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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL DAMON ALLEN, et al, Defendants.	No. BA424006 **NOTICE AND MOTION TO EXCLUDE PRIOR TESTIMONY (REVISED)** [Assigned to Judge Rappe] [Information Filed April 9, 2015] Date December 27, 2018 Time 8:30 a.m. CEN 103 Trial January 8, 2019

TO THE HONORABLE CURTIS RAPPE, EACH PARTY AND ATTORNEY OF RECORD:

PLEASE TAKE NOTICE at the place, time and date above or as soon as counsel may be heard defendant Michael Allen will and hereby does move the court for an order excluding the prior testimony of Freddie Earl Jelks on the ground defendant was ineffectively represented when Jelks testified and thus admission of Jelks's testimony will deny defendant his right to cross examination and a fair trial under the confrontation and due process clauses of the United States and California Constitutions.

The motion is based on the attached memorandum of points and authorities, the facts and records of this case, and whatever argument and evidence may be presented to the court at the time of the hearing of the motion.

Dated November 28, 2018, at Malibu, California.

LAW OFFICES OF EDWARD WYNNE MURPHY



By_____

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL ALLEN, et al, Defendants.	No. BA424006 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXCLUDE PRIOR TESTIMONY** [Assigned to Judge Rappe] [Information Filed April 9, 2015] Date December 27, 2018 Time 8:30 a.m. CEN 103 Trial January 8, 2019

Introduction

The prosecution proposes to introduce the now hearsay testimony Freddie Earl Jelks, deceased, gave August 6 and 7, 1997, at trial in Case No. BA105846, hereafter "former trial," under Evidence Code § 1291 that provides in part evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the party against whom the former testimony is offered had the opportunity

to cross-examine the declarant.[1] The declarant in this instance is Freddie Earl Jelks and the party is defendant Michael Allen. As will be shown Jelks's testimony is inadmissable because when Jelks testified, defendant's attorney, Joseph Orr, ineffectively represented him, thus admission of Jelks's testimony will deny defendant his right to cross examination under the confrontation and due process clauses of the United States and California Constitutions.

First, the evidence of which Mr. Orr was or should have been aware.

September 14, 1991, Tyrone Mosley Murder

Before Jelks testified on August 6 and 7, 1997, the prosecution disclosed to the defense that on September 14, 1991, about five weeks after the Loggins/Berolt murders—the murders with which defendant is charged in the instant case—Tyrone Mosley, a member of the 97 East Coast Crips gang, was shot and killed in a drive-by gang-related shooting while at a party on 97th Street near Central Avenue in Los Angeles. Two other individuals were seriously wounded in the attack. Witnesses reported that during the evening members and friends of the 97 East Coast Crips were partying in their neighborhood. A car drove slowly down the street in front of the party, then occupants of the car began firing into the crowd. There were three people in the car from which the shots were fired: the driver, as well as two people seated on the passenger side

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1. Evidence Code § 1291:
(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.
(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to: (1) Objections to the form of the question which were not made at the time the former testimony was given. (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

of the car that faced the party. One person, Tyrone Mosley, was killed and two others were seriously wounded. Crime scene investigators located .45 caliber shell casings at the scene, as well as a .380 caliber shell casing. (FTRT[2] 6227-6247 (Det. Johnson); 6264-6285 (Kim Coleman); 6304-6309, 6515-6540; People's Exhibit #84 and 84A at 6524 (Det. McCartin); 6313-6373 (Keith Williams)[3])

Marcellus James

February 27, 1992, Marcellus James, an in-custody informant, told detectives what he knew about the September 14, 1991, Mosley murder. (See references to this interview at FTRT 6199, 6202, 6210, 6240-6243,[4] 6247.)[5] July 11, 1994, detectives re-interviewed James regarding the Mosley murder.[6] Detective Tapia told James at the beginning of that interview that he and Detective McCartin "want to go over that statement that you [James] made" when "you [James] talked to the police back on February 27, 1992." (CT

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2. *FTRT* is abbreviation for former trial reporter's transcript; page number(s) follow.

3. Citations are from prosecution evidence offered against codefendant in the penalty phase.

4. During his penalty phase testimony, Det. Johnson indicated his memory of the James interview in February 1992 was not good. Ms. Lentz-Snyder referred to the alleged existence of a tape recording of the interview, as well as a handwritten statement of the interview, then without showing the witness either writing, or marking either writing as a court exhibit, she simply asked the detective the leading question: "And did he identify an individual by the name of Freddie—F.M.—as the driver of the car?" Johnson responded, "Yes."

5. Detective Johnson appeared confused when he testified at the penalty phase. On cross-examination he was shown a document to see if that refreshed his recollection as to the date that he interviewed James. Although the record is not clear if reading that document refreshed his recollection or if he simply read the date on the document, the detectives said "September 27, 2002, 1700 hours." (FTRT 31: 6246)

6. The transcripts of the recordings of the interviews as well as the police reports referenced in this motion are voluminous but will be made available by the defense upon request. For the court's convenience, the transcripts of the recordings of the main interviews are referenced by their location in the clerk's transcript accompanying defendant's appeal, in the court file.

Supp IVA[7] 1:124-125[8]) At the beginning of the interview James identified photographs of codefendant Cleamon Johnson as "Evil" and Freddie Jelks as "F.M." (CT Supp IVA 1:128-129). James told the detectives that he was standing with others in front of Johnson's house between 9:00 p.m. and 11:00 p.m. the evening of the Mosley murder. (CT Supp IVA 1:125-128, 132, 136) He observed codefendant, Jelks and "Jelly Rock" get into a black, four-door Mazda Protégé. (CT Supp IVA 1:129, 131) Jelly Rock was the driver, Jelks sat in the right front seat, and Johnson sat in the rear seat. (1:130-131) Johnson had a .45 caliber handgun and Jelks had a .38 caliber revolver. James said the three were leaving to "[k]ill somebody" from the "Nine-Seven East Coast Crips" gang because "one of their friends got shot." They told James it was a "perfect opportunity" because the "nine-sevens" were having a block party. (CT Supp IVA 1:133-134) "And then they went and did what they had to do and came back," James told the detectives. (CT Supp IV A, 1: 136) James told the detectives he heard no gun shots because he was standing on 88th Street and the "nine-sevens" party was "way down there on 97th where they was." (CT Supp IVA, 1:136) James explained that when they returned about ten minutes later they were in the same positions in the Mazda as when they left. That is, Jelly Rock was still driving, Jelks was still seated in the right front passenger seat, and codefendant was in the rear seat on the driver's side. (CT Supp IVA 1:137, 139-140) James told the detectives that both codefendant and Jelks talked about what happened after they returned. The driver, Jelly Rock, "didn't say too much." (CT Supp IVA 1:137-139) Referring to the shooting, James told the detectives, "When they got there they flicked the light[s] on and off to let them know they—they was perpetrated like they was their homies. And then when they got up on them, they shot them." (CT Supp IVA 1:136-137) According to James they said that three people got shot. (CT Supp IVA 1:13 8) The transcript is ambiguous as to who shot at the victims but Detective McCartin's

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7. *CT Supp IVA* is abbreviation for Clerk's Transcript Supplemental IV Part A.

8. *1:124-125* refers to Volume 1, pages 124 to 125.

response to James's "(Untranslatable)" answer suggests that both Johnson and Jelks admitting shooting at the victims. (CT Supp IVA 1:138)[9]

August 11, 1997, Marcellus James testified during the guilt phase of defendant's trial, and James was re-called to testify against codefendant in the penalty phase of the trial. During the penalty phase, James provided testimony regarding his interview with the police on September 21, 1994. James testified that Detective McCartin, who had previously interviewed him on July 11, 1994, showed him some photographs on September 21, 1994. James said he identified photographs of "Evil" (codefendant Johnson), and "F.M." (Freddie Jelks) who he knew as Freddie Mac. (FTRT 6203) James then testified regarding two People's Exhibits: People's Exhibit 59 was a photograph ID report, and People's Exhibit 60, a 6-photograph line-up display. James testified these photographs were shown to him on September 21, 1994. He testified that he selected a photograph from People's Exhibit 60, identified the photograph as "Jelly Rock", then wrote,"Jelly Rock is the person that I saw driving the black car when Evil [codefendant Johnson] and F.M. [Freddie Jelks] did the drive-by on 97 East Coast." (FTRT 6205-6206). People's Exhibit 61 was a photograph ID report, and People's Exhibit 62, a photocopy of a 16-photograph line-up display. James testified these photographs were shown to him on September 21, 1994. James said he identified a photograph of "F.M." (Fredie Jelks) from this larger display and wrote, "I saw him get in the black car [meaning black, four-door Mazda Protégé] with the .38." (FTRT 6205-6207)[10]

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9. August 17, 1995, James testified before the grand jury in the Mosley murder case. Los Angeles Superior Court # BA108967

10. Jelks also testified People's Exhibit 61 was a photo ID report, and People's Exhibit 62, a photocopy of a 16-photograph line-up display: James testified these photos were shown to him on September 21, 1994. James identified another photo from this larger display, identified it as "Evil" [codefendant], and told the police that he "saw Evil get in the black car with the .45 to do the drive-by on 97 East Coast" [i.e., the Mosley murder]. (FTRT 31 :6205-6207)

December 6, 1994, Jelks Interrogation

On December 6, 1994, the same two detectives who interviewed Marcellus James on July 11, 1994 and on September 21, 1994, interviewed Freddie Earl Jelks about his involvement in the September 14, 1991, murder of Tyrone Mosley. (CT Supp IV 4:833-836). When the detectives first asked Jelks about the Mosley murder (CT Supp IV 4:871) Jelks's story was he knew nothing about it. (CT Supp IV 4:871) The detectives told Jelks that witnesses they interviewed, without naming James, had identified Jelks's photograph. The detectives told Jelks, "They got you supposedly in the vehicle driving or whatever you're doing. Driving down through the hood with a couple of other people in the car, okay?" (CT Supp IV 4:872; see also 4:873) Jelks stuck with his story, however, and continued to deny any knowledge of the Mosley murder. (CT Supp IV 4:873)

At this point the detectives told Jelks what was going to happen because he insisted on denying he was involved in the drive-by Mosley murder: he would ultimately be booked for murder in the Mosley case. It being December, Detective McCartin then reminded Jelks of Jelks's desire to be with his young children for Christmas—the inference being that if Jelks admitted being in the car in the Mosley murder, Jelks might not be arrested for the murder.

> *McCartin*: Anyway, well, we have people that have picked you out. Picked you out on a—in a murder case. They got you supposedly in the vehicle *driving* or whatever you're doing. *Driving* down through the hood with a couple of other people in the car, okay? So, what we want to know is what happened?
> *Jelks*: I don't know nothing about that.
> *McCartin*: Because what's going to happen is ultimately you're going to get booked for murder, okay? Because that case is still open. Nobody's been booked for that yet.
> *Jelks*: Uh-huh.
> *McCartin*: And I know you said you want to go—you want to be home for Christmas, right?
> *Jelks*: Right. (Untranslatable)
> *McCartin*: You want to see your family?
> *Jelks*: Right.

McCartin: So we need to hear what happened out there. We got witnesses that have come out, looked through all the stuff, and identified you, as well as other people.
Tapia: Freddie—
McCartin: And I'm not going to tell you who they were. I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that we want to hear, okay? (CT Supp IV 4:872-874)

The "truth" about the Mosley murder, according to what Jelks heard the detective say, was synonymous with he wanted to hear: if only Jelks told him what he wanted to hear would Jelks be "cooperating" with the detectives.

The problem with Detective McCartin's interrogation tactic was now apparent: These same two detectives had previously interviewed witness Marcellus James who explained to these same two detectives on two separate occasions that Jelks was not the driver; rather, Jelks was sitting in the right front passenger seat with a .38 caliber handgun as the three gang members left, and was sitting in the right front passenger seat when they returned. Moreover these same detectives were aware that both .38 caliber and .45 caliber shell casings had been recovered at the murder scene indicating there had been two separate shooters in the assailants' car. But now they were suggesting to Jelks that he was the driver. What the detectives wanted to hear from Jelks seemingly was not necessarily the truth.

Both detectives continued to use this interrogation tactic on Jelks, apparently going for getting Jelks to admit he was just the driver in the Mosley drive-by shooting, rather than admit he was one of the shooters:

McCartin: We got witnesses that have come out, looked through all the stuff, and identified you, as well as other people. And I'm not going to tell you who they were. I want to hear the truth from you. And I'll see that you're cooperating with us. And you're giving us information that *we want to hear*, okay?
Tapia: *I don't think you were the shooter, Freddie.*
McCartin: Okay. Now, *I don't think that.* Otherwise we wouldn't be messing with you.
Tapia: But Freddie, I know who the shooter was. At least I think I know who it was. But I wanted your version, Freddie. (CT Supp IV 4:873-874) (Emphasis added.)

Almost as an afterthought, the detectives inquired of Jelks as to how many "strikes" or felony convictions he already had, thereby further implying that it would be in Jelks's best interest to "cooperate" with them. (CT Supp IV 4:874-875)

But Jelks continued to stick with his story, at least for the moment. Suddenly, Detective Tapia told Detective McCartin that they might as well end the interrogation because Jelks was unwilling to cooperate, present the Mosley murder case to the district attorney's office, and arrest and book Jelks right then and there. With that, Jelks seemingly panicked:

> *Tapia*: Well, why don't we—let's just send this in, Brian [McCartin]. And we'll do our thing. And we'll just book you [Jelks].
> *Jelks*: *Watt a minute, man. Watt a minute.*
> Tapia: Okay.
> *McCartin*: Is that what you want?
> *Jelks*: Wait a minute, man. I don't—I don't ... Don't—don't do my life like that, man.
> *McCartin*; We need the truth.
> *Jelks*: Don't do my life like that.
> *McCartin*: We're not fucking around here, Freddie.
> *Tapia*: Talk to me, Freddie.
> *McCartin*: We're not missing around. There's people that are dead out there. And we're trying to figure this out and goddamn clear them. And, so, you know, if you end up getting steam-rolled, and you're involved, that's the breaks. If you want to cooperate and clear this shit up for us, then let's hear it. We don't have time to listen to your bullshit. (CT Supp IV 4:876-877)

Once again, the detectives told Jelks that they wanted to hear the "truth," even though they knew that what they suggested Jelks admit was not the truth. But by admitting a falsehood—that Jelks was the driver of the car—he would demonstrate to the detectives that he was "cooperating" with them.

In spite of their urging, Jelks continued to deny any involvement in the Mosley murder. He told the detectives he didn't want his life ruined by going to jail for a crime he didn't commit. "God as my witness, I haven't never killed nobody, man," he exclaimed. Detective Tapia reminded Jelks that. "Like I said, I don't think you were the shooter." Jelks responded to them, however, by stating that even though he was not

involved in the Mosley murder, he was willing to help them clear "stacks of files" as long as they didn't arrest him and would let him go home. (CT Supp IV 4:875-880) This was a significant concession, Jelks told them, because he knew people that had been killed merely for talking to the police. Jelks added that if he talked to the detectives about 89 Family crimes, his life would be in danger. "I've seen OG's come down and shoot." (CT Supp IV 4:880-883) A few minutes later, Jelks added, "I—I can't even do this to my friends. I can't turn my back on them guys over there." When asked why, Jelks retorted, "Because they going to kill me." (CT Supp IV 4:887)

The interrogation continued. Jelks tried to exact a promise from the detectives that if he talked to them regarding the Mosley murder he would be allowed to go home that day. The detectives responded by stating that if Jelks told them the "truth," they would allow him to go home that day. The detectives added that they would work with the district attorney to keep Jelks out of jail. (CT Supp IV 4:888-889) In response, Jelks re-emphasized he was not involved in the Mosley murder, that the witnesses were not telling the truth, and that the witnesses identified Jelks simply because they thought he was a "weak" individual (CT Supp IV 4:889-893) The detectives reassured him that neither of them thought he was the shooter, that if he was "just in the car or whatever, that's okay." (CT Supp IV 4:895]

With that, Jelks finally abandoned Story #1 that he knew nothing about the Mosley murder and commenced to tell Story #2. Story #2 was all right, yes, he *knew* about the Mosley murder, but all he knew was what he had heard others say about it. When the detectives accused Jelks of still not being truthful, he insisted "I'm telling you the truth, man." (CT Supp IV 4:896-897) The detectives applied more pressure, telling Jelks they knew he had been there. That was when Jelks then came up with Story #3.

Jelks tried to make Story #3 consistent with what the detectives had told him. Jelks knew the detectives thought he was present because that was what the witnesses they mentioned had apparently told them. Okay. Jelks told the detectives that he and a girlfriend were going to meet that night. Jelks was at Johnson's house prior to going over to the girlfriend's house. Jelks said "Little Evil"—not codefendant, another Evil—and Jelly Rock drove up and confirmed there was a party in the 97 East Coast Crips territory.

Jelks said he then saw codefendant climb into the car and "they left. I got in my car. I went down to the girl house who lived on Colden [Avenue]. When I come back—when I got ready to go up Avalon, I heard the—some shooting, you know, I went back to my mother house. By the time I got to my mother house, it was—they was—Evil and them was back." (CT Supp IV 4:898-902).

The detectives accused Jelks of continuing to lie. The detectives then fibbed to Jelks in an attempt to get him to at least admit he was involved in the murder. They told Jelks the witnesses said that Jelks "*drove the car* down there to nine-seven hood." (CT Supp IV 4:903) The detectives told Jelks they could prove he was in the car, that he was the driver. Detective McCartin then suggested to Jelks that if he was just driving the car, to continue lying "was just going to dig a deeper grave for yourself." The detectives thereafter admonished Jelks to be honest with them. (CT Supp IV 4:904)

At this point Jelks obviously knew if he wanted to go home and be with his kids Christmas, it was in his best interests to tell the detectives what they wanted to hear. It did not matter whether it was the truth or not. The detectives had said they believed he was the *driver*, not one of the shooters. The detectives had said being the driver was not as serious as being one of the shooters. So Jelks "admitted" he was the driver of the car. (CT Supp IV, 4:906-907) He also said codefendant was shooting. Story #4.

Now the detectives told Jelks that he had to continue "cooperating" with them by telling them what he "knew" about *other* criminal homicide cases before they decided if they would allow him to go home for Christmas. One of these cases they eventually discussed was the instant case, the Loggins/Beroit murders. Oh yes, Jelks said that he was present at codefendant's house on August 5, 1991, when defendant agreed to "serve" Loggins and Beroit; that he saw codefendant obtain a gun from the rear yard, give it to defendant, then tell defendant how to accomplish the killings; that he saw defendant leave with Uzi in hand, heard shots minutes later, then saw defendant return to codefendant's house breathing heavily and perspiring. And oh yes, a couple days later, defendant admitted he shot and killed Loggins and Beroit. This in substance was Jelks's testimony at trial.

At the conclusion of the December 6, 1994, interview Detectives McCartin and Tapia told Jelks they knew he was "cooperating with them, and they would tell the district attorney about his cooperation. They could give him no promises as to whether the district attorney would file murder charges against Jelks, but they would convey that Jelks was cooperating. They then allowed Jelks to return home.

Ten days later on December 16, 1994 Jelks testified before the grand jury, and substantially told the same story. (CT 1:68-98) August 17, 1995, Jelks was indicted, along with codefendant Johnson, and arrested for Mosley's murder. When Jelks testified at the Loggins/Beroit trial, the Mosley murder trial was pending.

February 9, 1992, Evans Murder

Also before Jelks testified on August 6, 1997, and August 7, 1997, the prosecution disclosed material to the defense that indicated on February 9, 1992, Jelks and codefendant went on a crime spree. About 7:20 p.m. at 724 East Caliburn Drive Jelks and other armed male black Swan Blood gang members entered Avalon Gardens and opened fire on Meshack Evans, Barbara Hamlin, Shanelle Hamlin and Rodriguez DeLeon Moore. Evans died of his wounds the next day.

LAPD reports also list codefendant Johnson as a suspect in the Avalon Gardens shootings. When codefendant was interviewed, he denied being present but identified Jelks as one of the assailants. When detectives interviewed Jelks they reported he was "noticeable deceptive and untruthful."[11] April 17, 1992, the Los Angeles district attorney noted "additional information indicates Johnson was one of the shooters."

February 9, 1992, Holloway Murder

Then at 9:00 p.m. the same night, February 9, 1992, at 122 East 82nd Street, Jelks was in the front seat of a four-door tan Toyota driven by codefendant Johnson when Alex

11. As noted *supra* the police and other reports referenced in this motion are voluminous but will be made available by the defense upon request.

Viera jumped out and shot Jequwan Lamar Johnson and Allen Earl Holloway.[12] Jequwan Lamar Johnson survived his injuries; Allen Earl Holloway was pronounced dead at Martin Luther King/Drew Medical Center.

Joseph Orr

Jelks's now heamay testimony he gave on August 6 and 7, 1997, the prosecution proposes to introduce under Evidence Code § 1291. As can be seen, significant impeachment related to the September 14, 1991, murder of Tyrone Mosley, and Jelks's subsequent quadruple-version interrogation, awaited—or should have awaited—Jelks before he made himself comfortable in the witness chair. The defense had evidence of at least one instance of conduct that involved serious moral turpitude, and of multiple instances of lying to the police. But before Jelks testified, outside the presence of the jury, the prosecution requested an Evidence Code § 402 hearing (FTRT 3495). In a motion *in limine* the prosecutor, Jennifer Lentz-Snyder, requested the trial judge foreclose defense cross-examination of Jelks regarding the details of the Mosley murder. Ms. Lentz-Snyder explained the Mosley murder was pending and Jelks might assert his Fifth Amendment right and refuse to testify if the defense was allowed to question him as to the details of the Mosley murder. Further, Ms. Lentz-Snyder related that Jelks's indicted codefendant in the Mosley murder was Cleamon Johnson, codefendant in the instant case. Ms. Lentz-Snyder told the court Jelks was "charged as" the driver in the Mosley murder case (FTRT 3497) and that no promises had been made to him in the Mosley murder case (FTRT 3500). Understandably, the prosecution did not want its star witness impeached.

At this point Mr. Orr referred the court to the detectives on December 6, 1994, telling Jelks he better keep talking otherwise they would book him "on the murder warrant." (FTRT 3500) This was incorrect. In fact there was no warrant for Jelks arrest on December 6, 1994, for either the Mosley murder or the Loggins/Berolt murders. Be that as it may.

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12. LAPD DR 92-12-06378

The court asked then Mr. Lasting what *he* wished to ask Jelks about the Mosley murder. Mr. Lasting replied not very much. (FTRT 3500) Surprise, surprise. Or course this was Mr. Lasting's position. If allowed, Jelks would testify his client, codefendant Cleamon Johnson, was one of the shooters who murdered Mosley.

At this point Mr. Orr should have spoke out and advised the court that Mr. Lasting's position was *not* defendant Michael Allen's position. Mr. Orr should have asserted that on behalf of *his* client he *will* be asking Jelks if it were not true that he rode in the front passenger seat with a .38 caliber handgun and was one of the two shooters who fired shots and murdered Mr. Mosley, and if it were not true that he lied to the detectives in each of the four different stories he told them regarding the Mosley murder. And furthermore, since Jelks all but certainly would have denied Mr. Orr's questions accusing Jelks of being one of the shooters, Mr. Orr likely would be calling Marcellus James to impeach Jelks. Mr. Orr should have informed the court he could *not care less* about Mr. Lasting's position. Instead, Mr. Orr did not speak.

The court then asked Ms. Lentz-Snyder her position. Her position of course was the same as Mr. Lasting's position. She stated she objected to Jelks being questioned "with respect to the nature of the charges." (FTRT 3503-3504) Of course. Why would the prosecution want evidence elicited that its star witness to the Loggins/Beroit murders was a murderer and liar? Ms. Lentz-Snyder had to know this would happen when earlier in the case she objected to motions by both defendants to sever the defendants for trial. Cagey strategy. By having one jury hear the case, the prosecution could enlist one of the two defendants, namely codefendant Johnson, to *join* in its objection to the evidence Jelks was a murderer and liar, because besides showing Jelks was a murderer, the evidence would show codefendant Johnson was a murderer too. And that is precisely what happened. At this point Ms. Lentz-Snyder had Mr. Lasting joining in her objection to the only significant evidence that impeached Jelks's credibility whose testimony regarding the Loggins/Beroit murders was very hurtful to the defense. Hats off to Ms. Lentz-Snyder.

The court played right into it. Judge Horan said his tentative "feeling" was Jelks's testimony would be limited to the fact that he had a pending homicide case when he was

interviewed by detectives on December 6, 1994, and gave a statement about the Loggins/Beroit murders. But Judge Horan wanted to read the lengthy transcript of Jelks's interrogation by the detectives before he finally ruled on the matter. (FTRT 3505-3506) Judge Horan then asked counsel if Jelks gave "information about Mr. Johnson" during the December 6, 1994, interview by the detectives. Mr. Orr replied no. (FTRT 3507) This was incorrect. Jelks in fact told the detectives codefendant Johnson was the shooter. Mr. Orr must not have read the transcript.

Judge Horan said the court did not want to keep the jury waiting any longer. Hence, the court indicated it would make a final ruling at the conclusion of Jelk's direct examination. (FTRT 3509-3911)

Mr. Orr finally spoke up, inquiring of the court about the fact that Jelks was eventually "booked" for the Mosley murder. The court replied it did not think that fact was particularly germane. (FTRT 3509) Mr. Orr did not mention the prospect of the defense questioning Jelks about his participation in the Mosley murder, and thereafter repeatedly lying to detectives.

Jelks then proceeded to testify. On direct examination he told substantially the same story about defendant's involvement in the August 5, 1991, Loggins/Beroit murders that he told the detectives December 6, 1994. (FTRT 3511-3582) If credible, very hurtful to the defense. It was incumbent upon Mr. Orr to attack Jelks' credibility.

At the break the court indicated it had read half the rather lengthy transcript of Jelks's taped December 6, 1994, statement to the police (FTRT 3583) and inquired if there was any other evidence that tied Jelks and codefendant to the Mosley murder (FTRT 3584). Ms. Lentz-Snyder informed the court that another witness, whose name was being protected, had identified both Jelks and Johnson as being among the perpetrators. (FTRT 3584) The witness of course was Marcellus James, who detectives interviewed July 11, 1994. The court asked has that witness "testified before the grand jury," apparently meaning the Mosley murder August 17, 1995, grand jury. The prosecution said yes and would get the court a copy of the transcript (FTRT 3585)—although that apparently never happened.

The court recessed for lunch. But before it did Mr. Orr never spoke, seemingly unaware of Marcellus James making a liar of Freddie Jelks.

When the court resumed after lunch it had read the transcript given it of Jelks's taped December 6, 1994, statement to the police. (FTRT 3587), although later it appeared the court had not been given the entire transcript. (FTRT 3598-3599) Ms. Lentz-Snyder stated she brought the August 17, 1995, grand jury reporter's transcript of Mosley murder (FTRT 3590), but there is no indication the court read it.

The court then had an extended discussion with counsel covering many pages of transcript. (FTRT 3584-3617) Practically all the discussion was between the court, the prosecutor, and counsel for codefendant. The discussion focused on the scope of cross examination regarding the facts of the Mosley murder case and the consequences of codefendant's name being mentioned. This is where the prosecution strategy shines. Mr. Lasting is objecting to the evidence detailing Jelks's participation in the Tyrone Mosley murder, and his subsequent lying about it to the police, because his client *also* participated in the murder, and Ms. Lentz-Snyder is agreeing with him because Jelks's participation in the murder and his subsequent lying about it to the police impeaches her star witness's credibility regarding the only charges then pending, i.e., codefendant and defendant murdering Loggins and Beroit. During the long discussion it was as though Mr. Orr was not present.

At last Mr. Orr mentioned defendant made a motion to sever defendants for trial. He simply mentioned the motion was *made*. He did not mention the consequences of Ms. Lentz-Snyder's successful opposition to the motion was the enlistment of counsel for codefendant supporting her objection to evidence that impeaches her star witness's credibility. Then a strange colloquy ensued:

> *Mr. Orr:* What does Mr. Allen *do* if the court's inclined to let in other crimes with Mr. Johnson?
> *The court*: What does Mr. Allen *do?*
> *Mr. Orr*: Yeah.
> *The court*: I don't assume Mr. Allen would have to do anything. What are you asking me?
> *Mr. Orr*: Except sit there and have more of a crime associate be implicated with other crimes.
> *The court*: Well, is that a rhetorical question?

Mr. Orr: It's a rhetorical question, and also when I have a chance I want to speak to the court's tentative ruling.
The court: I'll hear you right now.
Mr. Orr: I think it's an outrageous decision by the court.
The court: I haven't made one yet.

What is strange about Mr. Orr's remarks is the prosecution never suggested it wanted to introduce in evidence other crimes *defendant* committed with codefendant: the evidence in question showed *Jelks* committed a crime with codefendant. Secondly, instead of requesting to elicit testimony from prosecution witness Jelks that he was a murderer and liar, Mr. Orr seems concerned that introducing Jelk's December 6, 1994, statement to the police will show *codefendant*, who Mr. Orr strangely characterizes as defendant's *crime associate*, was implicated in other crimes.

So what? The defense in the case was that the prosecution evidence did not established beyond a reasonable doubt that defendant was the shooter. The defense in the case was not that defendant's friends were fine and decent individuals. So what if codefendant is a murderer? Mr. Orr should have been intent on showing *Jelks* was a murderer—and liar—not fearful of codefendant being implicated in other crimes.

The defense respectfully submits this demonstrates Mr. Orr did not have a grasp of the proceedings that were transpiring, This was further indicated by Mr. Orr characterizing the court's "decision" as "outrageous." This was further indicated by Mr. Orr again referring to the detectives on December 6, 1994, having a "murder warrant" for Jelks, and at one point mistakenly referring to the August 5, 1991, Loggins/Benoit murders as happening in *1951*. Counsel realizes that all attorneys misspeak, not infrequently in fact, but taking Mr. Orr's remarks in their entirety, the defense respectfully submits the transcript shows Mr. Orr did not have a grasp on the proceedings that were transpiring.

Finally the court ruled. (FTRT 3608) Addressing *Mr. Lasting*, counsel for codefendant, *not* Mr. Orr, defendant's counsel, the court ruled Mr. Lasting could ask Jelks if in his "pending case" he was facing a potential life sentence if he were to be convicted (FTRT 16:3609); if Jelks had been made any offers regarding his "pending

case" (FTRT 16:3609); if Jelks had any expectations that his testimony in the case would assist him in his "pending case" (FTRT 16:3609). The court then stated:

> If *you* [i.e., Mr. Lasting] want to get into the nature of the case, I'll allow you to, but then we are going to get into the facts of the case as well, and *I'll allow him [Jelks] to testify to the jury as to what the facts were,* or at least I'll allow a tape to be played to the jury, assuming he'd want to invoke his right against self-incrimination. We'd determine that, and assuming so, then the court would *allow the jury to hear the facts of that case, and his [i.e., Jelks's] involvement, and your client's [i.e., codefendant's] involvement.* (FTRT 16:3609)

The court went on to tell Mr. Lasting

> I'll allow you to elicit from him the following: that they informed him he was a suspect in a serious crime, and that they promised him, or told him that he could go home—whatever they say in there, however they phrased it. You can get out of here tonight, we won't book you, we'll give this to the D.A. later, and they'll do what they are going to do but. If you want to get out of here tonight, tell us what happened in these various matters. I'll allow you to elicit that testimony.

Mr. Orr inquired of the court if they could "just" put in the detective saying to Jelks, "We got witnesses that have come out and identified you, as well as other people, in a murder case." The court replied:

> No. We are not going to talk about the fact it's a murder case, because if we do, if we discuss the facts—I told you what I'm going to let you have, which is that he's got a pending case wherein he is facing a potential life sentence. If anybody wants to elicit that it's a murder case, *go ahead and do it,* but then what we're going to do is we're going to hear the murder case and how he found himself in the situation of facing that murder case. And the way he did was to confess his involvement as the driver of the car in which Mr. Johnson allegedly acted as a shooter and passenger. (FTRT,16:3611)

Mr. Orr should have jumped on the court's statement, "If anybody wants to elicit that it's a murder case, *go ahead and do it."* Mr. Orr should have replied, "Fine, I *will.* On behalf of Mr. Allen I *will* be asking Mr. Jelks if his pending case is a murder case. I *will* be asking Mr. Jelks if it wasn't true that he rode in the front passenger seat with a .38

caliber handgun, and I *will* be arguing he was one of the two shooters who fired shots and murdered Mr. Mosley. I *will* be asking Mr. Jelks didn't you *lie* to the detectives in each of the four different stories you told them regarding the murder of Tyrone Mosley. And I *will* also be asking Mr. Jelks much more. And I *will* be calling Mr. James as my own witness if necessary to impeach Jelks." The defense position should have been if all this opens the door to testimony codefendant was one of the shooters who murdered Mr. Mosley, *so what.* The prosecution should not have opposed the defense motion to sever defendants for trial. This is what Mr. Orr *should have* stated.

Instead, Mr. Orr replied, the court was turning the word "murder" into "life sentence." (FTRT 3611-3612) The court responded, "I've indicated what you can get into in cross-examining this witness on the points you've raised so far. Obviously, you can cross-examine him on anything you want, but in terms of these specific points that's the way we'll handle it."

Jelks was brought back into the courtroom and the court told him, "Under no circumstances are we going to talk about the fact you've got a pending murder case. We are going to ask you, however, counsel will, if you have a case pending wherein you might do life, a life top."[13] With that admonition, Jelks resumed his testimony. When he finished, Mr. Orr started his cross examination. (FTRT 3641) Eventually, despite his earlier responses or lack thereof, it actually looked like Mr. Orr might be attempting to address Jelks's participation in the Mosley murder. But it was followed by another strange colloquy, stranger than before:

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13. The defense takes the position in these points and authorities that the court did *not* rule the defense was not allowed to elicit from Jelks his participation in the Mosley murder and subsequently lying to the police, and offer other evidence showing the same. Should the prosecution in defense of Mr. Orr take the position at the hearing of this motion that Mr. Orr was precluded from conducting this cross examination and offering this evidence because the court ruled the defense was not allowed to, then the defense will submit additional points and authorities showing the court abused its discretion in so ruling, and Ms. Lentz-Snyder committed prosecutorial misconduct by failing to disclose material evidence to the court upon the court's request, and thereafter by failing to correct the court's misunderstanding on multiple occasions.

Mr. Orr [to Jelks]: Did you ever participate into [sic] seeking out enemies of the Bloods a
Ms. Lentz-Snyder: Objection.
Mr. Lasting: Your honor, could we approach the bench, your honor?
The court: Yes. Come on up.

Mr. Lasting, Ms. Lentz-Snyder and Mr. Orr approached

Mr. Lasting: I'd object.
Mr. Orr: I know what he's talking about. Forget about it.
The court: You want to withdraw the question?
Mr. Orr: Forget about it.

Mr. Lasting, Ms. Lentz-Snyder and Mr. Orr returned to counsel table.[14]

The court: I believe Mr. Orr wants to withdraw the question, ladies and gentlemen. Is that right, Mr. Orr?
Mr. Orr: Yeah.
The court: Next question.

Why Mr. Orr said "forget about it" is a mystery. He started in the right direction, and then said forget about it. He asked more questions and concluded his cross examination. Later he asked Jelks some questions on re-cross examination. But he never pursued questioning Jelks about participating in seeking out enemies of the Bloods and destroying them; he never asked Jelks was it not true that on the night of September 14, 1991, Jelks, codefendant and Jelly Rock" got into a black, four-door Mazda Protégé; that Jelly Rock was the driver, Jelks sat in the right front seat, and Johnson sat in the rear

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14. In its response to these points and authorities should the prosecution raise an issue that current lead defense counsel, the author of these points and authorities, was second counsel at the trial and is somehow estopped from arguing Mr. Orr was ineffective, upon request counsel can execute a declaration that on several occasions during the trial second counsel advised Mr. Orr to change positions he took, or take positions he failed to take, but with little success. Some time after the trial ended Mr. Orr told current lead counsel he was an alcoholic and drank three or four shots of vodka every morning. If counsel would have suspected Mr. Orr had been drinking before coming to court, counsel would have told Mr. Orr to stop, and if he did not stop, counsel would have felt obligated to report it to the court. Mr. Orr, now deceased, was a good friend of counsel and it pains counsel to author these points and authorities arguing Mr. Orr was ineffective.

seat; that Johnson had a .45 caliber handgun and Jelks had a .38 caliber revolver; that they were off to kill somebody from the 97 East Coast Crips; that it was a perfect opportunity because the 97 East Coast Crips were having a block party; that Jelks and Johnson fired at the 97 East Coast Crips murdering Tyrone Mosley, and when they returned Jelks was still seated in the right front passenger seat. Mr. Orr never asked Jelks was it not true that of December 6, 1994, when Jelks was interviewed by Detective Tapia told Detective McCartin, he gave four different stories regarding the night of September 14, 1991, and never did tell the truth. Mr. Orr's cross examination of Jelks covered none of this.

Finally, as stated *supra*, August 11, 1997, Marcellus James testified during the guilt phase of defendant's trial. On direct examination Ms. Lentz-Snyder elicited from James an alleged admission by defendant that August 5, 1991, he walked up to Loggins and Beroit and just shot them. (FTRT 4042) Continuing on direct examination, Ms. Lentz-Snyder questioned James about his July 11, 1994, interview by detectives (FTRT 4044) but stayed clear of what James witnessed of Jelks's participation in the September 14, 1991, Mosley murder.

Then on cross examination of James, Mr. Orr seemed to attempt to get into the interview. (FTRT 4048) To no one's suprise, Ms. Lentz-Snyder objected. (FTRT 4049) Counsel approached. To no one's suprise, Mr. Lasting was also concerned. The following transpired:

> *Ms. Lentz-Snyder*: The subject matter of that interview, though, was the Mosley murder. The drive-by, which is why we didn't want to go into it. And I have admonished the witness that he can't talk about it, but he was a witness on that case.
> *The court*: I think we ought to stay away from that for that reason. We are liable to get right back into a situation—
> *Mr. Lasting*: That's why I wanted to bring it up.
> *Mr. Orr*: *I wasn't going to go into it.*

The "we" who did not want to get into Jelks's participation in the September 14, 1991, Mosley murder should have been Ms. Lentz-Snyder and Mr. Lasting, not Ms. Lentz-Snyder, Mr. Lasting *and* Mr. Orr. Mr. Orr *should have* wanted to get into it. But

again Mr. Orr made his position clear. He was *joining* Ms. Lentz-Snyder and Mr. Lasting.

Jelks's participation in the September 14, 1991, Mosley murder?

Mr. Orr wasn't going to get into it.

Forget about it.

Mr. Orr ineffectively represented defendant, and the ineffective representation, as will be seen in the cases cited, "affected" his cross examination of Freddie Jelks.

1. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED DEFENDANT THE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE JELKS THEREFORE JELKS'S PRIOR TESTIMONY IS INADMISSIBLE AT TRIAL.

The case law—California and federal—is clear that prior testimony at a hearing where defendant was ineffectively represented is inadmissible under the confrontation and due process clauses of the United States and California Constitutions, and Section 1291 of the Evidence Code. *People v. Jones* (1998) 66 Cal.App.4th 760 , 78 Cal.Rptr.2d 265; *Mancust v. Stubbs* (1972) 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 [affirming the federal confrontation requirement but holding counsel appointed four days before the trial does not *ipso facto* show ineffective representation]; *Stevenson v. Superior Court* (1979) 91 Cal.App.3d 925, 154 Cal.Rptr. 476 [represented defendant incompetent when testimony was given]; *People v. Gibbs* (1967) 255 Cal.App.2d 739, 63 Cal.Rptr. 471 [unavailable witness's prior testimony inadmissible where the attorney was appointed five minutes before his cross-examination]; *People v. Johnson* (1975) 46 Cal.App.3d 701, 120 Cal.Rptr. 372 [conviction reversed upon defense showing significant errors in interpreter's translation of the testimony of Spanish-speaking witness].

Jones gives a good articulation of the current law in California under Evidence Code § 1291 consistent with state and federal constitutional requirements. *Jones* holds that "what is crucial for purposes of both the former testimony exception and the confrontation clause is whether the previous opportunity for cross-examination was *effective*." [Emphasis added.] Citing the United States Supreme Court case of *Mancust v.*

Stubbs, supra, the court goes on to add, however, "[e]ven ineffective assistance of counsel at the first trial need not render former testimony inadmissible, *unless the ineffective assistance actually affected the cross-examination.*" Although the defendant in *Jones* failed to show the ineffective assistance actually *affected* the cross-examination,[15] as will be shown Mr. Orr's ineffective assistance did.

Mr. Orr Failed to Impeach Jelks Regarding His Participation and Later Lying to Police Regarding the Murder of Tyrone Mosley

There are four separate and distinct reasons why Mr. Orr ineffectively represented defendant by his failure to show Jelks's participation in the murder of Tyrone Mosley on September 14, 1991, and as a result thereof what Jelks was told and how Jelks responded and lied when he was interviewed by detectives December 6, 1994. Mr. Orr's ineffective representation deprived the defense of:

1. Contradicting much of Jelks's testimony on direct examination;

2. Introducing evidence of Jelks's character trait for dishonesty and moral turpitude;

3. Introducing evidence of Jelks's motive to ingratiate himself with the prosecution, regardless of whether his testimony was truthful or not;

4. Showing Jelks's testimony was false, involuntary, and the product of continuing police coercion.

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15. "We conclude that, to demonstrate that admission of the former testimony violated either the Evidence Code or the confrontation clause, it is not enough to show some violation of some constitutional right at the first trial; it must be shown the violation actually interfered with an effective cross-examination. Here, defendant did not do so. He never pointed to any particular deficiency in the cross-examination. Although he claimed he would have cross-examined differently, he never explained precisely what he would have done differently. Therefore, he never showed his cross-examination would have been any more effective."

In an effort to enhance his credibility with the jury, the prosecution elicited testimony by Jelks that could have been contradicted by his statements to detectives December 6, 1994. During direct examination of Jelks, Ms. Lentz-Snyder did more than just have Jelks testify as to what he claimed to have seen and heard on August 5, 1991, regarding the Loggins/Beroit murders. She asked numerous questions in an effort to bolster Jelks's credibility as a witness. Many of Jelks's answers however were direct contradictions to what he told the detectives December 6, 1994.

For example, Jelks falsely testified that he never would have performed a "mission" (i.e., a murder) for the gang. During direct examination, Ms. Lentz-Snyder started by asking Jelks what a "mission" was, and whether the Loggins/Beroit killings would have been a mission:

> *Ms. Lentz-Snyder*: Would this shooting [of Loggins and Beroit] have constituted a mission?
> *Jelks*: Yeah.
> *Ms. Lentz-Snyder*: What's a mission?
> *Jelks*: When you—when you go out and commit murder. (FTRT 3624-3625)

Ms. Lentz-Snyder then asked Jelks if he would have ever gone on a "mission" for Johnson. Jelks responded that he would *not* have gone on a mission *even* if Johnson had ordered it, adding he would have undergone the gang's disciplinary penalty for refusing Johnson's order before he would have gone on a mission:

> *Ms. Lentz-Snyder*: Now, if Mr. Johnson ordered you to go on a mission would you do it?
> *Jelks*: No.
> *Ms. Lentz-Snyder*: What would happen if you didn't go on it?
> *Jelks*: Discipline.
> *Ms. Lentz-Snyder*: What's—in the form of what?
> *Jelks*: Probably you'd get beat up, you know, beat on and jumped on.
> *Ms. Lentz-Snyder*: Would Mr. Johnson actually carry out the discipline?
> *Jelks*: In some cases, yeah.
> *Ms. Lentz-Snyder*: If he didn't do it, who would? .
> *Jelks*: The next person in line.
> *Ms. Lentz-Snyder*: Does Mr. Johnson—did Mr. Johnson in 1991 have any followers?
> *Jelks*: Yeah.

Ms. Lentz-Snyder: Would those people do what he said?
Jelks: Yes. (FTRT 3626-3627)[16]

This testimony by Jelks, elicited by the prosecutor, undoubtedly had an impact on the jury. In effect, Jelks told the jury he would have subjected himself to a physical beating by Johnson or members of the 89 Family Bloods gang before he would ever have agreed to kill someone.

The problem was Jelks's answer of course was a lie, and Ms. Lentz-Snyder *knew* it. Just five weeks after the Loggins/Beroit murders, Jelks *did* go on a mission with Johnson into 97 East Coast Grips territory, a rival gang member, Tyrone Mosley, was murdered and two other individuals were seriously wounded. During the December 6, 1994, interrogation, finally in Story #4, Jelks "admitted" he was the driver on that mission. Marcellus James had him armed with a .38 caliber revolver and likely one of the

16. Jelks also told the detectives the same lie at one point during his interrogation December 6, 1994, that he had not done "missions" with "Evil" in the past.(CT Supp IV 4:865-866)

shooters.[17] But on cross-examination, when it looked like maybe possibly hopefully Mr. Orr would confront Jelks and maybe possibly hopefully establish he had lied to the jury on direct examination about never serving a mission for codefendant Johnson because Jelks's participated in the Mosley murder, prosecutor Lentz-Snyder objected and defense lawyer Orr said, okay, forget about it.[18] Who said jury trials were a means at arriving at the truth?

This the defense respectfully submits was an instance of ineffective representation by Mr. Orr that *affected the cross-examination* under *Jones*. But for his lawyer, had

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17. In fact, during her penalty phase closing argument against codefendant Johnson, Ms. Lentz-Snyder told the jury that Jelks had "served" a "mission" with Johnson just five weeks after the Loggins/Benoit murders; that co-defendant Johnson "hops in the car with two other homeboys, F.M., known as Freddie Jelks, and Jelly Rock, Leondre Hewitt, and they do the drive by." (RT 7441) Ms. Lentz-Snyder further told the jury during the penalty phase that Jelks was the driver of the car, that he drove the killers into the rival gang's territory, that he flicked the lights on and off to attract the party-goers' attention, and then people "walking up toward the car and getting blasted by men who went over there with the intent to kill, with the intent to seek revenge against 8—against 97 East Coast Crips simply for being there." (RT 7441) Ms. Lentz-Snyder also told the jury minutes later, "But there was nobody in that car that did not intend that person [Tyrone Mosley] to die." (RT 7451) Of course, this argument by the prosecutor came long after she had Jelks testify on direct exam that he had never served a mission for Johnson, nor would he have ever served a mission for Johnson. Her argument came long after the jury deliberated the guilt of defendant based to a large extent on the "credible" testimony of Freddie Jelks. Her argument, coming when it did, could not be considered by the jury in determining that Jelks had lied while testifying during the guilt phase. In fact, because that argument, and the evidence upon which it was based, was introduced as aggravating evidence solely against codefendant Johnson, the jury was legally prohibited from considering it on behalf of defendant, even if they had wanted to! However, her penalty phase argument does illustrate in very clear terms that she knew Jelks's testimony was not truthful. The prosecutor apparently knew she was presenting false testimony yet did nothing at the time to correct it (and because of the court's ruling, she knew the defense could also do nothing to refute it).

18. During his direct examination was not the only time Jelks lied about never having served a mission for codefendant Johnson. During the December 9, 1994, interview, Jelks also told the detectives that he would never have served a mission for Johnson. (CT Supp IV 4:865-866) Of course, this statement by Jelks to the detectives occurred before Jelks "admitted" to the detectives that he was the driver in the Mosley murder.

defendant been allowed to confront Jelks with his participation with codefendant in the September 14, 1991, gang-related drive-by shooting, it would have been apparent to the jury Jelks had lied to them on direct examination about no missions with codefendant. This would have been bolstered by Mr. Orr establishing Jelks had also lied to the detectives during his interrogation December 6, 1994. This, along with the other details of Jelks participation in the murder and subsequent interrogation, could have led the jury to infer Jelks was very willing to lie if he thought it would in some way benefit him. This cross-examination of Jelks that Mr. Orr chose to "forget about" could have given the jury pause to accept Jelks's testimony regarding the Loggins/Beroit murders or even to discount his testimony outright. Mr. Orr 's ineffective representation in this regard precluded this from happening.

Another example of Jelks's answers at trial that contradict what he told the detectives December 6, 1994, was Jelks falsely testifying he was *not* the type of gang member who would want to shoot someone. Continuing to present Jelks in a false light to the jury, Ms. Lentz-Snyder asked Jelks a series of questions about what it meant to "go serving" or "go shooting" for the gang (FTRT 16:3542). After Jelks explained that defendant volunteered to "serve" Loggins and Beroit (FTRT 15:3543), Ms. Lentz-Snyder asked Jelks, "Why didn't *you* volunteer?" Jelks's responded that he "didn't want to shoot nobody."

> *Ms. Lentz-Snyder*: Well, you didn't like 89 East Coast, right?
> *Jelks*: No.
> *Ms. Lentz-Snyder*: Why didn't you volunteer?
> *Jelks*: I didn't want to go do it.
> *Ms. Lentz-Snyder*: Why not?
> *Jelks*: I didn't want to shoot nobody. (FTRT 16:3543)

Jelks had told this same lie to detectives on December 6, 1994, that he was not the type of person who "goes out and hurt[s] people" or "fucks over people"; that he was "one person that's trying to bring the positive message across" to residents of the gang-infested community. (CT Supp IV 4:852-853) Later Jelks repeated he was "not that type of guy" who "want[s] to hurt somebody for no reason."

> *Jelks*: Listen .... I'm not—I'm not that type of guy, man. And for some reason you feel like I am. But I'm not, man. I—I'm not. I'm not even—I'm not even that type of guy, man, that just want to hurt somebody for no reason, man. Even when I lived over there. (CT Supp IV 4:989-990)

But for Mr. Orr, the defense could have confronted Jelks with him *subsequently* telling the detectives that he was "the driver" in the September 14, 1991, gang-related drive-by shooting, not to mention James's statement and other evidence pointing to Jelks being one of the *shooters*. The court is quite familiar how this is done. Defendant's counsel gets Jelks to reaffirm his testimony on direct examination, then gets Jelks to confirm the self-serving comments he made to the detectives, then confronts Jelks with his subsequent admission to the detectives, even though he said he was the driver:

> *Mr. Orr*: Isn't it true Mr. Jelks that only five weeks after the Loggins/Beroit murders you drove Mr. Johnson and Jelly Rock into a rival gang's neighborhood at night for the sole purpose of killing someone for no good reason, and you admitted this on tape to detectives December 6, 1994?[19]

Alas, that question is *not* part of the transcript the prosecution now seeks to offer. Alas, that question or one like it was never asked by Mr. Orr in the transcript the prosecution now seeks to offer.

With the cross examination that never happened the jury would have seen Jelks in a different light. The jury would have realized Jelks was not forthright and honest when he testified under oath on direct examination. They would have known that Jelks lied to the detectives and that he was constantly trying to minimize his gang involvement. They would have seen that Jelks was willing to lie, and lie, and lie, when he thought it was in his best interests to do so.

But of course it *was* in Jelks's best interest to mislead the jury, if necessary, by testifying in a manner that assisted the prosecution. By assisting the prosecution, he could

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19. The various illustrations raised by defendant in this issue assume that Jelks was the driver in the Mosley murder. They do not address the additional dispute that would have been heaped on Jelks's credibility had the jury heard what Marcellus James said was Jelks's involvement.

have hope that his "cooperation" with law enforcement would be in his "best interest," and result in beneficial treatment regarding his *pending* case. This is another example of how Jelks's less-than-truthful testimony could well have caused the jury to view his credibility very differently, to discount or even reject his testimony. But because of Mr. Orr's ineffective representation we will never know.

Another example of Jelks's answers at trial that contradict what he did September 14, 1991, and said December 6, 1994, was that on direct examination Jelks falsely implied that he had "gotten away from the gang" because of the unnecessarily violent August 5, 1991, Loggins/Beroit Murders, violence in which he did not involve himself. Near the close of direct examination, Ms. Lentz-Snyder again sought to enhance Jelks's credibility by having Jelks once more deny ever being involved in violent gang activity. However here Ms. Lentz-Snyder and Jelks were careful not to be too specific. After referring to the Loggins/Beroit murders, the pronoun "things" was used. Although arguably ambiguous as to what Jelks meant when he used the word "things," the natural inference was that "things" referred to violent gang activity, such as the Loggins/Beroit murders that he referred to in the previous question. Jelks's response to Ms. Lentz-Snyder's question suggested Jelks decided to abandon his gang affiliation because of the senseless violence involved in the Loggins/Beroit murders:

> *Ms. Lentz-Snyder*: Now, since this—since this shooting [i.e., the August 5, 1991, Loggins/Beroit murders], you said that you have gotten away from the gang, is that right?
> *Jelks*: Yes.
> *Ms. Lentz-Snyder*: Why did you do that?
> *Jelks*: More or less I just having come to grips with myself, as far as all the things that I've seen.
> *Ms. Lentz-Snyder*: And all the things—have you done any of those things, too?
> *Jelks*: No. I—no. I've participated in some things, but a lot of things I just want to get away from.
> *Ms. Lentz-Snyder*: Have you gotten away from those things?
> *Jelks*: Yes. (FTRT 3627)

But for Mr. Orr, if defendant had been allowed to confront Jelks with Jelks's subsequently telling the detectives that he was "the driver" in the *September 14*, 1991,

gang-related drive-by shooting, not to mention the other evidence that he was one of the shooters, defendant's counsel could have confronted Jelks with what he meant when he used the word "things." The natural and reasonable inference would have been that the gang-related "things" Jelks had "seen" but not "done" were the violent "things" perpetrated by the gang. Jelks had previously admitted that he had participated in some "things" on behalf of the gang, such as selling drugs. (FTRT 3626) However, Jelks would have been viewed in a different light had Mr. Orr showed the disingenuousness of not only Jelks's answers, but Ms. Lentz-Snyder's questions. While lawyers are expected to spin their questions to support their positions, cross examination is supposed to clarify the true facts. It would have been difficult to say the least for Jelks to reconcile his answers to the prosecutor's questions on direct examination with his statements to the detectives December 6, 1994, that he was the driver in the violent September 14, 1991, murder of Tyrone Mosley.[20] This is yet another example of Jelks's less-than-truthful testimony on direct examination that could have caused the jury to view his credibility as a witness—a witness if a truthful individual, devastates defendant—in a different light. This proposed cross-examination of Jelks, never conducted by Mr. Orr, taken in conjunction with the other above-mentioned examples, could have caused the jury to discount Jelks testimony, or even reject it outright.

Perhaps the ultimate blow to defendant caused by Mr. Orr's ineffective representation occurred at the end of direct examination when Ms. Lentz-Snyder, doing what lawyers do, made a final attempt to portray Jelks in as favorable a light as possible to the jury. She asked him if anyone had told him what to say, was he being paid, was he telling the truth, did he tell the truth to the grand jury, and finally, "When you talked to the police in December of 1994, were you telling the truth?" Jelks responded as expected, "Yes." (FTRT 16:3640)

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20. The irony of this entire issue is that during the penalty phase of defendant's trial, Ms. Lentz-Snyder presented evidence to the jury that Jelks was involved in the Mosley murder. That testimony by James, however, was too late to be considered by the jury in evaluating Jelks's credibility in the guilt phase. Further, it was admissible only as to codefendant in the penalty phase. Even if the jury wanted to consider it on behalf of defendant, it was too late and they were instructed not to.

What an opportunity! Mr. Orr could have cross-examined Jelks with questions like these: "Which of your lies to the police were you referring to during the interview when you testified under oath that you told them the truth? Was it Story #1? Was it Story #2? Was it Story #3? Or was it Story #4?" The defense could have proven they were all lies. The defense respectfully submits it would have been significantly probative of Jelks's credibility for the jury to hear that Jelks lied to the police over and over and over about his own gang involvement. In fact, when considered with other evidence such as the testimony of Mr. James, the jury could have found that Jelks never did tell the police the truth about his own gang crime involvement even at the end of the interrogation when he adopted the detective's suggestion that he was "only" the driver in the drive-by murder of Mosley. The defense argument would then have been why believe him beyond a reasonable doubt when he then tells you about someone else's supposed involvement in a gang crime, i.e., defendant's. Mr. Orr could have conducted this cross examination and made these arguments rather than, to paraphrase Mr. Orr, "forgetting about it."

The reporter's transcript of Jelks's direct and redirect examination is lengthy. So these points and authorities do not run more pages than they now do, the court is invited to read it. If the court does, it will see there are other, more subtle places in Jelks's answers on direct examination at trial that contradict what he apparently really did on September 14, 1991, and told the detectives December 6, 1994, such as where Jelks falsely minimizes his gang involvement by suggesting he was only a "four" on the gang respect gauge. By reading the entire transcript of Jelks's testimony one gets a sense of the damage done by Mr. Orr's representation.

As stated *Jones* holds that while what is crucial for purposes of both Evidence Code § 1291, and the confrontation clause, the ineffective assistance of counsel renders former testimony inadmissible when it affected the witness's cross-examination. The defense has endeavored to show exactly how Mr. Orr's ineffective assistance did affect his cross-examination of Jelks by showing the lines he should have pursued and the questions he should have asked.

Besides depriving the defense of contradicting much of Jelks's testimony on direct examination, Mr. Orr's ineffective representation deprived the defense of presenting

evidence of Jelks's character traits for dishonesty and for moral turpitude, and there is no question the California cases allow this. The defense could have proven Jelks had a character trait for dishonesty, as well as for moral turpitude, if Mr. Orr would have introduced evidence of Jelks's participation in the Mosley murder and confronted Jelks with his statements to the detectives December 6, 1994. The evidence of Jelks's participation in the Mosley murder and his later lying to the police was admissible to impeach his credibility. Evidence Code § 780(e) expressly authorizes a jury in determining a witness's credibility to consider that witness' "character for honesty or veracity or their opposites." On June 8, 1982, the California electorate amended California Constitution Article I, § 28(d) to read, "Except as provided by statute ... relevant evidence shall not be excluded in any criminal proceeding." In response *People v. Harris* (1988) 47 Cal.3d 1047 held that Article I, § 28(d) abrogated the restrictive provisions of Evidence Code § 786, § 787 and § 790, and hence, specific instances of conduct are admissible to impeach the credibility of a witness by establishing that a witness has a character trait for dishonesty or untruthfulness.[21] See *People v. Wheeler*

21. § 28(d) was made applicable in cases in which the charged offense was committed on or after June 8, 1982. (People v. Smith (1983) 34 Cal.3d 251, 262) Hence, it applies to this case.

(1992) 4 Cal.4th 284, 295;[22] also *People v. Ayala* (2000) 23 Cal.4th 225, 273.[23] Thus the defense was entitled to show that Jelks had a character trait for dishonesty or untruthfulness. The defense could have shown this by showing Jelks would lie on various occasions if he thought he could avoid trouble, or if he thought he could benefit from lying. An illustration of Jelks's character trait for untruthfulness was his interrogation by detectives on December 6, 1994 when he lied, then lied, then lied again. That interrogation alone shows Jelks had a propensity to fabricate, lie or try to mislead whenever he thought he could avoid trouble, or when he thought it would be in his best interests. It was in his best interests to tell the detectives, and later Ms. Lentz-Snyder, what he thought they wanted to hear, regardless of whether it was the truth or not. Mr.

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22. Misconduct involving moral turpitude may suggest a willingness to lie (see *People v. Castro, supra,* 38 Cal.3d 301, 314-315; *People v. White* (1904) 142 Cal. 292, 294 [75 P 828], People v. Carolan (1886) 71 [4 Cal.4th 296] Cal. 195, 196 [12 P. 52]; *Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78), and this inference is not limited to conduct which resulted in a felony conviction. While the trial court may weigh proffered impeachment evidence on its individual merit, there is no basis for a ruling that the court's discretion may never be exercised to admit nonfelonious conduct.

23. In ruling on the question whether evidence is substantially more prejudicial than probative, the trial court enjoyed broad discretion. (Evid. Code, § 352.) The prosecution was entitled to impeach Sevocchio with evidence of his admitted dishonest representations to prison officials. "The voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases .... Hence, they have decreed at the least that in proper cases, nonfelony conduct involving moral turpitude should be admissible to impeach a criminal witness." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 [14 Cal.Rptr.2d 418, 841 P.2d 938]; id. at p. 296 [applying rule to misdemeanor conviction involving moral turpitude].) *Wheeler* is not limited to prior misdemeanors involving moral turpitude. (Id. at pp. 296-297 & fn. 7 [rule also applies to other conduct].) "Whether the trial court admits evidence of past misconduct should be determined solely on the basis that that conduct evinces moral turpitude. The label is not important [i.e., what type of statutorily defined offense, if any, the conduct constitutes]-the conduct is." (*People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90 [63 Cal.Rptr.2d 735].) [23 Cal.4th 274]

Orr's failure to show Jelks's participation in the Mosley murder and his later lying to the police prevented the defense from showing Jelks's propensity to lie.[24]

People v. Lankford (1989) 210 Cal.App.3d 227, 234, held that the defendant placed his character at issue by embellishing his credibility with specific acts of his good conduct and character. Accordingly, in *Lankford* the prosecution was allowed to introduce impeachment evidence of his *pending* robbery case to directly dispel the false and misleading evidence of credibility introduced by the defendant. The prosecution did the same through Jelks's testimony. Jelks repeatedly testified to specific conduct in order to downplay and minimize his gang involvement and enhance his credibility. For example, Jelks testified that he stopped his membership in the gang because he had a family to support (FTRT 3518); that he didn't want to shoot anybody (FTRT 3543); he was only a level four out of ten in gang participation (FTRT 3561); he would never be involved in a "mission" (FTRT 3626); that his only participation in the gang was to contribute money (FTRT 3626); that his reason for testifying was to simply tell what happened (FTRT 3628); that he left the gang after the senselessly violent Loggins/Beroit murders (FTRT 3627); that he had *never* participated in any gang related murder (CT Supp IV 4:1-338) Mr. Orr's failure to offer to show Jelks's participation in the Mosley murder and his later lying to the police disallowed the defense the opportunity to place Jelks in the proper light as permitted by *Lankford*, by rebutting the direct examination conducted by the prosecution.

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24. Since unlawfully trying to kill another human being with malice aforethought is an act involving moral turpitude (*People v. Castro* (1985) 38 Cal. 3d 301, 314), or a willingness to do evil (*Gerry v. Fitchburg Railroad* (1884) 137 Mass. 77, 78; *People v. Lepolo* (1997) 5 Cal.4th 85, 89; *People v. Feazier* (2002) 102 Cal.App.4th 1084, 1091.), evidence underlying Jelks's pending murder case was also relevant to prove his character trait "to do evil" whenever he thought it would be of benefit to him. After all, anyone who would unlawfully kill another human being for reasons that benefitted him would certainly be willing to lie, if he thought it would be of benefit to him. However, the court's ruling also disallowed defendant from establishing this fact also. See *People v. Lankford* (1989) 210 Cal.App 3d 227, 234 defendant's pending robbery case was admissible to refute his claim of recent good moral and law-abiding character].

Besides depriving the defense of contradicting much of Jelks's testimony on direct examination, and depriving the defense of presenting evidence of Jelks character trait for dishonesty and for moral turpitude, Mr. Orr's failure to show the details of Jelks's lying to the police about his participation in the Mosley murder foreclosed the defense from showing Jelks had a motive and a bias to say anything that he thought would please the prosecution, regardless of its truth or falsity. A criminal defendant shows a violation of the confrontation clause by showing that he was deprived of engaging in otherwise appropriate cross examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. *In re Ryan* (2001) 92 Cal.App.4th 1033, 1385, citing *Delaware v. Van Arsdall*, 475 U.S. at pp. 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 318. The cross-examiner must be allowed the opportunity to place the witness in his or her proper light, and to put the weight of the witness' testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, subject of course to the protective provisions of Evidence Code § §352.

Mr. Orr could have shown Jelks had a motive and a bias to say anything that he thought would please the prosecution, regardless of its truth or falsity, if Mr. Orr would have only tried. In *Davis v. Alaska* the United States Supreme Court held that even if cross-examination of a witness in general is allowed, not allowing impeachment of that witness on cross-examination can violate the confrontation clause. In *Davis* Richard Green, a seventeen year old on probation for burglarizing two cabins as a juvenile, was the prosecution's primary witness in a burglary prosecution against the defendant. Green testified that he had seen the defendant and another man standing with a crowbar at the side of a road near his home, where a safe from the burglary was later found. The defense wanted to cross-examine Green about his juvenile record. The defense intended to argue that Green "might ... have made a hasty and, faulty identification of [defendant Davis] to shift suspicion away from himself" as the burglar, and that "Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation."

Pursuant to the Alaska statute the trial judge prohibited any reference to Green's juvenile record. The defense attempted to cross-examine Green about his state of mind at the time of the identification. "Shielded from traditional cross-examination," Green testified he was not concerned whether the police suspected him in the burglary and categorically denied ever having been interviewed by police officers before—answers "highly suspect at the very least." The trial court ruled that "the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury." Wrong. The U.S. Supreme Court rejected the court's ruling:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. [Davis] was thus denied the right of effective cross-examination "which would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis* (1966) 384 U.S. 1, 3. (Id., at p. 318. Italics in original.)

The Supreme Court held that limiting the defendant's cross-examination of Green in this manner was a violation of the Sixth Amendment confrontation clause. Recognizing that cross-examination was "the principal means by which the believability of a witness and the truth of his testimony are tested," the court remarked that "it would be difficult to conceive of a situation more clearly illustrating the need for cross-examination" than this one. The court explained that the right to cross-examination has traditionally included the right to impeach the witness. "Introduction of evidence of a prior crime" intended to suggest to the jury that "the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" was a general means of impeachment. The exploration of "biases, prejudices, or ulterior motives" for a witness' testimony was a more specific means of impeachment. The court

stated that regardless of whether the jury would have believed it, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony."

Although *Davis* involved witness Green's prior juvenile adjudications for burglary, the same analysis would apply if the accusing witness had a pending murder case when cross-examined. Defendant Davis would still want to show that the witness' testimony may have been a lie in an attempt to deflect suspicion from himself. In the case where Jelks testified, and the prosecution now seeks to introduce his testimony, the defense would have wanted to show that the witness may have been subject to undue police pressure resulting from fear of arrest just before Christmas or reprisal at his impending trial. The similarity of the need of the defense to fully cross-examine the accusing witness in *Davis*, and need of the defense to fully cross-examine the accusing witness in the case where Jelks testified is obvious. The defense respectfully submits there was no less a violation of defendant's confrontation rights when Mr. Orr failed to impeach Jelks regarding his participation and later lying to police regarding the murder of Tyrone Mosley, than the court foreclosing cross examination by the defense in *Davis*.

Mr. Orr's failure to impeach Jelks regarding his participation and later lying to police regarding the murder of Tyrone Mosley prejudiced defendant. On direct examination, the prosecutor presented Jelks to the jury in a favorable light. To begin with, Jelks assured the jury that he was there to testify "voluntarily," even though he had a pending criminal case himself. He emphasized he had been given "no deals" in his pending case in exchange for his testimony. He swore that no one was forcing him to come to court and testify. (FTRT 3514) The prosecutor conveyed to the jury that Jelks came forward voluntarily and talked with the police about the Loggins/Beroit murders. Jelks did this because he felt "he ought to ... tell what happened" after seeing "all the chaos that goes on" while he lived in that community. Ms. Lentz-Snyder brought out that Jelks spoke to the police, and was now testifying even though he was "in custody" in his pending case, he was "facing a lot of time" in his pending case, and no one had promised him anything regarding his pending case in exchange for his testimony although he admitted he "hopes something good happens to" him. (FTRT 3627-3629) Jelks affirmed

that he was "telling the truth," that he was not required to testify in a particular manner nor had anyone told him "what to say." Jelks finally testified that he also had "told the truth" when he was interviewed by detectives on December 6, 1994, just as he was telling the truth while testifying before the jury. (FTRT 3639-3640) At the conclusion of direct examination, the prosecution had succeeded presenting Jelks to the jury in a very favorable light. The jury must have been impressed with Jelks's based on his testimony on direct examination. When Mr. Orr concluded his cross examination, Mr. Lasting, counsel for codefendant, made a few points when he asked Jelks the same question Ms. Lentz-Snyder previously asked him. Jelks's response was different, however. Rather than having a "hope that something good happens to" him on his pending case, Jelks now asserted that he was "not expecting anything" in exchange for his testimony. He denied have been told anything about his pending case. (FTRT 3684) He was evasive when responding to questions that pertained to the status of his pending case. He continued to minimize, if not deny, any expectation of favorable treatment he might receive in exchange for his testimony. (FTRT 3727)

Then on Ms. Lentz-Snyder's redirect examination, Jelks's answers magically became responsive and lucid as he further explained his reasoning for coming forward with information regarding the Loggins/Beroit murders. He explained to the jury that he "felt better" being able to finally "release the information" that he previously had kept inside him. (FTRT 3746-3747) Ms. Lentz-Snyder continued on redirect examination to elicit information from Jelks that undoubtedly placed him in a favorable light with the jury. Jelks explained it was his "hope" that by speaking out against the gang, he was "providing a break" for those people who still lived in that gang-dominated community. That was why he was voluntarily testifying, that no one was "forcing" him to testify, and that he had no ulterior motive for testifying:

> *Ms. Lentz-Snyder*: Are you testifying today because somebody is forcing you to?
> *Jelks*: No.
> *Ms. Lentz-Snyder*: Are you testifying today because somebody else has told you what to say?
> *Jelks*: No.

Ms. Lentz-Snyder: Are you testifying because you have something against Mr.. Johnson or Mr. Allen?
Jelks: No.
Ms. Lentz-Snyder: Why are you testifying?
Jelks: I'm—it's time for something different, you know. You've got a lot of people—you know, I got kids. A lot of people in the community needs another break, you know, and—
Ms. Lentz-Snyder: Are you providing a break?
Jelks: I would hope so. (FTRT 3747-3748)

Ms. Lentz-Snyder took a considerable amount of time and effort to present Jelks as an individual whose motivations for testifying were the same as any law-abiding citizen who had witnessed a terrifying crime. In fact, Ms. Lentz-Snyder succeeded in showing the jury that Jelks's motivations for testifying were nothing short of exemplary, even for a normal law-abiding citizen.

Unfortunately the prosecutor's presentation of Jelks as a witness whose credibility was the same as any good, law-abiding individual was of course false. Ms. Lentz-Snyder and Mr. Orr were in possession of evidence that Jelks was a murderer and a liar. It was very important to the defendant that his lawyer confront and cross-examine Jelks to present Jelks to the jury in a different light; that Jelks had not been forthright and honest with the jury. Mr. Orr could have shown that Jelks was not only disingenuous in his testimony, but he also lied. If Mr. Orr could have shown in detail what Jelks did on the night of September 14, 1991, and how Jelks responded and lied December 6, 1994, when interviewed by Detective Tapia and Detective McCartin. The defense could have argued that Jelks was not motivated to testify as any other "good citizen," and his testimony was about as "voluntary" as the robbery victim who turns over his wallet with a gun pointed at his heart. Instead, Mr. Orr advised the court with the concurrence of Ms. Lentz-Snyder, who had objected, "Forget about it."

That the prosecution presented Jelks in a false light became very apparent when Jelks finally agreed with the detectives that he was the driver of the car in the Mosley murder. He told the detectives that codefendant Cleamon Johnson and "Jelly Rock" were the shooters. (CT Supp IV 4:906-907) Immediately thereafter, Jelks began to say over and over that the 89 Family gang members were going to kill him because he told the

police about their involvement in the Mosley murder. (CT Supp IV 4:908) Detective McCartin tried to calm Jelks down, saying, "They don't know where you live. If you have to, we could relocate you somewhere, Freddie." (CT Supp IV 4:908) Besides depriving the defense of contradicting much of Jelks's testimony on direct examination, depriving the defense of presenting evidence of Jelks character trait for dishonesty and for moral turpitude, and depriving the defense of introducing evidence of Jelks's motive to ingratiate himself with the prosecution, regardless of whether his testimony was truthful or not, Mr. Orr's ineffective representation deprived the defense of showing Jelks's testimony was false, involuntary, and the product of continuing police coercion. As Jelks continued to lament to the detectives that his life was in extreme jeopardy, that he couldn't go to jail because of the danger, etc. (CT Supp IV 4:909-912), the detectives continued trying to get Jelks to commit to testifying against codefendant Johnson in the Mosley murder. Jelks directed the discussion back to the witness protection program and asked the detectives to explain it to him. It was here the detectives, in effect, told Jelks that if he wanted to have any hope of getting into the witness protection program, he would have to "please" the DA with his testimony. That is, his testimony in the Mosley murder case, or any other murder case for that matter, would have to be such that the DA would decide he was a good witness, that the DA would want to use him as a witness at the trial, and that his testimony would have to be "vital" in convicting the charged defendants. Jelks then inquired what would happen to him if the DA decided he was not a good witness, or the DA decided she didn't want to use his testimony, or the DA decided his testimony was not vital to the case? Since his homeboys would know that he had snitched them off, would he just be discarded because the DA didn't want to deal "with that asshole"? Detective McCartin's response was very clear and re-assuring to Jelks. Things would work out okay. They wanted to work out a deal with him, otherwise they wouldn't have been talking to him:

> *Tapia*: So either—either you're with us or you're not. There it is.
> *Jelks*: Okay. Now, let me say this to you. So if I—is that going to be—is that—what is that supposed to be like? A witness protection program or something?

McCartin: Yeah, we'd have to put you in a witness protection program. What happens is—no, if the DA decides that you're a good witness and they want to use you, and that you're vital to our case, funding will come down and you could be moved to another town another city somewhere to protect you from anybody ever coming after you. And when you're needed for these hearings, we go down, we pick you up, we bring you in, and then we take you back.
Jelks: And this is going to work?
McCartin: Yeah, why wouldn't it work?
Jelks: I'm asking you. I mean—
McCartin: No, we've done it (Untranslatable)
Jelks: (Untranslatable) I don't—See, I don't want to get you all upset, and then you be like "fuck it, I don't want to deal with this asshole," and—
McCartin: No, no, no, no, no. I don't want either. I want us to keep on a good rapport basis with you. I don't want to—I don't want things to not work out. That's why we got you.
Jelks: All right.
McCartin: And that's why we're talking to you. If we didn't want to work something out with you, we would have—we wouldn't even be in he room here sitting with you for so long.
Jelks: Right. (CT Supp IV, 4:913-915)

At this point, Jelks knew the police "wanted to work something out with" him. He had confessed to being the driver in the Mosley murder. He had "snitched off" fellow gang members Cleamon Johnson and "Jelly Rock." His life was in danger because of this. Jelks was fully aware at this point that his freedom as well as his life depended on his doing whatever the police and prosecutor wanted him to do. And up until this point in the interrogation, there had still been no mention of the Loggins/Beroit murders. As far as Jelks's state of mind at that time, everything he was expected to do for the prosecution pertained to the Mosley drive-by murder. The detectives continued discussing the Mosley murder with Jelks for another 15 pages of transcript (to CT Supp IV 4:930) Finally, the detectives asked Jelks about the Loggins and Beroit murders. (CT Supp IV 4:934)

On cross examination, the defense should have and under the cases cited could have rebutted Jelks's magnanimous responses by showing a bias on Jelks's part. The defense should have and could have shown Jelks was trying to please the prosecution and ingratiate himself with the jury. The defense should have and could have shown

Jelks's real reason for testifying was different and a lot less "noble" than what Jelks stated on direct examination. The defense should have and could have shown in effect Jelks had no choice. He either testified in a manner that pleased Ms. Lentz-Snyder or he knew he would 1) receive no benefit in his pending case in return for his testimony, and 2) not receive any witness protection or relocation assistance from the prosecution. The defense should have and could have shown Jelks believed he could spend the rest of his life in prison without protection from those who would seek to kill him if he did not testify in a manner that pleased the prosecution

But, alas, to show that Jelks fabricated his testimony Mr. Orr would have had to shown what Jelks did on September 14, 1991, and how he lied about it on December 6, 1994.

"Forget about it."

Mr. Orr Failed to Impeach Jelks Regarding His Participation Regarding the February 9, 1992, Murders

Besides Mr. Orr ineffectively representing defendant by his failure to show Jelks's participation in the murder of Tyrone Mosley on September 14, 1991, and as a result thereof what Jelks was told and how Jelks responded and lied when he was interviewed by detectives December 6, 1994, Mr. Orr also ineffectively represented defendant by his failure to show Jelks's participation in the February 9, 1992, murders and attempted murders at 724 East Calibum Drive in Avalon Gardens and later at at 122 East 82nd Street. The victims of these crimes were Meshack Evans, Barbara Hamlin, Shanelle Hamlin, Rodriguez DeLeon Moore, Jequwan Lamar Johnson and Allen Earl Holloway. Codefendant Johnson identified Jelks as one of the assailants that entered Avalon Gardens, and while codefendant Johnson denied being present, the district attorney noted additional information indicating Johnson was also present and one of the shooters. When detectives interviewed Jelks about the Avalon Gardens shootings, he was noticeably deceptive and untruthful. Jelks's participation in the Avalon Gardens shootings, like his participation in the Mosley shooting, constituted serious moral turpitude, and, as with the Mosley shooting, Mr. Orr should have sought to question Jelks

about it on cross examination. He never did. The same is true for Jelks participation later that the same night in the shootings at 122 East 82nd Street of Jequwan Lamar Johnson and Allen Earl Holloway

Mr. Orr Failed to Investigate and Prepare for Jelks's Testimony

The law is settled in California that counsel has to effectively investigate and prepare his cross examination, and failure to do so can constitute ineffective representation. The discovery clearly showed Jelks appeared at the police station under his own steam to be questioned December 6, 1994, by Detective McCartin and Detective Tapia. Mr. Orr's belief they had a "murder warrant" for his arrest indicates lack of preparation. Embarrassingly, Mr. Orr persisted in this belief even after he was corrected by counsel and the court.

Then before Judge Horan read the lengthy transcript of the December 6, 1994, interview by the detectives, he asked counsel if Jelks gave information about Mr. Johnson. Mr. Orr replied no. This indicated Mr. Orr had not read the transcript of the interview because Jelks crucified codefendant during the interview, claiming codefendant was a shooter in the Mosley murder.

When Judge Horan finished half the transcript he inquired if there was any other evidence that tied Jelks and codefendant to the Mosley murder. Ms. Lentz-Snyder informed him about the July 11, 1994, interview of Marcellus James and also the grand jury testimony of James in the Mosley murder case. Instead of detailing for the court *how* James tied Jelks to the Mosley murder Mr. Orr never spoke, seemingly unaware of the evidence about which the court was inquiring.

Finally, Mr. Orr was seemingly unaware of the evidence linking Jelks to the murders and attempted murders on February 9, 1992, at 724 East Caliburn Drive in Avalon Gardens and later at at 122 East 82nd Street.

The defense respectfully submits the transcript shows Mr. Orr failed to effectively investigate and prepare for the testimony of Freddie Earl Jelks, and as has been shown above in great detail the failure affected his cross examination of Freddie Earl Jelks.

2. DEFENDANT JOINS IN CODEFENDANT JOHNSON'S CONTENTION THE PROSECUTION WITHHELD EVIDENCE OF CONFLICTING STATEMENTS MADE BY JOHNNIE THOMAS

The defense expects counsel for codefendant to argue the prosecution withheld evidence of conflicting statements made by Johnnie Thomas which denied counsel the opportunity to cross examine Jelks in the 1997 trial, and therefore admission of a transcript of the testimony would result in a denial of the right to confrontation and due process under the United States and California Constitutions. The defense joins in that argument.

3. DEFENDANT JOINS IN CODEFENDANT JOHNSON'S CONTENTION THE PROSECUTION WITHHELD EVIDENCE OF A LENIENCY AGREEMENT BEFORE JELKS TESTIFIED.

At the first trial deputy district attorney Lentz-Snyder started out by stating, "*My position is* that none of the witnesses have been given any offers of leniency." (FTRT 4921). At the hearing of the motions to exclude Jelks' testimony, the court may hear the same "position" from the prosecution, even though, as the defense expects counsel for codefendant Johnson to aptly show in his points and authorities, in codefendant's subsequent trial for the murder of Mosley, this court expressly rejected the claim that no deal was made with Jelks before he testified at the first trial of the current case, and a different deputy district attorney, not Ms.. Lentz-Snyder, as much admitted in her closing argument in the Mosley murder trial a prior deal with Jelks was made.

Conclusion

Under *People v. Jones, supra,* and *Mancust v. Stubbs, supra,* and the other cases cited, the defense respectfully submits defendant was denied effective assistance of counsel in the trial during which the prosecution now seeks to offer Jelks's testimony, the

denial of effective assistance of counsel denied defendant the opportunity to cross-examine Jelks under Evidence Code § 1291, and the denial of the opportunity to cross-examine Jelks will deny defendant his right to confront Jelks under the confrontation and due process clauses of the United States and California Constitutions if Jelks's prior testimony is admitted at trial. Therefore the defense respectfully submits Jelks's prior testimony is inadmissible at trial.

Dated November 28, 2018, at Malibu, California.

LAW OFFICES OF EDWARD WYNNE MURPHY



By_____

Edward Wynne Murphy
Attorney for Defendant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, state of California. I am over the age of 18 and not a party to the within action. My business address is:

Law Offices of Edward Wynne Murphy
20700 Pacific Coast Highway, Suite 6
Malibu, California 90265

On_____I served the foregoing document described as NOTICE AND MOTION TO EXCLUDE PRIOR TESTIMONY addressed as listed below on the other parties to this action by:

- ☐ United States mail
- ☐ Hand delivery
- ☐ Fax
- ☐ Email

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed_____at Malibu, California.

_____

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