborhood Pirus charged with shooting him and killing Banks. (5) Powers and Batiste had left the Inglewood motel together the night of their murders.

All defendants opposed admission of the evidence proposed by the People, arguing there was no evidence the gun linked to Green had, in fact, been used to kill Powers[11] or that any of the defendants had been present at the Powers shooting. Defense counsel argued the People were simply seeking to bolster the weak Batiste case with inflammatory and prejudicial evidence from the uncharged murders. (See Evid. Code, § 352.) Judge Dabney agreed and ordered the People not to mention the gun evidence or the Ravenel shooting. He indicated he was still

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[11] The only bullet recovered from Powers's body was damaged and yielded no usable identifying marks.

undecided about allowing evidence Powers had been murdered only hours before the van collision but instructed the prosecutor to assume that evidence would not be admissible.

After consulting with his supervisors, the prosecutor elected to dismiss the case: "[T]he People are unable to proceed . . . [and] will move to dismiss and immediately refile. I've informed counsel of our intention to file and to have the defendants arraigned tomorrow." Although the prosecutor did not mention the statutory ground for the dismissal, the minute order stated, "The People announce unable to proceed. On [the People's] motion, case is dismissed pursuant to section 1385."[12]

*7. Refiling of the Case in the Central District*

Instead of refiling the case in the West District, the prosecutor refiled it that same afternoon in the Central District under a new case number.[13] Green promptly moved to transfer the case to the West District, arguing the prosecutor had engaged in improper forum shopping after receiving an adverse evidentiary ruling from Judge Dabney in violation of defendants' right to a speedy trial and applicable dismissal statutes.[14]

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[12] In accepting the People's request to dismiss, the court rejected a defense request the case be refiled under the same number "because [the People are] not dismissing and refiling under section 1387. . . . That's not the nature of the refiling here."

[13] The new information added an allegation Pennington had personally used a deadly or dangerous weapon in the commission of the offense, but the allegation was dismissed at trial.

[14] Counsel for all three defendants vigorously participated in the hearings addressing the defense motions related to prosecutorial misconduct and the People's effort to introduce evidence related to the Powers and Banks murders. Accordingly, none of these pretrial issues was waived for purposes of this appeal.

The motion was heard on June 20, 2012 by Judge George Lomeli. Asked the basis for the dismissal, the prosecutor asserted the People had moved to dismiss pursuant to section 1382, rather than section 1385, because they were unable to proceed at that time based on the court's rulings. Pressed by the court, the prosecutor, who acknowledged it had been his case, stated he could not identify any missing evidence or witnesses that might have justified dismissal under section 1382 without reviewing his notes. Judge Lomeli then asked, "Can you represent to this court that it was done or not done because the rulings were going against you?" The prosecutor answered, "I can say that was a factor in the People's decision; that because of the evidentiary rulings, there were going to be many . . . facts that were not going to be presented to the jury that went to the guilt of the defendants." Concerned, Judge Lomeli said, "Well, I've got to tell you that that doesn't sit well with the court. In terms of using that as a tactical . . . strategy, if you will, because rulings were going against you . . . , I hope that isn't the case. . . . I'm going to rule without prejudice. And if counsel can provide a more accurate record—I hope that isn't a factor, that you announced unable to proceed because rulings were going against you. I've never seen anything like that. . . . But hearing what you have to say, that it is a possible factor, that's disturbing. I will allow you an opportunity to further brief that part of it . . . ." As to the defendants' requested transfer back to the West District, Judge Lomeli ruled the case had been properly filed in the Central District because certain of the conversations relevant to the conspiracy had occurred at the county jail[15] and previous rulings

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[15] Los Angeles Superior Court, Local Rules, rule 2.3(a)(3) requires the filing of a criminal complaint in the judicial district where the offense was alleged to have occurred and, within that district, at the courthouse serving the area where the offense allegedly occurred. However, when more than one offense is alleged to have been committed and the offenses were committed

were "irrelevant and non-binding." He repeated, however, he was not ready to rule on whether the prosecution had used the dismissal to gain a tactical advantage.

Following several continuances, Dean moved to dismiss the case based on prosecutorial misconduct and forum shopping. In opposition the prosecutor argued the People had originally dismissed the case to perform additional DNA testing and to transcribe additional conversations. The motion was heard by Judge Michael Abzug. When asked why the case had been dismissed, the prosecutor acknowledged the case was dismissed in part for reevaluation after the adverse evidentiary ruling. Judge Abzug concluded that, absent some showing of concrete prejudice, the prosecutor had acted within his discretion to dismiss and refile. Moreover, the possibility of a ruling more favorable to the People was speculative at this juncture. In denying the motion Judge Abzug found the dismissal had been motivated by the adverse ruling but was not made "to 'circumvent' it."

8. *Pretrial and Trial Proceedings*

a. *Judge Lomeli's pretrial rulings*

The case was assigned to Judge Lomeli for trial. After extensive argument over the admissibility of evidence relating to the Powers murder, Judge Lomeli ruled the evidence that Powers had been killed because of his intention to testify against three Bloods gang members, that he was in the company of Batiste when he was killed and that Batiste may have been killed because he was a witness to the Powers murder was admissible against all three defendants. Further, any evidence Dean had provided to the police about the murder of Powers was admissible against each defendant. Judge Lomeli concluded this evidence was relevant to the defendants' motives for the killing of Batiste and the conspiracy to kill Dean and would provide jurors with some

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in different districts, the rule permits the complaint to be filed in any district where one of the offenses was allegedly committed.

context for the charges. The People's request to introduce evidence relating to the firearm and ammunition linked to Green and Green's use of the gun to shoot Ravenel was denied because there was no definitive proof that weapon had been used to kill Powers and none of the defendants had been charged with his murder. The court also denied Green's motions to sever his trial from those of his codefendants and to sever trial of the conspiracy charge from the murder charge.

b. *The People's case*

At trial the People first presented evidence of the crash of Burke's van on the freeway, the condition of the van at the scene, the CHP officers' encounter with Dean and Batiste's injuries. IPD detectives then testified about their efforts to protect Powers before the preliminary hearing for the Neighborhood Piru gang members charged with shooting Banks and Powers's murder. Kennedy testified she and Powers had met with Batiste and his wife at the Inglewood motel and acknowledged she had made certain statements, which she characterized as having been based on rumors, to an IPD officer about Powers's gang history. IPD Officer Kerry Tripp testified as an expert witness about Inglewood gangs. According to Tripp, Inglewood was generally a Bloods-dominated city. The Center Park Bloods or CPB, to which Dean, Pennington and Green all belonged, was a small gang allied with other Bloods gangs, including the Neighborhood Pirus, the Inglewood Family and its spin-off, the Centinela Park Family. Tripp also testified that a gang member who cooperates with police and provides information about other gang members (a "snitch") could be killed and that an order-to-kill (a "green light") had been put out on Powers before his death. Based on a hypothetical that included facts mirroring the evidence about Powers's reputation as a snitch and subsequent murder and Batiste's interaction with Powers before Batiste was found stabbed, Tripp opined the killing of Batiste had benefitted the CPB gang.

In addition to the forensic testing of items and material from the van, the clothing Batiste had worn the night of the collision and the blood-soaked shirt found inside the van were tested for DNA. A partial DNA profile from the back of Batiste's shirt matched Dean's DNA profile. The profile itself was very rare.[16] Another partial profile of an unknown male was found on the inside back collar of the bloody red shirt that also bore Batiste's DNA. Dean's DNA profile was excluded from all stains tested on the red shirt.

William Chisum, a retired criminalist and blood-pattern expert, reviewed evidence taken from the van and concluded Batiste had been sitting in the front when he was stabbed by a person sitting behind him. Chisum opined Batiste was not stabbed until he was seated in the van and, because his blood was found on the steering wheel, the collision probably resulted from a struggle after Batiste was attacked. Chisum believed the damage to the seats, which were pushed forward to the left, was caused by someone pushing forward on the seat. Dean's bloody handprint on the middle seat was most likely made when he was leaning into the van while standing outside.

9. *The defense case*

None of the defendants testified. Marc Taylor, a forensic scientist called by Dean, reviewed the reports and photographs in the case and concluded it was not possible to determine whether the stabbing of Batiste had occurred in the van or the cause of the collision. The impact of hitting the freeway divider could have injured the van's occupants and derailed the front seat when a rear passenger was thrown into it by the collision. Taylor also explained no DNA mixture had been found, despite the fact such

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[16] The People's DNA expert testified only one in 22 quintillion unrelated individuals would be expected to share this profile; only one in one sextillion individuals in the African-American population would have it.

mixtures are usually present when a person cut his own hand while stabbing another person.

10. *The Verdicts and Sentencing*

Dean and Pennington were each convicted of second degree murder. The jury found the criminal street gang enhancement allegation true but was unable to agree on the deadly weapon allegation against Dean, which the court dismissed in the interest of justice.[17]

Green and Pennington were each convicted of conspiracy to commit murder, again with true findings on the criminal street gang enhancement allegation. During trial the People had amended the information to allege—and Green admitted—he had previously suffered a prior serious felony conviction within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667 subds. (b)-(i)). The information also alleged the same offense was a prior serious or violent felony conviction within the meaning of section 667, subdivisions (b)-(i). The trial court sentenced Green to an aggregate indeterminate term of 35 years to life, calculated as 15 years to life for conspiracy to commit murder, doubled pursuant to the three strikes law, plus five years for the enhancement under "section 667(b)." Pennington was sentenced to consecutive terms of 15 years to life on each count for an aggregate indeterminate sentence of 30 years to life in state prison.

Both Pennington and Green were ordered to pay a $40 court operations assessment and a $30 criminal conviction assessment on each count. Pennington was ordered to pay a $300 restitution fine, and the court imposed and stayed a $300 parole revocation

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[17] Dean was charged with, and admitted, he had suffered a prior serious felony conviction and was sentenced to an aggregate term of 35 years to life in state prison: 15 years to life on count 1, doubled pursuant to the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), plus five years for the serious prior felony conviction (§ 667, subd. (a)(1)).

fine. Green was ordered to pay a $300 restitution fine, with an imposed and stayed $300 parole revocation fine.[18]

## DISCUSSION

1. *The Trial Court Did Not Err in Denying the Defense Motions To Dismiss the Case or Transfer to the West District Because of the Prosecutor's Alleged Forum Shopping*

Pennington and Green contend the prosecutor's refiling of the case in the Central District, rather than the West District, constituted either outrageous government conduct or prosecutorial misconduct in violation of their federal due process rights and state law. We address these contentions jointly.

a. *Governing law*

"A court's power to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution." (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1002, citing *Rochin v. California* (1952) 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183].) Under the standard first enunciated in *Rochin*, the conduct must have "'shocked the conscience' and [been] so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." (*Breithaupt v. Abram* (1957) 352 U.S. 432, 435 [77 S.Ct. 408,

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[18] The Attorney General concedes the minute orders entered following sentencing of Green and Pennington, as well as the abstracts of judgment, erroneously identify the amount of the restitution fine (§ 1202.4) and (stayed) parole revocation fine (§ 1202.45) as $280 each instead of $300, the minimum fine applicable when they committed the offenses. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189-1190.) Accordingly, we modify the written judgments to reflect restitution and stayed parole revocation fines of $300 for each appellant. Upon issuance of the remittitur the superior court is directed to correct the abstracts of judgment to reflect these modifications and to forward a copy of the corrected abstracts to the Department of Corrections and Rehabilitation.

1 L.Ed.2d 448]; see *U.S. v. Smith* (9th Cir. 1991) 924 F.2d 889, 897 ["[f]or a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice"].)

When prosecutorial misconduct "impairs a defendant's constitutional right to a fair trial, it may constitute outrageous governmental conduct warranting dismissal." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841.) ""A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd,* at p. 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd,* at p. 61.) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)[19]

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[19] There is disagreement among the cases as to the standard of review applicable to allegations of outrageous governmental

b. *The prosecutor's alleged forum shopping did not constitute misconduct sufficient to warrant dismissal or a new trial*

Green and Pennington contend the prosecutor engaged in misconduct when he was allowed to dismiss the case pursuant to section 1385 and, instead of refiling it in the West District where it most likely would have been reassigned to Judge Dabney, filed it in the Central District, resulting in assignment to a new judge. According to Green and Pennington, this gamesmanship, even if otherwise permitted by the local rules, was improperly motivated by the desire to obtain a better in limine ruling on the scope of evidence the People could present at trial and thus constituted misconduct within the meaning of the principles discussed.

Unquestionably, forum shopping by a prosecutor is viewed with disfavor, and several provisions of the Penal Code were adopted to curtail its use. One of the primary purposes of section 1387, for instance, which limits the number of times a prosecutor may dismiss and refile a criminal complaint, is the prevention of forum shopping by prosecutors. (See, e.g., *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018 ["[s]ection 1387 . . . curtails prosecutorial harassment by placing limits on the number of times charges may be refiled . . . [and] also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop," citations omitted]; *People v. Traylor* (2009) 46 Cal.4th 1205, 1209 ["[i]n particular, the statute guards against prosecutorial 'forum shopping'—the persistent refiling of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer"].)

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conduct. (Compare *People v. Uribe, supra,* 199 Cal.App.4th at pp. 855-856 [independent review]; *People v. Guillen, supra,* 227 Cal.App.4th at pp. 1006-1007 [following *Uribe*] with *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 445-446 [abuse of discretion].) We need not address that question in light of our conclusion the prosecutor's conduct in this case did not "shock the conscience" or offend traditional notions of fair play.

More directly, when a defendant has successfully moved under section 1538.5 to suppress evidence obtained as the result of an unlawful search or seizure, any subsequent motion made after a dismissal pursuant to section 1385 must be heard by the same judge who originally granted the motion if that judge is available. (See *People v. Rodriguez* (2016) 1 Cal.5th 676, 679 ["[a] judge may be found unavailable for purposes of section 1538.5(p) only if the trial court, acting in good faith and taking reasonable steps, cannot arrange for that judge to hear the motion"]; *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 807 [§ 1538.5's legislative history "'makes it clear the Legislature intended . . . to prohibit prosecutors from forum shopping.' [Citation.] To allow the prosecutor to make a judge unavailable to rehear the suppression motion simply by filing a peremptory challenge under Code of Civil Procedure section 170.6 would permit this prohibited forum shopping and 'essentially eviscerate[] the provisions of subdivision (p).'"]

Pennington and Green correctly assert a trial court should generally refrain from reconsidering and overruling an order of another court. As this court explained in *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), "[F]or reasons of comity and public policy . . . , trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Id.* at pp. 992-993, fns. omitted; see *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1293 [quoting *Riva*];

see also *People v. Williams* (2006) 40 Cal.4th 287, 300 [citing *Riva* and the general rule]; *In re Alberto* (2002) 102 Cal.App.4th 421, 424-425, 427 [new judge was without authority to increase amount of defendant's bail; "even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court"].)

In *Riva* the defendant successfully moved to exclude certain statements he had made to the police on the ground they had been obtained in violation of his right to counsel. After Riva's first trial ended in a mistrial, he renewed the motion before a different judge, who denied the motion. (*Riva, supra,* 112 Cal.App.4th at p. 988.) We concluded the statements were admissible and the judge at the second trial was not bound by the ruling of the first judge. We analogized proceedings after a mistrial to a new trial following reversal on appeal, a situation the Supreme Court has held "'permits [the] renewal and reconsideration of pretrial motions and objections to the admission of evidence.'" (*Riva,* at p. 991-992, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 849 [allowing relitigation of admissibility of a confession at second trial following reversal of judgment on appeal].) Also, like in limine motions, motions to suppress are "intermediate, interlocutory rulings subject to revision even after the commencement of trial." (*Riva,* at p. 992; see *Mattson,* at pp. 849-850 ["Absent a statutory provision precluding relitigation, a stipulation by the parties, or an order by the court that prior rulings made in the prior trial will be binding at the new trial, objections must be made to the admission of evidence (Evid. Code, § 353), and the court must consider the admissibility of that evidence at the time it is offered. [Citations.] *In limine* rulings are not binding."].) We concluded, "it is difficult to see why a new trial after a mistrial should be treated differently in this respect from a new trial after a reversal on appeal." (*Riva,* at p. 992.)

The circumstances presented here—dismissal of an action pursuant to section 1385 and refiling of the charges—closely resemble the proceedings after a mistrial at issue in *Riva*. As Judge Lomeli observed, the dismissal of the case by Judge Dabney vacated all preceding orders; there were no orders to which the general rule of comity continued to apply. Thus, Green and Pennington do not dispute Judge Lomeli had the authority to rule anew on the prosecutor's in limine motion. (Cf. *People v. Saez* (2015) 237 Cal.App.4th 1177, 1185 ["[t]o avoid the effects of [a pretrial § 995] ruling, the People could have either appealed it or filed a new accusatory pleading that would have required a new preliminary hearing, but they did neither," citations omitted].) Writing on a blank slate, some of Judge Lomeli's rulings tracked those made originally by Judge Dabney, but his rulings during trial evolved with the testimony of witnesses, reinforcing the similarity of the in limine rulings in this case to those of concern in *Riva*.

To be sure, in *Riva* we were not confronted with an allegation of forum shopping by the prosecutor,[20] as we are here. While we view the prosecutor's rationale for refiling the case in the Central District with skepticism, both Judge Lomeli and

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[20] Justice Johnson, writing for this court in *Riva*, distinguished the decision in *Schlick v. Superior Court* (1992) 4 Cal.4th 310 on the ground "[t]he prosecutor's conduct in *Schlick* amounted to blatant forum shopping, a factor not present in the case before us." (*Riva, supra*, 112 Cal.App.4th at p. 990.) In *Schlick* the Supreme Court construed an earlier version of section 1538.5 to bar the People from relitigating a motion to suppress when an adverse result had led to the dismissal of the complaint under section 1385. The decision in *Schlick* was based on the text of former section 1538.5, subdivision (d), which the Legislature amended after *Schlick* to narrow the circumstances under which a dismissal bars relitigation of such a motion. (See generally *People v. Rodriguez, supra*, 1 Cal.4th at pp. 688-690 [discussing amendments to § 1538.5; *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 876-880 [same].)

Judge Abzug declined to find he had refiled it there for an improper purpose. Likewise, we have found no case suggesting, let alone holding, a prosecutor's permissible refiling of a complaint in compliance with state law and local rules constitutes misconduct, even if the purpose of the refiling was to avoid an adverse ruling. If the essence of prosecutorial misconduct is prosecutorial error (see *People v. Centeno, supra,* 60 Cal.4th at pp. 666-667), we cannot brand a permissible refiling as misconduct sufficiently outrageous to warrant retrial. Similarly, we cannot conclude the prosecutor's conduct fell within the scope of outrageous governmental conduct warranting dismissal.

2. *The Trial Court Did Not Abuse Its Discretion in Allowing Evidence of the Powers and Banks Murders*

The legitimacy of Judge Lomeli's ruling on the scope of evidence to be allowed at trial forms the basis for several of the arguments raised by Green and Pennington on appeal. While Judge Dabney tentatively ruled the evidence related to the murders of Powers and Banks was unduly prejudicial and only tangentially related to the People's case, Judge Lomeli permitted the People to introduce evidence that Powers was with Batiste the night both were killed; that Powers had been killed in retaliation for his planned testimony against the Neighborhood Piru gang members who murdered Banks; that Batiste had possibly been killed because he witnessed Powers's murder; and that Green and Pennington conspired to kill Dean because they believed he had provided information about either or both of these murders.[21]

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[21] Judge Lomeli initially decided evidence related to Banks's murder or the motive for Powers's murder was inadmissible under Evidence Code section 352 but, after further argument, expanded his ruling to allow the People to show that Powers was murdered shortly before he was scheduled to testify against the Neighborhood Pirus who had shot him and killed Banks.

Like Judge Dabney, Judge Lomeli excluded the ballistics evidence proffered by the prosecutor.[22]

Green and Pennington argue that the trial court abused its discretion under Evidence Code sections 1101 and 352 by admitting this evidence and that Powers's statements to police officers and to his girlfriend about the death of Banks constituted inadmissible hearsay.

a. *Evidence of the Powers and Banks Murders Was Not Precluded by Evidence Code Sections 1101 and 352*

"'Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence that a person committed a crime, civil wrong, or other act may be admitted, however, not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or identity. (*Id.*, § 1101, subd. (b).)'"[23] (*People v. Leon* (2015) 61 Cal.4th 569, 597; accord, *People v. Harris* (2013)

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[22] During pretrial proceedings the prosecutor sought permission to introduce evidence the gun used by Green to shoot Ravenel and shell casings for rounds similar to those found in Green's possession were also found at the scene of Powers's murder, thereby attempting to link Green to Powers's murder. The trial court excluded the evidence because the bullets recovered from Powers's body were too damaged for ballistic identification and any inference that could be drawn from Green's statements about his potential liability for other crimes was speculative.

[23] Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

57 Cal.4th 804, 841.) "The conduct admitted under Evidence Code section 1101[, subdivision ](b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.] . . . Specifically, the uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*Leon,* at pp. 597-598.) "We review the trial court's decision whether to admit evidence, including evidence of the commission of other crimes, for abuse of discretion." (*Leon,* at p. 597; accord, *Harris,* at p. 841.)

Green and Pennington argue that evidence of the Powers and Banks murders should have been excluded as uncharged acts made inadmissible by Evidence Code section 1101, subdivision (a). However, as the Attorney General points out, the trial court admitted this evidence not for its probative value as to Green and Pennington's character, but as highly probative evidence of their motive and intent. (See, e.g., *People v. Riccardi* (2012) 54 Cal.4th 758, 815 ["Evidence that 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive' is generally admissible. [Citation.] Although motive is normally not an element of any crime that the prosecutor must prove, 'evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable.'"]; *People v. McKinnon* (2011) 52 Cal.4th 610, 655 [""because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence""]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129 ["we have frequently held that evidence of other offenses is cross-admissible to prove motive [citations] and in particular a motive to kill to prevent a witness from testifying"].)[24]

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[24] Green's reliance on *People v. Alcala* (1984) 36 Cal.3d 604 is misplaced. There, the trial court allowed the People to introduce evidence the defendant had on three previous occasions abducted

Judge Lomeli concluded evidence of the Bloods' motive to kill Powers was crucial to understanding the motive to kill Batiste: "You can't give this case to the jury without that [motive evidence]."

Although Judge Dabney's tentative ruling was equally within the realm of discretion accorded a trial court, we cannot conclude Judge Lomeli's decision to allow evidence of the motive for Powers's murder was an abuse of that same broad discretion.[25] In addition to providing a plausible motive for the murder of Batiste, this evidence was highly relevant to the criminal street gang enhancement allegation against Green, Pennington and Dean, who were members of the same Bloods gang. Evidence of

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and sexually abused young girls. The Supreme Court reversed under Evidence Code section 1101 because the prior crimes did not meet the strict requirements for similarity necessary for the admission of evidence of a consistent modus operandi to prove identity and were thus unduly prejudicial. (*Alcala*, at pp. 631-632.) In addition, the prosecutor's theory the accused's prior crimes may have increased his incentive to eliminate his victim as a witness, the Court explained, would permit the defendant's past criminal acts to be introduced at trial whenever the defendant was accused of premeditated murder during a subsequent offense: "The accused's mere status as an ex-criminal would place him under an evidentiary disability not shared by first offenders." (*Id.* at p. 635.) Here, evidence of the Banks and Powers murders was admitted to show that Batiste had been killed as part of a Bloods vendetta against Powers and did not purport to attribute responsibility for the Banks and Powers murders to Green or Pennington.

[25] "The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'"'" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

the chain of murders was critical to proving the pattern of gang retribution—that is, Powers had been "green-lighted" by the Bloods because they believed he had pointed the police to Big J-Rock; Banks had been killed when the Neighborhood Pirus attempted to murder Powers; Powers was lured back to Inglewood and killed when he was in the company of Batiste, who was in turn killed because he likely witnessed Powers's murder. Dean was then targeted by Green and Pennington because they feared he would implicate them in the murder of Batiste or Powers. (See *People v. Armstrong* (2016) 1 Cal.5th 432, 457 [defendant's desire to avoid prosecution for murder provided motive for shooting victim's brothers and to torture another victim; admissibility of other crimes depended not on application of Evid. Code, § 1101, subd. (b), but "derive[d] from the fact and sequence of their commission"]; *People v. Cage* (2015) 62 Cal.4th 256, 274 ["[w]here other crimes or bad conduct evidence is admitted to show motive, '"an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself" [citation], the other crimes or conduct evidence may be dissimilar to the charged offenses provided there is a direct relationship or nexus between it and the current alleged crimes"].)

Green contends that, even if the evidence was not specifically relevant to his own character (as contemplated by Evidence Code section 1101), the evidence amounted to character assassination of Bloods-affiliated gangs and improperly tainted all three defendants with the broad brush of inflammatory gang evidence only remotely connected to the Center Park Bloods. (See *People v. Leon*, *supra*, 61 Cal.4th at p. 599 [even if evidence of uncharged crimes is relevant under Evid. Code, § 1101, subd. (b), before admitting the evidence, trial court must also find it has substantial probative value that is not largely outweighed by its potential for undue prejudice under Evid. Code, § 352].) Green argues this evidence was particularly prejudicial to him because

he was identified by the People's gang expert as a "shot caller" or leader within the gang.

It is precisely because of that testimony, however, seen in light of Green's own statements attempting to direct Dean's murder and his acknowledgement he faced potentially far greater criminal liability if he did not succeed in silencing Dean, that made the testimony about the Bloods' motive to murder Powers exceptionally probative.[26] As a shot caller Green stood in the position to direct the murder of his fellow gang member Dean; and his attempt to communicate with members of other Bloods-affiliated gangs to accomplish that murder demonstrated his ability to coordinate with those gangs for the commission of a crime. "The prejudice which exclusion of Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638; accord, *People v. Merriman* (2014) 60 Cal.4th 1, 60.) Here, the prejudice to Green resulted from the persuasiveness of the evidence, not from the possibility it could be misconstrued or evoke an irrational emotional bias against Green.

The trial court also acted within its discretion when it rejected Green's argument the gorier details of Batiste's killing would improperly inflame the jury against Green and should be excluded under Evidence Code section 352. This evidence was necessary to establish where Batiste had been killed; without that

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[26] Although evidence of Banks's murder was probably not necessary to establish the "green light" on Powers, there was no suggestion any of the defendants in this case killed Banks.

information the jury would have had an incomplete view of his murder and Dean and Pennington's culpability for it. Although the evidence did not link Green to the van (other than the generic testimony a third unidentified man was seen leaving the van and a criminalist's testimony about a DNA sample from the red shirt from which Green could not be excluded as a contributor) and he was not charged with Batiste's murder, Green was plainly motivated by those events to target Dean based on his fear Dean was talking to the police, whether the intent was to protect Pennington or himself.

In sum, although the trial court could have exercised its discretion in a different manner, we cannot conclude it abused its discretion by allowing evidence of the Banks and Powers murders.

b. *The admission of Powers's statements to police, even if erroneous, was harmless error*

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (Evid. Code., § 1200, subd. (b).) Green and Pennington contend the trial court erred in admitting hearsay statements made by Powers to the IPD to substantiate the Bloods' motive to kill him. IPD Detective Burton testified he interviewed Powers after he and Banks had been shot. Over defense objections Burton testified Powers said he and Banks had been sitting on a porch when three men approached. Powers yelled at Banks to run as the men began shooting at them. Powers showed Burton his bandaged hand and told him his finger had been shot off. In a subsequent interview Powers identified the three men who had shot at him and Banks and told Burton they were members of the Neighborhood Piru gang.

"Evidence of an out-of-court statement is . . . admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay

purpose is relevant to an issue in dispute. [Citations.] For example, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements." (*People v. Davis* (2005) 36 Cal.4th 510, 535-536; see *People v. Smith* (2009) 179 Cal.App.4th 986, 1003 [""[i]f a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence""].) "'A determination of relevance and undue prejudice lies within the discretion of the trial court, and a reviewing court reviews that determination for abuse of discretion.'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; accord, *People v. Jones* (2013) 57 Cal.4th 899, 956.)

The Attorney General contends Detective Burton's statements were properly admitted for the nonhearsay purpose of showing Powers had cooperated with police and would have been considered a snitch for doing so and to provide context for Detective Burton's testimony Powers had been scheduled to testify against the Neighborhood Pirus when he was murdered. According to the Attorney General, whether the Neighborhood Pirus were the shooters and whether the shooting occurred as described by Powers was irrelevant.

The Attorney General's explanation is valid to a point, but the identification of the shooters as members of a Bloods-affiliated gang—the truth of Powers's statements to Detective Burton—was certainly relevant to the People's theory of the case. At most, the statements constituted hearsay admissible to provide context, as the Attorney General suggests, for the fact that Powers was killed after he had been green-lighted for cooperating with the police. Even were we to assume the trial court erred in admitting the evidence, however, any error was harmless under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].) Detective Burton testified that Powers was scheduled to testify at

a preliminary hearing against the Neighborhood Pirus he had identified, thus establishing the Bloods' motive to kill him. Powers's earlier statements added little to that information and nothing that would cause additional prejudice to Green or Pennington. Accordingly, it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson,* at p. 836.)

c. *Green and Pennington have forfeited their objections to statements attributed to Powers about the J-Rock incident*

Green and Pennington also assert the trial court erred in admitting statements Powers purportedly made to his girlfriend Kennedy. The testimony cited, however, most of which was elicited by Dean's counsel on cross-examination without objection from Powers and Green, refers to Kennedy's statements to IPD detectives about the shooter who yelled "J-Rock" that she attributed to rumors she had heard about Powers. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1248 [a party may not ask relevant questions, then "prevent all cross-examination (or redirect examination) responding to the same point by successfully asserting that its own question was improper"]; *People v. Parrish* (2007) 152 Cal.App.4th 263, 274-276 [otherwise inadmissible testimonial statement of unavailable witness properly admitted under Evid. Code, § 356 to put witness's statement in context after defense elicited portion of statement that "viewed in isolation, presented a misleading picture"].)

Moreover, a belated objection to some of Kennedy's statements was sustained by the court but, otherwise, the issue has been forfeited by Green and Pennington's failure to object promptly to the statements. (See *People v. Williams* (2008) 43 Cal.4th 584, 620 [""questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal""]; see generally Evid. Code, § 353, subd. (a) ["[a]

verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].)

3. *The Trial Court Did Not Abuse Its Discretion in Denying Green's Motions To Sever His Trial*

Joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378-379; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) "When the statutory requirements are met, joinder is error only if prejudice is clearly shown." (*People v. Scott* (2011) 52 Cal.4th 452, 469, 354.) Section 954 permits joinder when two or more different offenses are charged in the same pleading if the offenses are either "connected together in their commission" or "of the same class." (See *People v. Armstrong, supra,* 1 Cal.5th at p. 455 ["[t]his 'statute permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant'"].) Similarly, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (§ 1098.)

In ruling on a severance motion, "'the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of defendant's other criminal activity to tip the balance and convict him.' [Citation.] We review the trial court's decision to deny a severance motion for abuse of discretion. [Citation.] To establish an abuse of discretion, the defendant must make a '"clear showing of prejudice."'" (*People v.*

*Armstrong, supra,* 1 Cal.5th at p. 456.) "'[W]e consider the record before the trial court when it made its ruling.'" (*Ibid.;* accord, *People v. Sanchez* (2016) 63 Cal.4th 411, 464.) "If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "'resulted in 'gross unfairness' amounting to a denial of due process.'"" (*People v. Avila* (2006) 38 Cal.4th 491, 575; accord, *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 150.)

a. *Joinder of the murder and conspiracy charges under section 954 was proper and did not unduly prejudice Green*

Joinder of the charges here—murder and conspiracy to commit murder—was proper under section 954 for two reasons: The murder of Batiste provided the motive for the subsequent conspiracy to murder Dean; and, as assaultive offenses, the two charges fell within the same class of crimes. (See, e.g., *People v. Jackson* (2016) 1 Cal.5th 269, 298-299 [rape and murder are properly joinable under § 954 as ""offenses of the same class of crimes,"" because both ""are assaultive crimes against the person""]; *People v. Zambrano, supra,* 41 Cal.4th at pp. 1129-1130 [murder and attempted murder are both assaultive crimes against the person, and as such are "offenses of the same class" expressly made joinable by § 954; evidence that offenses are similar is "not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one"]; *People v. Valdez* (2004) 32 Cal.4th 73, 119 [murder and escape charges were "'connected together in their commission'" because "the motive for the escape was to avoid prosecution" on the murder charge].)

When charges are properly joined under section 954, the trial court retains discretion to try them separately, but "'[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*People v. Armstrong, supra,*

1 Cal.5th at p. 455.) The framework for analyzing prejudice in this context is well established: "'Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled.' [Citation.] 'If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses."' [Citation.] Three factors are most relevant to this assessment: '(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense.'" (*People v. Jackson, supra,* 1 Cal.5th at p. 299; see *Armstrong,* at p. 456 ["if the evidence is cross-admissible, 'that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges'"].)

The trial court concluded the evidence relevant to the two crimes was cross-admissible with one exception: Dean's statement to the police the driver of the van had been his girlfriend, "Nette," which posed a potential violation of Pennington's Sixth Amendment right to confront and cross-examine witnesses as articulated in *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177], as well as the *Aranda/Bruton* rule.[27] The court resolved that potential

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[27] The *Aranda/Bruton* rule refers to *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. Both cases, which predate the Supreme Court's decision in *Crawford,* recognize that a defendant is deprived of his or her Sixth Amendment right to

violation by seating two separate juries, one to decide the charges against Green and Pennington and the other to decide the charge against Dean. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1208 ["the problem addressed in *Bruton* and *Aranda* may be solved by the use of separate juries for codefendants, with each jury to be excused at appropriate times to avoid exposure to inadmissible evidence"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 ["The use of dual juries is a permissible means to avoid the necessity for complete severance. The procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants."].)

As discussed, the trial court did not err in ruling the remaining evidence of the Banks and Powers murders was admissible against Green. Accordingly, any potential prejudice to Green was sufficiently dispelled, and severance of the murder and conspiracy charges was not required. We also reject Green's argument the evidence of those other crimes was unduly inflammatory compared to the conspiracy charge. As the Supreme Court recently explained, "the animating concern underlying this factor is not merely whether evidence from one offense is repulsive, because repulsion alone does not necessarily engender undue prejudice. [Citation.] Rather, the issue is ""whether strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime."' (*People v. Simon* (2016) 1 Cal.5th 98, 124; see *People v. Sandoval* (1992) 4 Cal.4th 155, 173 [defendant failed to show requisite prejudice

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confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant. In this situation the court must either grant separate trials, exclude the statement or excise all references to the nondeclarant defendant. (*Aranda,* at pp. 530-531; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.)

from joinder of other murder charges because any "inflammatory effect of defendant's gang membership as to the [other] case was neutralized by the fact that the victims were also gang members"].)

b. *Any error in the joinder of the three defendants under section 1098 was harmless*

Premised on many of the same principles as section 954, section 1098 requires a court to examine whether joinder of defendants (rather than charges) is appropriate in a particular case. Under section 1098, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.'" (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 190; accord, *People v. Mackey* (2015) 233 Cal.App.4th 32, 99.)

In arguing the court erred in denying his motion to sever his trial from that of Dean and Pennington, Green relies primarily on *People v. Ortiz* (1978) 22 Cal.3d 38 (*Ortiz*), in which the Supreme Court interpreted section 1098 to mean "a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried." (*Ortiz*, at p. 43, fn. omitted.) Ortiz and an accomplice were accused of robbing a mini-mart and were jointly charged with two other codefendants, who, along with Ortiz's accomplice, were charged with robbing a drug dealer a few hours earlier. Reversing the trial court's denial of the defendant's motion to sever under section 1098, the Court emphasized the dangers of allowing a jury to hear evidence concerning a crime with which the defendant had no connection and found there was a reasonable probability he would have obtained a more favorable result at trial. (*Ortiz*, at pp. 47-48; see *People v. Burney* (2009) 47 Cal.4th 203, 237 ["[i]f we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial"].)

Several courts have recognized exceptions to the *Ortiz* rule. In *People v. Hernandez* (1983) 143 Cal.App.3d 936 (*Hernandez*) the court concluded a joint trial was appropriate for three defendants charged with different counts arising from the gang rape of a single victim: "We are convinced that the Supreme Court [in *Ortiz*] did not intend, in establishing a rule requiring separate trials of defendants not jointly charged, to include within the purview of that rule defendants charged with crimes arising out of a single set of circumstances. The evil sought to be avoided by *Ortiz* was the prejudicial impact of irrelevant evidence. In a joint trial of unrelated offenses, the jury would hear evidence concerning the conduct of [the] defendant's associates, which evidence would not have been admissible in a separate trial. [Citation.] Here, of course, evidence concerning the conduct of all of the victim's assailants would have been admissible in either a joint or separate trial. Furthermore, a requirement of separate trials could subject the victim and all witnesses to the ordeal of two complete trials, with no attendant benefit to [one of the codefendants]. We therefore conclude that the *Ortiz* holding does not extend to defendants charged with a crime or series of crimes committed as part of a single transaction." (*Hernandez,* at pp. 940-941, fn. omitted.) This holding was extended in *People v. Wickliffe* (1986) 183 Cal.App.3d 37, in which the court approved the joint trial of a defendant charged with driving under the influence and a codefendant charged with battery and assault where all of the crimes occurred during a joint operation of repossessing a vehicle. (*Id.* at pp. 40-41.)

Green is correct this case does not fall squarely within the "single transaction" exception to the *Ortiz* rule described in *Hernandez* and *Wickliffe*. Like the courts in those cases, however, we question whether the Supreme Court would adhere to the rigid line apparently described in *Ortiz* under the circumstances presented here. The defendants were members of the same gang, the two offenses were directly related to each other, and each offense

was allegedly committed for the benefit of the gang. The criminal street gang allegation provided the basis for much of the motive evidence admitted at trial. Moreover, Green was not entitled to a trial separate from that of Pennington under section 1098 because they were both charged with conspiracy to murder Dean, and severance of Pennington's murder charge was not required by section 954. Nor can Green identify any prejudice associated with the decision denying him a separate trial from Dean: By seating two juries, the trial court effectively eliminated any prejudice associated with trying Dean and Green together. Under these circumstances the trial court did not abuse its discretion by denying Green's section 1098 motion to sever.

Even if we were to conclude it was error to deny Green's motion to sever under section 1098, however, any error was harmless under the analysis presented in *Ortiz*. As *Ortiz* instructs, "The right to a separate trial is not so fundamental that its erroneous denial requires automatic reversal." (*Ortiz, supra,* 22 Cal.3d at p. 46.) The factors to be applied in determining whether a denial of severance was prejudicial "include whether a separate trial would have been significantly less prejudicial to defendant than the joint trial, and whether there was clear evidence of defendant's guilt." (*Ibid.*) We reverse "only upon a showing 'of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.'" (*Ibid.*; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41; *People v. Mackey, supra,* 233 Cal.App.4th at p. 100.) The evidence contained in the recorded telephone calls and handwritten notes Green showed to Pennington during her visit to the jail left no doubt as to his guilt on the conspiracy charge.

c. *Green's due process right to a fair trial was not violated*

Even if, as we conclude, the trial court did not abuse its discretion in denying severance pretrial, we must also determine "'whether events *after* the court's ruling demonstrate that joinder

actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.'" (*People v. Simon, supra,* 1 Cal.5th at p. 129.) "In determining whether joinder resulted in gross unfairness, we have observed that a judgment will be reversed on this ground only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*Id.* at pp. 129-130.) As discussed, the evidence of Green's culpability for the conspiracy to murder Dean was overwhelming. Consequently, there was no violation of his due process right to a fair trial.

4. *Substantial Evidence Supported Pennington's Convictions*

In considering Pennington's claims of insufficient evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval*

(2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The standard of review is the same in cases in which the People rely mainly on circumstantial evidence to prove one or more elements of their case. (*People v. Clark* (2016) 63 Cal.4th 522, 625; *People v. Tully* (2012) 54 Cal.4th 952, 1006-1007.) ""Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt."" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 358; accord, *Clark*, at p. 626.)

a. *The murder conviction*

Pennington, who was convicted as the driver of the van of second degree murder on an aiding and abetting theory, contends there was insufficient evidence for the jury to conclude she shared Dean's intent to kill Batiste.

A person aids and abets the commission of a crime "when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1118.) "'[A]n aider and abettor's guilt "is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state." [Citation.]' [Citation.] Establishing aider and abettor liability 'requires proof in three distinct areas: (a) the direct perpetrator's actus

reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 146.) Direct evidence of the defendant's mental state is rarely available and may be shown with circumstantial evidence. (*Beeman*, at pp. 558-559.) "Mere presence at the crime scene is, by itself, not aiding and abetting, but it can be one factor among others that support conviction as an aider and abettor. [Citation.] 'Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense.'" (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1065; see *In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

The jury heard undisputed, albeit circumstantial, evidence Pennington was in the van when it crashed and direct evidence she was an active member, with Dean, of the Center Park Bloods. The jury also heard that Batiste was more than likely with Powers when Powers was killed (because he had talked to the police) and was then stabbed to death himself within hours, again, more than likely, in the van. Rather than attempt to obtain help for Batiste, Pennington, like Dean and the unknown third man in the van, disappeared. She lied to the police about the source of her injuries and claimed she had been carjacked. Soon after, she attempted to retrieve her purse and identification card from the impound facility. She then conspired with Green to kill Dean because he appeared to be talking to police about the incident. The wiretap evidence showed Pennington held an important position in a gang strongly allied to other Blood-affiliated gangs and confirmed her willingness to betray someone who considered her a friend for the benefit of the gang. The jury thus had ample

evidence—circumstantial and direct—from which to infer Pennington shared Dean's intent to kill Batiste.

b. *The conspiracy to commit murder conviction*

"'Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. [Citations.] A conspiracy requires (1) the intent to agree, and (2) the intent to commit the underlying substantive offense.' [Citation.] '"The punishable act, or the very crux, of a criminal conspiracy is the evil or corrupt agreement."' [Citation.] [¶] If the agreement between the conspirators is the crux of criminal conspiracy, then the existence and nature of the relationship among the conspirators is undoubtedly relevant to whether such agreement was formed, particularly since such agreement must often be proved circumstantially. '"The existence of a conspiracy may be inferred from the conduct, *relationship,* interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Homick* (2012) 55 Cal.4th 816, 870.)

Pennington contends she was a passive observer of Green's conspiratorial comments and never entered into an agreement with Green to kill Dean. The evidence, however, is plainly susceptible to the interpretation that the agreement to kill Dean was made in early December 2002, well before Pennington's jail visit when Green gave her instructions on how the murder should be accomplished, and that Pennington was an active participant in the planning. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. Pennington replied she had spoken with CKay the previous evening who agreed Dean was a problem and said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Recognizing the implication of that conversation, Green told Pennington not to talk on the phone and said, "On Blood, this gonna be handled," and indicated he would have to

trust CKay. After that call Pennington summoned a meeting of gang members to discuss how Dean would be handled. The plan reflected by this conversation was apparently discovered by Dean, who called Pennington and told her he had heard his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington who was putting "mud" on him, and Pennington replied she had been hearing it "a whole lot." When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing. Based on this evidence the jury could reasonably find the initial agreement to kill Dean began at this time, and Pennington went to the jail on December 20, 2002 to receive instructions on implementing the plan. Green's instructions included an exhortation that Dean must be killed immediately and a contact (Robby Tobby, a Bloods prison gang shot caller), who would be able to implement the plan.

Pennington additionally contends the alleged conspiracy never progressed beyond planning because no overt acts were taken to accomplish its purpose (the murder of Dean). An overt act is "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8, quoting *Chavez v. United States* (9th Cir. 1960) 275 F.2d 813, 817.) "This act need not 'constitute the crime or even an attempt to commit the crime which is the conspiracy's ultimate object. Nor is it required that such a step or act, in and of itself, be a criminal or unlawful act.'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) "[I]nternal discussions and arrangements between coconspirators can easily constitute overt acts in furtherance of the conspiracy." (*Id.* at p. 244 [alleged overt

acts consisted of "solicitation of additional conspirators," "requests for information regarding the victim and the plan," "payments to secure a coconspirator's assent to the conspiracy," and "numerous phone conversations laying out the manner in which the conspiracy would be carried out"]; accord, *People v. Sconce* (1991) 228 Cal.App.3d 693, 699 [alleged overt acts consisted of defendant's pointing out the intended victim to a coconspirator, coconspirator's solicitation of another conspirator, and defendant's inquiries of one coconspirator to "to take care of and kill" the victim]; see *Van Villas,* at p. 245 ["[i]f the conspirators partake, among themselves, in arrangements, discussions, and preparation in regard to and for the criminal act, then they have ventured beyond a mere criminal intention and forgone the opportunity afforded them by the overt act requirement: "'to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy'"].) As discussed in these cases, Pennington's ongoing discussions with Green and other gang members amply supported her conviction for conspiracy.

5. *The Five-year Sentence Enhancement for Green's Prior Serious Felony Conviction Was Properly Imposed*

The amended information filed September 10, 2013 alleged Green had previously been convicted of a serious or violent felony pursuant to Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i)—the three strikes law—and identified Green's April 2004 conviction for aggravated assault, Los Angeles Superior Court case no. YA053259 (assault with a firearm for the shooting of Tyrone Ravenel).[28] A separate paragraph in the amended information "further alleged . . . pursuant to Penal Code section(s) 667(b) through (i)" that Green had suffered a prior conviction of a serious or violent felony, again

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[28] The original information filed July 11, 2012 did not allege that Green had previously been convicted of a serious or violent felony.

citing case no. YA053259. At Green's sentencing hearing the People introduced evidence Green had suffered two prior convictions, the April 2004 conviction for the Ravenel assault and an October 2008 conviction for possession of a controlled substance under Health and Safety Code section 11350, subdivision (a) (Los Angeles Superior Court case no. YA071118). Green, who at that time had obtained permission to represent himself, did not appear to be aware the possession charge had not been alleged in the amended information and admitted both prior convictions. After an extended discussion during which the court referred to case no. YA053259 as the "alleged strike" and case no. YA071118 as the "one-year prior," the court sentenced Green to 15 years to life for conspiracy to commit murder, "doubled . . . for the aforementioned strike conviction in case no. YA053259, plus an additional five years under 667(b) for his aforereferenced prior, and the court referenced that case."

Section 667, subdivision (b), however, does not provide for a sentence enhancement. The sentence enhancement for a prior serious felony conviction in addition to the provisions of the three strikes law—the further allegation contained in the amended information—is found in section 667, subdivision (a)(1). Compounding what appears to have been a misstatement by the trial court (most likely precipitated by the incorrect citation in the amended information), the minute order from Green's sentencing hearing mischaracterizes the enhancement as a five-year sentence under section 667.5, subdivision (b), a mistake repeated in the abstract of judgment. Section 667.5, subdivision (b), authorizes only a one-year sentence enhancement for a prior prison term—an allegation not contained in the amended information—and may not be imposed when a sentence enhancement under section 667, subdivision (a)(1), is imposed for the same offense. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150.)

Green contends the sentence enhancement listed in the minute order and abstract of judgment was unauthorized and

must be stricken. The People contend the error should be addressed through remand to the superior court but note the same error was made at Dean's sentencing hearing and was corrected nunc pro tunc by the trial court to specify the correct basis for the five-year prior serious felony conviction enhancement—section 667, subdivision (a)(1).

We have the inherent authority to correct an unauthorized sentence (§ 1260; *People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical error at any time]). Remand is unnecessary here to correct what was merely an inadvertent miscitation by the trial court, which plainly intended to impose the sentence enhancement alleged in the amended information for a prior serious felony conviction. Accordingly, the judgment in Green's case is modified to reflect imposition of a five-year sentence enhancement pursuant to section 667, subdivision (a)(1), for the prior serious felony conviction alleged in the amended information.

## DISPOSITION

The judgment against Green is modified to provide that the five-year sentence enhancement was imposed under section 667, subdivision (a)(1), instead of subdivision 667.5, subdivision (b). The judgment is further modified to reflect the imposition of restitution fines of $200 and parole revocation fines (stayed) of $200 on each defendant. As modified, the judgments are affirmed. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

Court of Appeal, Second Appellate District, Division Seven - No. B256776

**S238974**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

JASON GREEN, Defendant and Appellant.

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The petition for review is denied.

SUPREME COURT
FILED

FEB 15 2017

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

*Chief Justice*

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

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|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>PLAINTIFF/RESPONDENT,<br><br>VS.<br><br>02 LYNETTE PENNINGTON,<br><br>DEFENDANT/APPELLANT. | SUPERIOR COURT<br>NO. BA396890-02<br><br>2ND CRIMINAL<br>NO. B259139<br><br>AUGMENTATION |



APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE GEORGE G. LOMELI, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

PURSUANT TO NOTICE DATED MARCH 27, 2015

APRIL 25 AND JUNE 20, 2012

APPEARANCES:

PLAINTIFF/RESPONDENT: KAMALA HARRIS
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CALIFORNIA 90013

DEFENDANT/APPELLANT: IN PROPRIA PERSONA



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CHRISTINE TAYLOR, CSR NO. 6373
OFFICIAL COURT REPORTER

CASE NUMBER: SA071962

CASE NAME: PEOPLE VS. 01 GARRY DEAN
02 LYNETTE PENNINGTON
03 JASON GREEN

LOS ANGELES, CALIFORNIA WEDNESDAY, APRIL 25, 2012

DEPARTMENT LX-F HON. JAMES R. DABNEY, JUDGE

REPORTER: JOYCE K. RODELA, CSR NO. 9878

TIME: 10:45 A.M.

APPEARANCES:

DEFENDANT DEAN PRESENT IN COURT WITH HIS COUNSEL, CAROL OJO, ATTORNEY AT LAW; DEFENDANT PENNINGTON PRESENT IN COURT WITH HER COUNSEL, MICHAEL G. CLARK, ATTORNEY AT LAW; DEFENDANT GREEN PRESENT IN COURT, HIS COUNSEL, DAN FACTOR, ATTORNEY AT LAW, PRESENT VIA TELEPHONE; EUGENE P. HANRAHAN, DEPUTY DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: LET'S GO ON THE RECORD ON PEOPLE VERSUS DEAN, PENNINGTON, AND GREEN. THIS IS SA071962.

STATE YOUR APPEARANCES FOR THE RECORD, PLEASE.

MS. OJO: CAROL OJO, FOR MR. DEAN.

MR. CLARK: MICHAEL CLARK, ON BEHALF OF MS. LYNETTE PENNINGTON, PRESENT IN COURT, IN CUSTODY.

MR. FACTOR: DAN FACTOR, ON BEHALF OF MR. GREEN, WHO'S PRESENT IN COURT, IN CUSTODY.

MR. HANRAHAN: GOOD MORNING, YOUR HONOR.

GENE HANRAHAN, FOR THE PEOPLE.

THE COURT: ALL RIGHT. WE'RE PROCEEDING NOW WITH THE TRIAL MOTIONS. I WANT TO START WITH THE MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF EVIDENCE RELATING TO THE POWERS INCIDENT AND THE RAVENEL ATTEMPT MURDER.

I HAVE READ AND CONSIDERED THE PAPERS FILED IN THE PEOPLE'S TRIAL MEMORANDUM AS WELL AS THE PEOPLE'S SUPPLEMENTAL MOTION IN LIMINE THAT WAS FILED IN RESPONSE TO MR. GREEN'S MOTION RELATING TO THE 403 HEARING ON THESE ISSUES.

AND LET'S SEE. SO THAT WE'RE CLEAR ON THIS, THE PEOPLE WOULD LIKE TO BE ABLE TO INTRODUCE THE -- ALL THE EVIDENCE CONNECTING MR. GREEN AS WELL AS THE INCIDENT ITSELF RELATING TO THE MURDER OF MR. POWERS. AND THAT WOULD BE EVIDENCE OF -- AND THE MURDER OF MR. POWERS, I ASSUME YOU'D WANT TO CALL WITNESSES THAT CAN HELP -- AS TO OBSERVATIONS THAT OCCURRED AT THE TIME OF THE SHOOTING; IS THAT CORRECT?

MR. HANRAHAN: YES.

THE COURT: OBVIOUSLY, THIS WILL ENTAIL THE QUESTIONS OF EVIDENCE RECOVERED FROM THAT PARTICULAR SCENE AS WELL. IT WOULD ALSO INVOLVE -- THE PEOPLE ALSO SEEK TO INTRODUCE EVIDENCE OF THE RECOVERY OF A BOX, A GUN BOX, AND AMMUNITION FROM THE APARTMENT OF ONE MS. JONES, AND THE EVIDENCE SURROUNDING THE RECOVERY OF THOSE ITEMS THAT THE PEOPLE BELIEVE TIE MR. GREEN AND MS. PENNINGTON TO THE POWERS INCIDENT IN THAT THE GUN BOX IS FOR A GUN THAT WAS RECOVERED FROM THE VEHICLE WHERE MR. POWERS WAS KILLED.

MR. HANRAHAN: CORRECT.

THE COURT: AND THAT THERE IS AMMUNITION IN THE BAG

WHERE THE GUN BOX IS FOUND THAT IS OF THE SAME TYPE AND CALIBER, SAME MANUFACTURER. THERE ARE THREE SEPARATE MANUFACTURERS OF CASINGS THAT ARE FOUND AT THE POWERS INCIDENT AS WELL AS AT THE RAVENEL INCIDENT.

SO YOU'D WANT TO INTRODUCE BALLISTICS TYING POWERS TO THE USE OF THAT GUN, TO THE BOX, AND TO THE FACT THAT ON RAVENEL'S CASE, MR. GREEN WAS -- PLED, APPARENTLY, TO THAT CASE OF AN ATTEMPTED MURDER OF MR. RAVENEL. AND THERE'S BALLISTICS TYING THAT INTO THAT PARTICULAR INCIDENT.

MR. HANRAHAN: YES.

THE COURT: SO THE PEOPLE WOULD LIKE TO HAVE EVIDENCE OF THE RAVENEL CASE COME IN IN ORDER TO BUTTRESS THE EVIDENCE OF POWERS, WHICH YOU ARGUE IS CONNECTED WITH THE MURDER OF MR. BATISTE AND THE CONSPIRACY TO MURDER MR. DEAN.

DID I GET ALL OF THAT RIGHT?

MR. HANRAHAN: THE ONLY THING I THINK -- JUST A COUPLE MINOR CORRECTIONS. MR. JASON GREEN PLED TO ASSAULT WITH A FIREARM ON TYRONE RAVENEL, PLED GUILTY TO THAT INSTEAD OF ATTEMPTED MURDER.

THE COURT: RIGHT.

MR. HANRAHAN: AND THE COURT JUST OMITTED A SMALL -- A SIGNIFICANT FACT, THAT THE LIVE ROUNDS FOUND IN THE GYM BAG THAT HAD THE BOX, THAT WAS THREE GRAMS OF AMMO, AND THERE WERE TWO EXPENDED CASINGS FOUND AT EACH SCENE. BUT ALSO, THE GUN ITSELF WAS LOADED WITH THE SAME TYPE OF AMMUNITION FOUND IN THE BOX.

IT WAS FOUND WITH BOTH -- TWO OF THE TYPES OF AMMUNITION, THE FIOCCHI HOLLOW-POINTS AS WELL AS THE

FEDERAL -- A LIVE ROUND OF FEDERAL CARTRIDGES, WHICH WAS ALSO IN THE MIXED BOX OF AMMUNITION.

THE COURT: LET ME ASK YOU THIS: I UNDERSTAND THAT CERTAIN ITEMS OF EVIDENCE RELATING TO THE BALLISTICS THAT WE ARE REFERRING TO TIE THESE CASINGS TO THE GUN THAT WAS FOUND IN THAT CAR FOR THESE TWO INCIDENCES. WHEN WAS THAT BALLISTICS ANALYSIS DONE, IN 2002?

MR. HANRAHAN: THE BALLISTICS ANALYSIS THAT LINKS THE CASINGS FROM THE TWO SCENES TO THIS GUN, THAT WAS DONE -- WE GOT THE REPORT -- THE REPORT WAS DONE WITHIN THE LAST MONTH. SO I'M --

THE COURT: OKAY. AND --

MR. FACTOR: WE RECEIVED JUST -- IF I MAY, YOUR HONOR, WE RECEIVED THE INFORMATION ABOUT TWO-AND-A-HALF WEEKS AGO. I IMMEDIATELY FILED A MOTION TO HAVE AN EXPERT APPOINTED AT THAT POINT SO THAT WE COULD START AN INVESTIGATION AS TO ANY BALLISTICS ON THE CASE.

THE COURT: RIGHT.

MR. FACTOR: AND THE COURT, I THINK, TABLED IT AT THAT POINT.

THE COURT: I HAVE TABLED IT UNTIL TODAY.

MR. FACTOR: OKAY. SO WE HAVE NOT HAD THE OPPORTUNITY TO HAVE ANY BALLISTICS INVESTIGATION DONE UP TO THIS POINT TO VERIFY, OR RETEST, OR ANYTHING ON THAT ISSUE.

THE COURT: I UNDERSTAND. THAT REALLY GOES TO ANOTHER ISSUE. ALL RIGHT.

MS. OJO: AND YOUR HONOR, I JUST WANT TO STATE FOR THE RECORD THAT I'M NOT REALLY PREPARED TO DEAL WITH ANY OF THESE

TODAY, BECAUSE I'VE BEEN IN A TRIAL THAT STARTED ON MARCH 8TH AND ENDED YESTERDAY AT 4:15.

THE COURT: OKAY.

MS. OJO: SO I'M STILL TRYING TO CATCH UP ON ALL OF THESE MOTIONS.

THE COURT: RIGHT. WELL, THE ONLY MOTION I'M DEALING WITH RIGHT NOW IS THE MOTION BOTH COUNSEL HAVE JOINED IN ON, BUT REALLY IT WAS MR. GREEN'S MOTION TO LIMIT THIS EVIDENCE RELATING TO THE POWERS AND THE RAVENEL INCIDENTS. AND I UNDERSTAND THAT BOTH MR. DEAN AND MS. PENNINGTON ARE JOINING IN ON THE MOTIONS TO EXCLUDE THOSE AS WELL.

MS. OJO: AND YOUR HONOR, YOU MENTIONED THE RAVENEL INCIDENT IS ALSO GOING TO BE -- THE PEOPLE ARE ALSO TRYING TO INTRODUCE EVIDENCE FROM THE RAVENEL CASE?

THE COURT: CORRECT.

MR. HANRAHAN: CORRECT.

MS. OJO: AGAINST MR. GREEN, I PRESUME?

THE COURT: AGAINST MR. GREEN AND MS. PENNINGTON.

MS. OJO: OKAY.

THE COURT: ALL RIGHT. SO LET ME -- ALL RIGHT. IS THERE ANYTHING YOU WISH TO ADD TO YOUR MOVING PAPERS, THE FACTUAL SCENARIOS, THINGS OF THAT NATURE, THAT ARE LAID OUT IN BOTH YOUR TRIAL MEMORANDUM AND ALSO YOUR RESPONSE? IS THERE ANYTHING THAT'S NOT IN THERE YOU WANT TO ADD?

MR. HANRAHAN: THE ONLY THING THAT I WOULD ADD IS SOMETHING THAT I JUST UNDERSTOOD AND -- AND THAT'S -- THAT GOES TO THE MURDER OF BATISTE. AND IT'S BASED ON THE D.N.A. EVIDENCE THAT WAS FOUND INSIDE THE VAN IN WHICH HE WAS

MURDERED.

THE COURT: OKAY.

MR. HANRAHAN: THERE WAS A RED SHIRT FOUND IN THERE. THERE WAS A RED, JERSEY-TYPE SHIRT THAT LOOKS LIKE THE SAME TYPE OF JERSEYS AND SWEATSHIRTS THAT JASON GREEN AND GARRY DEAN WERE WEARING IN THE PHOTOGRAPHS THAT WERE FOUND IN LYNETTE PENNINGTON'S VAN.

I DON'T KNOW IF THE COURT --

THE COURT: I SAW IT.

MR. HANRAHAN: -- SAW THE LITTLE SMALL PHOTOGRAPH. THEY'RE ALL IN A GROUP PHOTO, ALL WEARING RED.

THE COURT: RIGHT.

MR. HANRAHAN: A JERSEY SIMILAR TO THAT, OR LOOKS LIKE THAT, WAS FOUND IN THE VAN IN THE FRONT COMPARTMENT. THE D.N.A. RESULTS SHOWED THAT THE VICTIM, ALTON BATISTE'S, BLOOD WAS ALL ON THE FRONT OF IT, AROUND THE WAIST. AND WHAT APPEAR TO BE KIND OF HAND SMEARS ARE ALSO ON THE SHIRT.

THERE WAS AN UNKNOWN CONTRIBUTOR'S D.N.A. ON THE TAG OF THE SHIRT, RIGHT IN THE TAG/COLLAR AREA. AND ON THE CUFF OF THE SHIRT THERE WERE -- THERE WAS A MIXTURE OF D.N.A.

THE ALLELES SHOW THAT THE MIXTURE INCLUDES -- THE MAJOR CONTRIBUTOR IS THE VICTIM, ALTON BATISTE. BUT THERE ARE AT LEAST TWO OTHER CONTRIBUTORS ON THAT CUFF. AND OF COURSE -- BUT THAT'S ALL WE KNOW AT THIS POINT. THAT'S ALL WE KNOW AT THIS POINT.

ALL THAT REALLY GIVES THE COURT IS THE MINIMUM NUMBER OF PEOPLE THAT WERE IN THE VAN OR AT LEAST CONNECTED WITH THIS SHIRT, CONNECTED WITH THIS CRIME, WHICH KIND OF

MATCHES UP WITH THE EYEWITNESS TESTIMONY. AND THE EYEWITNESS TESTIMONY FROM KELLY GROAT HAD VARIED IN TERMS OF EXACTLY HOW MANY PEOPLE HE SAW LEAVING THE VAN.

SO IT JUST -- IT ADDS TO THE QUANTUM OF EVIDENCE THAT SUGGESTS THAT GREEN AT LEAST COULD HAVE BEEN IN THE VAN. AND WE'RE GOING TO ASK THE COURT TO ALLOW HIM TO BE BUCCAL SWABBED TO -- BECAUSE THERE IS ENOUGH EVIDENCE IN THAT D.N.A. SAMPLE TO COMPARE AGAINST.

MS. OJO: AND I JUST WANT TO INQUIRE ABOUT ONE THING.

MR. HANRAHAN: THAT'S THE ONLY NEW --

MS. OJO: THAT UNKNOWN SAMPLE HAS BEEN CHECKED AGAINST DEAN, AND IT'S NOT DEAN? BECAUSE YOU HAVE DEAN'S --

MR. HANRAHAN: DEAN WAS EXCLUDED FROM THE UNKNOWN CONTRIBUTOR FROM --

THE COURT: THE TAG.

MR. HANRAHAN: -- THE COLLAR.

THE COURT: RIGHT.

MR. HANRAHAN: SO I BELIEVE -- I'LL HAVE TO LOOK AT MY LITTLE CHEAT SHEET, BUT I BELIEVE HE AND PENNINGTON WERE EXCLUDED. THAT'S WHY HE'S UNKNOWN, BECAUSE THEY WERE EXCLUDED.

THE COURT: ALL RIGHT. MR. FACTOR, IS THERE ANYTHING YOU WISH TO ADD?

MR. FACTOR: YES, YOUR HONOR.

THE COURT: OKAY.

MR. FACTOR: AS FAR AS THE CONNECTION TO MY CLIENT, WE'RE LOOKING AT THE POWERS KILLING. THERE'S A GUN, OBVIOUSLY, THAT'S FOUND AT THAT LOCATION. THE GUN HAS NOT

BEEN DETERMINED TO BE THE MURDER WEAPON. IT COULD VERY EASILY BE A DEFENSIVE WEAPON. IT'S IN THE VEHICLE.

GANG MEMBERS -- EVERY GANG EXPERT THAT I HAVE EVER TALKED TO OR EVER HEARD ON A WITNESS STAND WILL TESTIFY THAT GANG MEMBERS PASS GUNS AROUND WITHIN THEIR GANG. SO THERE IS NOTHING THAT SHOWS THAT THAT WAS THE MURDER WEAPON AT THAT LOCATION.

THE COURT: WELL, IT DOESN'T --

MR. FACTOR: IT'S EITHER A MURDER WEAPON OR A DEFENSIVE WEAPON. AS A MATTER OF FACT, MR. POWERS'S HANDS WERE SWABBED FOR G.S.R. AND I DON'T HAVE ANY RESULTS ON THOSE AS FAR AS WHETHER THEY ACTUALLY FOLLOWED THROUGH AND TESTED THEM FOR G.S.R. OR NOT, TO BE IN THE PRESENCE OF GUNPOWDER.

THE COURT: WELL, ASSUMING THE GUN WAS FIRED INSIDE THE CAR -- LET ME JUST SAY THIS: I DON'T BELIEVE THAT THERE'S ANY EVIDENCE THAT WOULD CONCLUSIVELY ESTABLISH THAT THIS IS IN FACT THE MURDER WEAPON. BUT TO SAY THAT THERE'S NO EVIDENCE THAT THIS IS THE MURDER WEAPON I THINK IS GOING TOO FAR.

TO THE EXTENT THAT THERE ARE CASINGS THAT WERE FIRED -- APPARENTLY, NO BULLET WAS REMOVED FROM THE BODY ITSELF, CORRECT?

MR. FACTOR: NO. I BELIEVE --

THE COURT: OKAY.

MR. HANRAHAN: CORRECT. THERE WAS A PROJECTILE FOUND WITH NO -- NOTHING CAN BE DERIVED FROM --

MR. FACTOR: UNTESTABLE. ONE UNTESTABLE CARTRIDGE WAS FOUND.

THE COURT: SO CERTAINLY WHAT WE HAVE IS A SITUATION WHERE THE GUN MAY HAVE BEEN THE MURDER WEAPON OR ALSO MAY HAVE BEEN USED DEFENSIVELY. AND THERE'S NO EVIDENCE TO CONCLUSIVELY ESTABLISH IT ONE WAY OR ANOTHER.

MR. FACTOR: SO WHEN WE'RE LOOKING AT IT, I THINK IF THE COURT -- AND I REALIZE IT'S NOT REALLY MY OBJECTION, BUT THE COURT MADE THE REPRESENTATION AT A PRIOR HEARING THAT THERE WAS ABSOLUTELY NOTHING THAT CONNECTS MR. DEAN TO THIS, TO THE POWERS KILLING.

BECAUSE OF THAT, YOU HAD ASKED THE D.A. IF HE WOULD ELABORATE HOW IT MIGHT CONNECT MR. DEAN. AND HE HASN'T. HE STILL HASN'T. SO OBVIOUSLY, THAT SHOULD NOT COME IN AGAINST MR. DEAN.

MS. OJO: MR. GREEN.

MR. FACTOR: I UNDERSTAND. I'M REFERRING TO MR. DEAN INTENTIONALLY.

AS FAR AS MY CLIENT, I AGAIN WOULD SUGGEST THAT THERE ARE -- AS THE COURT CHARACTERIZED IT, THERE ARE MULTIPLE INFERENCES THAT CAN BE DRAWN OR NOT DRAWN, SO THERE'S NOTHING CONCLUSIVE ABOUT THAT.

IT CERTAINLY WOULD BE MORE PREJUDICIAL THAN PROBATIVE UNDER THAT SITUATION SINCE IT COULD BE ARGUED EITHER WAY, AND THERE'S NO FACTUAL BASIS THAT GIVES IT WEIGHT EITHER DIRECTION.

THE D.N.A. THAT THE DISTRICT ATTORNEY IS NOW ATTEMPTING TO ADD ON WOULD BE SOMETHING THAT -- I DON'T KNOW IF IT'S GOING TO COME BACK. I DOUBT THAT IT WILL COME BACK. BUT SHOULD SOMETHING COME BACK, WE WOULD BE IN THE MIDST OF

TRIAL WHILE D.N.A. EVIDENCE WAS POTENTIALLY BEING DROPPED ONTO MY CLIENT AT THAT POINT.

SO I THINK THAT TEN YEARS IS A SUFFICIENT AMOUNT OF TIME FOR THEM TO HAVE TESTED THE D.N.A. IN THIS PARTICULAR CASE AND MADE A DETERMINATION.

AND AGAIN, AS I SAID BEFORE, THE BALLISTICS -- WE HAD REQUESTED A BALLISTICS EXPERT TWO WEEKS -- TWO-AND-A-HALF WEEKS AGO, AND THE COURT TABLED IT AT THAT TIME. I WOULDN'T SAY DENIED IT, TABLED IT AT THAT TIME. WE WOULD HAVE BEEN TWO-AND-A-HALF WEEKS CLOSER TO HAVE THE TESTING DONE, OR THE RETESTING DONE, AND AN EVALUATION DONE.

THE SUBSTANCE OF IT IS THAT -- AND I REALIZE WE'RE NOT ARGUING THE MOTION TO SEVER. BUT WHAT'S HAPPENING IS THAT THE D.A. IS ATTEMPTING TO BOLSTER A WEAK CASE WITH WEAK INFERENCES FROM OTHER CASES THAT ARE PREJUDICIAL AND INFLAMMATORY.

AND THOSE WEAK INFERENCES FROM THE OTHER CASES CERTAINLY GO TO A 352 ARGUMENT THAT THIS IS TRYING TO MAKE SOMETHING WHERE THE JURORS WILL BE SWAYED BY THE INFLAMMATORY NATURE OF THE OTHER INFORMATION, NONE OF WHICH CONCLUSIVELY POINTS -- I'M NOT CERTAIN THAT IT WOULD BE SOMETHING THAT WOULD GET PAST A PRELIMINARY HEARING AS WEAK AND AS LOW AS THE STANDARD IS NOW FOR A PRELIMINARY HEARING.

LIKE I SAID, EVERY GANG EXPERT I'VE EVER HEARD, DEFENSE OR PROSECUTION, WILL SAY GUNS ARE PASSED AROUND WITHIN A GANG.

THE FACT OF THE MATTER AS TO THE RED SHIRTS, EVERYBODY IN THOSE PICTURES WAS WEARING A RED SHIRT. SO THAT

IS AGAIN VERY, VERY WEAK AND INFLAMMATORY. AND AS A MATTER OF FACT, AT THE TIME THAT THIS TOOK PLACE, PEOPLE WERE MUCH MORE LIKELY IN GANGS TO WEAR COLORS BACK IN 2002 THAN THEY WERE TO WEAR THOSE NOW. NOW IT'S ALMOST PASSE IN A SENSE. PEOPLE DON'T WEAR THEM THE SAME WAY THAT THEY DID THEN.

BUT BACK IN 2002, I KNOW THE COURT WAS -- MAY HAVE BEEN PRACTICING AS A D.A. AT THE TIME. BUT I KNOW THAT I WAS. AND ALL OF THOSE CASES BACK THEN, PEOPLE WORE COLORS MUCH MORE PROMINENTLY, RED SHOELACES, THINGS LIKE THAT. SO THAT'S JUST AS TO THE POWERS INCIDENT.

AS TO THE RAVENEL INCIDENT, THAT PLEA WAS TAKEN. AS I REVIEWED THAT PLEA -- AND WE DON'T HAVE A TRANSCRIPT OF THE PLEA IN THE DISCOVERY. WE ONLY HAVE THE *TAHL* WAIVER. THE *TAHL* WAIVER INDICATES THAT IT WAS A *WEST* PLEA, THAT IT WAS DONE BECAUSE IT WAS IN HIS BEST INTEREST TO TAKE ADVANTAGE OF THE OFFER FROM THE DISTRICT ATTORNEY'S OFFICE.

AND I'M NOT SURE IF INGLEWOOD WAS IN THE -- I THINK IT WAS TAKEN -- THE PLEA WAS TAKEN IN INGLEWOOD. IF INGLEWOOD AT THAT TIME WAS ONE OF THE COURTS THAT SAID, WE REFUSE TO TAKE NO CONTEST PLEAS. WE WILL NOT TAKE THEM. WE ONLY TAKE GUILTY PLEAS. BUT I BELIEVE THEY MAY HAVE BEEN.

THAT'S SOMETHING I NEED TO CHECK OUT OR FIND OUT. AND IT'S SOMETHING I THINK, IF THE D.A. WISHES TO PUT THAT FORWARD, I THINK THAT BURDEN WOULD BE ON HIM TO DO SO IF HE WISHES TO ENTER THAT PLEA.

BUT THE OTHER SIDE OF THAT IS THAT THE ONLY REAL RELEVANT EVIDENCE AS TO THE RAVENEL INCIDENT IS THAT -- IS THE GUN BOX --

THE COURT: AND THE AMMUNITION.

MR. FACTOR: -- AND THE AMMUNITION.

THAT PARTICULAR INFORMATION -- NOT THE FACT OF THE SHOOTING. THE SHOOTING IS NOT SIGNATURE IN ANY WAY, AND IT CAN'T BE USED UNDER 1101(B) OR (A) TO SHOW A PROPENSITY FOR VIOLENCE, WHICH IS REALLY WHAT IT'S BEING OFFERED FOR IN THIS PARTICULAR CASE.

THE GUN BOX AND AMMUNITION TYPE IS THE SITUATION WHERE THERE IS SOME MARGINAL RELEVANCE BETWEEN THAT AND THE POWERS SHOOTING. BUT HE'S NOT CHARGED WITH THE POWERS SHOOTING. HE'S CHARGED WITH A CONSPIRACY. AND THE BASIS OF THE CONSPIRACY IS ABOUT THE BATISTE ISSUE. IT'S ABOUT GARRY DEAN AND THE BATISTE ISSUE. GARRY DEAN DOESN'T CONNECT INTO THE POWERS CASE.

AND THAT'S WHY I WAS GOING TO THAT POINT WITH THE ARGUMENT, THAT IT'S A BOOTSTRAP ON A BOOTSTRAP ON A BOOTSTRAP; AND IT'S AN ATTEMPT TO PUT IN A LOT OF MARGINAL EVIDENCE WHICH WILL PREVENT HIM FROM ACTUALLY GETTING A FAIR TRIAL ON A CONSPIRACY CASE.

THERE'S AN ABUNDANCE OF EVIDENCE IN TERMS OF HIS CONVERSATIONS THAT THE D.A. IS GOING TO PUT ON. THAT EVIDENCE WILL BE DECIDED ON BY A JURY. THEY'LL SAY "YEA" OR "NAY" TO IT. BUT THAT'S WHAT THE CASE IS ABOUT.

AND WHAT IT'S BEING SHIFTED -- IT'S KIND OF A STRAW MAN ARGUMENT. IT'S MOVING THIS CASE TO ANOTHER ISSUE, AND HE'S RAISING A STRAW MAN, WHICH IS THIS CASE IS REALLY ABOUT THE POWERS INCIDENT, AND THIS IS -- AS FAR AS MY CLIENT GOES, AND THE RAVENEL INCIDENT.

AND IT WILL PREVENT A JURY FROM ACTUALLY HEARING THE EVIDENCE IN THIS CASE AND MAKING A DECISION BASED ON HIS CHARGE RATHER THAN ON A PREJUDICIAL SPILLOVER EFFECT FROM THIS OTHER ISSUE AND FROM THESE OTHER CASES, WHICH ARE ONLY MARGINAL AT THE VERY BEST.

SO THAT'S WHAT I HAVE FOR RIGHT NOW.

THE COURT: OKAY.

MR. FACTOR: I'LL SIT DOWN. THANK YOU.

THE COURT: THANK YOU.

DO EITHER OF YOU WISH TO ADD ANYTHING --

MR. CLARK: YES, YOUR HONOR.

THE COURT: -- AT THIS POINT?

MR. CLARK.

MR. CLARK: YES. JUST ABOUT FIVE MINUTES, YOUR HONOR.

FIRST, WHAT'S AMAZING IN THIS CASE, AS THE COURT GLEANS, IS THAT TWO HOMICIDE DETECTIVES, ONE FROM L.A.P.D. AND ONE FROM INGLEWOOD, HAVING THIS CASE AND HAVING THOUSANDS AND THOUSANDS OF PAGES OF POLICE REPORTS, WIRETAPS, AND EVERYTHING, DID NOT AT THE TIME TEST THE SHELL CASINGS AT THE RAVENEL SHOOTING TO THE SHELL CASINGS AT THE POWERS SHOOTING. THAT'S ONLY BEEN DONE RECENTLY.

AND I THINK THAT EVERYBODY WOULD AGREE AT BEST IT WOULD BE NEGLIGENCE. SO I THINK THIS ALSO IS AN ISSUE IN THE SPEEDY TRIAL THING. SO IT'S NOT LIKE D.N.A., WHERE THEY HAVE D.N.A. ON A COLD CASE, WHERE THEY DIDN'T HAVE D.N.A. AND THEN LATER ON THE D.N.A. GETS BETTER AND THEY TEST IT. SO I THINK THAT'S AN ISSUE IN THAT.

BUT I THINK WHAT THE DISTRICT ATTORNEY WANTS TO

SAY IS, THE REASON WHY HE WANTS THESE THINGS IN -- ORIGINALLY HE SAID, I THINK LAST WEEK, WAS THAT HE WANTED THIS EVIDENCE IN TO SHOW THAT GARRY DEAN WOULD HAVE -- PARDON ME -- THAT JASON GREEN WOULD HAVE A MOTIVE TO KILL GARRY DEAN. AND THAT MOTIVE WOULD BE THEY WERE BOTH, MEANING DEAN AND GREEN, WERE PRESENT AT THE TIME OF THE SHOOTING OF TRAVON POWERS, WHICH IS, AS THE COURT REMEMBERS, JUST HALF A BLOCK EAST OF CENTER PARK.

THEY'RE ALL ALLEGED TO BE CENTER PARK BLOODS, AND CENTER PARK IS HALF A BLOCK WEST OF WHERE THE SHOOTING SCENE OCCURRED, AT 111TH AND YUKON. AND SO THE PEOPLE'S THEORY IS, OBVIOUSLY, FROM THAT, THE DEFENDANTS WERE PRESENT IN CENTER PARK WITH RED SHIRTS ON BEFORE THE SHOOTING, BUT THE SAME NIGHT. THAT'S GOING TO BE THE ARGUMENT, WHICH -- THAT'S WHY THE CAMERA WAS THERE.

THAT WAS ANOTHER THING THAT WAS QUITE AMAZING. THAT CAMERA WAS IN THE CAR, AND THE PICTURES HAD NOT BEEN DEVELOPED UNTIL ABOUT NINE YEARS LATER. SO THAT'S ANOTHER THING ABOUT THIS CASE THAT WAS KIND OF -- THAT EVIDENCE WAS NOT DEVELOPED UNTIL THAT TIME.

AND SO THE DISTRICT ATTORNEY WANTS TO ARGUE THAT DEAN AND GREEN ARE PRESENT AT THE TIME OF THE SHOOTING OF TRAVON POWERS. AND OBVIOUSLY, THE ARGUMENT IS THAT EITHER DEAN -- GREEN GAVE HIS GUN, THAT WAS USED TO SHOOT RAVENEL, TO DEAN TO SHOOT POWERS, OR GREEN HIMSELF SHOT.

BECAUSE THERE'S A WOMAN IN THIS CASE, MRS. TRINIDAD, WHO SAID THAT AT THE TIME OF THE SHOOTING, A PERSON IN A GRAY SHIRT AND A PERSON IN A RED SHIRT WERE

RUNNING WESTBOUND ON 111TH.

AND IT TURNS OUT, LO AND BEHOLD, ALTON BATISTE HAD A GRAY SHIRT. AND THEN WHEN THE HIGHWAY PATROL QUESTIONED GARRY DEAN ABOUT WHO WAS THE DRIVER OF THE VEHICLE, WAS HE IN THE VEHICLE, HE HAD A RED SHIRT ON. SO THE LOGICAL ARGUMENT IS GOING TO BE THAT BATISTE AND POWERS -- PARDON ME -- BATISTE AND GARRY DEAN WERE RUNNING WESTBOUND.

SO I BELIEVE THAT THERE'S GOING TO BE AN ARGUMENT BY THE D.A. THAT EITHER GREEN SHOT, HE WAS PRESENT, OR HAD GIVEN THE GUN TO GARRY DEAN, AND HE DID THE SHOOTING.

AND THE REASON I BRING THIS UP ABOUT PENNINGTON IS, FIRST OF ALL, I THINK IT WOULD BE HIGHLY PREJUDICIAL TO ALLOW THIS EVIDENCE IN, BECAUSE I DON'T THINK THAT THIS WOULD BE EVIDENCE THAT -- THE PROBATIVE VALUE OF WHY JASON GREEN WOULD WANT TO CONSPIRE TO KILL GARRY DEAN. I AGREE WITH MR. FACTOR, IT'S AT BEST SPECULATIVE.

AND YET THE ARGUMENT BY THE PROSECUTOR IS GOING TO BE THAT DEAN AND GREEN WERE PRESENT AT THE TIME OF THE SHOOTING BECAUSE OF THE FACT THAT -- HE'S GONNA SAY THAT GARRY DEAN WAS IN THE VEHICLE, AND THAT PERHAPS MR. GREEN DIDN'T GET INTO THE VAN WHERE BATISTE WAS KILLED, BUT THAT BATISTE WAS KILLED BECAUSE THE SHOOTING WAS BOTCHED; THE WAY IT OCCURRED, WITH POWERS RUNNING ACROSS THE STREET, COLLAPSING WITH MULTIPLE GUNSHOTS, THE GUN BEING LEFT IN THE CAR WITH SHELL CASINGS, WAS BOTCHED.

OBVIOUSLY, IT WAS BATISTE'S CAR. AND OBVIOUSLY, THE ARGUMENT WOULD BE THE INTENTION WAS FOR THEM -- FOR

POWERS TO GET OUT OF THE VEHICLE UNDER THE PRETEXT OF SEEING HIS OLD HOMIES, AND THEN HE'S KILLED. AND BECAUSE IT WAS BOTCHED, AND BECAUSE BATISTE SAW IT WAS BOTCHED, HE WAS ELIMINATED AS A WITNESS TO THIS HOMICIDE.

AND THE SAME REASON POWERS WAS KILLED, BECAUSE HE WAS GOING TO TESTIFY IN AN ATTEMPT MURDER CASE ON THE FOLLOWING MONDAY IN INGLEWOOD IN A PRELIMINARY HEARING.

SO THE FACT THAT LYNETTE PENNINGTON WAS ARRESTED IN OCTOBER WITH JASON GREEN WHEN GREEN IS WALKING OUT OF A RESIDENCE SUPPOSEDLY OCCUPIED BY KAMESHA JONES -- HE DOESN'T HAVE A GUN ON HIM. HE DOESN'T HAVE THE GUN BOX OR AMMUNITION.

TO ALLOW THIS EVIDENCE THAT HE HAD SHOT RAVENEL WITH SHELL CASINGS IN JULY, AND THEN HIS GUN WAS USED, OR POSSIBLY USED, IN THE POWERS SHOOTING AS FAR AS LYNETTE PENNINGTON, THAT WOULD BE PREJUDICIAL. AND I THINK THAT IT WOULD BE PREJUDICIAL AS TO ALL DEFENDANTS.

AND THE PROBATIVE VALUE TO SHOW A MOTIVE, WHICH IS ALL WE'VE BEEN TOLD IS THAT IT'S TO SHOW A MOTIVE BECAUSE OF GREEN, WE'VE ALL WONDERED IF THE CASE -- IF THE EVIDENCE WAS THAT STRONG, WHY HASN'T THIS MURDER CASE BEEN FILED, FOR EXAMPLE, ON MR. GREEN. WHY HASN'T IT?

BUT I WOULD OBJECT TO ANY OF THIS EVIDENCE COMING IN. IF THE COURT IS GOING TO ALLOW IT IN, I WOULD WANT A LIMITING INSTRUCTION THAT IT BE LIMITED TO JASON GREEN AND NOT TO LYNETTE PENNINGTON, YOUR HONOR.

THE COURT: DO YOU HAVE ANYTHING TO ADD, MS. OJO?

MS. OJO: JUST VERY BRIEFLY, YOUR HONOR.

THERE'S BEEN A LOT OF WILD SPECULATION GOING AROUND ABOUT MR. DEAN BEING INVOLVED IN THE POWERS SHOOTING. I HAVEN'T SEEN ANY EVIDENCE SO FAR. THERE'S ABSOLUTELY NOTHING PUTTING MR. DEAN AT THE SCENE OF THE POWERS SHOOTING.

AND THE FACT THAT, YOU KNOW, HE WAS WEARING A RED SHIRT THAT NIGHT, THERE'S A VAN PULL OF PEOPLE, IF YOU LOOK AT THE PHOTOGRAPHS, WHO WERE ALL WEARING RED SHIRTS. SO I DON'T THINK THAT THE FACT THAT MR. DEAN WAS WEARING A RED SHIRT IS SUFFICIENT EVEN TO GET PAST A PRELIMINARY HEARING TO CONNECT HIM TO THE POWERS SHOOTING.

THE PEOPLE ALLEGED IN THEIR MOVING PAPERS THAT THE ONLY LOGICAL EXPLANATION IS THAT POWERS WAS TOGETHER WITH BATISTE WHEN THE -- WHEN POWERS WAS KILLED, AND THIS IS WHY. BUT, I MEAN, THEY'RE REALLY STRETCHING. AND I AGREE WITH MR. FACTOR, THEY'RE TRYING TO BOOTSTRAP ON A BOOTSTRAP ON A BOOTSTRAP TO GET THIS EVIDENCE IN FRONT OF THE JURY.

IT'S EXTREMELY PREJUDICIAL AS TO MR. DEAN, IN PARTICULAR BECAUSE THERE'S NOTHING TO CONNECT MR. DEAN TO THE POWERS SHOOTING. MR. DEAN IS CONNECTED TO THE VAN WHICH ALTON BATISTE WAS IN. I CAN SEE THAT. HE'S CONNECTED TO THAT VAN.

THAT VAN WAS NOT SEEN IN THE VICINITY, IN THE AREA OF THE POWERS SHOOTING. THERE'S NO EVIDENCE THAT THIS VAN WAS ANYWHERE CLOSE TO THIS INCIDENT WHEN THE POWERS SHOOTING OCCURRED.

AND THE PEOPLE'S CONJECTURE THAT MR. BATISTE WAS TAKEN AWAY FROM THE SCENE OF THE KILLING OF POWERS JUST SO HE COULD BE KILLED SOMEWHERE ELSE DOESN'T MAKE ANY SENSE.

IF THE GOAL IS TO KILL BATISTE AND POWERS, AND YOU HAVE A GUN, WHY WOULD YOU TAKE BATISTE AWAY SO YOU CAN STAB HIM? I MEAN, IF HE'S THERE, AND YOU'VE GOT THE GUN, YOU CAN SHOOT THEM BOTH. THERE'S NOTHING TO PREVENT YOU FROM SHOOTING THEM BOTH AT THE SAME SCENE.

IT'S JUST LUDICROUS TO THINK THAT, YOU KNOW, THIS THEORY THAT THEY'VE DEVELOPED, WHICH IS JUST TRYING TO GET A CASE CLOSED IS NOT SUFFICIENT FOR EVIDENCE TO BE ALLOWED IN A CASE AGAINST MR. DEAN, WHICH IS IN ITSELF PRETTY WEAK. I MEAN, THEY HAVE MR. DEAN IN THE VAN. THAT'S PRETTY MUCH IT. THEY HAVE SOME D.N.A. CONNECTING HIM, BUT THAT'S PRETTY MUCH IT.

YOU KNOW, IN TERMS OF TRYING TO BOOTSTRAP THE POWERS EVIDENCE, AS COUNSEL -- BOTH COUNSEL HAVE INDICATED, IT'S EXTREMELY PREJUDICIAL. THERE IS ABSOLUTELY -- THERE'S NOTHING THAT WOULD CONNECT MR. DEAN TO THE POWERS SHOOTING.

AND IF THE COURT IS INCLINED TO ALLOW THIS EVIDENCE IN AGAINST MR. GREEN, WHO'S REALLY THE ONLY PERSON WHO'S SOMEWHAT CONNECTED TO IT, I WOULD ASK THE COURT FOR A SEPARATE JURY FOR MR. DEAN, BECAUSE I DON'T BELIEVE THAT IT'S POSSIBLE FOR A LIMITING INSTRUCTION TO BE EFFECTIVE IN TERMS OF MAKING SURE THAT THE JURY -- THAT THERE'S NO OVERSPILL BETWEEN THE BATISTE KILLING AND THE POWERS KILLING.

MR. HANRAHAN: MAY I BE HEARD JUST VERY BRIEFLY, YOUR HONOR?

THE COURT: WELL, YOU HAVE THE BURDEN, I GUESS. SO YES, YOU CAN HAVE THE FINAL WORD.

MR. HANRAHAN: AND SPEAKING OF BURDEN, THE PEOPLE'S

BURDEN, SINCE WE'VE CHARGED MR. GREEN AND MS. PENNINGTON WITH CONSPIRACY, AND THAT CASE -- THE EVIDENCE OF THAT CASE IS MADE UP OF THEIR STATEMENTS TO ONE ANOTHER ON -- FROM WIRETAPS AND WRITTEN NOTES AT A JAIL VISIT. SO THE PEOPLE'S BURDEN IS TO INTERPRET WHAT EXACTLY THEY ARE SAYING TO EACH OTHER. WHAT ARE THEY TALKING ABOUT AND WHY ARE THEY TALKING ABOUT IT?

AND FROM THE WIRETAPS AND THE EXCERPT THAT I QUOTED TO THE COURT, JASON GREEN IS EXTREMELY CONCERNED -- I MEAN EXTREMELY WORRIED. HE'S EXTREMELY WORRIED ABOUT GARRY DEAN PROVIDING FURTHER INFORMATION TO THE POLICE. THAT'S WHY, UNDER THE PEOPLE'S THEORY, THAT HE AND LYNETTE PENNINGTON ARE CONSPIRING TO KILL HIM.

THE COURT: RIGHT.

MR. HANRAHAN: BUT THE QUESTION THEN IS: WHAT IS GREEN CONCERNED ABOUT DEAN DISCLOSING TO THE POLICE? WHAT HAS HE DONE THAT HE'S WORRIED ABOUT GETTING IN TROUBLE FOR?

HE'S ALREADY BEING CHARGED. HE'S ALREADY IN CUSTODY FOR THE ATTEMPTED MURDER AND ASSAULT ON TYRONE RAVENEL. AND IN GREEN'S MIND, HE THINKS THIS IS A, QUOTE, "SPEEDING TICKET." THIS IS INCONSEQUENTIAL COMPARED TO THE OTHER THINGS FOR WHICH HE WOULD NEED JOHNNY COCHRAN AND ROBERT SHAPIRO TO DEFEND HIMSELF ON.

SO THEN THE QUESTION IS: WHAT IS HE TALKING ABOUT? AND THE EVIDENCE, THE HARD EVIDENCE; NOT THE SPECULATION, NOT THE CONJECTURE, THE HARD EVIDENCE DOESN'T REALLY LINK HIM VERY STRONGLY TO THE MURDER OF ALTON BATISTE OTHER THAN HIS RELATIONSHIP WITH THE CODEFENDANTS.

PENNINGTON IS HIS GIRLFRIEND. DEAN IS IN THE SAME GANG.

HE MAKES SOME REMARK ABOUT BORROWING A KNIFE TO KAMESHA JONES -- FROM KAMESHA JONES, YOU KNOW, FROM HER KITCHEN, THAT HE SAYS IN THE CONTEXT OF USING A SHANK IN CUSTODY AGAINST OTHER PEOPLE. BUT THAT'S IT. THERE'S NO REAL -- NO D.N.A. PUTTING HIM IN THE VAN. NO EYEWITNESS OF HIM IN THE VAN. THAT'S IT.

SO -- BUT THE HARD EVIDENCE, THE GUN EVIDENCE, LINKS HIM DEFINITIVELY TO THE MURDER OF TRAVON POWERS. I MEAN, BY ITSELF, THE FACT THAT -- AND IT CERTAINLY GOES BEYOND THE STANDARD OF A PREPONDERANCE OF EVIDENCE, WHICH IS ALL THAT'S REQUIRED UNDER 1101(B).

FOR THE COURT TO EXCLUDE THAT, THE COURT WOULD HAVE TO SAY THAT NO RATIONAL TRIER OF FACT, NO RATIONAL JUROR COULD FIND BY A PREPONDERANCE OF EVIDENCE THAT GREEN COMMITTED THE CRIME OF -- OR, YOU KNOW, HAD ANY CRIMINAL CULPABILITY FOR THE CRIME OF -- THE MURDER OF TRAVON POWERS.

AND I'VE BRIEFED AT LENGTH, AND I THINK THE COURT IS INTIMATELY AWARE OF JUST THE FACTUAL CONNECTION BETWEEN THE TWO -- THE TWO EVENTS. AND THEY'RE SO CLOSELY CONNECTED THAT IF THE COURT WERE TO EXCLUDE THAT EVIDENCE, THEN WE WOULD JUST HAVE A NARRATIVE.

THE GIRLFRIENDS WOULD TESTIFY TRAVON AND ALTON LEFT THE MOTEL IN THE SAME VEHICLE. THEY WERE GONNA GO OUT AND DO THE SAME THING, GET DRUGS AND BRING THEM BACK TO THE MOTEL. AND FROM THERE, THE JURY WOULD HEAR NOTHING ABOUT WHAT HAPPENED TO TRAVON, BUT THEY WOULD HEAR THAT AT 1:30 IN THE MORNING ALTON BATISTE'S BODY WAS FOUND.

AND THAT'S A GLARING -- THAT'S A GLARING GAP IN WHAT TRULY HAPPENED, ESPECIALLY WHEN THAT GLARING GAP WOULD LINK US EXACTLY TO ONE OF THE THREE DEFENDANTS CHARGED IN THIS CASE, WHEN THE EVIDENCE IS POWERFUL THAT IT WAS HIS GUN, THAT HE USED IT ON JULY 28TH, 2002, AGAINST TYRONE RAVENEL; AND THAT HE WAS ARRESTED WITH THE BOX FOR THAT GUN ON OCTOBER 17TH, 2002.

SO THE MURDERS IN THIS CASE ARE BOOKENDED BY INCIDENTS WITH JASON GREEN. AND RIGHT IN THE MIDDLE OF THOSE BOOKENDS IS THE MURDER IN THIS CASE.

AND FOR ALL THAT BALLISTICS EVIDENCE LINKING GREEN TO THIS -- TO THE MURDER OF TRAVON POWERS, I THINK WOULD BE -- WOULD BE TO EFFECTIVELY GUT THE PEOPLE'S CASE.

AND LAST, WITH RESPECT TO -- OH. AND IT'S TRUE THAT THIS CASE IS PREDOMINANTLY ABOUT THE MURDER OF POWERS. THIS CASE IS ALL ABOUT THE MURDER OF POWERS. THERE WAS NO KNOWN MOTIVE TO KILL BATISTE, BUT THERE WAS A WHOLE LOT OF MOTIVE TO KILL POWERS.

POWERS HAD PROVIDED INFORMATION TO THE POLICE THAT RESULTED IN A CENTINELA PARK FAMILY GANG MEMBER BEING PUT ON DEATH ROW. HE WAS ALSO RESPONSIBLE FOR CHARGES OF MURDER AND ATTEMPTED MURDER AGAINST THREE NEIGHBORHOOD PIRUS. BOTH OF THOSE GANGS ARE INGLEWOOD BLOOD GANGS. THEY COOPERATE. THEY, YOU KNOW, HANG OUT TOGETHER. THEY GET ALONG ACCORDING TO THE GANG EXPERT, KERRY TRIPP.

SO -- BUT THERE WAS NO SUCH MOTIVE TO KILL ALTON BATISTE. THE ONLY MOTIVE TO KILL HIM WAS THAT HE WAS ALONG FOR THE RIDE WITH TRAVON POWERS. AND -- AND SO HE WAS

GOTTEN RID OF.

THIS CASE IS ABOUT KILLING SNITCHES. AND THEY JUST TIED UP THE LOOSE ENDS, AND THAT WAS WHY THEY KILLED ALTON BATISTE. BUT TO GET TO ALTON BATISTE, WE NEED TO PROVE UP THE MURDER OF TRAVON POWERS.

AND AS FAR AS THE CONNECTION TO DEAN, OBVIOUSLY -- CAN WE PUT DEAN AT THE SCENE OF THE CRIME? WE'RE NOT ARGUING THAT DEAN WAS THERE AT THE TIME. ALL WE'RE SAYING IS THAT -- OF THE MURDER OF TRAVON POWERS. BUT GREEN WAS CONCERNED THAT HE KNEW.

GREEN WAS CONCERNED THAT DEAN KNEW ABOUT THAT MURDER, AND DEAN -- AND GREEN WAS OBVIOUSLY CONCERNED ABOUT -- THAT DEAN KNEW ABOUT THE MURDER OF ALTON BATISTE, ONE, BECAUSE HE WAS THERE; AND TWO, BECAUSE GREEN KNEW THAT DEAN HAD GIVEN UP LYNETTE PENNINGTON'S NAME TO THE POLICE, AND THAT'S WHY THE POLICE WERE HITTING UP LYNETTE PENNINGTON AND NOT GARRY DEAN.

SO THAT WAS THEIR MOTIVE. THIS EVIDENCE IS CRUCIAL TO PROVE, IN SUM, TO TRANSLATE WHAT GREEN AND PENNINGTON ARE SAYING, WHAT WAS ON THEIR MIND, WHAT THEY WERE TALKING ABOUT, AND WHAT MOTIVATED THEM TO KILL A MEMBER OF THEIR VERY OWN GANG.

MR. FACTOR: MAY I RESPOND?

MS. OJO: YOUR HONOR, THAT STILL --

THE COURT: DO YOU WANT THE BURDEN?

MR. FACTOR: NO, I DO NOT WANT THE BURDEN.

THE COURT: OKAY. THANK YOU.

MR. FACTOR: THANK YOU. I TAKE THE COURT'S SUGGESTION.

THE COURT: ALL RIGHT. THE ISSUE, I THINK, BOILS DOWN TO THIS: NOBODY HERE IS CHARGED WITH MR. GREEN'S MURDER.

MR. FACTOR: POWERS.

THE COURT: MR. POWERS'S MURDER. AND MR. GREEN IS NOT CHARGED IN THE BATISTE MURDER. HE'S NOT. THE -- I'M NOT HERE TO DETERMINE WHETHER OR NOT, HAD THE PEOPLE CHOSEN TO FILE THE POWERS CASE, WHETHER IT COULD HAVE PROPERLY BEEN JOINED WITH THE BATISTE MURDER.

THEY MAY BE FACTUALLY INTERCONNECTED ENOUGH UNDER THOSE CIRCUMSTANCES SO THAT THEY COULD BE FILED TOGETHER UNDER 954 IF YOU HAD SUFFICIENT EVIDENCE TO FILE IN THE FIRST INSTANCE. BUT WE DON'T HAVE THAT SITUATION.

WHAT I'M DEALING WITH HERE IS A QUESTION OF WHETHER, UNDER 1101, THIS UNCHARGED EVIDENCE CAN COME IN. THAT'S MY ISSUE.

AND SO WHY IS IT COMING IN UNDER 1101? CLEARLY, THERE'S NO WAY THAT WE CAN USE THIS TO PROVE IDENTITY. AND ONE OF THE PROBLEMS WITH 1101 IS THAT WHAT WE'RE TALKING ABOUT IS THE CONNECTION BETWEEN THE POWERS MURDER AND THE BATISTE MURDER, AND MR. GREEN ISN'T CHARGE WITH EITHER AT THIS POINT. AND HE'S CERTAINLY NOT CHARGED WITH THE MURDER OF MR. BATISTE. SO AS TO MR. GREEN, THAT 1101 GOES TO THE MOTIVE FOR THE COUNT RELATING TO THE CONSPIRACY TO KILL MR. DEAN.

NOW, I UNDERSTAND THAT WHAT YOUR ARGUMENT IS, IS THAT WE HAVE ALL OF THESE TAPES. AND IN ORDER TO UNDERSTAND WHAT THE MOTIVE WAS BEHIND THAT IN INTERPRETING THOSE PARTICULAR TAPES, THAT YOU NEED TO HAVE THE POWERS INCIDENT.

EXCEPT WE DON'T HAVE ANY EVIDENCE REALLY LINKING MR. DEAN TO THE POWERS INCIDENT. SO IT PRESUPPOSES -- WE'RE MISSING A LINK HERE THAT MR. DEAN HAD SOMEHOW, WHEN HE'S TALKING TO THE POLICE, HE'S TALKING ABOUT THE POWERS INCIDENT.

ALL THE EVIDENCE SEEMS TO SUGGEST THAT MR. DEAN, WHEN HE'S TALKING TO THE POLICE, IS TALKING ABOUT THE BATISTE INCIDENT. AND YOU YOURSELF, IN YOUR MOVING PAPERS, INDICATE THAT THERE WERE STATEMENTS THAT RELATE TO -- BETWEEN MR. GREEN AND MS. PENNINGTON WHERE MR. GREEN ALLEGEDLY SAYS SOMETHING ABOUT, IF YOU'RE GOING AFTER BONNIE, YOU'VE GOT TO WORRY ABOUT CLYDE, OR SOMETHING TO THAT EFFECT. AND THE ALLEGATIONS ARE THAT MR. GREEN AND MS. PENNINGTON REFERRED TO THEMSELVES AS BONNIE AND CLYDE. AND SO EVERYTHING IS CONNECTED WITH THE BATISTE MURDER.

WHAT YOU NEED TO PROVE MOTIVE ON THE COUNTS RELATING TO PENNINGTON AND GREEN AS TO MR. DEAN'S -- THE CONSPIRACY TO COMMIT, DEAN, THE STRONGEST EVIDENCE THAT YOU HAVE AND THE MOST DIRECT EVIDENCE THAT YOU HAVE IS ALL CENTERED ON THE MURDER OF MR. BATISTE.

SO WHAT I -- AND AGAIN, I DON'T SEE THE CONNECTION BETWEEN THE MOTIVE TO KILL MR. DEAN AND THE POWERS MURDER. I DON'T SEE THAT. I HAVEN'T HEARD IT, THAT THERE WAS THAT CONNECTION, THAT IT AFFECTS THE MOTIVE AS TO KILLING HIM. SO I DON'T THINK IT IS ADMISSIBLE UNDER 1101.

EVEN IF IT WERE, EVEN IF IT WERE, I WOULD HAVE TO SAY THAT UNDER 352 GROUNDS, THE PROBATIVE VALUE OF THAT EVIDENCE RELATING TO THE GUN AND TO THE RAVENEL MATTER, AS OPPOSED TO THE PREJUDICIAL VALUE, I THINK IS GREATLY

OUTWEIGHED BY THE PREJUDICIAL VALUE.

ALL WE KNOW IS THAT THE GUN THAT WAS USED TO KILL POWERS WAS IN THE POSSESSION OF -- ALLEGEDLY IN THE POSSESSION OF MR. GREEN AT SOME EARLIER TIME WHEN HE KILLED RAVENEL, AND THAT THE GUN BOX IS FOUND IN A LOCATION THAT MR. GREEN AND MS. PENNINGTON ARE LEAVING ABOUT A MONTH-AND-A-HALF LATER.

SO WE HAVE EVIDENCE CONNECTING MR. GREEN, AND ARGUABLY MS. PENNINGTON, POSSIBLY, TO THE GUN. BUT WE DON'T HAVE ANY OTHER EVIDENCE CONNECTING MR. GREEN TO THE ACTUAL HOMICIDE OF MR. GREEN (SIC). THERE'S NO D.N.A. THERE'S NO WITNESSES. THERE'S NOTHING TO SAY THAT IT'S THIS GENTLEMAN. THERE IS -- AGAIN, OTHER THAN -- AGAIN, THE AMMUNITION IS THE ONLY THING THAT GOES BEYOND THE MERE FACT THAT HE HAD ACCESS TO THAT GUN.

AS FAR AS THE INTERRELATIONSHIP BETWEEN THE POWERS MURDER AND THE BATISTE MURDER AND HOW THEY'RE CONNECTED, I -- QUITE FRANKLY, I HAVEN'T READ ANYTHING, I HAVEN'T SEEN ANYTHING THAT EXPLAINS TO ME WHY IT IS THAT MR. BATISTE WAS MURDERED.

I POINT OUT THAT MR. BATISTE -- LET'S SEE. WAS HE A CENTER PARK BLOOD?

MS. OJO: ACCORDING TO --

MR. HANRAHAN: ACCORDING TO THE GANG EXPERT, HE WAS NOT A MEMBER OF A GANG. BUT ACCORDING TO CIVILIANS, HE WAS A MEMBER OF CENTINELA PARK.

THE COURT: THE CENTINELA FAMILY BLOODS, WHICH IS -- OKAY. SO -- AND MR. POWERS WAS A MEMBER OF THE CENTINELA

FAMILY BLOODS?

MR. HANRAHAN: YES.

THE COURT: OKAY. SO WE HAVE THIS -- APPARENTLY, THESE ARE NOT RIVAL GANGS. THEY ARE FRIENDLY.

MR. HANRAHAN: YES.

THE COURT: AND THEN WE HAVE A HIT THAT'S OUT ON POWERS. THERE'S ALL THIS STUFF ABOUT MR. POWERS THAT RELATES TO THE MOTIVE FOR HIS PARTICULAR MURDER, AND WHO HAD THE MOTIVE TO KILL HIM THAT, IN ESSENCE, WOULD BE PART OF THAT PARTICULAR CRIME.

IF I ALLOW THAT IN, ESSENTIALLY WHAT I WOULD BE DOING IS WE'RE GONNA HAVE AN ENTIRE SEPARATE TRIAL AS TO THE ISSUE OF THE POWERS MURDER, WHEN THE CONNECTION BETWEEN THE POWERS MURDER AND THE CHARGED CRIMES THAT WE HAVE HERE IS TENUOUS AT BEST.

SO I WOULD -- I WOULD EXCLUDE IT EVEN IF IT WAS ARGUABLY ADMISSIBLE UNDER 1101. AND I DON'T BELIEVE THAT THE CONNECTION IS STRONG ENOUGH TO EVEN GET OVER THAT INITIAL HURDLE. EVEN IF THAT WERE THE CASE, I THINK BECAUSE OF THE TENUOUS CONNECTION, IT'S GREATLY OUTWEIGHED BY THE AMOUNT OF TIME THAT WOULD BE CONSUMED IN DOING THIS AND THE PREJUDICIAL EFFECT.

THE FACT IS THAT, EVEN THOUGH YOU MAY NOT ARGUE THAT IT'S MR. DEAN WHO WAS IN THAT CAR, WHO POPPED OUT OF THE CAR WEARING THE RED SHIRT, EVEN THOUGH HE WAS WEARING A RED SHIRT AFTERWARDS, A JURY MAY IMPROPERLY DRAW THAT INFERENCE.

AND I WOULD POINT OUT THAT THIS IS -- THE FACT THAT -- THE FACT THAT THE PERSON WAS WEARING A RED SHIRT, AND

THAT MR. DEAN IS WEARING A RED SHIRT, FACTUALLY IS NOT VERY STRONG GIVEN THE FACT THAT THEY'RE BLOODS. SO I MEAN, IT'S JUST LIKE -- AND THE HIT WAS FROM BLOODS ON BLOODS. SO THE FACT THAT SOMEBODY MAY HAVE BEEN WEARING A RED SHIRT IS NOT THAT STRONG OF A CONNECTION.

SO WITH ALL OF THAT, I WOULD EXCLUDE ANY MENTION OF THE GUN AND THE RAVENEL ISSUE.

THE QUESTION -- THE ONLY QUESTION THAT REMAINS IN MY MIND IS WHETHER THERE CAN BE ANY MENTION OF THE FACT THAT MR. BATISTE LEFT THE LOCATION WITH MR. POWERS, THAT MR. POWERS ENDED UP DEAD, AND THAT THEN MR. BATISTE ENDS UP DEAD AN HOUR-AND-A-HALF LATER IN TERMS OF THE NARRATIVE OF WHAT'S GOING ON HERE, WITHOUT HAVING ANY REFERENCE TO THE BALLISTICS AND THINGS OF THAT PARTICULAR NATURE, EVIDENCE THAT COMES IN SPECIFICALLY ATTEMPTING TO TIE IN ONE OF THESE THREE DEFENDANTS INTO THAT MURDER.

AND THEN THE QUESTION BECOMES: IS REFERENCE TO IT -- IS REFERENCE TO THE MURDER ITSELF OF MR. POWERS NECESSARY TO ESTABLISH THE CONTEXT OF THE MURDER OF MR. BATISTE? AND I THINK THAT'S A MUCH TOUGHER QUESTION TO ANSWER THAN THE QUESTION AS TO WHETHER OR NOT -- WHO'S ACTUALLY RESPONSIBLE FOR THE POWERS MURDER IS TO THE FACTS IN THIS CASE.

MS. OJO: AND YOUR HONOR, YOU'RE NOT GONNA RULE ON THAT ISSUE RIGHT NOW? BECAUSE I WOULD ASK THE COURT TO, YOU KNOW, NOT RULE ON THE ISSUE UNTIL WE HAVE A CHANCE TO DISCUSS IT FURTHER. BECAUSE I DON'T THINK -- I DON'T THINK EVEN THE MENTION OF THE POWERS MURDER SHOULD BE ADMITTED IN THIS CASE.

BECAUSE AS THE COURT INDICATED, THERE'S NOTHING TO CONNECT THE TWO. THERE'S NO EVIDENCE TO CONNECT THE TWO WHATSOEVER.

AND I THINK IN TERMS OF SAYING THAT THEY LEFT THE HOTEL TOGETHER, I THINK THAT'S ADMISSIBLE. BUT I DON'T THINK WE HAVE TO HAVE -- YOU KNOW, GET INTO WHAT HAPPENED TO MR. POWERS AT ALL.

THE COURT: OKAY. WELL, LOOK. I DON'T KNOW WHETHER OR NOT THERE'S ANY WAY TO BRING IN MENTION OF THE POWERS INCIDENT WITHOUT RAISING ALL THESE SORT OF ISSUES THAT WE HAD --

MS. OJO: RIGHT.

THE COURT: -- THAT I THINK ARE MAKING THE ACTUAL CONNECTIONS ADMISSIBLE. WHAT DO YOU DO? THE JURY WOULD HAVE TO BE ADMONISHED THAT NOBODY HERE IS BEING CHARGED WITH THE --

MS. OJO: POWERS.

THE COURT: -- THE POWERS MURDER, SO --

MS. OJO: AND IT LEAVES IT OPEN TO SPECULATION FOR THEM. I THINK IT JUST COMPLICATES THE ISSUE TO EVEN MENTION THE POWERS MURDER.

THE COURT: WELL, I GUESS THE QUESTION IS THIS: AT THE SAME TIME, I THINK MR. HANRAHAN MAKES A GOOD POINT IN TERMS OF HOW -- IT'S DIFFICULT ENOUGH TO TRY TO EXPLAIN WHY IT IS THAT MR. BATISTE WAS MURDERED UNDER THE CIRCUMSTANCES. HE WAS MURDER DRIVING DOWN THE FREEWAY. I MEAN, IT'S LIKE -- AND YOU KNOW --

MS. OJO: FORTUNATELY, THE LAW DOES NOT REQUIRE THAT THEY DETERMINE WHY HE WAS MURDERED. MOTIVE IS NOT REQUIRED.

SO ALL THEY NEED TO SHOW IS THAT HE WAS MURDERED AND THAT SOMEBODY KILLED HIM; THAT HE'S DEAD, AND HE WAS MURDERED BY THE HAND OF SOMEBODY ELSE. THEY DON'T NEED TO SHOW MOTIVE.

MR. FACTOR: AND IF I MAY ADD TO THAT, YOUR HONOR.

THE COURT: YES.

MR. FACTOR: THE FACT THAT A PART OF THE NARRATIVE IS MISSING DOESN'T PREVENT -- OR HAS PREVENTED THE DEFENSE ON MULTIPLE OCCASIONS FROM PRESENTING THINGS THAT MAY NOT BE FACTUALLY RELEVANT.

MS. OJO: RIGHT.

MR. FACTOR: WE WOULD LIKE TO FILL IN AND HAVE A COHESIVE NARRATIVE. BUT THE ARGUMENT, I NEED THIS BECAUSE I NEED A COHESIVE NARRATIVE, I THINK IS A MISPLACED ARGUMENT. HIS BURDEN OF PROOF IS TO PUT ON THE EVIDENCE THAT HE HAS AND TO SHOW THAT EVIDENCE.

IF THE MOTIVE IS NOT THERE, AND HE DOESN'T HAVE THAT MOTIVE, THAT'S -- THAT HAS NO EFFECT ON WHETHER THE COURT SHOULD JUST -- YOU KNOW, HIS ARGUMENT IS BASICALLY, YOU SHOULD GIVE ME THIS BECAUSE I NEED TO PUT ON A FULLER EXPLANATION.

THE COURT: WELL, THAT PRESUPPOSES THAT THERE ISN'T A CONNECTION BETWEEN THE TWO.

MR. FACTOR: RIGHT.

THE COURT: AGAIN -- AND THIS GOES -- SEE, BECAUSE WHAT I WAS FOCUSING ON BEFORE WAS THE RELEVANCE OF THE POWERS MURDER TO THE CONSPIRACY TO COMMIT, MR. DEAN.

THIS ISSUE IS SLIGHTLY DIFFERENT. THIS IS THE QUESTION OF THE RELEVANCE OF THE POWERS MURDER TO THE MURDER

OF MR. BATISTE, WHICH IS DIFFERENT, AND REALLY DOESN'T NECESSARILY RELATE TO YOUR CLIENT, SINCE I'VE ALREADY MADE IT CLEAR I'M EXCLUDING EVIDENCE THAT WOULD ARGUABLY TIE HIM INTO THAT OTHER THAN SUBSEQUENT CONSPIRACY --

MR. FACTOR: RIGHT.

THE COURT: -- WHICH WOULD REMAIN AS FAR AS WHETHER HE HAD ANY CONNECTION TO BATISTE, EVEN THOUGH HE'S NOT CHARGED WITH IT.

THE -- BECAUSE I DO SEE THAT IN TERMS OF -- THE FACT OF THE POWERS MURDER MAY NOT EVEN BE 1101, BECAUSE YOU'RE NOT ALLEGING THAT ANY OF THEM DID IT.

BUT THE QUESTION IS -- THE FACT OF THE POWERS MURDER MAY BE RELEVANT TO ESTABLISH THE CONTEXT OF THE BATISTE MURDER. SO EVEN THOUGH THE THREE OF THEM MAY NOT BE INVOLVED WITH THE FIRST, THE FIRST MAY BE CONNECTED WITH PROVIDING THE MOTIVE FOR THE TWO THAT ARE INVOLVED IN THE BATISTE MURDER. THAT'S WHERE I'M --

MS. OJO: YOUR HONOR, IF I MAY?

THE COURT: YES.

MS. OJO: BASED ON THE EVIDENCE THAT WE HAVE, IT'S ENTIRELY POSSIBLE THAT THE BATISTE MURDER HAD NOTHING TO DO WITH THE POWERS MURDER, BECAUSE BATISTE WAS STABBED EITHER DURING A RIDE, OR AFTER THE CRASH, OR SOME -- IT'S ENTIRELY POSSIBLE THAT A COMPLETELY DIFFERENT SET OF CIRCUMSTANCES LED TO HIS MURDER. THERE COULD HAVE BEEN AN ARGUMENT IN THE VAN AT SOME POINT.

THE COURT: WASN'T POWERS ALSO STABBED?

MS. OJO: NO. POWERS WAS SHOT.

THE COURT: I KNOW HE WAS SHOT, BUT WASN'T THERE A STAB WOUND AS WELL?

MS. OJO: YOUR HONOR, I'M NOT THAT --

MR. FACTOR: NO.

MR. HANRAHAN: I THINK ONE PERSON OBSERVED WHAT THEY THOUGHT WAS A STAB WOUND, BUT IT WAS ACTUALLY AN EXIT WOUND.

THE COURT: THAT WAS THE INVESTIGATING OFFICER'S INITIAL --

MR. HANRAHAN: I THINK IT WAS.

THE COURT: SO THE CORONER DIDN'T BACK THAT UP?

MR. HANRAHAN: NO.

MR. FACTOR: NO.

THE COURT: I GUESS THE QUESTION IS THIS: BEFORE WE LAUNCH INTO THE REST OF THIS, YOUR OPTIONS AT THIS POINT ARE TO GO FORWARD WITHOUT ANY OF THE BALLISTICS EVIDENCE AND THE RAVENEL INCIDENT AT ALL.

AND THEN WE COULD -- AND THEN I'LL SEE IF THERE'S ANY WAY TO BRING IN THE FACT THAT -- I WOULD NEVER LET ANYTHING BEYOND THE FACT THAT THEY LEFT TOGETHER, ONE ENDS UP DEAD, AND THE OTHER ONE ENDS UP DEAD AN HOUR-AND-A-HALF LATER. AND I'M NOT SURE WHETHER I WOULD ALLOW THAT. BUT GIVEN THE FACT THAT I'M NOT ALLOWING THAT PARTICULAR EVIDENCE, WE CAN GO FORWARD.

I DON'T KNOW WHETHER YOU BELIEVE THAT YOU HAVE SUFFICIENT EVIDENCE TO INDEPENDENTLY CHARGE MR. GREEN OR ANYBODY ELSE WITH THE POWERS MURDER, OR WHETHER YOU BELIEVE THAT WITH THE POWERS MURDER YOU HAVE SUFFICIENT EVIDENCE TO CHARGE MR. GREEN WITH THE BATISTE MURDER. SO I DON'T KNOW

HOW YOU WANT TO PROCEED.

MR. HANRAHAN: WELL, AT THIS POINT, GIVEN THE COURT'S RULING -- AND IF I -- I JUST WANT TO CLARIFY WHAT THE COURT'S RULING IS AS FAR AS THE FIREARMS EVIDENCE. I JUST WROTE NO GUN AND RAVENEL ISSUE. SO NO INFORMATION ABOUT THE JULY 28TH SHOOTING OF TYRONE RAVENEL IS ADMISSIBLE?

THE COURT: CORRECT.

MR. HANRAHAN: AND WHEN YOU SAY NO GUN, NO EVIDENCE THAT A GUN WAS FOUND AT TRAVON POWERS'S SHOOTING, AND NO CASINGS, AND NO -- THE FACT THAT HE WAS SHOT?

THE COURT: I WOULD -- I WOULD -- I MEAN, THE FACT THAT HE WAS SHOT AND KILLED, I DON'T -- THAT WOULD ACTUALLY SEPARATE IT FROM THIS PARTICULAR INCIDENT. BUT I MEAN, THE FACT THAT HE WAS SHOT -- AT THIS POINT WHAT I'M STILL GRAPPLING WITH IS THE ISSUE OF WHETHER OR NOT I ALLOW THE FACT IN THAT POWERS AND BATISTE LEFT TOGETHER -- WELL, THAT'S GONNA COME IN --

MR. HANRAHAN: OKAY.

THE COURT: -- BECAUSE THEY LEFT TOGETHER. THAT'S THE LAST PEOPLE WHO SAW THEM. THAT'S GONNA COME IN. THE QUESTION IS WHETHER OR NOT, IN ADDITION TO THAT -- THEN MR. BATISTE IS KILLED AT 1:30 THAT MORNING -- WHETHER THERE IS A BASIS FOR INTRODUCING THE FACT THAT MR. POWERS, BEFORE THAT, WAS SHOT AND KILLED.

MR. HANRAHAN: OKAY. OKAY.

THE COURT: SO THAT ISSUE IS UP IN THE AIR, AND I'LL HEAR FURTHER ARGUMENT ON IT, BECAUSE THE FOCUS OF EVERYTHING ELSE WAS ESSENTIALLY AS TO WHETHER OR NOT THE POWERS MURDER

WAS ADMISSIBLE TO PROVE THE CONSPIRACY. AND I DON'T THINK THAT --

MR. HANRAHAN: AND IS THE COURT -- WOULD THE COURT EXCLUDE THE FACT THAT THE GUN BOX AND THE SAME AMMO -- SO THAT'S OUT, TOO?

THE COURT: THAT'S OUT.

MR. HANRAHAN: OKAY. SO GUN BOX OUT. AMMO OUT.

THE COURT: SEE, BECAUSE ALL OF THAT IS ALL RELEVANT IN AN EFFORT TO TIE IN MR. GREEN TO SOMEHOW THE COMMISSION OF THE OFFENSE; IF NOT THE ACTUAL COMMISSION, IN AT LEAST PROVIDING THE GUN, IF NOTHING ELSE, RIGHT?

I MEAN, THAT WOULD BE THE ARGUMENT THAT -- THAT'S THE STRONGEST EVIDENCE YOU HAVE BASED ON WHAT -- BASED ON THE TESTIMONY YOU HAVE, THE STRONGEST INFERENCE IS THAT HE, AT THE VERY LEAST, PROVIDED THE WEAPON TO SOMEBODY WHO USED IT TO KILL, IF HE DIDN'T KILL HIMSELF.

MR. HANRAHAN: THE REASON I'M ASKING FOR THIS CLARIFICATION IS THAT I HAVE TO MAKE A DECISION RIGHT NOW ABOUT WHAT WE'RE GOING TO -- WHAT THE PEOPLE ARE GOING TO DO IN TERMS OF FILING AND CONSULT WITH MY SUPERVISORS IN LIGHT OF WHAT THE COURT HAS ALREADY RULED.

THE COURT: RIGHT.

MR. HANRAHAN: AND --

THE COURT: AND I WOULD -- WHEN -- I'LL GIVE YOU UNTIL -- IT'S 20 TO 12:00 NOW. I'LL GIVE YOU UNTIL 1:30.

MR. HANRAHAN: OKAY. THANK YOU.

THE COURT: AND WHEN YOU CONSULT WITH YOUR SUPERVISORS, I -- I WOULD SUGGEST THAT YOU ASSUME I'M NOT LETTING ANY

REFERENCE TO POWERS IN, EVEN THOUGH I HAVEN'T DECIDED THAT. BUT IN MAKING YOUR DETERMINATION --

MR. HANRAHAN: YEAH.

THE COURT: -- I WOULD ASSUME THAT BECAUSE -- AND I'M GOING TO HEARING ARGUMENT, BUT I'M HAVING -- I SEE THE POSITION THAT YOU'RE PUT IN BY EXCLUDING THAT IN TERMS OF PUTTING THIS THING INTO CONTEXT. ON THE OTHER HAND, I'M HAVING DIFFICULTY SEEING HOW I DON'T OPEN THE DOOR TO ALL THE OTHER PROBLEMS THAT I'VE ALREADY ADDRESSED.

BUT BECAUSE EVERYTHING ELSE HAS BEEN FOCUSED ON THE ADMISSIBILITY OF THAT TO PROVE THE CONSPIRACY CHARGE AS OPPOSED TO PROVE THE MURDER CHARGE, THE BATISTE CASE, I'M NOT FINALLY RULING ON IT. I WANT TO GIVE COUNSEL AN OPPORTUNITY TO -- TO ADDRESS IT.

MR. HANRAHAN: AND I DON'T WANT TO MESS THE COURT UP IN TERMS OF BRINGING JURORS IN HERE, SO I WANT TO GET THE COURT AN ANSWER AS QUICKLY AS POSSIBLE ABOUT WHAT WE'RE GOING TO DO.

THE COURT: RIGHT. PUT IT THIS WAY: IF YOU WANT TO DISMISS AND REFILE, YOU'VE GOT TO LET ME KNOW AT 1:30.

MR. HANRAHAN: OKAY.

THE COURT: IF YOU DON'T LET ME KNOW AT 1:30, WE'RE PROCEEDING.

MR. HANRAHAN: SO THE COURT, FOR OUR PURPOSES NOW, NO REFERENCE TO POWERS, NO REFERENCE TO RAVENEL, NO REFERENCE TO ANY -- THE ONLY EVIDENCE THAT'S ADMISSIBLE IS THAT --

THE COURT: RIGHT.

MR. HANRAHAN: -- POWERS AND BATISTE LEFT TOGETHER FOR

OUR PURPOSES.

THE COURT: IN TERMS OF MAKING YOUR DETERMINATION RIGHT NOW, BECAUSE I WANT YOU TO DECIDE BY 1:30 --

MR. HANRAHAN: OKAY.

THE COURT: -- WHETHER YOU'RE GOING FORWARD OR NOT.

I MAY -- I HAVEN'T DECIDED THAT ISSUE, AND I'M GONNA HEAR ARGUMENT ON THAT ISSUE AT 1:30 IF YOU DECIDE THAT YOU'RE GONNA PROCEED WHETHER YOU HAVE IT OR NOT.

MR. HANRAHAN: OKAY.

THE COURT: DO YOU UNDERSTAND?

MR. HANRAHAN: YES, I --

THE COURT: IF YOU COME BACK HERE AND YOU TELL ME YOU'RE GONNA PROCEED, THEN WE'RE GONNA PROCEED REGARDLESS OF HOW I RULE ON THAT ISSUE.

MR. HANRAHAN: BUT THE COURT HAS ALREADY CERTAINLY RULED NOTHING DO WITH RAVENEL, NO GUN PLAY.

THE COURT: ABSOLUTELY, THE GUN IS OUT. RAVENEL IS OUT. THE BOX IS OUT. SO ALL THAT EVIDENCE AS TO JONES --

MR. HANRAHAN: OKAY.

THE COURT: -- ALL THAT STUFF IS GONE.

MR. HANRAHAN: OKAY.

THE COURT: THE ONLY THING THAT'S LEFT IN THE AIR IS WHETHER OR NOT THERE CAN BE MENTION OF THE FACT THAT MR. POWERS ENDED UP GETTING SHOT AND KILLED.

MR. HANRAHAN: OKAY.

THE COURT: OKAY.

MR. HANRAHAN: OKAY. THANK YOU, YOUR HONOR.

THE COURT: AND THEN WE'LL COME BACK AT 1:30. PLEASE

LET ME KNOW AT THAT POINT IN TIME HOW YOU WISH TO PROCEED.

AND I -- DO WHAT YOU WANT. HOWEVER, THERE'S ANOTHER ASPECT OF THIS THING THAT IS -- THAT YOU -- SHOULD COME INTO THIS MIX, BECAUSE YOU WEREN'T HERE WHEN WE DID THIS -- THIS PORTION OF THE CASE.

THERE WAS A MOTION TO DISMISS FOR PREACCUSATION TO DELAY THAT WAS DENIED BASED ON THE EVIDENCE THAT WAS -- THE STATE OF THE EVIDENCE THAT WAS PRESENTED AT THAT PARTICULAR HEARING RELATING TO PREJUDICE.

BUT ALL ALONG IT'S BEEN UNDERSTOOD THAT THIS WAS SOMETHING THAT WAS DENIED WITHOUT PREJUDICE AND THAT, DEPENDING ON WHAT THE FACTS WERE AT TRIAL, IT MAY VERY WELL BE THAT THE SITUATION CHANGES. I DON'T KNOW IF IT WILL OR WON'T. I DON'T HAVE A CRYSTAL BALL, BUT I CAN ENVISION THE CASE.

SO THIS IS ALL WITHIN THE CONTEXT OF THE FACT THAT THIS STUFF IS BEING DONE TEN YEARS AFTER THE PARTICULAR INCIDENT, WHERE WE HAVE THIS ISSUE OF POTENTIAL PRETRIAL DELAY ISSUE. AND IF IT IS DISMISSED AND REFILED, WE'RE GONNA TALK ABOUT ANOTHER YEAR BEFORE WE HAVE ALL OF YOU GUYS BACK IN HERE AND READY TO GO TO TRIAL.

AND MR. DEAN HAS BEEN OBJECTING SINCE AUGUST OF 2011. SO NONE OF THE DELAY ATTRIBUTED TO GETTING THIS THING TO TRIAL FROM AUGUST 11TH TO TODAY IS GOING TO BE ATTRIBUTABLE TO -- HE'S BEEN OBJECTING.

MS. OJO: AND YOUR HONOR, IF THEY DECIDE TO PROCEED WITH A DISMISSAL, I'M GOING TO BE ASKING THE COURT TO CONSIDER RELEASING MR. DEAN.

THE COURT: WELL, YOU CAN ASK WHATEVER YOU LIKE. ALL RIGHT. WE WILL SEE YOU ALL AT 1:30.

(THE PROCEEDINGS ARE CONTINUED TO 1:30 P.M OF THE SAME DAY.)

CASE NUMBER: SA071962

CASE NAME: PEOPLE VS. 01 GARRY DEAN
02 LYNETTE PENNINGTON
03 JASON GREEN

LOS ANGELES, CALIFORNIA WEDNESDAY, APRIL 25, 2012

DEPARTMENT LX-F HON. JAMES R. DABNEY, JUDGE

REPORTER: JOYCE K. RODELA, CSR NO. 9878

TIME: 1:40 P.M.

APPEARANCES: (AS HERETOFORE NOTED.)

THE COURT: ON THE RECORD ON PEOPLE VERSUS DEAN, PENNINGTON, AND GREEN. ALL COUNSEL ARE PRESENT. THE DEFENDANTS ARE PRESENT.

SO WHAT IS IT?

MR. HANRAHAN: THE ANSWER, YOUR HONOR, IS THE PEOPLE ARE UNABLE TO PROCEED. AND THE PEOPLE WILL MOVE TO DISMISS AND IMMEDIATELY REFILE. I'VE INFORMED COUNSEL OF OUR INTENTION TO FILE AND TO HAVE THE DEFENDANTS ARRAIGNED TOMORROW.

THE COURT: OKAY.

MR. FACTOR: YOUR HONOR, I'D MAKE A MOTION TO DISMISS WITH PREJUDICE. I DON'T THINK IT'S REALLY TRULY UNABLE TO PROCEED. I THINK THAT WHAT IT IS IS THE COURT'S RULINGS IN THIS CASE HAVE MADE THE PEOPLE DECIDE THAT THEY DON'T WISH TO GO FORWARD, WHICH IS DIFFERENT FROM UNABLE TO PROCEED.

SO I'D ASK TO HAVE A COPY OF THE TRANSCRIPT OF TODAY'S PROCEEDINGS AND THE COURT RULINGS TO BE PRODUCED.

AND I'D ALSO LIKE TO RENEW THE SPEEDY TRIAL MOTION. MY CLIENT'S BEEN WAITING FOR TRIAL ON THIS CASE.

HE'S BEEN IN CUSTODY SINCE SOMETIME, I BELIEVE, IN 2008, THE BEGINNING OF -- EXCUSE ME -- THE END OF 2008, BEGINNING OF 2009. IT'S BEEN THREE YEARS HE'S BEEN IN CUSTODY WAITING FOR IT. AND SO THE ELECTION OF THE D.A. TO DECIDE THAT SINCE THEY'RE UNHAPPY WITH THE COURT'S RULINGS, I THINK THAT THAT WOULD AMOUNT TO ACTUAL PREJUDICE.

AND AS TO THE SPEEDY TRIAL ISSUE, I WOULD LIKE TO RAISE THAT AT THIS TIME JUST AS TO THAT ASPECT OF IT. IT DOES AMOUNT TO SOME PREJUDICE.

THE COURT: OKAY. WELL -- YES?

MS. OJO: YOUR HONOR, I WILL BE JOINING IN THAT MOTION. AND I'M SURE I DON'T HAVE TO MAKE THE COURT AWARE OF MR. DEAN'S FEELINGS REGARDING THIS CASE.

THE COURT: NO, YOU DON'T.

MS. OJO: MR. DEAN HAS BEEN TRYING TO GET THIS CASE TO GO TO TRIAL FOR CLOSE TO A YEAR NOW.

THE COURT: I UNDERSTAND.

MS. OJO: AND IF THE COURT IS GOING TO DENY THIS MOTION, I'LL ASK THE COURT TO CONSIDER RELEASING MR. DEAN. THERE'S NOTHING TO HOLD HIM ON IF PEOPLE DISMISS THIS CASE. I DON'T BELIEVE THERE'S ANYTHING ELSE HOLDING HIM IN CUSTODY. I'D ASK THAT HE BE RELEASED FROM HERE.

MR. FACTOR: THE SAME FOR MY CLIENT.

THE COURT: WELL, AS FAR AS DISMISSING WITH PREJUDICE OR DEALING WITH THE SPEEDY TRIAL ISSUE, I'M NOT GONNA DO THAT, BECAUSE FIRST OF ALL, BY DISMISSING THE CASE, THERE'S NOTHING -- THE CASE IS DISMISSED.

ONCE IT'S REFILED, AT THAT POINT IN TIME, IF AND

WHEN IT'S REFILED, THE ISSUE WILL BECOME RIPE AGAIN AS TO -- THE SPEEDY TRIAL ISSUES WILL ARISE.

I -- PEOPLE ARE ANNOUNCING UNABLE TO PROCEED. I AM DISMISSING THE CASE. I DON'T KNOW WHAT'S HOLDING THE THREE OF THEM, BUT IT'S NOT GOING TO BE THIS CASE, OKAY? SO IF THEY'RE GOING TO BE REARRESTED, THEN THEY NEED TO BE REARRESTED.

MS. OJO: YOUR HONOR, I WOULD ASK THE COURT TO ORDER A TRANSCRIPT OF THIS MORNING'S PROCEEDINGS.

THE COURT: THAT'S FINE.

AGAIN, AS FAR AS -- ON THAT ISSUE, I WILL ORDER A COPY OF THIS MORNING'S PROCEEDINGS, AND WE'LL HAVE THE ORIGINAL PLUS FOUR. BUT AS I STATED AT THE OUTSET, THE ISSUES OF THIS MORNING'S MEETINGS WERE RELATING TO WHETHER UNDER 101 THESE INCIDENTS WOULD BE ADMISSIBLE AND NOT A QUESTION UNDER 954, WHICH IS REALLY NOT BEFORE ME; BUT WILL BE BEFORE SOMEBODY IF, IN FACT, IT'S REFILED WITH THOSE ADDED CHARGES.

NOW, IF THEY REFILE THE SAME CHARGES, THAT MAY BE A DIFFERENT ISSUE THEN, AT THAT POINT IN TIME. THAT APPEARS VERY DIFFERENT THAN IF THEY FILED ADDITIONAL CHARGES.

MR. FACTOR: YOUR HONOR, JUST AS A REQUEST, COULD THIS CASE NUMBER BE INCORPORATED, IF IT WERE, INTO THE NEW CASE NUMBER? WHICH I DON'T KNOW WHAT IT IS, BUT I'D LIKE THIS RECORD TO BE APPENDED TO THE NEW CASE NUMBER, BECAUSE OF ALL OF THE ISSUES THAT WE HAVE REGARDING SPEEDY TRIAL AND OTHER ISSUES, SEARCH AND SEIZURE ISSUES, *TROMBETTA* ISSUES, *HITCH* MOTIONS, THINGS LIKE THAT.

THE COURT: I WILL SAY THIS: ONCE THE CASE IS REFILED, IT HAS TO GO THROUGH THE PRELIMINARY HEARING PROCESS. THESE RECORDS ARE NOT GOING TO GO AWAY. THERE'S BEEN A LOT OF -- YOU KNOW, I DON'T KNOW. IT'S GOING TO BE UP TO THE MASTER CALENDAR COURT WHERE THE CASE GOES.

BUT OBVIOUSLY, WE'VE DONE A LOT OF WORK ON THIS CASE. SO THIS CASE WAS ASSIGNED HERE, TO THIS DEPARTMENT OR TO ME, FOR ALL PURPOSES. AND IF THEY DO THAT AGAIN, I WOULD ASSUME IT WOULD BE COMING BACK HERE. BUT I DON'T KNOW. THAT'S GOING TO BE UP TO THE MASTER CALENDAR COURT.

BUT I CAN'T GIVE YOU THE SAME NUMBER, BECAUSE YOU'RE NOT DISMISSING AND REFILING UNDER 1387. WE'RE NOT DOING THAT. THAT'S NOT THE NATURE OF THIS REFILING HERE. SO IT'S GONNA HAVE A NEW NUMBER. OBVIOUSLY, THEY'RE GOING TO BE RELATED CASES, AND WE'RE GONNA START OVER. A LOT OF ISSUES WILL HAVE TO BE REVISITED. OKAY?

MR. HANRAHAN: THANK YOU, YOUR HONOR.

MS. OJO: THANK YOU, YOUR HONOR.

MR. FACTOR: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU ALL, COUNSEL.

THE REPORTER: DO YOU WANT A TRANSCRIPT OF JUST THIS MORNING'S PROCEEDINGS OR THE WHOLE DAY?

THE COURT: JUST THE MORNING'S PROCEEDINGS.

THANK YOU.

(END OF PROCEEDINGS.)

**(THE NEXT PAGE NUMBER IS 301.)**

CASE NAME: PEOPLE VS. DEAN, PENNINGTON, AND GREEN

CASE NO.: BA396890-01/02/03

LOS ANGELES, CALIFORNIA WEDNESDAY, JUNE 20, 2012

DEPARTMENT NO. 123 HON. GEORGE G. LOMELI, JUDGE

REPORTER: CHRISTINE TAYLOR, CSR NO. 6373

TIME: 9:35 A.M.

APPEARANCES:

DEFENDANTS DEAN, PENNINGTON, AND GREEN, PRESENT WITH COUNSEL, CAROL OJO, MICHAEL CLARK, AND DANIEL FACTOR, ATTORNEYS AT LAW, APPOINTED PURSUANT TO C.C.P. SECTION 987.2, RESPECTIVELY; EUGENE HANRANHAN, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: ALL RIGHT. WE HAVE THE MATTERS OF PEOPLE VERSUS GARY DEAN, REPRESENTED BY MS. OJO -- IS THAT CORRECT?

MS. OJO: YES, YOUR HONOR.

THE COURT: -- MS. PENNINGTON BY MR. CLARK --

MR. CLARK: YES, YOUR HONOR.

THE COURT: -- AND THEN JASON GREEN BY MR. FACTOR.

MR. FACTOR: GOOD MORNING, YOUR HONOR.

THE COURT: ON BEHALF OF THE PEOPLE, WE HAVE MR. HANRAHAN; IS THAT CORRECT?

MR. HANRAHAN: YES, YOUR HONOR.

THE COURT: A COUPLE OF MOTIONS HAVE BEEN FILED IN THIS MATTER: A MOTION TO SEVER, AND THEN A VICINAGE MOTION. I'VE READ YOUR RESPECTIVE PLEADINGS IN THIS MATTER. IS THERE ANYTHING THAT ANYONE WOULD LIKE TO ADD -- NOT A REITERATION OF WHAT IS ALREADY IN THE MOTION, BUT ANYTHING THAT IS NOT IN THE MOTION THAT YOU'D LIKE TO POINT OUT?

LET ME ASK DEFENSE COUNSEL.

MS. OJO: THANK YOU, YOUR HONOR. ON BEHALF OF MR. DEAN, I'M JOINING IN THE MOTION.

AND THE ONLY THING I WANTED TO ADD IS THAT MR. DEAN IS NOT -- OTHER THAN BEING THE VICTIM OF THE CONSPIRACY TO COMMIT MURDER, HE'S NOT INVOLVED IN ANY OF THE ACTS THAT OCCURRED IN THE LOS ANGELES COUNTY JAIL, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT.

MR. HANRAHAN: YOUR HONOR, I WOULD JUST POINT OUT THAT THE DEFENSE FAILED TO FILE ANY MOTION TO SHORTEN TIME. THE PEOPLE -- THE DEFENSE MOTIONS WERE FILED ON JUNE 14, FIVE COURT DAYS BEFORE TODAY. THE RULES OF COURT STATE THE DEFENSE MOTION MUST BE FILED TEN COURT DAYS BEFORE THE HEARING.

THE COURT: DIDN'T YOU POINT THAT OUT IN YOUR OPPOSITION?

MR. HANRAHAN: I JUST WANTED -- AND I WANTED TO POINT OUT TO THE COURT THAT I HAVE NOT FILED A FORMAL RESPONSE. I HAVE NOT HAD TIME TO FILE A FORMAL RESPONSE TO THE

DEFENSE MOTION TO SEVER UNDER 1098. I MEAN, SO -- I DID FILE -- HAVE TIME TO FILE A WRITTEN MOTION IN RESPONSE TO THE MOTION TO SEVER AND FOR THE ANTAGONISTIC DEFENSES.

THE COURT: OKAY.

MR. HANRAHAN: SO I WOULD ASK FOR FURTHER TIME TO FULLY BRIEF THAT ISSUE.

THE PEOPLE DID NOT WAIVE ANY RIGHT UNDER THE RULES OF COURT. AND THE MOTION IS, FRANKLY, UNTIMELY. IT VIOLATED THE COURT'S BRIEFING SCHEDULE THAT WAS SET AT THE PREVIOUS HEARING, WHEN THE COURT WAS GOING TO ENTERTAIN MOTIONS AND THE DEFENSE SAID, WELL, HE WOULD FILE THE MOTIONS IMMEDIATELY. INSTEAD, WE GET THE MOTIONS FIVE COURT DAYS BEFORE THIS HEARING, AND SO --

THIS IS A VERY COMPLICATED CASE WITH A LOT OF FACTUAL BACKGROUND, AND I WOULD ASK FOR REASONABLE TIME TO RESPOND IN WRITING TO THAT MOTION.

THE COURT: ALL RIGHT. ANYTHING, MR. FACTOR --

MR. FACTOR: YES, YOUR HONOR.

THE COURT: -- NOT INCORPORATED --

MR. FACTOR: DID THE COURT GET THE RESPONSE TO THE RESPONSE THIS MORNING?

THE COURT: YES, IT DID.

MR. FACTOR: OKAY. THE REAL --

THE COURT: AGAIN, NO REITERATION OF WHAT IS HERE ALREADY.

MR. FACTOR: NO. I APPRECIATE THAT. I WILL NOT REITERATE WHAT WAS JUST SAID.

THE COURT: YES.

MR. FACTOR: BUT THE REAL FOCUS, I THINK, IS ON THE ABUSE OF DISCRETION IN THE DISMISSAL AND REFILING.

WHAT I WOULD ASK IS IF THE COURT COULD INQUIRE -- BECAUSE WE'VE TRIED DO THIS ON A COUPLE OF OTHER OCCASIONS. IF THE COURT COULD INQUIRE OF THE D.A. WHAT THE BASIS WAS FOR THE DISMISSAL?

BECAUSE AT THIS POINT, IT APPEARS, ON THE FACE OF IT, TO BE AN ELECTION THAT HE MADE FOR TACTICAL REASONS, WHICH WOULD DEPRIVE MY CLIENT OF HIS RIGHT TO A SPEEDY TRIAL, AND THE OTHER TWO INDIVIDUALS HERE OF THEIR RIGHT TO A SPEEDY TRIAL.

COULD THE COURT INQUIRE?

THE COURT: MR. HANRAHAN, I TAKE IT THE 1382 -- YOU WERE UNABLE TO PROCEED BASED ON THE STATE OF THE EVIDENCE AT THAT POINT?

MR. HANRAHAN: WELL, YOUR HONOR, I'M PREPARED TO ADDRESS THE MOTIONS THAT ARE BEFORE THE COURT. WE FILED -- WE MOVED TO DISMISS UNDER 1382. WE WERE UNABLE TO PROCEED AT THAT TIME BASED ON THE COURT'S RULINGS. AT THIS TIME --

THE COURT: I KNOW, BUT --

MR. FACTOR: BASED ON THE COURT'S RULINGS, I THINK IS THE POINT. I'M SORRY, YOUR HONOR, I DIDN'T MEAN TO INTERRUPT. I APOLOGIZE.

THE COURT: THAT'S HIS PRECISE ARGUMENT. YOU ANNOUNCED UNABLE TO PROCEED BECAUSE THE RULINGS WERE GOING AGAINST YOU. FROM WHAT I'VE READ, THAT REMAINS TO BE SEEN, THESE ARE SIMPLY CONJECTURE AND SPECULATION ON BEHALF OF THE DEFENSE THAT THAT'S WHY YOU DID THAT.

BUT I TAKE IT THAT THE 1382 -- AND I MAY BE WRONG -- WAS BECAUSE YOU DIDN'T HAVE A NECESSARY WITNESS OR EVIDENCE TO PROCEED AT THAT TIME, SOMETHING WAS MISSING IN THE LINK, NOT SO MUCH THAT THE RULINGS WERE GOING AGAINST YOU?

MR. HANRAHAN: WELL, I'M JUST NOT PREPARED TO RESPOND TO THE COURT'S INQUIRY AT THIS TIME. I'LL HAVE TO LOOK THROUGH THE FILE AND LOOK THROUGH MY NOTES AND SEE PRECISELY WHAT WAS OCCURRING AT THE TIME OF THIS INCIDENT.

THE COURT: THIS WAS NOT YOUR CASE?

MR. HANRAHAN: NO, IT WAS MY CASE AT THE TIME.

THE COURT: WELL, I MEAN, YOU DON'T KNOW WHY YOU ANNOUNCED UNABLE TO PROCEED WITHOUT LOOKING THROUGH THE FILE?

MR. HANRAHAN: WELL, I WANT TO GIVE -- PROVIDE AN ACCURATE RECORD OF PRECISELY WHAT WAS GOING ON AT THAT TIME WITH RESPECT TO LINING UP OF WITNESSES --

THE COURT: CAN YOU REPRESENT TO THIS COURT THAT IT WAS DONE OR NOT DONE BECAUSE THE RULINGS WERE GOING AGAINST YOU?

MR. HANRAHAN: I CAN SAY THAT WAS A FACTOR IN THE PEOPLE'S DECISION; THAT BECAUSE OF THE EVIDENTIARY RULINGS, THERE WERE GOING TO BE MANY -- MANY FACTORS -- MANY FACTS THAT WERE NOT GOING TO BE PRESENTED TO THE JURY THAT WENT TO THE GUILT OF THE DEFENDANTS.

THE COURT: WELL, I'VE GOT TO TELL YOU THAT THAT DOESN'T SIT WELL WITH THE COURT. IN TERMS OF USING THAT AS A TACTICAL, YOU KNOW, STRATEGY, IF YOU WILL, BECAUSE

RULINGS WERE GOING AGAINST YOU THAT YOU ANNOUNCED UNABLE TO PROCEED, I HOPE THAT ISN'T THE CASE.

WHAT I'M GOING TO DO IS I'M GOING TO RULE THIS MORNING -- I'M GOING TO RULE WITHOUT PREJUDICE. AND IF COUNSEL CAN PROVIDE A MORE ACCURATE RECORD -- I HOPE THAT ISN'T A FACTOR, THAT YOU ANNOUNCED UNABLE TO PROCEED BECAUSE RULINGS WERE GOING AGAINST YOU. I'VE NEVER SEEN ANYTHING LIKE THAT. I'VE HEARD ACCUSATIONS, AND SOME OF THEM WERE RAISED IN COUNSEL'S MOTIONS, BUT AGAIN, IT WAS NOT EVIDENT TO ME OTHER THAN SPECULATION OR CONJECTURE ON COUNSEL'S PART.

BUT HEARING WHAT YOU HAVE TO SAY, THAT IT IS A POSSIBLE FACTOR, OR IT WAS A FACTOR, THAT'S DISTURBING. I WILL ALLOW YOU AN OPPORTUNITY TO FURTHER BRIEF THAT PART OF IT, BUT I WILL RULE TODAY ON THE SEVERANCE MOTION AND WITH RESPECT TO THE VICINAGE MOTION.

NOW, YOUR MOTION WITH RESPECT TO THE 1382 AND ABUSE OF DISCRETION IN EXERCISING THE 1382 BECAUSE RULINGS WERE GOING AGAINST YOU, THAT THE MANEUVER WAS SIMPLY USED AS A TACTICAL DECISION ON THE D.A.'S PART IN ORDER TO GET A SECOND CRACK AT THE APPLE, IF YOU WILL -- YOU CALLED IT "FORUM SHOPPING" -- I WILL ALLOW YOU TO BRIEF THAT SUBJECT ON IT.

BUT, IN ANY EVENT, ANYTHING ELSE BY ANYONE AT THIS POINT?

MR. FACTOR: NO, YOUR HONOR.

IF THE COURT IS GOING TO MAKE A RULING BASED ON TIME LIMITATIONS, THEN WE WOULD BE WILLING TO WAIVE TIME TO

ALLOW THE D.A., OBVIOUSLY, TO BRIEF IT FURTHER; IF THE RULING IS ON ANY OTHER BASIS, THEN WE WOULD ASK TO GO FORWARD.

AND, ALSO, WE WOULD BE REQUESTING A COPY OF THE TRANSCRIPT OF TODAY'S PROCEEDINGS.

THE COURT: WELL, FIRST OF ALL, WITH RESPECT TO ALLOWING COUNSEL ADDITIONAL TIME TO RESPOND, WHAT DAY ARE YOU TODAY?

MS. OJO: WE'RE ZERO OF TEN FOR PRELIM TODAY.

THE COURT: YOU'RE AT ZERO OF TEN FOR PRELIM TODAY -- ARE YOU AT ZERO OF TEN?

MR. HANRAHAN: YES.

THE COURT: ALL RIGHT. BECAUSE BASED ON WHAT I HAVE IN FRONT OF ME, I DON'T HAVE SUFFICIENT INFORMATION FROM COUNSEL, BECAUSE HE SAYS HE HAS OTHER INFORMATION AS TO WHY THE 1382 AND HE HAS TO LOOK AT THE FILE -- BASED ON WHAT HE'S STATED THIS MORNING, I'M NOT PREPARED TO MAKE A FINDING THAT IT WAS AN ABUSE OF DISCRETION, AN ABUSE OF THE USE OF PENAL CODE SECTION 1382.

MS. OJO: YOUR HONOR?

THE COURT: YES?

MS. OJO: IF I MIGHT JUST ADD?

WE HAD -- COUNSEL HAD -- HE HAD ANNOUNCED READY. WE WERE IN THE MIDST OF 402 HEARINGS, WHEN HE -- AFTER THE COURT RULED AGAINST HIM AT THE 402 HEARINGS, HE TOOK A BREAK TO DISCUSS IT WITH HIS SUPERVISORS. THEN HE CAME BACK AND DISMISSED IT, BASED ON THE RULINGS OF THE COURT WHICH EXCLUDED SOME OF THE EVIDENCE THAT HE WANTED TO

HAVE IN.

MR. FACTOR: WE HAD 140 PREQUALIFIED JURORS THAT WERE GOING TO BE COMING IN THAT AFTERNOON. THAT HAD BEEN SET UP AT THE AIRPORT. EVERYBODY HAD ANNOUNCED READY. THE D.A. HAD ANNOUNCED READY, MS. OJO HAD ANNOUNCED READY, MR. CLARK HAD ANNOUNCED READY, I HAD ANNOUNCED READY.

THE MOTIONS WENT AGAINST HIM. WE THEN TOOK THE LUNCH BREAK, THEN OVER THE LUNCH BREAK -- AFTER THE LUNCH BREAK, HE CAME BACK IN AND DECIDED TO ANNOUNCE UNABLE TO PROCEED.

IT'S BEEN REQUESTED -- THIS IS NOW THE THIRD TIME THAT THIS HAS BEEN ASKED. HE KNOWS THE CASE. HE'S HAD THE CASE FOR A COUPLE OF YEARS, I BELIEVE, OR AT LEAST A YEAR AND A HALF, AND WOULD KNOW BASED ON THAT WHY HE WAS UNABLE TO PROCEED, WHAT WITNESSES MAY HAVE BEEN MISSING.

NOTHING CHANGED BETWEEN THE MORNINGTIME, WHEN HE ANNOUNCED READY, AND 1:30, WHEN HE SAID UNABLE TO PROCEED. AND THEN WHEN THE COURT ASKED HIM TODAY, HIS FIRST COMMENT ON THE RECORD WAS "I DID IT" -- HE SAID THAT HE -- IT WAS DONE BECAUSE THE RULINGS HAD GONE AGAINST HIM.

AND THE COURT GAVE HIM AN OPPORTUNITY --

THE COURT: HE DIDN'T ACTUALLY SAY THAT.

MR. FACTOR: YOU GAVE HIM AN OPPORTUNITY TO HEDGE THAT, AND HE HEDGED IT A LITTLE BIT THIS MORNING.

THE COURT: WHAT HE SAID IS IT MAY HAVE BEEN A FACTOR.

MR. FACTOR: WHAT HE SAID INITIALLY IS IT WAS A FACTOR, AND THEN WHEN THE COURT RE-ASKED HIM, HE SAID IT

WAS A FACTOR, IT WAS ONE FACTOR.

CAN I GET A COPY OF THE TRANSCRIPT? I'M NOT INVOLVING YOU IN ANY WAY.

THE COURT: ARE YOU BAR PANEL? ARE YOU PRIVATELY RETAINED?

MR. FACTOR: WE'RE ALL BAR PANEL.

THE COURT: ALL RIGHT. LET'S GET A COPY OF THE TRANSCRIPT.

MY RECOLLECTION IS THAT HE HADN'T HAD A CHANCE TO ADDRESS THE 1382, HE WANTED TO GO THROUGH THE FILE, MAKE AN ACCURATE RECORD. WHEN I ASKED HIM AGAIN, HE SAID IT MAY HAVE BEEN A FACTOR; I DON'T THINK HE SAID IT WAS 1382.

WITH RESPECT TO COUNSEL'S STATEMENT THAT HE CONSULTED WITH HIS SUPERVISOR, THAT PRESUPPOSES THAT THE SUPERVISOR TOLD HIM TO DISMISS OR ANNOUNCE UNABLE TO PROCEED BECAUSE THE RULINGS WERE GOING AGAINST HIM. I DON'T THINK THAT WAS EVER CLEAR ON THE RECORD.

MR. FACTOR: NO, NO. AS FAR AS THE SUPERVISOR, I WASN'T PRIVY TO THAT SO I DON'T KNOW WHAT OCCURRED THERE.

THE COURT: MS. OJO.

MS. OJO: I DON'T KNOW WHAT HAPPENED THERE, BUT HE INDICATED -- WHEN HE LEFT THE COURT AT LUNCHTIME, HE WAS ANNOUNCING UNABLE TO PROCEED.

YOUR HONOR, WE DID REQUEST A TRANSCRIPT OF THE COURT HEARING WHERE --

THE COURT: I'M NOT GOING TO RULE RIGHT NOW, IF YOU'RE ASKING ME TO DO THAT.

MR. FACTOR: NO, WE'RE NOT ASKING YOU TO RULE ON THE

1382 JUST YET.

THE COURT: WE'LL RESERVE THAT. I'LL ALLOW COUNSEL THE OPPORTUNITY TO FLESH THAT OUT.

LET'S TAKE YOUR SEVERANCE MOTION WITH RESPECT TO DIVERGENT AND/OR CONFLICTING DEFENSES.

IN THAT DEFENDANT DEAN IS CHARGED WITH PENAL CODE SECTION 187, AND HE WILL BE -- IT APPEARS THAT IT IS THE CONTENTION OF THE DEFENSE THAT IT IS THE INTENT TO BLAME DEFENDANT GREEN FOR THE 187 AS OPPOSED TO MR. DEAN BEING CHARGED WITH THE 187.

MR. DEAN IS CURRENTLY CHARGED, ALONG WITH MS. PENNINGTON, WITH CONSPIRACY TO SILENCE MR. DEAN, THEREFORE CONSPIRACY TO COMMIT MURDER.

MR. FACTOR: RIGHT, YOUR HONOR. AND THIS MOTION WAS FILED ON THE PREVIOUS CASE. I DID NOT CITE THE PAGE NUMBERS TO THE COURT BECAUSE IT WAS IN THE OTHER PRELIMINARY HEARING, FROM THE MULTI-DAY PRELIMINARY HEARING THAT WAS HELD AT THE AIRPORT COURT, BUT IN THAT PRELIMINARY HEARING THERE WERE STATEMENTS FROM MS. OJO TO THAT EFFECT, I BELIEVE, AND MS. OJO CAN VERIFY THAT --

MS. OJO: I'M SORRY.

MR. FACTOR: -- AS TO THE STATEMENTS REGARDING THE DEFENSE THAT MS. OJO HAD.

YOUR HONOR, BEFORE WE GO ANY FURTHER, IS THERE -- CAN WE INQUIRE AS TO THE NAME OF THE SUPERVISOR THAT WAS CONSULTED OVER LUNCH?

THE COURT: COUNSEL WILL, I'M SURE, PROVIDE ALL OF THAT. HE DOESN'T HAVE TO IDENTIFY THE SUPERVISOR, HE CAN

JUST GIVE ME HIS RUN OF THE -- HIS VERSION OF WHY 1382 WAS EXERCISED AT THAT POINT.

AND I'M MORE CONCERNED THAT HE SAID IT WAS A FACTOR, IN THAT THE RULINGS WERE GOING AGAINST HIM. BUT I WANT HIM TO BE, IN FAIRNESS TO HIM, ABLE TO PERUSE THROUGH THE FILE, BECAUSE IT IS AN OLD CASE, IT'S A THICK FILE, I'M SURE, AND I WANT HIM TO GET A CHANCE TO LOOK AT IT.

MR. FACTOR: WE HAD REQUESTED LAST TIME THAT THE AIRPORT FILE BE BROUGHT OVER HERE. I DON'T KNOW IF THAT EVER OCCURRED.

THE COURT: I DON'T KNOW IF THAT WAS DONE.

IS THE AIRPORT FILE HERE?

THE CLERK: I DON'T KNOW IF IT'S WITH THE FILE. I HAVEN'T LOOKED AT IT.

THE COURT: OKAY.

MR. FACTOR: THE AIRPORT CASE NUMBER IS SA071962.

MS. OJO: YOUR HONOR, I DON'T KNOW IF THE COURT WAS AWARE, THE CASE WAS ORIGINALLY FILED IN 2009.

THE COURT: NO, I DON'T HAVE THAT. ALL RIGHT. WELL, WE'LL GET THAT FILE. SEE IF IT'S THERE, DAVID. I THINK WE ORDERED IT LAST TIME.

LET ME GO ON, THOUGH. THE MERE FACT THAT DEFENDANTS MAY WELL BE POINTING FINGERS AT EACH OTHER DOESN'T JUSTIFY SEVERANCE, OR WHERE EACH DEFENDANT MAY ATTEMPT TO SHIFT RESPONSIBILITY TO THE OTHER.

I CITE THE CASE OF *PEOPLE VERSUS ALVAREZ*, 14 CAL.4 AT 155.

NO DENIAL OF A FAIR TRIAL RESULTS FROM THE MERE

FACT THAT TWO OF THE DEFENDANTS WHO WERE JOINTLY TRIED HAVE ANTAGONISTIC DEFENSES AND ONE DEFENDANT GIVES TESTIMONY THAT IS DAMAGING TO THE OTHER AND THUS HELPFUL TO THE PROSECUTION.

THERE HAVE BEEN ARGUMENTS THAT WERE SIMILARLY MADE BY MR. FACTOR, IN THAT BASICALLY YOU HAVE TWO PROSECUTORS WHEN YOU HAVE THE DEFENSE GOING AGAINST EACH OTHER. BUT AGAIN, THE CASES HAVE HELD THAT THAT ISN'T ENOUGH.

AND I'LL CITE *PEOPLE VERSUS SIMMS* ON THAT ISSUE, AT 10 CAL.APP.3D 299, SPECIFICALLY AT 313.

I'LL CITE THE ADDITIONAL CASES OF *PEOPLE VERSUS BOYDE*, AT 46 CAL.3D 212, SPECIFICALLY AT 2312; *PEOPLE VERSUS CUMMINGS*, AT 4 CAL.4TH 1233, SPECIFICALLY AT 1237.

ALSO, I UNDERSTAND TO THE EXTENT THAT -- THE 1101(B) EVIDENCE REGARDING PAST INCIDENTS, THAT WILL BE USED AGAINST DEAN TO, I IMAGINE, PROVE THE 187 AND NOT AGAINST DEFENDANT GREEN. GREEN MAY HAVE HIS OWN 1101(B), IN THAT, THE A.D.W.'S -- DON'T INTERRUPT ME -- AND THAT MAY BE USED ULTIMATELY AGAINST THAT INDIVIDUAL. AND I'LL HEAR YOU OUT IN JUST A MOMENT.

NOW, WITH RESPECT TO -- SO I'M NOT INCLINED TO SEVER, AT THIS POINT, THE -- FROM COUNSEL'S ARGUMENT, I'M NOT CONVINCED THAT THE DEFENSES ARE SO DIVERGENT THAT IT WOULD DEPRIVE ANY OF THE DEFENDANTS OF A FAIR TRIAL.

NOW, WITH RESPECT TO THE SEVERANCE OCCURRING BASED ON AN *ARANDA/BRUTON* ISSUE, TO THE EXTENT THAT DEFENDANT DEAN IS IMPLICATING DEFENDANT GREEN TO THE

POLICE, THE SEVERANCE MAY LIE, BUT THAT REMAINS TO BE SEEN AT THIS POINT, VERSUS CONVERSATIONS BETWEEN GREEN AND PENNINGTON.

AS YOU KNOW, *ARANDA/BRUTON* DOESN'T APPLY TO ANY STATEMENTS MADE IN FURTHERANCE OF A CONSPIRACY, AS BOTH PENNINGTON AND GREEN ARE CHARGED WITH THE CONSPIRACY TO COMMIT MURDER.

ALSO, ALL CHARGES ARE INTERTWINED. AND THERE'S A NEXUS AS TO DEAN'S MURDER, ALLEGED MURDER OF A VICTIM AND HIS ALLEGED FINGERING, AGAIN, OF DEFENDANT GREEN. AND THAT PROVIDES A MOTIVE FOR THE CONSPIRACY, PURPORTEDLY.

THE COURT UNDERSTANDS THAT THERE EXISTS SUFFICIENT EVIDENCE AGAINST DEFENDANT DEAN, ACCORDING TO WHAT I'M LOOKING AT, STANDING ALONE, AND THAT THE DIVERGENT DEFENSES DON'T COMPEL SEVERANCE.

AND LET ME CITE THE CASE OF *PEOPLE VERSUS TAFOYA*, T-A-F-O-Y-A, AT 42 CAL.4TH 147, AT 162.

AND SO EVEN WITH THAT, I'M NOT INCLINED TO SEVER THE DEFENDANTS IN THIS MATTER.

DO YOU WANT TO SPEAK TO THAT ISSUE, COUNSEL, BRIEFLY?

MR. FACTOR: YES. I HAVE TWO BRIEF THINGS TO MENTION TO THE COURT.

THE COURT: SURE.

MR. FACTOR: ONE, THE 1101(B) EVIDENCE IS NOT CLAIMED TO BE AGAINST MR. DEAN, BUT AGAINST MY CLIENT, MR. GREEN.

THE COURT: OKAY.

MR. FACTOR: SO -- I KNOW THE COURT IS NOT AS

FAMILIAR WITH THE CASE AS WE ARE.

THE COURT: ALL RIGHT.

MR. FACTOR: AND THE SECOND THING IS THAT I AGREE WITH THE COURT, THERE IS NO CASE THAT SAYS THAT THE COURT IS MANDATED TO SEVER FOR ANTAGONISTIC DEFENSES.

THE COURT: RIGHT.

MR. FACTOR: HOWEVER, I CANNOT IMAGINE A CASE WHERE THE DEFENSES ARE MORE ANTAGONISTIC. THE OBJECT -- OR THE ALLEGED OBJECT OF THE CONSPIRACY WAS THE DEATH OF MR. DEAN, AND THERE CANNOT BE A POSSIBLY MORE ANTAGONISTIC SITUATION, OR AT LEAST I HAVE TROUBLE IMAGINING ONE -- I HAVE A FAIRLY GOOD IMAGINATION, I THINK -- BUT I CAN'T IMAGINE A SITUATION WHERE THE DEFENSES WOULD BE MORE ANTAGONISTIC.

I UNDERSTAND THE COURT'S RULING. I APPRECIATE THE FACT THAT IT'S WITHOUT PREJUDICE. WE MAY BRING THIS UP AGAIN AT A LATER DATE.

THE COURT: THIS IS NOT WITHOUT PREJUDICE. WHAT WILL BE WITHOUT PREJUDICE IS THE 1382 RULING, YOUR CONTENTIONS WITH RESPECT TO THE 1382 ISSUE AS TO THE REASONS THAT THE MOTION WAS MADE.

MR. FACTOR: THE SEVERANCE MOTIONS ARE WITH PREJUDICE?

THE COURT: WITH PREJUDICE. I'VE READ THE LAW ON IT AND IT IS WHAT IT IS. AND THAT'S WHAT, YOU KNOW, THE COURT OF APPEAL IS FOR.

MR. FACTOR: OKAY.

MS. OJO: YOUR HONOR, IF I MAY?

THE COURT: YES.

MS. OJO: I HAVE NOT JOINED IN THIS SEVERANCE MOTION BECAUSE THE ISSUE AS TO SEVERANCE IS NOT RIPE FOR ME UNTIL WE DETERMINE WHETHER OR NOT THE PEOPLE ARE GOING TO BE TRYING TO INTRODUCE EVIDENCE FROM ANOTHER MURDER THAT'S NOT CONNECTED TO THIS -- WELL, THAT'S MARGINALLY CONNECTED TO THIS CASE AGAINST MR. GREEN.

AND THAT'S PART OF THE PROBLEM THAT HAPPENED IN THE LAST HEARING. THE PEOPLE WERE TRYING TO INTRODUCE SOME EVIDENCE THAT CONNECTS ANOTHER MURDER THAT OCCURRED ON THE SAME NIGHT THAT THIS MURDER OCCURRED TO MR. GREEN. IF THEY'RE TRYING TO INTRODUCE THAT IN A JOINT TRIAL WITH MR. DEAN, THEN I THINK I HAVE A VALID SEVERANCE MOTION.

THE COURT: YOU SHOULD HAVE NOTICE OF IT ALREADY. TO THE EXTENT THAT YOU DO NOT, I'M ADVISING THE PROSECUTION TO GIVE NOTICE, ALL RIGHT, BECAUSE THERE'S A MOTION CUT-OFF DATE, FIRST OF ALL.

MS. OJO: THEY HAVE NOT OFFICIALLY GIVEN US --

THE COURT: OKAY. YOU CAN ASSUME IF YOU DON'T GET NOTICE, THEY'RE NOT GOING TO USE IT.

MS. OJO: THE LAST TIME, IT WAS CLOSER TOWARDS THE TRIAL DATE -- BASICALLY, IT'S BRAND-NEW EVIDENCE. AS I SAID, THEY'RE GOING TO BE TRYING TO USE IT. I WANT TO MAKE SURE THAT I'M NOT JOINING IN THIS SEVERANCE MOTION BECAUSE I'M RESERVING THIS.

THE COURT: YOUR MOTION TO TRANSFER THIS CASE BACK TO THE WEST DISTRICT, THE VICINAGE -- A WORD I NEVER HEARD; SEE, YOU TAUGHT ME SOMETHING IN THAT REGARD -- IS -- AS THIS IS A REFILING, ANY AND ALL RULINGS MADE PRIOR TO THIS

BY THE JUDICIAL OFFICER, I THINK IT WAS JUDGE DABNEY --

MR. FACTOR: YES.

THE COURT: -- I KNOW HE HAD HEARD MOTIONS ACCORDING TO YOUR POINTS AND AUTHORITIES AND CHRONOLOGY OF THE CASE, SPEEDY TRIAL, *TROMBETTA*, SEARCH AND SEIZURE MOTIONS, 402/403 MOTIONS, ARE NOW NON-BINDING AND IRRELEVANT, BECAUSE THIS IS A REFILING AND THIS IS SOMETHING THAT YOU LOOK AT ANEW.

YOU CITE SUPERIOR COURT RULE 2.3, WHICH PROVIDES, AMONG OTHER SCENARIOS, THAT A MATTER MAY BE FILED WITHIN THE JUDICIAL DISTRICT WHERE AT LEAST ONE -- ONE -- OF THE ALLEGED OFFENSES HAS OCCURRED.

AND IT'S THE CONTENTION HERE THAT COUNT 2, THE CONSPIRACY AGAINST DEFENDANTS GREEN AND PENNINGTON, OCCURRED WITH RESPECT TO VARIOUS CONVERSATIONS WHICH PURPORTEDLY TOOK PLACE WITHIN THE COUNTY JAIL WITHIN THE CITY OF LOS ANGELES.

AGAIN, THAT IS ENOUGH UNDER 2.3 TO HAVE THIS CASE HEARD IN THIS JUDICIAL DISTRICT UNDER 2.3 OF THE SUPERIOR COURT RULES.

THE FACT THAT THE D.A. -- AGAIN, 1382 -- HAS USED THAT AS A TACTICAL ADVANTAGE, I WAS PREPARED TO SAY THIS MORNING THAT THAT REMAINS TO BE SEEN, BUT BASED ON WHAT I'VE HEARD, I THINK THIS IS AN ISSUE THAT I WILL NOT RULE ON. SO I DON'T NEED TO GET INTO RULING WITH OR WITHOUT PREJUDICE, I WILL NOT RULE ON THIS MOTION YET, AND I WILL LET COUNSEL RESPOND TO THAT MOTION WITH RESPECT TO THE 1382 PORTION OF IT.

ALL RIGHT. AND YOU CAN PROVIDE WHATEVER RESPONSE YOU WOULD LIKE ONCE COUNSEL DOES THAT.

THAT'S GOING TO NECESSITATE SOME TIME. I DON'T KNOW WHAT YOU'RE LOOKING AT. DO YOU GUYS HAVE A NEW DATE THAT YOU WANT?

MR. FACTOR: WELL, I THINK THAT WE'RE SET FOR PRELIMINARY HEARING.

MS. OJO: WE'RE ZERO OF TEN TODAY.

THE COURT: YOU'RE ZERO OF TEN.

LET ME ADD, TOO, WITH RESPECT TO THE MOTION FOR SEVERANCE, I UNDERSTAND FROM THE PROSECUTION'S RESPONSE, OR OPPOSITION, THAT THERE -- HE STATES THAT THERE'S AN ABUNDANCE OF INDEPENDENT EVIDENCE OF GUILT WITH RESPECT TO DEFENDANT DEAN, IRRESPECTIVE -- AND I'M READING PAGE 9 -- OF WHAT THE DEFENDANTS ARGUE.

FIRST OF ALL, MR. DEAN WAS DETAINED NEAR THE SCENE OF THE STABBING WITH BLOOD ON HIS CLOTHES AND A CUT HAND; TWO, HE ADMITTED THAT HE WAS IN THE PASSENGER'S SEAT; THREE, HIS BLOOD WAS INSIDE THE VAN AND ON THE VICTIM'S SHIRT.

AND THEIR CONTENTION IS THAT THERE IS ALSO A GREAT DEAL OF WIRETAP EVIDENCE AND HANDWRITTEN NOTES THAT PROVE THAT MR. GREEN CONSPIRED TO KILL MR. GREEN, TO SUPPORT A CONSPIRACY CHARGE AGAINST DEFENDANT GREEN.

THAT'S JUST ADDED FOR THE RECORD ON THIS MATTER.

WHAT KIND OF DATE WERE YOU GUYS LOOKING FOR?

MR. FACTOR: WELL, WE WERE SCHEDULED, ACTUALLY, I

BELIEVE, TO START THE PRELIMINARY HEARING TOMORROW.

THE COURT: OKAY.

MR. HANRAHAN: WE WERE ZERO OF TEN TODAY.

THE COURT: YOU'RE ZERO OF TEN TODAY, SO --

MR. FACTOR: I UNDERSTAND WE WERE IN HERE TODAY WITH THE IDEA THAT WE WOULD BE SENT TO THE PRELIMINARY HEARING COURT TOMORROW.

THE COURT: IT WILL BE SENT TO THE PRELIMINARY HEARING COURT TOMORROW. I DON'T THINK IT WILL BE HEARD, BUT IT WILL BE SENT TO A PRELIMINARY HEARING COURT.

MR. FACTOR: I'M OUT OF THE COUNTRY ON THE 24TH.

THE COURT: GIVE ME A DATE THAT IS CONVENIENT FOR ALL OF YOU.

MR. FACTOR: WHAT DATE IS THE COURT AVAILABLE IN THE WEEK OF JULY 2?

THE COURT: JULY 2?

MR. FACTOR: YES, FOR PRELIMINARY HEARING.

THE COURT: I DON'T KNOW. WHATEVER DATE WE GO TO WILL BE A ZERO OF TEN; THEY MAY HEAR YOU ON THE NEXT DAY, THEY MAY NOT, AS LONG AS THEY HEAR YOU WITHIN THE TEN-DAY PERIOD.

MR. FACTOR: YES, TODAY IS ZERO OF TEN.

THE COURT: SO I CAN BRING YOU GUYS BACK ON THE -- HMM. I DON'T WANT TO DO THIS, BUT I CAN BRING YOU GUYS BACK ON THE 3RD, AS A ZERO OF TEN.

MR. FACTOR: I'M GOING TO -- THAT'S GOING TO FALL RIGHT INTO WHEN I'M OUT OF THE COUNTRY. THAT'S WHY WE SET IT FOR TODAY, SO THE CASE COULD BE DONE BY --

THE COURT: I UNDERSTAND WHAT YOU'RE SAYING, MR. FACTOR. YOU CAN'T HAVE IT BOTH WAYS.

MR. FACTOR: I'M NOT TRYING TO. I'M NOT.

THE COURT: EITHER I SEND OUT FOR PRELIM WITHOUT THE 1382 BEING RESOLVED OR WE'LL PUT IT OVER TO RESOLVE THAT. THAT'S UP TO YOU.

MR. FACTOR: I WOULD RATHER PUT THE 1382 ISSUE OVER, THEN. WE'LL TABLE THAT AND I'LL FILE A MORE FORMAL VERSION OF THAT.

THE COURT: PICK A DATE THAT IS NOT GOING TO INTERFERE WITH YOUR TIME.

(A DISCUSSION WAS HELD OFF THE RECORD BY DEFENSE COUNSEL, WHICH WAS NOT REPORTED.)

THE COURT: DO YOU GUYS WANT, LIKE, THE --

MR. FACTOR: THE 3RD?

MS. OJO: THE 3RD IS GOOD.

MR. FACTOR: FOR PRELIMINARY HEARING?

THE COURT: NO, IT WON'T BE FOR PRELIMINARY HEARING. IT'S FOR THE 1382 IN HERE.

MR. FACTOR: YOUR HONOR, THEN I WITHDRAW MY 1382 AT THIS TIME AND I WILL REFILE IT AT SOME TIME IN THE FUTURE.

THE COURT: WELL, THIS IS YOUR OPPORTUNITY TO DO IT HERE. YOU'RE NOT FORECLOSED. ONCE YOU HAVE A PRELIMINARY HEARING, ONCE YOU'RE SENT TO SUPERIOR COURT, YOU CAN FILE IT THERE.

MS. OJO: YOUR HONOR, MAY WE CONFER BRIEFLY BEFORE HE MAKES THE --

THE COURT: YES.

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| CASE NAME: | PEOPLE VS. DEAN, PENNINGTON, AND GREEN |
| CASE NO.: | BA396890-01/02/03 |
| LOS ANGELES, CALIFORNIA | WEDNESDAY, JUNE 20, 2012 |
| DEPARTMENT NO. 123 | HON. GEORGE G. LOMELI, JUDGE |
| REPORTER: | CHRISTINE TAYLOR, CSR NO. 6373 |
| TIME: | 10:02 A.M. |
| APPEARANCES: | AS HERETOFORE NOTED |

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: COUNSEL, IS THIS CASE GOING OUT FOR PRELIM?

MS. OJO, DO YOU KNOW, IS THIS CASE GOING OUT FOR PRELIM?

MS. OJO: I THINK WE'RE TRYING TO DETERMINE THAT.

THE COURT: I NEED TO KNOW OTHERWISE.

MR. FACTOR: YOUR HONOR, WHAT I'D LIKE TO DO IS GET THE TRANSCRIPT, WITHDRAW THE 1382 RIGHT AT THIS TIME, AND THEN SET IT SO THAT THE PRELIMINARY HEARING -- WITH A BRIEF TIME WAIVER SO THAT WE GO TO THE END OF JULY, PROBABLY JULY --

MR. HANRAHAN: I'M GOING TO BE IN TRIAL FOR SIX WEEKS AS OF THE 16TH. I CAN DO THIS BEFORE JULY 16. AFTER THAT, I AM STUCK IN JUDGE RAPPE'S COURT FOR AT LEAST SIX WEEKS, MAYBE EIGHT.

MR. FACTOR: THAT'S -- SEE, THAT'S PART OF WHAT THE

PROBLEM HAS BEEN ON THIS CASE SINCE THE BEGINNING. WE HAD MULTIPLE ATTORNEYS. IT GOT CONTINUED OVER OBJECTION, PARTICULARLY MR. DEAN'S, MANY, MANY, MANY TIMES.

THE COURT: SO WHY NOT GO FOR PRELIM WITHIN THE ZERO OF TEN?

MR. FACTOR: I WOULD LIKE TO GO FOR PRELIM WITHIN THE ZERO OF TEN, SOMETHING AROUND THE AREA OF THE WEEK OF JULY 2, SO WE CAN FINISH IT.

THE COURT: WELL, TODAY IS ZERO OF TEN, SO JULY 2 IS GOING TO BE -- LET'S SEE. YOU'RE AT -- ONE, TWO, THREE -- THE TENTH DAY FALLS ON THE 29TH.

MR. FACTOR: THAT'S FINE.

THE COURT: BUT I CAN'T SEND YOU OUT ON THE 29TH. IT'S GOT TO GO OUT BEFORE THAT.

MR. FACTOR: THE 28TH.

THE COURT: THE 27TH OR 28TH.

MS. OJO: THE 27TH IS FINE.

MR. FACTOR: THE 27TH IS FINE. I HAVE A TWO-DAY PRELIM IN COMPTON RIGHT AFTER THAT, SO THAT DATE WILL BE FINE.

(A DISCUSSION WAS HELD OFF THE RECORD BY THE COURT AND CLERK, WHICH WAS NOT REPORTED.)

THE COURT: WHAT DAY IS THAT, SEVEN OF TEN?

MR. HANRAHAN: SEVEN OF TEN. THE 27TH DAY OF JUNE, SEVEN OF TEN.

MR. FACTOR: YOUR HONOR, I JUST WANTED TO BRING UP ONE THING. I UNDERSTAND THE COURT DENIED THE MOTION WITH PREJUDICE. I DON'T BELIEVE UNDER --

(A DISCUSSION WAS HELD OFF THE RECORD BY THE COURT AND CLERK, WHICH WAS NOT REPORTED.)

THE COURT: I'M SORRY, YOU WERE SAYING?

MR. FACTOR: I'M NOT TRYING TO SHOW ANY DISRESPECT TO THE COURT, BUT -- I UNDERSTAND THE COURT DENIED THE MOTION WITH PREJUDICE. I DON'T BELIEVE UNDER THE CASE LAW THAT THAT CAN BE DONE. I THINK WE STILL HAVE THAT RIGHT IN THIS CASE.

THE COURT: SURE, IN SUPERIOR COURT.

MR. FACTOR: OKAY. SO THIS IS THE COURT OF LIMITED JURISDICTION AT THIS POINT?

THE COURT: YES. ONCE IT GETS TO SUPERIOR COURT --

MR. FACTOR: SO WE CAN REDO IT?

THE COURT: YES.

MR. FACTOR: OKAY. THAT WAS MY UNDERSTANDING. I JUST WANTED TO HAVE IT ON THE RECORD AND NOT THAT I WAS ACQUIESCING TO SOMETHING.

MS. OJO: YOUR HONOR, ARE WE COMING BACK HERE FOR PRELIM?

THE COURT: WE'RE WAITING FOR A CALL. WE CAN TAKE ALL OF THE DEFENDANTS BACK. WE DON'T NEED THEM OUT IF IT'S GOING OUT FOR PRELIM. I JUST ASK COUNSEL TO WAIT A LITTLE

BIT TO DO THAT.

THE BAILIFF: WE'RE NOT GOING TO NEED ANY KIND OF WAIVERS OR ANYTHING, JUDGE? WE'RE DONE WITH THEM?

THE COURT: RIGHT.

MR. HANRAHAN: SO WE'RE COMING BACK HERE ON THE 27TH?

THE COURT: I DON'T KNOW IF WE'RE COMING BACK HERE. THAT'S WHAT WE'RE WAITING TO HEAR. THAT'S THE ONLY THING.

MR. HANRAHAN: OKAY.

THE COURT: WE'RE WAITING FOR A PHONE CALL.

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| CASE NAME: | PEOPLE VS. DEAN, PENNINGTON, AND GREEN |
| CASE NO.: | BA396890-01/02/03 |
| LOS ANGELES, CALIFORNIA | WEDNESDAY, JUNE 20, 2012 |
| DEPARTMENT NO. 123 | HON. GEORGE G. LOMELI, JUDGE |
| REPORTER: | CHRISTINE TAYLOR, CSR NO. 6373 |
| TIME: | 10:23 A.M. |
| APPEARANCES: | NONE |

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: PEOPLE VERSUS DEAN, PENNINGTON, AND GREEN, NUMBER 12. DAVID, IS IT NOW SET IN DEPARTMENT 30?

THE CLERK: THE AGREED-UPON DATE WAS 6/27. I BELIEVE THAT'S SEVEN OF TEN.

THE COURT: SO THAT'S OKAY?

THE CLERK: YES. THEY'LL TAKE CARE OF IT. THEY'LL HAVE TO HANDLE IT IF THERE IS NO TIME WAIVER. THEY SAID THAT'S WHAT THEY'LL HAVE TO DO.

THE COURT: OKAY. I APPRECIATE IT.

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CASE NAME: PEOPLE VS. DEAN, PENNINGTON, AND GREEN

CASE NO.: BA396890-01/02/03

LOS ANGELES, CALIFORNIA WEDNESDAY, JUNE 20, 2012

DEPARTMENT NO. 123 HON. GEORGE G. LOMELI, JUDGE

REPORTER: CHRISTINE TAYLOR, CSR NO. 6373

TIME: 10:30 A.M.

APPEARANCES:

DEFENDANTS DEAN, PENNINGTON, AND GREEN, NOT PRESENT, NOT REPRESENTED BY COUNSEL; PAUL MINNETIAN, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

MR. MINNETIAN: ONE MATTER FOR CLARIFICATION. THAT'S FOR PRELIMINARY HEARING, THE THREE-DEFENDANT CASE?

THE COURT: YES, THAT'S FOR PRELIMINARY HEARING, JUNE 27, FIVE OF TEN.

MR. MINNETIAN: ISN'T THAT FIVE OF TEN COURT DAYS?

THE COURT: NO, THEY COUNT THE WEEKENDS. UNLESS IT FALLS ON A WEEKDAY --

MR. MINNETIAN: PRELIM IS ALSO COURT DAYS.

THE COURT: IS IT?

MR. MINNETIAN: SHOULD I JUST LET HANRAHAN CLEAN THAT UP ON THE NEXT DATE, LET HIM FIGURE IT OUT?

THE COURT: NOW I'M BOTHERED BY IT. IS IT COURT DAYS? I THOUGHT IT WAS JUST --

MR. MINNETIAN: PRELIM IS ALSO COURT DAYS, ZERO OF TEN COURT DAYS.

THE COURT: WE'LL LEAVE IT AS SEVEN OF TEN. I'LL GO LOOK AT MY PRELIM BOOK. IF IT'S SOMETHING ELSE, WE'LL CHANGE IT.

MR. MINNETIAN: OKAY.

(A DISCUSSION WAS HELD OFF THE RECORD BY THE COURT AND CLERK, WHICH WAS NOT REPORTED.)

THE COURT: I'LL CHECK RIGHT NOW IN THE PRELIM BOOK.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT LX-F HON. JAMES R. DABNEY, JUDGE

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| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| PLAINTIFF, | ) | |
| VS. | ) | NO. SA071962 |
| 01 GARRY DEAN,<br>02 LYNETTE PENNINGTON,<br>03 JASON GREEN, | ) | |
| DEFENDANTS. | ) | |

I, JOYCE KATHLEEN RODELA, CSR #9878, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THRU 41-300 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY REPORTED BY ME IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON APRIL 25, 2012.

DATED THIS 3RD DAY OF APRIL, 2015.

_____, CSR #9878
JOYCE KATHLEEN RODELA, OFFICIAL REPORTER

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

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| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| | ) | |
| PLAINTIFF/RESPONDENT, | ) | SUPERIOR COURT NO. BA396890-02 |
| VS. | ) | |
| | ) | 2ND CRIMINAL |
| 02 LYNETTE PENNINGTON, | ) | NO. B259139 |
| | ) | |
| DEFENDANT/APPELLANT. | ) | REPORTER'S CERTIFICATE |

I, CHRISTINE TAYLOR, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT PAGES 301 THROUGH 327/600, INCLUSIVE, COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON JUNE 20, 2012.

DATED THIS 8TH DAY OF APRIL, 2015.

Christine Taylor

CHRISTINE TAYLOR, RPR, CRR, CSR NO. 6373
OFFICIAL COURT REPORTER