IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LAM THANH NGUYEN, Defendant and Appellant.	)	**S076340** (Orange County Superior Court No. 95WF0682) **DEATH PENALTY CASE**

APPELLANT'S PETITION FOR REHEARING

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MISCELLANEOUS

Appellant Lam Nguyen hereby petitions this Court to grant rehearing of his automatic appeal. With respect, appellant submits that the Court's opinion does not fully and fairly present the facts and does not fully and fairly state and/or address many of the issues presented. Because of time limitations, appellant can only address some of those deficiencies.[1]

I.
FACTS AND BACKGROUND

The "Facts and Background" section of the Court's opinion describes the evidence from a perspective that is overly favorable to the respondent and omits evidence that casts doubt upon the prosecution's case or is affirmatively defense-favorable. An approach along those general lines might be defended as to claims of insufficient evidence — though even there, the overly constricted approach taken in the opinion is difficult to reconcile with established law — but it is inappropriate as to any other issue. It is from this skewed perspective that the opinion assesses error and evaluates prejudice.

"There is, as former Chief Justice Roger Traynor has observed, 'a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (*People v. Arcega* (1982) 32 Cal.3d 504, 524, quoting Traynor, The Riddle of Harmless Error 26-27 (1970).) One major difference is that a prejudice inquiry calls for an

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[1] As with appellant's prior briefing, all references in this petition to the Constitution or to due process or other constitutional provisions — including but not limited to references to due process, fundamental fairness, equal protection, and the rights to a fair trial and to a jury trial — are to the federal Constitution and to the Fifth, Sixth, Eighth, and Fourteenth Amendments thereto.

appellate court to consider the *whole* appellate record and not to focus exclusively on prosecution-favorable evidence and inferences. This is true regardless of whether the error is to be measured under the state or the federal standard. Thus, where the *Watson* test[2] is applicable, "prejudicial error is shown where after *an examination of the entire cause, including the evidence*, [the reviewing court] is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, italics added.[3]) "In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (*People v. Butts* (1965) 236 Cal.App.2d 817, 832. See also, e.g., *People v. Russell* (2006) 144 Cal.App.4th 1415, 1433 [*Watson* prejudice found because evidence not "so overwhelming that a rational jury could not reach a contrary result"]; *People v. Randle* (2005) 35 Cal.4th 987, 1004 [reversal where "the evidence was . . . susceptible of the interpretation" favoring the defense]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [*Watson* prejudice found "because the evidence supports conflicting conclusions"]; *People v. Arcega,* 32 Cal.3d at p. 524 [reversal called for where evidence "is open to the interpretation" that defendant not guilty of charged offense].)

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[2] *People v. Watson* (1956) 46 Cal.2d 818.

[3] Hereafter, all italics are added unless indicated otherwise.

Similarly, when there has been federal constitutional error, "the general rule of the post-*Chapman*[4] cases [is] that the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt* (1991) 500 U.S. 391, 409. *Accord, e.g.*, *Rose v. Clark* (1986) 478 U.S. 570, 583 ["The question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt."] (internal quotation marks omitted); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."]; *United States v. Hasting* (1983) 461 U.S. 499, 509 ["Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole . . . ."].).

Whole-record review necessarily requires consideration not merely of the evidence and inferences favorable to the prosecution but also of evidence and inferences that favor the defense or undercut the prosecution's case. As the United States Supreme Court has noted in another context, "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331.)

Obviously, since the correct prejudice inquiry does "not . . . ignore reasonable inferences favoring the appellant" but requires an assessment of whether the prosecution's case was "so overwhelming that a rational jury could not reach a contrary result," whether "the evidence supports

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4 *Chapman v. California* (1967) 386 U.S. 18.

conflicting conclusions" or whether there was "evidence that could rationally lead to a contrary finding" to the one sought by the prosecution, an appellate court cannot assess prejudice by looking solely to prosecution-favorable evidence in the record or drawing only prosecution-favorable inferences.

Nor can this Court make credibility determinations as a basis for finding that an error did not improperly influence the jury's verdict. To do so would be to usurp the role of the jury and deprive appellant of his right to have a jury make credibility determinations and to accept or reject appellant's defense on the basis of properly admitted evidence. It is well established that appellant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." (*Dillon v. United States* (2010) 130 S.Ct. 2683, 2692. See also, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483-484 [discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"]; *People v. Melton* (1988) 44 Cal.3d 713, 735 [jury has the "exclusive function as the arbiter of questions of fact and the credibility of witnesses"].) The credibility of witnesses is clearly an "essential fact." Their credibility is thus a fact entrusted to the jury by constitutional rights to a jury and to due process. (See also *Cavazos v. Smith* (2011) ___ U.S. ___, 132 S.Ct. 2, 4 ["it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial."]; *Blakely v. Washington* (2004) 542 U.S. 296, 308 ["the Sixth Amendment . . . limits judicial power . . . to the extent that the claimed judicial power infringes on the province of the jury."]; *Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, 1174 ["weighing of evidence and credibility determination is for the

jury."]; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 874-875 [Sixth Amendment "prohibit[s] judges from weighing evidence and making credibility determinations, leaving these functions for the jury. . . . It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others."]; *United States v. United States Gypsum* (1978) 438 U.S. 422, 446.)

The Facts and Background section of the Slip Opinion mentions only the most extreme and prosecution-favorable evidence and inferences and ignores the very substantial weaknesses in the prosecution's case against appellant and the evidence that affirmatively exculpates him. This is not only an unreasonably incomplete and unfair portrayal of the evidence, but it directly affects the Slip Opinion's subsequent analyses of the merits of appellant's claims and the prejudice flowing from errors. Indeed, the Slip Opinion's approach to the evidentiary record and to the credibility questions posed by that record violates not only of appellant's right to a jury trial but his Sixth and Fourteenth Amendment rights to due process and to present a defense, and results in a death judgment that is unreliable under appellant's Eighth Amendment right to freedom from cruel and unusual punishment.

A. The July 21, 1994 Shooting of Tony Nguyen

The sole evidence linking appellant to this shooting came from the identification testimony of Kevin Lac. The opinion states that at the scene of the crime, Lac "told the police that he could not identify anyone in the other car" but that "[a] few days later, Lac realized that the male sitting in the back seat behind the shooter was defendant, who lived downstairs from

him." (S.O. 3; see also S.O. 44 [similar].) These statements do not fully or fairly portray the extent or credibility of Lac's evidence.

At the scene of the shooting, Lac told the police, not that he "could not identify" the occupants of the other car but that he did not "know" any of them. (9 RT 1628.) The mischaracterization of Lac's testimony is significant because he knew appellant as a downstairs neighbor.

And while Lac *claimed at trial* that he "realized" a few days later that appellant was the rear passenger, his claim cannot be reconciled with facts that the opinion omits. For in May 1995 (ten months after the shooting, and before he came forward with his story that appellant was in the back seat of the shooter's car), Lac twice viewed photo lineups containing appellant's picture, and on both occasions made no identification, even though appellant was known to him. Indeed, on the second viewing, he was specifically asked if he would be able to recognize any of the males in the car, and he responded, "Probably the guy in the front seat" (who of course was not appellant). (9 RT 1719, 1731.)

At the same session, Lac was also shown a single photograph of appellant, whom he recognized, but he did not claim that appellant was connected in any way with the shooting of Tony Nguyen. (9 RT 3631-3637.) So, even ten months after the shooting, when presented with appellant's photograph, Lac did not in any way implicate him even though he knew him.

It was not until 13 months after the shooting that Lac claimed appellant was in the back seat and that Lac selected appellant's photograph from the same photo lineups he had seen earlier. By itself, the belated emergence of this new story implicating someone Lac had known all along casts doubt on his identification, but the timing of Lac's change of story is

made even more significant because it occurred in the period when all of the Cheap Boy witnesses and their associates were changing their stories to implicate appellant. We will discuss these changes in more detail in the ensuing discussions of the killing of Tuan Pham and the shooting of Khoi Huynh, but for present purposes, it bears noting that the Court's opinion omits mention that Lac was himself a Cheap Boy, and it also omits to mention the discussions that the Cheap Boys leader (Khoi Huynh) had with other gang members that led to them calling the police and giving new stories implicating appellant.

B. The February 5, 1995, Murder of Sang Nguyen

The sole issue at trial was whether appellant was the person who shot Sang Nguyen. There were three witnesses who testified to having seen the shooter. Two of the witnesses were members of or affiliated with the Cheap Boys (Trieu Binh Nguyen and Linda Vu), and the third was an average citizen, unconnected with any gang (Charles Hall). The opinion does not fully and fairly present the evidence related to any of these witnesses.

1. Charles Hall's Testimony

With regard to the independent witness (Hall), the opinion states that "Hall failed to identify defendant in a subsequent photo lineup and did not identify defendant as the shooter at trial" (S.O. 6), but this is not a full portrayal of Hall's evidence. Unmentioned in the opinion is that Hall described the shooter as being considerably taller than appellant (approximately 5'10" vs. appellant's height of 5'2"). (11 RT 2093-2094, 2100.) Also unmentioned is that in a photo lineup ten days after the killing, Hall affirmatively identified one Bao Quoc as the shooter and put his signature next to Quoc's photo. (23 RT 4458, 4460-4461.) And the

opinion also fails to mention that on the occasion in which Hall "failed to identify defendant" in a photo lineup containing appellant's photograph (but not Quoc's), Hall insisted that he would recognize the shooter if he saw his profile. (23 RT 4461). So, evidence from Hall was not merely neutral on the question of whether appellant was the shooter (he did not merely "fail to identify defendant"), but when considered in its entirety, it was affirmatively helpful in establishing that appellant was not the shooter.

2. Evidence from Linda Vu and Trieu Binh Nguyen

As for the two other witnesses (Linda Vu and Trieu Binh Nguyen), the opinion correctly indicates that at trial, they identified appellant as the shooter and that Vu had also identified appellant "in a photographic line up [and] at the preliminary hearing." (S.O. 6.) The opinion further notes that at the scene of the crime, both Vu and Trieu Binh had told the police that Trieu Binh had been in the bathroom at the time of the shooting, and the opinion then mentions one of these witnesses's multiple trial explanations (the most prosecution-favorable explanation) as to why they had made those statements to the police. (*Ibid.*) However, the opinion does not remotely tell the full story.

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To begin with, the opinion fails to note that Linda Vu was a member of the Southside Scissors gang, which was associated with the Cheap Boys. (10 RT 1971, 11 RT 2108, 2196.)

* * * *

Second, the opinion fails to mention that on the night of the shooting, Linda Vu not only told officers that Trieu Binh Nguyen was in the bathroom and that she had not seen the shooting, but she gave the

police her word that she was telling the truth, and when she was asked if she was intimidated by gangs, she said she was not, *and she started laughing*. (11 RT 2209, 2235-2236.) The detective asked Linda if she was willing to tell the truth if she knew it, and she replied, "Yeah, I would if I knew it." (11 RT 2236.)

The opinion also fails to mention (1) that her description of the shooter's height and "stocky" build did not fit appellant and (2) that six months after the shooting, she told police she thought the shooter was a friend of Sang Nguyen from CYA, a male named Chinh. (11 RT 2165, 2179, 2193, 2244; 17 RT 3315.)

* * * *

Third, the opinion fails to fully depict what Sang Nguyen's dinner companions told the police on the night of the shooting. It was not merely Trieu Binh who told police that he was in the bathroom at the time. It was Trieu Binh and *four* other dinner companions, all of whom *independently* also told police the same thing. Thus, a total of five individuals — Trieu Binh, Linda Vu, Trieu Hai Nguyen (Trieu Binh's brother), Michelle To, and Amy Pech — placed Trieu Binh in the bathroom, and none placed him anywhere else. (See AOB 27-28.) The opinion omits to mention these facts.

* * * *

Fourth, the opinion fails to mention how and when four of these five witnesses came to change their stories. The changed stories began with Trieu Binh a few months after Sang Nguyen's killing. Trieu Binh had returned to Texas about two days after Sang's death (7 RT 1262), and in the interval between then and the emergence of his new story, Trieu Binh talked every week or so by telephone with Khoi Huynh, one of the "shot-

callers" and "core members" of the Cheap Boys gang. (7 RT 1262-1263, 17 RT 3316-3317.) In their weekly talks, Trieu Binh and Khoi discussed "things that pertain[ed] to Cheap Boy matters," including the May 3rd shooting death of gang member Duy Vu (the victim in Counts 11 and 12, of which appellant was acquitted), the May 6th shooting death of gang member Tuan Pham (the victim in Counts 13 and 14), and the death of gang member Dai Hong.[5] (7 RT 1263-1264.)

After several weeks of these conversations, Khoi and Trieu Binh initiated a three-way telephone conversation with Westminster Detective Mark Nye. (7 RT 1238, 1258-1259.) In this conversation, Trieu Binh came forward with a story about having seen appellant shoot Sang Nguyen (although also unmentioned in the opinion, this initial story differed in many respects from the story he would testify to at trial).

Thereafter, Linda Vu, Trieu Hai Nguyen (Trieu Binh's brother), and Michelle To (Trieu Binh's girlfriend) came forward with new stories, with Linda now claiming that she saw the shooter and that Trieu Binh was not in the bathroom, and the other two witnesses retracting their statements that Trieu Binh had been in the bathroom. Linda Vu told officers that she changed her story because she had been asked on come forward by Samantha Lee "and other members of the Cheap Boys." (17 RT 3321.) Michelle To testified to her new story even though just three weeks before testifying, she had confirmed to a defense investigator that Trieu Binh had

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[5] The date and circumstances of Dai Hong's death were not disclosed to the jury, but in the course of arguments to the court, it was indicated that Hong had been killed on March 2, 1995, and that a suspect was a member of the Nip Family gang. (5 RT 1020; see also 1 Muni.CT 67 [preliminary hearing stipulation].)

indeed been in the bathroom. (19 RT 3581-3582.) Amy Pech, however, reiterated what she had told police on the night in question.

* * * *

Fifth, the opinion states that at trial, Trieu Binh "explained" his crime scene statement to the police (that he had been in the bathroom) by testifying that "in the gang subculture, a person who talks to the police may be beaten or killed." (S.O. 6.) Appellant cannot find any testimony by Trieu Binh that corresponds to the opinion's characterization. The closest that appellant has found is Trieu Binh's testimony on re-direct examination that "something might happen to me if I rat on him." (7 RT 1346.) But even if he had some something along those lines, the opinion fails to portray the full story.

At trial, Trieu Binh maintained that he lied to police on the night of the shooting regarding his whereabouts when Sang Nguyen was shot, but, he testified, his "lie" was not due to any fear of telling them the truth. (7 RT 1257.) To the contrary, Trieu Binh was affirmatively "interested in getting the person who shot Sang." (7 RT 1255.) Trieu Binh's initial explanation for lying was, "I was confused. This happen so fast. I didn't have a chance to think. Depressed." (7 RT 1228.) Thereafter, the prosecutor led Trieu Binh to agree that on the night of the shooting, he was "still within the gang subculture, in other words did not want to rat" (7 RT 1236), but when asked on cross-examination about his statements on the night of the shooting, Trieu Binh's testimony was, first, that he had been "confused" and, then, that he had been "[n]ot confused, but I was — I didn't have a brain to think at that time. I didn't think what to say." (7 RT 1248-1249.) Thereafter, he testified that he *had* been "confused." (7 RT 1250, 1251.) And after that, his testimony was that the "only reason" he

lied was that he was "frustrated." (7 RT 1253.) No, "confused *and* frustrated." (7 RT 1254.) No, "frustrated, *not* confused." (7 RT 1255.) He did not want to "rat," but he *was* "interested in getting the person who shot Sang,"and he was not afraid to help the police, nor was he afraid that someone would come looking for him. (7 RT 1255, 1257.)

Thereafter, Trieu Binh testified, it took him three or four months — the period of his weekly telephone conversations with Cheap Boys shot-caller Khoi Huynh — to become "unconfused and unfrustrated" and to come forward with his story that the shooter was appellant. (7 RT 1262-1263, 1258.) Then, finally, on the prosecutor's redirect examination, Trieu Binh offered the explanation that he had been "confused" because he was caught between the police and a fear that something might happen to him. (7 RT 1346.)

For the opinion to say merely that Trieu Binh "explained that in the gang subculture, a person who talks to the police may be beaten or killed" does not fully or fairly describe his testimony, and it amounts to the Court unconstitutionally making a credibility determination.

3. Conclusion and Implications

In sum, by any objective assessment, the prosecution's case against appellant with regard to the killing of Sang Nguyen was an extremely close one: (1) no physical evidence tied appellant to the crime; (2) the lone independent eyewitness — Mr. Hall, the only one with no ties to Sang, the Cheap Boys, or any other gang and who had no reason to favor either side — identified someone other than appellant as the shooter, described the shooter as considerably taller than appellant, and failed to identify appellant either in a photo lineup or in court; (3) on the night of Sang's death, Sang's five dinner companions not only denied seeing the shooting,

but each independently told the police that Trieu Binh was in the restaurant's bathroom at the time; and (4) these other witnesses started changing their stories only after Trieu Binh had had weekly phone conversations with Khoi Huynh, one of the Cheap Boys' "shot callers."

The opinion, however, presents an unreasonable, excessively prosecution-favorable summary of the evidence, omitting affirmatively defense-favorable aspects of Hall's testimony and also omitting to mention the identical stories told by all five of Sang Nguyen's dinner companions on the night in question, and also omitting the facts regarding how and why the new stories implicating appellant emerged.

These omissions are particularly significant because the opinion finds various errors to be harmless based entirely upon its misleadingly one-sided rendition of the evidence. For example, in addressing appellant's claim that the trial court erred in admitting the expert opinion testimony of Detective Nye, the opinion states that any error "would have been harmless." (S.O. 15.) The full reasoning given to justify this conclusion is that "[a]ll witnesses but Amy Pech retracted their initial statements about having been in the bathroom, and both Trieu Binh Nguyen and Linda Vu identified defendant as the person who shot Sang Nguyen." (*Ibid.*) This approach to harmless error is wrong. It simply adopts the most extreme, prosecution-version of the evidence, which of course would render any error in any case harmless. The opinion does not account for the whole record, which as we have shown presented an extremely close case for the prosecution, and it amounts to an unconstitutional determination by this Court as to what highly disputed evidence and inferences to credit.

C. The March 11, 1995 Shooting of Khoi Huynh

Khoi Huynh was a shot-caller with the Cheap Boys gang, and the sole issue with respect to his shooting was the identity of the gunman. The Slip Opinion indicates that Huynh himself and one Jeremy Lenart identified appellant as the shooter. The opinion describes Huynh's identification testimony as follows:

> At his home 10 days later, Huynh told a sheriff's department investigator that defendant had shot him. He and defendant had been friends at one time. Huynh told the investigator that he could not testify because he was a gang member. The next day, Huynh picked defendant's photo out of a photo lineup."

(S.O. 7.) As for Jeremy Lenart, the opinion simply says "Lenart saw defendant shoot one victim, who was unarmed, and chase that victim as he ran, firing additional shots." (*Ibid.*)

The opinion does not fully and fairly portray the state of the evidence.

1. The Non-Gang Eyewitnesses

There were four eyewitnesses (including Lenart) who were not gang members and made identifications in this case. All four (Lenart, Ignacio Raygoza, Ignacio's wife Staci, and Michelle Bagstad) were shown a photo lineup containing an "excellent likeness"[6] of appellant, and all four (including Lenart) selected the photograph of one An Phung as the shooter. (9 RT 1782, 1791-1792, 1817, 10 RT 1873, 13 RT 2539-2540, 21 RT 3941.) Indeed, referring to An Phung, Lenart told an officer, "That's definitely him." (9 RT 1792.) These facts are not mentioned in the opinion.

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[6] 9 RT 1817; see also 9 RT 1784 ("amazing likeness").

Subsequently, a live line-up was held in which appellant (but not An Phung) appeared. Ignacio Raygoza selected appellant, but at trial he testified that appellant "really doesn't look very familiar at this time." (9 RT 1811, 1813.) Staci Raygoza thought appellant "looked familiar, but I am not sure if it was from this case," and at trial she testified she did not see the shooter in the courtroom. (10 R 1875.) Michelle Bagstad, who was 5'5" tall, testified that the shooter was taller than she. (21 RT 3934.)

As for Mr. Lenart, the opinion fails to mention that Lenart was a long-term methamphetamine addict and a felon on probation, that he was under the influence of that drug on the night of the shooting, that Lenart told police at the scene the shooter was "a tall person, five-seven, five-ten," that Lenart made a "definite" identification of An Phung as the shooter, and that he also gave the police a very different version of events from the one he recited at trial. (9 RT 1775-1778, 1781, 20 RT 3789-3791.)

2. Khoi Huynh

The Slip Opinion unreasonably fails to fully and fairly describe Khoi Huynh's multiple statements about who had shot him.

First, on March 14 or 15, 1995 (three or four days after the shooting), Huynh told Sheriff's Investigator Janet Strong that on the evening in question, he was approached by two armed males whom he "suspected" were from the Nip Family. (13 RT 2469-2470, 2473, 2501-2502.) Although Huynh would later admit that he and appellant had been friends, he told Strong he was not sure he could identify anyone. (13 RT 2476-2477.)

Investigator Strong interviewed Huynh a second and third time, on March 21 and 22. (13 RT 2477, 2495.) On March 21, Huynh asked if Strong had his assailant in custody, and Strong replied that she did not

because she did not know who the assailant was. (13 RT 2483.) Strong showed Huynh a number of photographs of Nip Family members, including one of appellant. (13 RT 2496, 2404-2405.) Huynh said he did not see any suspect among the photographs. (13 RT 2505-2506.)

On either March 21 or 22, Strong asked Huynh if he knew who shot him, and Huynh said he did. (13 RT 2484, 2508.) Huynh said that the shooter's name was "Lam" and that he had recognized Lam when he came out of the pool hall because he and Lam had once been friends. (13 RT 2484-2486.) Huynh told Strong he could not testify due to the stigma against gang members being a witness. (13 RT 2495.) Strong responded by telling Huynh that Nip Family members had testified in several cases against Cheap Boys, and Huynh replied that the Nip Family did not play fair. (13 RT 2495.)

On March 22, Strong showed Huynh a photo lineup, the same one that would be shown to Ignacio and Staci Raygoza, Jeremy Lenart, and Michelle Bagstad. (13 RT 2495, 2496-2497, 2533.) Huynh selected appellant's photograph and said that appellant had shot him. (13 RT 2497-2498, 2515-2516.) Huynh repeated that he knew appellant because they had been friends. (13 RT 2516.) Strong testified that because of the war between the Cheap Boys and the Nip Family, it was likely that Huynh and appellant had not been friends for a few years. (13 RT 2518.)

Strong then showed Huynh the same photograph of appellant as she had shown him the day before, and she asked Huynh if he recognized it now. (13 RT 2517.) Huynh said he had not recognized appellant because the photograph appeared to be a few years old (which would have been much closer to the time when Huynh and appellant were friends). (13 RT 2517.)

Strong had contact with Huynh for a fourth time on March 31, about 10 days later, and Huynh told Strong he would testify in court if necessary. (13 RT 2511, 2515.)

On May 3, 1995 — five weeks later — Duy Vu, a Cheap Boy, was shot and killed at a coin laundry in Westminster. While police were at the crime scene, Huynh showed up, uninvited, and contacted Detective Michael Proctor, who took Huynh to the police station and tape recorded a statement from him. (23 RT 4467-4468.) In the taped conversation, Proctor asked Huynh if there was "any specific group of Nip Family that you're having problems with, any specific people," and Huynh replied, "Yes, sir. It's just a gang, the whole gang." (23 RT 4469.) Proctor then said, "I know, but I mean any specific persons in that gang?," to which Huynh replied, "Not really, not that I know of. *I don't even know the guy that shot me*." (23 RT 4469-4470.)

Proctor had occasion to talk with Huynh at some later time, and Huynh stated it was Nip Family who shot him but again did not say who specifically the shooter was. (23 RT 4470-4471.)

On May 6 — three days after the killing of Duy Vu — Tuan Pham, another Cheap Boy, was killed. Again, Khoi Huynh showed up uninvited at the crime scene, claiming to the police that "instinct" had told him Tuan had been shot. (15 RT 2894, 2915.) Huynh was interviewed by Garden Grove Officer Robert Donahue and said that he had been shot at a billiard parlor on March 11 by Lam Nguyen. (15 RT 2895, 2915.)

D. The May 6, 1995 Killing of Tuan Pham

Two eyewitnesses testified to seeing the start of the shooting, Robert Murray (who is mentioned in the opinion) and Shawn Burchell (who is not). Both watched as Tuan Pham approached a white Honda. "Oh, my

God," Burchell said to her companion, "he's going to kill somebody."[7] (13 RT 2598.)

Pham stopped just to the rear of the Honda driver ("like when you get pulled over by a policeman . . . he's a little off to the side . . . so you couldn't shoot him"), turned toward him, and moved his right arm as if raising it. (13 RT 2602-2603 [Burchell]; see also 14 RT 2715 [Murray: Pham was "right dead even with the driver" and was "85 percent facing" him and "the minute [Pham] stopped at the car is when he went for it"] & 2736 [Murray: Pham "could have climbed in the car. I mean, he was right on the car."].) Thus, it was only at the very last possible second that the driver of the Honda started to fire.

The opinion states that "[a]s Pham approached the Honda, the driver of the Honda reached out and fired three shots at him." (S.O. 8; also S.O. 25 [similar] and 34 ["Just before Pham arrived at the driver's side window"].) However, Pham was not shot "as Pham approached the Honda." As indicated in the preceding paragraph, he was shot after he had stopped just behind the driver and as he was raising his pistol. The Respondent's Brief itself acknowledges the point. (RB 99 [Pham was shot "[a]s [he] began to raise his shooting arm while standing a short distance behind the driver's door."].)[8]

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With regard to the identity of the Honda's driver, the opinion states that Mr. Murray "later picked out defendant' s photograph from a photo

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[7] The trial court, took, found that Pham "was actively seeking to kill the defendant." (31 RT 6082.)

[8] Appellant also cannot find any testimony that supports the statement the driver "reached out" to fire at Pham.

lineup as someone who looked 'close' to the driver of the white Honda, but Murray said he could not 'make any identification.'" (S.O. 8-9; see also S.O. 67 [Murray "picked defendant's photograph out of a lineup"].) Actually, as Murray explained at trial, he had not initially pointed out anyone, but

> then, you know, the talking and the talking back and forth, and are you sure nobody looks like this or that. And, you know, I said it's possible. I mean, if you were to say the likeliness and the cleanliness and the clean and the good looks of the person, it's possible, sure. That was basically what I had said right there. But, I wasn't going to initially say anybody, because I don't know. I really do not know.

(14 RT 2723.)

Murray attended the live lineup in which appellant was in position #5, but he saw no one he recognized from the shooting. (14 RT 2750.)

The opinion fails to mention these facts.

* * * *

The opinion states that at trial appellant "admitted having been in the white Honda when Tuan Pham was killed but said he was unarmed and sitting in the back seat." (S.O. 10.) The opinion further states that, when arrested, appellant "had injuries to his left hand and right elbow consistent with wounds caused by a shotgun." (*Ibid*.) Both sentences are less than full and fair summaries of the relevant evidence.

As for appellant's testimony, appellant testified that while he was seated in the rear, the driver of the Honda told him to "[l]ook in the back." (22 RT 4228.) Appellant turned around to his left and saw a person behind the car with a shotgun or a rifle pointing in appellant's direction. (21 RT 4044, 22 RT 4228, 4230.) Appellant ducked and put his hands up, and he heard a shot. (21 RT 4044, 22 RT 4229.) Then he heard more shots from

very close by. (21 RT 4044.) Appellant's hand went numb; he thought it had been hit by glass from the rear window. (21 RT 4044-4045.) He crouched down on the back seat, with his head toward the driver's side. (21 RT 4045, 22 RT 4231-4232.) He heard more shots and felt like someone had kicked him in the back, and he ended up on the car's carpet. (21 RT 4045, 22 RT 4243.)

As for the statement that appellant "had injuries to his left hand and right elbow consistent with wounds caused by a shotgun," this is both incomplete and under-informative. As pointed out in the AOB and ARB, appellant actually had three sets of shotgun-pellet injuries: (1) on the inside of his right forearm (see Exh. 113); (2) on *the inside* of his left thumb and forefinger and on the top of his left index finger (see Exhs. 114 & 115); and (*3) on the left side of his back from the bottom of his shoulder blade to just above his waist* (see Exh. 140). (See 15 RT 2897-2899.) The injuries to the right forearm are inconclusive as to whether appellant was in the back seat at the time he was shot; they are as consistent with appellant's testimony as with the prosecutor's scenario.

But the other injuries are not. It is difficult to believe that the back injuries were sustained by the driver of a car being hit by pellets fired from beyond the rear of the car. The car door and the car's seat would have protected the driver's mid-back and lower back from pellets fired from behind, particularly since the pellets were merely birdshot. By contrast, given that the rear window of the Honda was shot out, the back wounds were consistent with appellant's story that he was hit there while crouched down on the rear seat of the Honda with his head facing the driver's side.

Similarly, it is difficult to perceive how the driver of a car could have sustained injuries to the *inside* of the fingers of his *left* hand if he was

shooting out the driver's window either to the side toward Tuan Pham or to the rear toward the shotgun wielder. These injuries are, however, consistent with appellant's testimony that his initial reaction, upon seeing a man aiming a shotgun at him from behind the Honda, had been to put his hands up to protect himself, that he then heard a shot, and that his hand went numb. (21 RT 4044, 22 RT 4228-4230.)

Thus, the full evidence concerning appellant's injuries is more consistent with appellant being the passenger than with him being the driver.

II.
ISSUES RELATED TO COUNTS 13 AND 14
(The Killing of Tuan Pham)

A. Self-Defense

As to the killing of Tuan Pham, appellant argued (1) that self-defense was established as a matter of law but (2) that even if a theory existed that could properly have allowed the jury to reject self-defense, reversal would still be required because the jury was given improper theories and it is impossible to conclude, beyond a reasonable doubt, that the jury relied on a proper theory. Throughout his briefing, appellant pointed out that his arguments were supported not only by state law and by logic but also by the federal constitutional right to self-defense, the doctrine of constitutional avoidance, and by other principles of constitutional law. (AOB 123-197, ARB 71-115.) The Slip Opinion rejects appellant's claims (S.O. 25-31), but despite the fact that appellant set forth the reasoning for his arguments in considerable detail, the opinion does not address any of what appellant said.

1. The Alleged Multiple-Motivation Limitation on Self-Defense

The failure to address appellant's reasoning is perhaps most striking in connection with the alleged multiple-motivation limitation on self-defense. There, appellant acknowledged that some prior decisions had "assumed, without analysis, that the 'such fears alone' language of section 198 precludes the use of self-defense by someone who acts based on some motivation in addition to a fear of death or great bodily harm" (AOB 187-188), but appellant based his argument on something that none of the prior decisions in question had been presented with or considered, namely, copious evidence of the Legislature's intent when it enacted the statutory language (AOB 175-187). Appellant's position was bolstered by an amicus brief that also presented information not produced or addressed in the prior decisions. Given that "it is axiomatic that cases are not authority for propositions not considered,"[9] it is unclear how the Slip Opinion could reject appellant's claim based upon decisions that did not consider the basis appellant proffered for his claim. Particularly is this unclear inasmuch as respondent did not dispute any of the evidence of legislative intent that appellant put forward.

Of the case law mentioned in the opinion, the decision most relied on — and the only one that discussed the issue in more than passing depth — is *People v. Trevino* (1988) 200 Cal.App.3d 874. (S.O. 28-29.)

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[9] *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160 (Liu, J., for the Court); see also *Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1134 (Cantil-Sakauye, C.J.); *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 641 (Corrigan, J.); *People v. Brown* (2012) 54 Cal.4th 314, 330 (Werdegar, J.); *People v. Johnson* (2012) 53 Cal.4th 519, 528 (Chin, J.), internal quotation marks and citations omitted.

But the language from *Trevino* that the opinion quotes was not a holding, as the opinion states (S.O. 28); it was dictum. And it was ill-considered dictum at that. (See AOB 187-192.)

The defendant in *Trevino* had been convicted of murder following a trial at which he claimed he had killed in self-defense. (The facts of the case are skimpily laid out.) On appeal, the defendant challenged the jury instruction that contained the "such fears alone" language of section 198. In his appellate argument, the defendant assumed that section 198 — when applicable — forbids self-defense when a defendant acts with multiple motivations, but he argued that the jury should have been advised that the multiple-motivation bar was applicable only when the defendant killed out of the *appearance* of danger and that the bar was not applicable when the danger to which he was responding was *real*. The defendant purported to find this distinction between real and apparent necessity for self-defense in the language in section 198 that seemed to limit section 198 to the situations "mentioned in Subdivisions 2 and 3 of the preceding section [§ 197]." (*Trevino*, 200 Cal.App.3d at pp. 877-878.)

The *Trevino* court quite properly rejected the defendant's argument, finding no distinction in the law such as the defendant was proposing between real and apparent necessity. (200 Cal.App.3d at pp. 878-879.) The court then proceeded to offer its view as to what the "such fears alone" language allows and disallows, using the language that is quoted in the Slip Opinion here. But, obviously, that language was dictum. It was not necessary to the decision. In fact, the defendant in the case did not raise any challenge to the notion that the "such fears alone" clause of section 198 precluded self-defense from being raised by someone who acted with multiple motivations. Rather, he *assumed* that section 198 did embody a

multiple-motivation limitation; he simply argued that the limitation only applied to *apparent* dangers and not to *real* ones. Thus, he did not marshal any of the evidence of legislative intent that was presented in the present brief. With the current arguments and evidence not having been raised or considered, *Trevino* does not undermine them in any way. (See *People v. Jennings* (2010) 50 Cal.4th 616, 684 ["The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning."], internal quotation marks omitted.)

Moreover, there are two fatal fallacies with the *Trevino* dictum. First, the *Trevino* court failed to recognize that there is another reasonable interpretation of the "such fears alone" language of section 198 and that this other interpretation is in fact the one that the Legislature intended when it enacted the Penal Code in 1872. This should be, by itself, dispositive of the issue before this Court.

Second, *Trevino*'s (and now this Court's) perceived distinction between additional emotions that are merely "felt" and those that are "acted on" is utterly incapable of being implemented in the real world, if not illusory altogether. How is a defendant who is faced with imminent and deadly peril supposed to be able to decide whether or not he is entitled to use self-defense? "Detached reflection cannot be demanded in the presence of an uplifted knife." (*Brown v. United States* (1921) 256 U.S. 335, 343.) Yet the *Trevino* rule would require an imminently imperiled individual to ponder on whether he harbors emotions in addition to a fear of death and, if he finds one or more, to try to purge his mind of those emotions before defending himself. This is neither rational nor practicable.

And how is a jury to rationally determine whether a defendant who harbored multiple emotions, or might have harbored multiple emotions, acted purely on the basis of self-defense? Virtually anyone faced with an imminent deadly assault is likely to feel anger, hatred, hostility, or resentment toward the assailant. How does a jury determine whether those normal feelings actually contributed to the decision to use self-defense? The defendant's self-defending act of killing the assailant would have happened with or without the contribution of such feelings. How, then, does the jury decide if those feelings did in fact contribute?

And why should those extra motivations matter? They do not make the individual's life any less endangered. They do not mitigate the would-be killer's actions or intent or ability to carry out his deadly goal. The threatened individual is still compelled by "the great universal principle of self-preservation" to do that "to which he is prompted by nature, and which no prudential motives are strong enough to restrain"and which "is not, neither can it be, in fact, taken away by the law of society." (3 Blackstone's Commentaries 3-4, 186.)

These impracticalities and absurdities make it even less likely that the Legislature enacted the dual-motivation rule that *Trevino* attributed to section 198.

The only practical, sensible, and constitutional answer here is the one outlined by Professor LaFave. "[I]f [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself, as where he enjoys using force upon his adversary because he hates him." (2 LaFave, Substantive Criminal Law (2d ed. 2003) § 10.4(c), pp. 149-150.) So long as the defendant does in fact act out of an actual and objectively reasonable

fear for his life, self-defense is allowed. Properly construed, that is what section 198 means, and that is also what the United States Constitution require, which the opinion also fails to address. Nor does the opinion deal with the doctrines of constitutional avoidance and of lenity in the interpretation of criminal laws.

* * * *

At the end of its discussion of the multiple-motivation theory, the opinion "note[s] that defendant did not argue in the trial court, nor has he argued on appeal, that the jury should have been instructed that acting based on mixed motives is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no occasion to consider whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases." (S.O. 29.) With due respect, these statements are perplexing. While it is true that appellant did not argue that the jury should have been given a but-for instruction, an argument he did make very plainly did encompass the notion (1) that rejection of self-defense based upon the multiple-motivation theory was improper if there was a causal relationship between the shooting and reasonably perceived need to defend oneself[10] and (2) that there was such a causal relationship established in this case, as the opinion indicates (S.O. 34).

A causation relationship is precisely what appellant described at page 192 of the AOB: "S*o long as the defendant does in fact act* out of an actual and objectively reasonable fear for his life, self-defense is allowed." (Italics added, original italics deleted). Moreover, the very but-for form of causation relationship that the opinion suggests should have been raised as

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[10] A "but-for" test is simply one form of a causal relationship.

instructional error was discussed at oral argument as part of the meaning of the relevant statute (Pen. Code, § 198). That appellate counsel did not make this into an *instructional* issue cannot be used to avoid the fact that the correct meaning of "such fears alone" — and whether it would preclude reliance on self-defense when a defendant "does in fact act out of an actual and objectively reasonable fear for his life" even though the defendant also acted with some other motivation — was one of appellant's major points.

If, notwithstanding other motivating emotions, self-defense applies when there is a but-for relationship (or some other causal relationship) between an individual's reasonable fear of imminent death and his decision to kill, the immediate question is not merely whether the jury was properly instructed on the concept. The antecedent question — the one posed by appellant in his briefing — is whether there is evidence in the record to support the required finding that no such relationship existed in this case. That question was encompassed within appellant's challenge to the sufficiency of the evidence to support the rejection of self-defense on the multiple-motivation theory because that challenge revolved around what the actual meaning is of Penal Code section 198. If the meaning of section 198 encompasses the notion that self-defense is available — notwithstanding other motivating emotions — when there is a causal relationship between the reasonably perceived need for self-defense and the defendant's act of shooting, then appellant's challenge embraced that point.

In short, appellant did raise the question of whether a causal relationship is part of the meaning of "such fears alone" and, if so, whether there was evidence in the record that would have justified a finding that there was no such relationship between appellant Nguyen's action and his reasonably perceived need for self-defense.

The opinion suggests, however, that this issue should have been framed as instructional error. With the benefit of the opinion's guidance, appellant will now argue that the trial court erred in failing to instruct the jury that self-defense applies, even if an individual acts with multiple motivations, as long as the individual both (1) reasonably believed he was in imminent danger of death or great bodily injury and (2) this belief caused the individual's act of killing the assailant. Inasmuch as this issue was closely and openly connected to the facts of the case, rehearing should be granted to consider the issue. And if the Court is of the view that this claim comes too late, then rehearing should be granted because of the ineffective assistance of undersigned counsel in failing to timely raise the claim, and the Court should consider appointing new counsel to represent appellant in further proceedings. But in any event, it is appellant's position that due process, equal protection, the right to counsel, and the Eighth Amendment all prohibit a death judgment from being affirmed when an appellate court recognizes that there is an unresolved appellate issue that could invalidate the death judgment.

2. The Mutual Combat, Initial Aggressor, and Seeks-a-Quarrel Limitations on Self-Defense

The opinion rejects appellant's claims that the mutual combat, initial aggressor, and seeks-a-quarrel limitations on self-defense were inapplicable to this case as a matter of law. (S.O. 27, 30.) Again, the opinion does not address any of appellant's arguments, and with regard to the latter two limitations, the opinion gives no reasoning. As for mutual combat, the opinion drastically expands the scope of the doctrine and does not address the constitutional problems with doing so. (See AOB 141-154, ARB 111.) The opinion does the same thing with respect to the initial-aggressor

doctrine and seeks-a-quarrel limitations on self-defense. (See, e.g., *People v. Robertson* (1885) 67 Cal. 646, *People v. Baldocchi* (1909) 10 Cal.App. 42, *People v. Randle*, *supra*, 35 Cal.4th 987; *People v. Glover* (1903) 141 Cal. 233, 242). In allowing the three doctrines to be applied here, the opinion violates due process and equal protection because each such application is unexpected and indefensible in light of the law that had been expressed prior to appellant's act of self-defense on May 6, 1995. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354.)[11]

3. The Alleged "Emotional Reaction" and "Decent Person" Limitations on Self-Defense

Appellant argued that the verdicts cannot be sustained on the basis of the "emotional reaction" and "decent person" theories that the instructions and the prosecutor's argument authorized the jury to use to reject self-defense. (AOB 165-174, ARB 102-109.) The Slip Opinion rejects these claims on the basis that any error "would merely amount to prosecutorial misconduct during argument" and that because defense counsel failed to object, the claims are forfeited. (S.O. 31, internal quotation marks and citations omitted.) The opinion fails to address any of the reasons that appellant has offered as to why a finding of forfeiture is inappropriate, namely:

1. The error here was not merely prosecutorial misconduct but was instructional error that plainly affected appellant's substantial rights.

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[11] Appellant uses the phrase "seeks-a-quarrel" theory rather than as the "contrived self-defense" theory, the label used in the opinion, because the jury at appellant's trial was instructed only in the language of "seeks a quarrel." (27 RT 5285-5286.) If there is a difference between the two formulations, only the "seeks a quarrel" formulation may constitutionally be used here on appeal.

(*People v. Beltran* (2013) 56 Cal.4th 935, 954-955 & fn. 15 ["Instructional Error" occurred when although the instructions would "under ordinary circumstances" have been "unproblematic," prosecutor "muddied the waters" as to the elements needed for conviction]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1315 fn. 43; *People v. Morgan* (2007) 42 Cal.4th 593, 612-613 [instructional error occurred when "[t]he instructions permitted the jury to take [a legally incorrect view of the case]; and the district attorney expressly urged such a verdict in his argument."]; see Pen. Code, § 1259.)

2. Objections to the prosecutor's arguments would have been futile, since the trial court believed that those arguments amounted to "good efforts . . . to be accurate" and did not contain any "major difference" from the instructions. (27 RT 5231.) Moreover, by endorsing the prosecutor's legal arguments in this way, the trial court effectively informed the jurors that the law and reasoning processes that the prosecutor urged upon them were valid and acceptable, and thus the court created instructional error in this way, as well. (Cf. *Graves v. United States* (1893) 150 U.S. 118, 121; *People v. Woods* (2006) 146 Cal.App.4th 106, 113-114, 118; *People v. Piazza* (1927) 85 Cal.App. 58, 85-86.)

3. If, however, appellant's claims are forfeited, then appellant was denied his Sixth Amendment right to the reasonably effective assistance of trial counsel, since there could be no conceivable tactical or reasonable justification for an attorney to allow a jury to use a legally invalid theory to convict his client of murder and to make the client death-eligible. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

B. The Admission of Officer On's Testimony

Appellant argued that the trial court erred in admitting testimony from Office Vincent On that the passenger who fled from a car and who dropped a gun that had been used in the shooting of Tuan Pham. (AOB 218-229, ARB 130-137.) The opinion rejects the claim on the ground that any error "could not have affected the judgment" because On's testimony "had little probative value." (S.O. 40.) However, the opinion fails to note how little evidence there was that put appellant in the driver's seat, as opposed to in the rear of the car. The identification testimony of Robert Murray was extremely weak. The opinion's description of that testimony portrays it as weak, and even that portrayal is overstated. (See *ante*, § I.D.) The evidence of appellant's pellet wounds is, if anything, inconsistent with him being the driver. (See *ibid*.) Thus, Officer On's testimony that a man looking like appellant fled from police and dropped a weapon that had been used in the shooting of Tuan Pham was probably the prosecution's strongest evidence that appellant was the driver. Certainly, the prosecutor saw it that way, because it was the primary basis for her argument that appellant was the driver. (26 RT 5001-5002.)

When evaluating prejudice, a court looks at the closeness of the evidence and how the prosecutor exploited the error. The opinion in this case does neither. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 260.)

III.
ISSUES RELATED TO COUNTS 6 AND 7
(The Killing of Sang Nguyen)

A. The Admission of Detective Nye's "Expert" Testimony

Appellant challenged the introduction into evidence of Detective Nye's testimony that "[i]n my experience with investigating gang crimes in the cafes and restaurants, the number one answer [that people give where a gang crime is involved and they don't was to cooperate] is 'I was in the bathroom at the time.'" As the Slip Opinion acknowledges, appellant's position is that the testimony involved improper speculation and mind-reading because it was premised on two implicit propositions: (1) that, when a gang crime occurs at a café or restaurant, those persons who claim to have been in the bathroom are giving an "excuse" — i.e., are not telling the truth — and (2) that the reason for giving the excuse is that they do not want to cooperate with the police. (AOB 82-92, ARB 8-35.)

The Slip Opinion rejects appellant's challenge on three grounds. (S.O. 10-15.) First, the Slip Opinion states that the challenged testimony was not "expert opinion" at all because it "was based upon [Nye's] personal observations at numerous gang-related crime scenes." (S.O. 13.) With due respect, this reasoning does not hold water. How can a person's conclusion that people have lied and that they did so for a particular reason be deemed to be a "personal observation"? Lying and motivation cannot be personally observed. If these are deemed to be matters of personal observation, then a police officer can take the witness stand in any criminal case and testify that, in his experience, defendants who deny guilt are usually lying. After all, such testimony is based as much upon his "personal observations" as was the testimony of Detective Nye here.

The fact of the matter is that the propositions upon which Detective Nye's testimony was premised were personal, subjective opinions or inferences, explicitly based on his "experience" as a person who believed he could determine both when people are lying and why they are lying. The Evidence Code explicitly provides that an opinion "[b]ased on . . . experience" is expert opinion testimony, and it also provides that "[t]he word 'opinion' is used [in Evid. Code, §§ 800-870] to include all opinions, inferences, conclusions, and other subjective statements made by a witness." (See Evid., Code, § 801, subd. (b); Law Revision Commission Comments to Evid. Code, Div. 7.) So, contrary to the Slip Opinion, Nye's testimony — which was based on his experience and relating his opinions, inferences, and conclusions about witnesses he had encountered — constituted expert testimony. But, of course, expert testimony is not per se admissible. As the case law cited in the AOB makes clear (none of which the opinion addresses), the Evidence Code does not allow experts to testify to personal determinations of credibility and motivation.

And even if the Slip Opinion were correct that Nye's testimony was not *expert* opinion testimony (a position that neither the trial court nor respondent has taken), it would still be *lay* opinion testimony. (See Evid. Code, § 800.) The Slip Opinion fails to explain why a *lay* person can testify to personal determinations of credibility and motivation.[12]

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[12] In support of its conclusion that Nye's testimony was admissible because it "was based upon his personal observations at numerous gang-related crime scenes," the Court's opinion cites *People v. Champion* (1995) 9 Cal.4th 879, 921-922. (S.O. 13.) With respect, appellant can find nothing in the cited pages that makes *Champion* relevant here.

Next, the Slip Opinion holds that Nye's testimony was admissible as expert opinion testimony because "the bathroom excuse used by witnesses to gang-related shootings was sufficiently beyond common experience to allow admission under Evidence Code section 801." (S.O. 14-15.) Appellant has never disputed that Nye's claimed experience with the bathroom excuse was "beyond common experience." However, being "beyond common experience" is not sufficient to justify the admission of expert testimony. By explicit statutory proviso, such testimony must also "be based on matter [that is] perceived by or personally known to the witness or made known to him at or before the hearing" and must be "of a type that reasonably may be relied on by an expert." (Evid. Code, § 801, subd. (b).) An opinion as to whether and why a person is lying does not satisfy these latter requirements. That is the import of the case law cited in appellant's briefing, none of which is addressed in the Slip Opinion.

* * * *

Finally, the Slip Opinion says that any error in admitting Detective Nye's testimony would have been harmless because ""[a]ll witnesses but Amy Pech retracted their initial statements about having been in the bathroom, and both Trieu Binh Nguyen and Linda Vu identified defendant as the person who shot Sang Nguyen." (*Ibid.*) As we have pointed out, this approach to the question of harmless error is excessively one-sided, cannot be reconciled with either the *Chapman* or *Watson* tests, and violates both the state and federal Constitutions.

B. <u>The Exclusion of Evidence from Tin Dun Phan</u>

In his briefing, appellant argued that the trial court erroneously precluded the defense from showing, through Cheap Boy Tin Duc Phan, that the Cheap Boys had a specific motivation to engage in "ratting

retaliation," namely, that they believed that a Nip Family member (Ky Nguyen) was "ratting" on a Cheap Boy (Lap Nguyen). (AOB 96-107, ARB 36-51.) The Slip Opinion rejects this claim on grounds that are incorrect factually and legally. (S.O. 16-19.)

Acting on the belief that the trial court "explained that defense counsel had exceeded the scope of questioning that the parties had agreed to," the opinion concludes that "[t]he trial court did not abuse its discretion in declining to permit defense counsel to ask the witness that question for the first time at trial, which would have had the effect of circumventing the parties' agreement that defense counsel would give the prosecutor advance notice of the evidence he planned to present." (S.O. 17, 18-19.) The key facts in these statements are wrong. The court was not of the view that "defense counsel had exceeded the scope of questioning that the parties had agreed to." The relevant transcript pages show that the court was merely summarizing *the prosecutor's* objection. (See 20 RT 3841.) And the court specifically found that "there was *not* an agreement as to what was permissible and what was not." (*Ibid.*).

Not only does the opinion overlook the judge's explicit words, it simply repeats respondent's plain misunderstanding of the agreement discussion in the superior court. This is doubly problematic.

First, as to the misunderstanding itself. In discussing the alleged agreement, the prosecutor read the judge *two different parts* of a report that defense investigator Daniel Watkins had prepared concerning his interview with Tin Duc Phan. One part had to do with statements Phan had made to Watkins about why Khoi Huynh had been shot, and the second part involved Phan's statements about "ratting retaliation." (See 20 RT 3840, compare lines 2-6 with 17-26.) As the trial court found, *it was only "the*

first part" that the prosecutor had objected to. (29 RT 3841.) Defense counsel himself stated that he had agreed merely that he would "not talk[] about Khoi Huynh being shot. That's what I agreed to [and] I wasn't getting there." (20 RT 3841. See also 20 RT 3834 [defense counsel distinguishes between the part of the report that he "wasn't going to ask" about and the part dealing with "Ky Nguyen Nip Family is ratting on Cheap Boy in a separate incident."].) There was never even a hint of any agreement regarding the second part, which is the matter at issue in appellant's present claim. This is why the trial stated that "there was *not* an agreement as to what was permissible and what was not."[13] (20 RT 3841.) Thus, the factual premise for the opinion's ruling is incorrect.

Second, even if defense counsel had made the agreement that respondent has posited, neither respondent nor the opinion has cited any authority to support the notion that an informal agreement of the sort that is (mistakenly) postulated here can *ever* be made binding on the defense, let alone under the circumstances of the present case. This point was discussed at some length in the ARB at pages 38-39 but not addressed in the opinion. Space limitations prevent appellant from repeating all of what was said there, so appellant refers the Court to that discussion.

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The opinion further states, "In any event, defendant cannot demonstrate prejudice resulting from the court's ruling because the record before us does not reflect how the witness would have answered the question." (S.O. 19.) But neither the court nor the prosecutor expressed

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[13] This was explained in the ARB (pp. 37-38) but is not mentioned in the opinion.

the slightest doubt on this score. Defense counsel made very clear, both in his questioning of Phan and in his discussion of the issue with the court, that he was referring to the January 5, 1995 incident in which Cheap Boy Lap Nguyen had shot Nip Family member Ky Nguyen and after which Ky had cooperated in the prosecution of Lap. Phan admitted that he knew Lap Nguyen, a fellow Cheap Boy. Thus, particularly given the testimony of gang experts concerning gang members' knowledge of gang events, Phan could be expected to admit (1) that he knew Lap had been arrested for Ky's shooting and (2) that he also believed that Ky had cooperated with the police to finger Lap. Undoubtedly, this explains why neither the trial court nor the prosecutor complained that they didn't know what Phan would say. Not only was Phan's likely response clear to all, but it is fundamentally unfair at this late stage to fault appellant for failing to make a further showing that he was not called upon to make at the time.

C. Precluding Impeachment of Michelle To

Appellant argued that the trial court erred by refusing to allow the defense to ask Michelle To (the girlfriend of purported eyewitness Trieu Binh Nguyen) about whether she and Trieu Binh were living together around the time Trieu Binh testified against appellant. (AOB 112-115, ARB 62-65.) The Slip Opinion rejects appellant's claim on the basis that "any possible prejudice from not permitting defense counsel to ask this question was cured when, immediately thereafter, defense counsel was permitted to have the witness testify that she had been married to Trieu Binh Nguyen for several months in 1997." (S.O. 24.)

With respect, the opinion's reasoning is flawed. Like the other dinner companions, Ms. To told police on the night of the shooting that Trieu Binh had been in the bathroom at the time of the shooting, and as late

as April 27, 1998 (three weeks before Trieu Binh's testimony at trial), she confirmed this version of events to a defense investigator. (19 RT 3576, 3581-3582.) However, by the time she was called as a witness in mid-June (after Trieu Binh's testimony), Ms. To had changed her story. She was now claiming that her story to the police in February 1995 and to the defense investigator a few week earlier had been a lie and that in fact Trieu Binh had not been in the bathroom but had been outside smoking. (19 RT 3576-3577.)

The defense naturally sought to explore how Ms. To's recent change of story came about, and so counsel wanted to ask her whether she had been living with Trieu Binh. (19 RT 3596.) "No," the court said. "The answer is no." (*Ibid*.) According to the opinion, any error in the court's ruling was harmless because To testified she "had been married to Trieu Binh Nguyen for several months in 1997." But the fact that she had been married to him for some time in 1997 does not shed any light on whether she was living with him in 1998, during the time that she changed her story as to whether he was in the bathroom. The testimony about 1997 cannot reasonably be held to cure prejudice from the exclusion of evidence about 1998.[14]

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[14] Appellant also takes issue with the opinion's rejection of the claim that the trial court erred in refusing to allow evidence showing that the Cheap Boys had a crash pad that Khoi Huynh and Linda Vu frequented. (AOB 96 & 108-111, ARB 51-61.) The opinion reasons that the evidence "was marginally relevant at best" because the crash pad was discovered "well before the Cheap Boys alleged began the conspiracy to frame defendant." (S.O. 22.) But the crash pad was discovered on January 29, 1995, and the conspiracy began shortly after Khoi Huynh was shot on March 11, only 41 days later. Given the presumption of continuity cited in

(continued...)

IV.
GANG CHARGES RE SHOOTING OF HUY NGUYEN

The Slip Opinion holds that there was sufficient evidence to support the gang charges associated with the shooting of Huy Nguyen because he "commit[ted] an underlying felony with at least one other gang member," with the opinion indicating that the other gang member(s) were "members of the Natoma Boys." (Slip Opn. 58.) With due respect, appellant does not believe there is any evidence either that the individuals who came to his aid after several people had jumped him were gang members, let alone members of the Natoma Boys, or that those individuals committed an "underlying felony" — presumably, attempted murder — with him (assuming arguendo that he was the shooter).

Moreover, in a very recent decision, the Court has held that, in order for actions of one gang to be attributed to another, there must be "evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*People v. Prunty* (No. S210234, Aug. 27, 2015) ___ Cal.4th ___ [Slip Opn. at p. 2].) There was no evidence showing any associational or organizational connection uniting appellant's alleged gang (the Nip Family) with the Natoma Boys (or any other gang).

Consequently, rehearing should be granted on this ground as well, and the gang count and enhancement connected with the Huy Nguyen shooting incident stricken.

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[14](...continued)
the briefing but not mentioned in the opinion, that 41-plus-day interval cannot be deemed to place the crash-pad discovery "well before" the conspiracy.

V.
ISSUES RELATED TO THE ENTIRE GUILT PHASE

A. The Crimes of Defense Investigator Watkins

Appellant has argued that he was afforded the ineffective assistance of counsel as the result of the prejudicially unreasonable actions of defense investigator Daniel Watkins and that, in any event, a remand is necessary so that the superior court can undertake an appropriate inquiry into whether counsel had a conflict of interest. (AOB 297-320, ARB 194-203.) The Slip Opinion rejects the claims but does not fully and fairly deal with them.

1. The IAC Claim

a. The Background Facts

The opinion states that in the proceedings below, defense counsel "alleged" that Watkins was being prosecuted for attempting to silence a prosecution witness. (S.O. 61.) This was not just an allegation. Watkins had in fact been arrested and was the subject of two separate prosecutions, one by federal authorities and one by state authorities.

Watkins was initially arrested by federal authorities on charges that he had conspired with Hung Mai, another capitally-charged inmate at the county jail, to kill a witness from Texas in Mai's case. The FBI obtained a federal search warrant in connection with that offense, and in the affidavit, it was disclosed that Watkins had used his investigative trips to Texas — including at least one trip he had taken as part of his work in appellant's case — to obtain information needed to locate and identify the targeted witness for the (feigned) assassin whom Mai had hired. (5 CT 1711, 1714, 1717-1720, 1722.) When, later on, Mai came to wonder why he had not heard of the witness' demise, Watkins offered to use another trip he was

taking to Texas on appellant Nguyen's behalf to check the matter out. (5 CT 1723-1724.)

The FBI affidavit also disclosed that not long before Watkins' offer to find out about the targeted witness in Texas, he and Mai had a conversation in the jail that was surreptitiously recorded. This conversation became the basis for a separate *state* prosecution for obstruction of justice, because in the conversation, it was revealed that Watkins was seeking Mai's assistance in preventing Khoi Huynh (the Cheap Boys shot-caller) from giving adverse testimony against appellant Nguyen. The colloquy in question was as follows:

Hung Mai: "You want me to put a shut on Khoi [Huynh] what I really need is that portion you asked me to read, but without the name of whoever it is that wrote it. I just need that portion because I talked to Khai [Vo] and he said he, you know, believes what I'm saying and all the other stuff, but he needs that portion if something needs to be done. You know what I mean?"

Watkins: "Okay."

Hung Mai: "Because that's the paper that will keep that guy shut, you know."

Watkins: "Yeah, well, I don't want to know anything more about that."

Hung Mai: "But if you want . . . I need that soon if you want that taken . . .you know?"

Watkins: "Okay, I'll stop by the jail today. What you want me to do is take that page and to white out . . . ."

Hung Mai: "The name of . . . whoever it is that wrote it, or just cut it out. I just need the portion part of what I read."

Watkins: "Okay, and I'll just make it look like it's all blacked out. I'll drop that by."

(5 CT 1726 ¶ 67c, ellipses in original, indicating pauses or sentences not completed by the speaker.)

Watkins' effort to silence Khoi Huynh was successful. As the prosecutor herself would note, Huynh had been "cooperative for three years" but at trial, he "c[a]me in and [could] not remember anything about being shot seven times." (21 RT 3982.) Both the prosecutor and defense counsel believed Huynh was lying about his memory lapses. (See 26 RT 4995-4998 [prosecutor].) Defense counsel would call Huynh's claims of memory lapse "laughable." (30 RT 5899.) Huynh telephoned the district attorney's office after his testimony and stated that he did not identify appellant as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶ 67d.)[15]

On June 1, 1998, jail personnel searched the cell of Khai Vo, the inmate to whom Mai had referred in his "put a shut on Khoi" phone call with Watkins. (5 CT 1727 ¶ 67e.) In Vo's cell, jailers found a report by a defense investigator indicating that Khoi Huynh had purported to identify appellant as the person who had shot him on March 11, 1995. (*Ibid.*) The letterhead of the report was whited out, which was consistent with what Watkins had told Mai he would do with the document they discussed in the recorded phone call.

These events formed the basis for the obstruction-of-justice charge that was filed against Watkins in state court.

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[15] The opinion's suggestion that Huynh may have been "unable" to identify appellant at trial (S.O. 62) is not a reasonable reading of the record.

b. Watkins' Trial Testimony

About a month after Watkins' "put a shut on Khoi" conversation with Hung Mai, Watkins testified for the defense. Defense counsel's purpose in calling Watkins was to impeach Tin Duc Phan, a Cheap Boy, who had been asked whether he had told Watkins that it was "okay to rat on [the Nip Family], since they're ratting on us" and that the motivation for the Cheap Boys fingering appellant was "to teach Nip Family that Cheap Boys will rat off Nip Family gang members in retaliation for any Nip Family ratting on them." As to both quoted statements, Phan claimed he did not remember. (20 RT 3833-3834.) The defense then called Watkins, who testified that Phan had made the statements. (21 RT 3975-3976.)

Thereupon, Watkins was cross-examined. The opinion does not fully describe the relevant portion of that examination; it understates the number of questions the prosecutor asked on this subject and the preposterous nature of Watkins' responses.

The prosecutor began by asking Watkins whether he had talked to anyone — including "anyone outside of this case" — with the aim of preventing Khoi Huynh from testifying. (21 RT 3983-3984.) Faced with this question, Watkins had three unpalatable choices: (1) he could incriminate himself by admitting his involvement in the criminal scheme to "put a shut on Khoi," (2) he could commit perjury by denying involvement in that scheme, or (3) he could feign a memory loss as to what he had done a month earlier. Watkins took the latter course. "Not that I can recollect," he said when the prosecutor first posed a question about pressuring Khoi not to testify. (21 RT 3983.)

"Not that you can recollect?" the prosecutor asked incredulously. "You just don't remember?" Watkins said he had talked to a lot of witnesses "and I don't recollect having done that." (21 RT 3983-3984.)

The prosecutor persisted. "Have you talked to anyone outside of this case intending or hoping that they would put pressure on Khoi Huynh not to testify"? "No," Watkins replied, "Not that I can recollect having talked to anybody to put pressure." (21 RT 3984.)

"You can't remember if you talked to anyone to put pressure on him not to testify?" the prosecutor continued. "No," Watkins responded, "I don't remember that." (*Ibid.*)[16]

c. <u>Prejudice</u>

The opinion concludes that "defendant has failed to show he suffered prejudice" as a result of these events. (S.O. 62.) However, the opinion fails to mention one of the two most significant forms of prejudice and omits to address appellant's reasoning as to the other.

1. The most immediate prejudice came from Khoi Huynh shutting down at trial. As to each of the counts where Cheap Boys and their associates were key witnesses — the attempted murder of Tony Nguyen, the murder of Sang Nguyen, and the shooting of Khoi Huynh — the defense position was that the Cheap Boys, of which Huynh was a shot-caller, schemed to frame appellant in retaliation for Nip Family members testifying against Cheap Boys. However, this defense was undermined when Huynh suddenly decided at trial to stop cooperating with the prosecution and to feign having no memory of who shot him and whom he

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[16] It was after these exchanges that Watkins made the statement about not having talked to Huynh "in depth" that the opinion quotes. (21 RT 3984-3985.)

had previously identified. Such behavior showed Huynh to be trying to *help* appellant, which would have been seen by the jury as flatly inconsistent with the defense claim that Huynh and the Cheap Boys were trying to frame appellant. The opinion does not address this prejudice.

2. Whatever remaining hope the defense had of raising a doubt that appellant was the target of a frame-up by the Cheap Boys was destroyed by the second form of prejudice that flowed from Watkins' dereliction, the destruction of his credibility on the witness stand when testifying about Tin Dun Phan's admissions. The opinion states that "[a]lthough jurors might have found it suspicious that Watkins initially failed to affirmatively deny pressuring Huynh not to testify, the record does not support defendant's assertion that Watkins's 'claim of lack of recall was an obvious falsehood' that 'exposed [Watkins] as both a liar and a suppressor of evidence.'" (S.O. 64.)

It is unclear, however, why the opinion uses the word "initially." Watkins gave the same I-don't-remember response consistently, on four separate occasions. He never changed his tune. And Watkins did not merely "affirmatively fail[] to deny pressuring Huynh." His testimony was that he did not recall having attempted to put pressure on Huynh not to testify. It defies human experience and common sense that anyone — and especially a trained investigator — would take affirmative steps to pressure a key witness and then not remember having done so. Thus, any juror would have immediately seen Watkins' claim for what in fact it was, a lie. And since the claim of lack of recall was an obvious falsehood, any juror would have drawn the logical (and correct) conclusion that Watkins had in fact engaged in that behavior.

These conclusions were devastating to the defense, and on several levels. First of all, with Watkins exposed as both a liar and a suppressor of evidence, his credibility as a witness was destroyed, and with it went the believability of his testimony as to what Tin Duc Phan had told him, which was an essential piece of the frame-up defense to Counts 2, 3, 6, 7, 9, and 10. Add this to the fact that Watkins' scheming with Hung Mai had resulted in Khoi Huynh faking a lack of recall at trial and thus appearing to act inconsistently with the "framed by Cheap Boys" defense, and the prejudice from Watkins' deficient performance is overwhelming as to these six counts.

But the prejudice went beyond these counts. Watkins' deficient performance prejudicially affected the entire judgment, because it cast a pall of incredibility and deception over the entire defense team. When a central defense figure such as Watkins is exposed as resorting to unscrupulous means to obtain a favorable outcome and nothing is done to distance the rest of the defense team from his actions, jurors will naturally distrust everything else the defense says, does, and presents.

The opinion mentions appellant's claim that Watkins's behavior at trial was devastating to the defense, but the opinion never addresses the reasoning that underlies that claim. It simply dismisses it summarily.

2. The Conflict-of-Interest Claim

The opinion next concludes that there is no need to remand the case for an inquiry into counsel's conflict of interest. The opinion states that the trial court "conducted a lengthy hearing" (S.O. 62) but omits to note that the focus of the hearing was Watkins' derelictions, not conflict of interest.

The opinion then declines to remand the case for an inquiry into conflict because appellant "fails to explain how the purported conflict

affected defense counsel's presentation of the motion for a new trial." (S.O. 65.) The only fact the opinion mentions that is relevant to the conflict-of-interest issue is that the prosecutor " suggested that independent counsel be appointed to argue the motion for new trial" and that the court declined to appoint counsel but preferred to "'take another look at that situation as things develop here this on this hearing.'" (S.O. 64, quoting 31 RT .) The opinion fails to mention that the court never did return to the subject. The opinion also fails to mention the facts — in addition to the prosecutor's suggestion — upon which appellant's bases his claim that, under constitutional law, the record "strongly suggests" that a conflict of interest existed. (*Wood v. Georgia* (1981) 450 U.S. 261.) Those facts were discussed at some length in appellant's briefing (AOB 317-320; AOB 201), so appellant will only quickly summarize them here:

1. Lead defense counsel Harley had had a long social and professional relationship with Watkins, frequently asking that Watkins be appointed to assist him in his cases, and he "considered Watkins a friend that he felt a certain amount of loyalty toward." (See AOB 298, 318; ARB 201; 31 RT 6037; 9/29/06 Supp.CT vol. 2 at p. 590.) Indeed, after Watkins' arrest, Harley was "willing to act as surety and post his partial interest in his office building" to obtain Watkins' release on bail and was also prepared to "vouch for [Watkins'] character . . . ." (AOB 318, quoting 9/29/06 Supp.CT vol. 3 at p. 747.)
2. At in camera hearings held prior to Watkins' arrest, Harley failed to accurately advise the court of the extent of Watkins' then-pending legal problems (counsel failed to mention that

Watkins was facing charges of child abuse/endangerment and spousal battery). (AOB 304-305, 318 fn. 179; ARB 201; 9 RT 1851-1852, 21 RT 3900-3904, 31 RT 6013-6015, 5 CT 1688.)

3. Defense counsel Harley was himself potentially exposed to criminal liability both for the scheme to "put the shut" on Khoi Huynh and for the scheme to kill a witness in Texas:

   a. when questioned by law enforcement, Harley admitted he had given Watkins permission to give Hung Mai the report later found in Khai Vo's cell (though Harley told officers the report he saw had no white-outs) (AOB 307-308, 319-320; ARB 201; 31 RT 6053, 9/29/06 Supp.CT vol. 2 at pp. 591, 594; Mo.NewTrialExh. 1); and

   b. after Watkins' arrest, his attorney wrote to the court and represented that all of Watkins' actions had been authorized by the attorneys he was working for, including Harley. (AOB 319, 9/28/06 CT vol. 3 at p. 748.)

These facts are strong indications that defense counsel had a conflict of interest in presenting the motion for new trial and that there is at least a reasonable likelihood that appellant was prejudiced by the conflict.

Moreover, while the opinion states that the trial court conducted a "lengthy hearing," the opinion fails to note how little of the hearing related to the conflict issue. The conflict issue was mentioned only on the last day of proceedings on the motion for a new trial. The opinion also fails to note how the trial court truncated the scope of the hearing into ineffective

assistance: other than the "put a shut on Khoi" conversation, the only evidence from the hearing that the opinion mentions is Khoi Huynh's testimony "that Watkins never contacted him or asked him not to testify" and that an investigator for the district attorney "testified that Huynh told him that no one had contacted him or asked him not to testify." (S.O. 62.) The opinion omits to mention that Khoi telephoned the district attorney's office after his testimony and stated that he did not identify appellant as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶ 67d.)

The opinion also omits to mention that the trial court would only allow Khoi Huynh to be questioned whether about Watkins had *directly* and *personally* sought to dissuade him from testifying. The court refused to allow the defense to ask Huynh whether "anyone" had suggested he claim a failure to recall, which was the only form of witness tampering involved in this case. (AOB 305-306, 30 RT 5924-5925, 5929-5930.)

When the full facts are considered, it is unreasonable to reach the opinion's conclusion that the trial court conducted an adequate inquiry into conflict of interest.

B. The Use, on Rebuttal, of Appellant's Illegally Obtained Statements

Appellant has argued that the trial court committed several errors when it permitted the prosecution to introduce, as impeachment of appellant's testimony, certain improperly obtained statements that appellant had made to Detective Nye on May 25, 1995. (AOB 326-340, ARB 209-223.) One of his claims was that use of the statements was improper because they were involuntary. (AOB 335-337, ARB 212-216.) The opinion describes the relevant facts as follows:

> When defendant asked for an attorney, the interview stopped. But a few minutes later, police detectives reentered the interrogation room and resumed the questioning, telling defendant: "We just have to get some other things clear." During the questioning that followed, defendant admitted that he was a member of the Nip Family gang.

(S.O. 68.)

Based on this view of the record, the opinion concludes the statements were not involuntary because "Detective Nye did not mislead defendant into thinking that his statements could not be used in court" and "Nye's questioning was not overbearing or otherwise coercive." (S.O. 73, 74.)

However, consideration of the full facts requires a different conclusion. It is true that when appellant asked for an attorney, "the interview stopped." However, the opinion omits that appellant was removed from the room and then brought back four minutes later, and that after he was told to sit down, the first words the detective said to him were, ""Now, we're back on. We're back talking to you and stuff. *I know you[] asked for an attorney and stuff like that. We just have to get some other things clear*. Okay." (9/29/06 Supp.CT 1249-1250; 22 RT 4110.)

The opinion quotes the second of the two italicized sentences but not the first. That omission is significant because, without knowing about the first sentence, a reader cannot tell that the detective is informing appellant that "we just have to get some other things clear" despite the fact that appellant had just "asked for an attorney." When both sentences are considered, it becomes clear that the detective was informing appellant that his right to counsel did not apply to the questions he was about to ask, that appellant had no right to refuse the officers' request to "get some other

things clear." It was this misinformation, apparent when the whole record is considered, that made appellant's ensuing statements involuntary and undermines the opinion's conclusion that Nye "did not mislead the defendant into thinking that his statements could not be used in court." (S.O. 73.)

* * * *

Appellant also claimed that his statements could not be used on rebuttal because they were obtained in deliberate, systematic, and officially sanctioned violation of *Miranda* after appellant had repeatedly invoked his right to counsel. (AOB 331-335, ARB 209-212.) Detective Nye acknowledged that he had received training on the subject of impeachment evidence through the Westminster Police Department. He was taught that if he obtained statements after a suspect had invoked his right to an attorney, the statements could be used as impeachment. (22 RT 4112.) This training came from 24 training tapes and an oral presentation, all by a member of the Orange County District Attorney's Office. (22 RT 4112-4113.) Not all 24 tapes were about the same topic, but each time the issue arose concerning talking to a suspect after he had invoked his rights, the message communicated by the District Attorney was that this could be done for impeachment purposes. (22 RT 4115.)

The opinion rejects appellant's claim on the basis that "the record on direct appeal does not demonstrate widespread, systematic police misconduct." (S.O. 71.) "[W]e have before us no evidence that Detective Nye or other members of the Westminster Police Department employed such methods on a regular basis. Nor is there any allegation that Detective Nye acted pursuant to an official police department policy." (S.O. 72.) This reasoning, which neither respondent nor the parties below tendered,

assumes (1) that training given to Detective Nye was withheld from the police department as a whole and (2) that the trainees were not expected to and did not comply with the training they received. With due respect, neither assumption appears reasonable to appellant. Nye received his training via an oral lecture and 24 tapes from the District Attorney's Office that were provided to him "through the [Westminster Police] Department." (22 RT 4112.) The only rational inference is that this training was provided department-wide, or at least to those officers whose jobs included interrogating suspects. Moreover, just as jurors are presumed to follow instructions given them by the judge, there is no reason to believe a police officer would not follow instructions that he was given at sessions that his department had him attend.

The opinion further holds that appellant "does not show that the trial court's rulings prevented him from developing the record on" the matters as to which the opinion finds evidence lacking. (S.O. 74.) However, the opinion fails to mention that the trial court sustained repeated objections by the prosecutor that prevented defense counsel from establishing, for example, what Nye had "been trained . . . to do when [suspects] say they want to talk to an attorney" or why the District Attorney's Office had said it was important to talk to a suspect after he invoked that right. (22 RT 4111-4112 [three times], 4116.)

VI.
PRECLUDING VOIR DIRE ON POSSIBLE MISCONCEPTIONS ABOUT A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE

The trial court refused to allow any inquiry into whether prospective jurors harbored views about a sentence of life without parole that prevented

or substantially impaired them in their ability to vote in favor of such a sentence. The court based its decision on its belief that this Court had "expressly said that it's wrong for the judge to tell the jury that life imprisonment without the possibility of parole means just that." (4 RT 625-626.) As appellant pointed out, the trial court was wrong. (AOB 373-382, ARB 238-240.) In the course of his argument to this Court, appellant stated that it is not "fanciful" or "uncommon" to find prospective jurors who believe that persons with sentences of life without parole are frequently paroled and who will disbelieve instructions to the contrary. (AOB 373, 379-380.) In support of this statement, appellant cited some examples from the voir dire in his own case and in one of this Court's decisions, and he cited two surveys of death-qualified adults in California. (AOB 373.)

The Slip Opinion rejects appellant's claim, reasoning that "the trial court did not abuse its discretion in limiting voir dire" because "defense counsel did not bring such evidence to the trial court's attention or otherwise demonstrate the need to subject all prospective jurors to voir dire on this issue." (S.O. 83.) This reasoning, which appellant has had no opportunity to address because it was not proffered by respondent or relied on by the trial court below, is unavailing for two reasons. First, this Court has itself frequently relied on data not presented to the trial court when ruling on an issue.[17] No principle is apparent as to why appellant may not

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[17] See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 62 (citing book on gangs as a basis for rejecting claim of insufficient evidence re gang enhancement); *In re Marriage Cases* (2008) 43 Cal.4th 757, 828 fn. 50 (citing N.J. Civil Union Review Com., First Interim Rep. (Feb. 19, 2008) pp. 6-18 <http:// www. nj. gov/ oag/ dcr/ downloads/ 1 st- Interim

(continued...)

similarly rely on such data, particularly when respondent has not disputed the accuracy of the data. (See *People v. Seumanu* (Aug. 24, 2015) ___ Cal.4th ___ [2015 WL 4998963 *52-*53].)

Second, it is inappropriate to rely on this new ground for the first time on appeal. Ordinarily, of course, "[i]f the court's ruling or decision is right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.) However, this general rule has exceptions, one of which applies here. For it is established that when "we are dealing not with a pure question of law but with the exercise of a trial court's discretion[, it] would be incongruous for an appellate court, reviewing such order, to rely on reasons not cited by the trial court. Otherwise, we might uphold a discretionary order on grounds never considered by, or, worse yet, rejected by the trial court." (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1542.)

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[17](...continued)
Report- CURC. pdf> [as of May 15, 2008] regarding problems faced by children raised by same-sex parents who are not allowed to marry); *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 723, Werdegar, J. dissenting (citing <http:// money. cnn. com/ magazines/ fortune/ fortune 500_ archive/ snapshots/ 2000/ 850. html> [as of Nov. 30, 2009] as source of information relevant to exemplary damages for a corporation); *People v. Sorden* (2005) 36 Cal.4th 65, 79 fn. 2, Kennard, J., concurring (citing Health & Wellness Resource Center, at http:// infotrac.galegroup.com [as of June 23, 2005] to show that "'periods of adjustment disorder . . . may evolve into a major depressive disorder'"). See also, e.g., *Ballew v. Georgia* (1971) 435 U.S. 223 (relying on social science to conclude that larger groups of factfinders are more reliable than smaller ones); *Roper v. Simmons* (2005) 543 U.S. 551, 569-570, 573 (relying on social science to conclude that Constitution prohibits execution of juveniles).

Indeed, when, as here, the newly proposed theory involves a discretionary weighing that the trial court did not engage in, it is fundamentally unfair to invoke the general rule because it effectively deprives the affected party of the opportunity he would have had at trial to either have the trial court exercise its discretion *in his favor* or to refine his presentation so as to meet whatever concerns the trial court might have had. Allowing a new theory to be invoked on appeal amounts to invoking a conclusive presumption that the trial court would necessarily have exercised its discretion against the defense on the newly offered ground. There is no basis in the law for such a presumption.[18]

VII.
OTHER ISSUES RELATED TO THE DEATH JUDGMENT

A. Precluding Expert Testimony Related to LWOP Sentences

On appeal, appellant argued that the trial court improperly refused to permit Norman Morein, a sentencing consultant, to testify to (1) the prison conditions to which LWOP inmates would be subjected, (2) the unlikelihood that LWOP prisoners would ever be presented to the governor

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[18] Arguably, a new theory might properly be raised for the first time on appeal if there could have been no reasonable exercise of discretion in favor of allowing the precluded voir dire. No such argument would be tenable in the present case.

The opinion states, with respect to juror P.C., that her "responses [on the questionnaire] gave defense counsel an independent basis to question P.C. during voir dire and, if she confirmed her inability to follow the law, to challenge her for cause." (S.O. 84.) The opinion appears to have overlooked that the trial court refused to allow counsel to conduct oral voir dire as to matters covered in the questionnaire. (AOB 383-388, ARB 241-242.)

for parole consideration via commutation, and (3) the socially useful work that an LWOP prisoner could perform. (AOB 389-404, ARB 243-246.) The Slip Opinion rejects those claims. (S.O. 85-86.)

As to the prison-conditions claim, the opinion simply notes that appellant had acknowledged that the Court had repeatedly rejected such testimony in the past. (S.O. 85.) However, the opinion fails to note that appellant supported his claim with a statutory-intent argument that had not been considered in any prior decision. (AOB 390-398, ARB 245-246.) Since "it is axiomatic that cases are not authority for propositions not considered,"[19] the cases cited in the opinion do not dispose of appellant's claim, nor did appellant acknowledge that they did.

With respect to the socially-useful-work claim, the opinion holds that testimony along these lines was encompassed by the judge allowing Morein to testify that appellant "'would be a peaceful individual in prison.'" (S.O. 86, quoting 28 RT 5611.) This reasoning, which was not advanced by respondent, cannot be squared with the record.

At a section 402 hearing, Morein outlined the testimony he would give. This included testimony about the kind of work that LWOP prisoners could do. (28 RT 5541-5542.) Thereafter, the court asked a question of its own about a separate matter. It said that in prior cases, Morein also had "testified as to the conditions of the facilities within the Department of Corrections and then given an opinion as to how you felt the particular defendant would or would not adjust to the conditions, the rules, and procedures associated with confinement in state prison." Morein responded that he had not mentioned that point because he thought the

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[19] See cases cited *ante* at footnote 9.

judge wouldn't allow it but that he was prepared to address it. The court indicated it wasn't sure whether this additional topic was permissible. (28 RT 5544.)

The court's indecision on the issue of the likelihood a particular defendant would adjust to prison conditions vanished within a few hours. For, that afternoon, defense counsel asked the trial court what portions of Morein's proposed testimony was admissible, and the court responded, "I don't think anything." (28 RT 5589.)

The next day, the prosecutor said she thought Morein could "give an opinion as to the fact that the defendant would be a peaceful individual in prison." (28 RT 5611.) The judge responded that Morein could give an opinion on "the defendant's ability to adjust well to the life and routine that goes with being confined" but that if Morein did so testify, the court would allow the prosecution to admit certain evidence of alleged misbehavior by appellant in juvenile camp and in the county jail, which meant that defense counsel had "a tactical decision" to make. (28 RT 5611-5612.) In light of the latter part of the ruling, defense counsel decided he would not have Morein discuss appellant's ability to adjust. (28 RT 5612-5613.) But the judge reiterated that Morein could *not* testify as to "the type of life you will lead" in prison; indeed, defense counsel could not even "make reference to that" in his jury argument. (28 RT 5613.)

Thus, as an examination of the full record shows, the trial court merely allowed Morein to testify to appellant's personal "ability to adjust well" to prison life. The court never allowed Morein to testify on what it and the parties plainly saw as a different subject, namely, the socially useful work that an LWOP prisoner could engage in.

B. Restricting Defense Counsel's Argument

Appellant also argued that the trial court erred by precluding defense counsel from arguing to the jury about (1) the harshness of serving an LWOP sentence, (2) imprisonment's future impact on appellant, and (3) other well-known cases where life without parole was imposed. (AOB 405-407, ARB 247-248.) The opinion rejects appellant's claims. (S.O. 86-88.)

The opinion rejects appellant's first claim on the ground that the trial court merely "preclud[ed] defense counsel's attempt to describe the precise measurements and features of the cell in which defendant would serve his sentence, a matter on which the defense had proffered no evidence." (S.O. 87.) That is not an accurate description of the trial court's ruling. As just pointed out, the court's ruling was that counsel could not "make reference" at all to "the type of life [appellant] will lead" in prison. (28 RT 5613.) The fact that the court did not stop counsel when he argued that appellant was "going to be locked up in prison" for the rest of his life did not in any way reflect an expansion of the court's earlier ruling precluding reference to harshness of the harshness of the life he would lead while locked up. The opinion's reasoning is a non-sequitur.

As for appellant's claim that the trial court erred by precluding defense counsel from discussing other well-known cases where verdicts of life without parole had been handed down, the opinion simply points out that appellant had acknowledged that the Court had frequently rejected such claims. However, the opinion ignores what else appellant said: that those rejections could not be reconciled with other decisions allowing prosecutors to comment on well-known cases. (AOB 405-406, ARB 248.)

The opinion makes no attempt to correct or address the lack of even-handedness these two lines of decision.

CONCLUSION

Rehearing should be granted for all of the reasons set forth in this petition and also for the reason that, given the extent to which the opinion does not fully, fairly, and reasonably present the facts and state and/or address many of the issues presented, appellant was denied the substantive and procedural due process to which he was entitled under the Constitution.

DATED: August 27, 2015

_____

Richard C. Neuhoff
Attorney for Appellant
Lam T. Nguyen

CERTIFICATE OF WORD COUNT

I certify that the attached the above Petition for Rehearing uses a 13 point Times New Roman font and contains 16,816 words.

Dated: August 27, 2015

_____

Richard C. Neuhoff

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am an active member of the State Bar of California and not a party to the cause described herein; my business address is 11 Franklin Square, New Britain, CT 06051-2604. On today's date, I served a copy of:

Appellant's Petition for Rehearing

in *People v. Lam T. Nguyen* (No. S076340) by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at New Britain, CT, addressed as follows:

Lam Thanh Nguyen
P.O. Box P-28000
San Quentin State Prison
San Quentin, CA 94974

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Capital Case Appeals
700 Civic Center Drive West, Rm. K100
Santa Ana, CA 92702-2024

Ms. Robin Park
Deputy District Attorney
401 Civic Center Drive West
Santa Ana, CA 92701

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 28, 2015, at New Britain, Connecticut

_____

Richard C. Neuhoff