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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JONES, JR., Defendant and Appellant.	B286506 (Los Angeles County Super. Ct. No. BA254741)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Reversed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kevin Jones, Jr. was convicted of one count of first degree murder, two counts of attempted murder, two counts of shooting at an occupied motor vehicle, and one count of assault with a semiautomatic firearm. Under the People's theory of the case, Jones was the driver in a gang-related drive-by shooting that occurred on August 12, 2003. Another division of this court affirmed Jones's convictions in an unpublished opinion. That appellate court rejected Jones's contentions that statements he made in a police interview violated his right to remain silent and that statements he made in that interview, as well as a subsequent interview, were involuntary. Jones sought federal habeas relief, which the Ninth Circuit Court of Appeals granted in a published opinion. The Ninth Circuit held that detectives violated Jones's right to remain silent during the first interview and that the admission of Jones's statements made in violation of *Miranda*[1] was prejudicial; it did not address whether his statements in the interviews were obtained voluntarily.

After the Ninth Circuit issued its decision, the jury in Jones's first retrial was unable to reach a unanimous verdict. Jones was convicted of the above-described offenses at the conclusion of a second retrial, and received an aggregate prison sentence of 10 years plus 50-years-to-life.[2] Jones now appeals from this second judgment of conviction.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[2] We note that the minute order for Jones's sentencing hearing and the abstracts of judgment indicate that Jones was sentenced to an aggregate prison term of 9 years plus 50 years to life, whereas the reporter's transcript reflects that he received an aggregate sentence of 10 years plus 50 years to life. This

Although Jones asserts multiple errors in the proceedings below, we need address only one of them: whether an admission Jones made during a police interview that he was present at, and the driver in, a shooting is the tainted product of an involuntary admission he made during a prior police interview. Because we conclude the detectives obtained these admissions through coercion, including false promises of leniency, and that admitting the admission from the second interview was prejudicial, we reverse the judgment and remand the matter to the trial court.

PROCEDURAL BACKGROUND

On March 9, 2007, appellant Kevin Jones, Jr. was convicted of one count of first degree murder, two counts of attempted murder, one count of assault with a semiautomatic firearm, and two counts of shooting at an occupied motor vehicle. (See *People v. Jones* (Sept. 3, 2008, B197793) [nonpub. opn.] [2008 WL 4060941, at p. *1] (*Jones I*).)[3] The trial court sentenced Jones to an aggregate prison term of 5 years plus 75 years to life. (*Ibid.*) This prison term included certain criminal street gang and firearm enhancements. (*Ibid.*)

In Jones's appeal of the judgment, he argued: (1) the prosecutor's use of peremptory challenges to exclude three prospective African-American jurors violated his constitutional right to a jury of his peers, (2) statements he made during two

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discrepancy is immaterial because we reverse the entirety of the judgment.

[3] On October 15, 2018, we took judicial notice of the prior appellate opinion, the records on file relating thereto, and the records on file in the Ninth Circuit Court of Appeals that concern Jones's habeas petition.

police interviews were involuntary and obtained in violation of his rights under *Miranda*, and (3) the criminal street gang enhancements should have been stricken instead of stayed. (*Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *1].) On September 3, 2008, in an unpublished opinion, Division Eight of this court rejected all but the last claim of error, struck the criminal street gang enhancements, and affirmed the judgment in all other respects. (*Id.* at pp. *1, *9.) Our Supreme Court denied Jones's petition for review. (*People v. Jones* (Nov. 19, 2008, S167550.)

The United States District Court for the Central District of California thereafter denied Jones's request for federal habeas relief. (*Jones v. Harrington* (9th Cir. 2016) 829 F.3d 1128, 1132, 1135 (*Harrington*) [discussing the procedural history of this case].) On July 22, 2016, the Ninth Circuit Court of Appeals reversed the judgment of the federal district court, and remanded the case to the district court with instructions to grant the petition for a writ of habeas corpus. (*Id.* at pp. 1132, 1142.)

The Ninth Circuit concluded that, during Jones's first interview with the detectives, they violated his *Miranda* rights by continuing to question him after he unambiguously invoked his right to remain silent. (See *Harrington*, *supra*, 829 F.3d at pp. 1133–1134, 1136–1141.) The panel also found that the trial court's erroneous admission of statements Jones made after he invoked his right to remain silent was not harmless because this evidence had a "substantial and injurious effect on the jury's decision." (See *id.* at pp. 1141–1142.) Because this error alone entitled Jones to habeas relief, the Ninth Circuit declined to reach Jones's remaining claims, including the assertion that

Jones's statements to the detectives were involuntary.[4] (See *id.* at pp. 1136, fn. 1, 1142.)

Upon conclusion of the first retrial, the trial court declared a mistrial because the jury was deadlocked 6-to-6 on all counts. At Jones's second retrial, the jury found him guilty of all six aforementioned counts, and found true the factual predicates of certain criminal street gang and firearm enhancements. On November 17, 2017, the trial court sentenced Jones to an aggregate prison term of 10 years plus 50 years to life. Later that day, Jones appealed the new judgment of conviction to this court.

FACTUAL BACKGROUND

1. The People's theory of the case at Jones's second retrial

Shortly before 7:40 p.m. on August 12, 2003, Henrico H., Douglas Watson, and James F. were fueling their Chevy Nova at an ARCO gas station, which was located at 76th Street and Western Avenue. The station was within territory claimed by the Eight Trey Gangster Crips, a gang that had a violent rivalry with the Rollin 90's Neighborhood Crips. Jones was an active member of the Rollin 90's Neighborhood Crips and, although Henrico H., Watson, and James F. were not gang members, James F. was wearing an Allen Iverson jersey commonly associated with the Eight Trey Gangster Crips.

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[4] The parties dispute whether the Ninth Circuit's decision barred the People from introducing certain incriminating statements that Jones made during the second interview. We need not reach this question because we find that these statements were otherwise inadmissible.

Jones drove his black 1995, two-door Ford Escort over to the gas station. As his vehicle approached the station, the passenger therein shouted the following gang epithet: "Fuck Tramps. This is 90's."

Soon thereafter, Henrico H., Watson, and James F. entered their Chevy Nova, and Henrico H. drove the vehicle north on Western Avenue. They reached the intersection of Western Avenue and Florence Avenue, and prepared to make a left turn onto Florence. Jones's vehicle then appeared alongside the Chevy Nova. As Jones flashed certain Rollin 90's gang signs, the passenger aimed a small caliber weapon at the Chevy and fired 13 shots.

To escape the gunfire, Henrico H. drove the Chevy into oncoming traffic, collided with another vehicle, and ultimately executed a successful left turn onto Florence. Watson sustained a fatal gunshot wound to his head, and Kenneth P., another driver in a different car who also was attempting to make a left turn onto Florence, was shot in his shoulder. Henrico H., James F., and Kenneth P. survived the shooting and appeared as witnesses at Jones's second retrial.[5]

2. The defense theory of the case at Jones's second retrial

The defense insisted that no eyewitnesses had identified Jones as the driver of the vehicle in question or saw the license plate belonging to it. The defense further claimed Henrico H.

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[5] In Jones's first trial, Michael Lee Hall was jointly tried with Jones as the passenger/shooter. (See *Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *1].) Hall was acquitted. (*Ibid.*)

believed that the vehicle was a four-door car, and that in prior testimony, James F. also claimed it was a four-door vehicle. Defense counsel also asserted the body of Jones's vehicle had "obvious dents" on it that neither Henrico H. nor James F. told police they had seen. Additionally, the defense attorney claimed "[t]here was no scientific evidence connecting . . . Jones to this crime." The defense contended that particular incriminating statements Jones made during his interviews with police were unreliable because the detectives employed coercive interrogation tactics to procure them.

3. Jones's first interview with detectives on August 16, 2003

Around 12:30 a.m. on August 16, 2003, Detectives Jolivette and Fallon[6] interviewed Jones at a police station. The interview lasted about two hours. (*Jones I*, *supra*, B197793 [2008 WL 4060941, at pp. *2, *6].) Near the beginning of the interview, the detectives asked Jones whether he knew why he was at the station; Jones responded that the police had approached him near his home and told him that he "*had to* come in" so they could ask him "a few questions."[7] (Italics added.)

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[6] Although a transcription of the interview included in the augmented clerk's transcript indicates that Detective "Allan" was present, the redacted audio recording introduced at trial establishes instead that Detective Fallon participated in the interview.

[7] We attribute statements made by the police during this interview to "the detectives" generally. We do so because Detective Fallon's trial testimony suggests that he actually made certain statements that are attributed to Detective Jolivette in

A short time later, the detectives stated, "[W]e only give you this one chance to talk to us. [¶] If you refuse to talk to us, or you've lied to us, or you take us around with it, it will [¶] just throw yourself right in the mix." The detectives reiterated that point by stating that Jones had "one chance to talk to detectives about this, and then after that it's gone on down the row." Shortly thereafter, the detectives read Jones his *Miranda* rights, and Jones confirmed he understood them.

The detectives later stated that if Jones's "facts" do not "match up" with their facts, then they would "have a problem." Further, the detectives falsely claimed video surveillance showed that Jones's vehicle was near the gas station at around the time the shooting occurred. The detectives also suggested that "other witnesses driving by" may have seen Jones's vehicle near the scene of the crime.

When Jones insisted he did not drive the vehicle used in the shooting, the detectives asked him whether he was "trying to get [himself] hooked up to the max in this." Jones answered in the negative, to which the detectives replied, "Then you should stop telling us all the crazy stuff you're telling us and say, you know what, I drove the car." The detectives also stated that if Jones failed to "give an explanation" for his actions, "they're going to look at it and well fine, well throw the book at him."

The detectives also evoked certain imagery to convey the consequences of Jones's refusal to admit that he was the driver. In the middle of the interview, the detectives asserted, "It's gotten to a point where this is like the end of the world, like

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the transcription included in the augmented clerk's transcript. These ambiguities do not impact our resolution of Jones's appeal.

you're standing on a mountain right now, and you're looking down, and you're thinking—what you should be thinking is, well, how can I help myself here, because I'm just a driver. Or you're thinking, I'm getting ready to go to hell with this one. That's your call." The detectives later stated that Jones could either inform detectives of the extent of his "involvement" or take "the ride" for his "homies." The detectives then explained: "And this is a long ride. It ain't no short ride. The train leaves this station and then it stops at another station. There ain't no more stations after that. . . . And being that you're sitting there, 19 years old, we're talking about some time here."

Additionally, the detectives strongly intimated that Jones would be charged with only minor offenses if he simply confirmed his involvement in the shooting. The detectives claimed they "th[ought] that [Jones's] part in this thing is really a minor part, okay. [Jones is] the driver, maybe [he] didn't have knowledge of what was going to happen." The detectives repeatedly reiterated that point, claiming Jones had "a minimal part in what happened," he had a "minor" role as the driver of the vehicle, and "[i]t ain't like [the detectives were] trying to put a heavy case" on Jones because he "just drove" and "didn't know they were going to do no shooting out the window." According to the detectives, the "heavy case" was instead reserved "for the person that did the shooting." Although the shooter had "a major problem," if Jones "didn't do no shooting, then there ain't no problem."

In other parts of the interview, the detectives made the connection between an admission to being the driver and some form of leniency more overt. The detectives assured Jones they were aware of his minimal role, and stated, "[W]e're trying to hook you up. . . . [W]e're trying to get an explanation from you, so

we could write something good about you. . . . We know you didn't shoot nobody. We know this. But the only person that can help [Jones] here today is [Jones], okay." The detectives explained that if Jones told them that the shooting "wasn't [Jones's] idea," then "that makes [Jones] look better on [his] part of it." The detectives later stated that Jones should say "you know what, I drove the car," and claimed that they were "trying to let [Jones] go." Toward the end of the interview, the detectives gave Jones two "options": He could "choose to be the guy that did it," or "the guy that was there and didn't know that it was going to go out like that."[8]

Shortly after the detectives explicitly gave him these two options, Jones conceded for the first time that he drove the vehicle involved in the shooting. Jones claimed that while he was driving his vehicle on Western Avenue, a man with a gun "jumped in front" of Jones's vehicle and entered it. Jones asserted that he agreed to drive the armed man because Jones was "scared" of him. He further contended that the man "pok[ed] his head out the window" as the vehicle approached the gas station at 76th and Western, and shouted a gang epithet (i.e., "Fuck A Tre"). Jones stated that the man later "jumped out the car" and fired four shots at several males who were traveling in a nearby automobile. Jones then purportedly drove away from the scene of the shooting.

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[8] Earlier in the interview, Jones claimed someone had stolen the vehicle from his driveway on the day of the shooting but returned it several hours later. Jones reasoned he did not report this crime to the police because the thief returned his vehicle. The detectives told Jones they did not believe him.

Jones next provided a description of the gunman—i.e., an African American male who had a white T-shirt and "a small jerry curl." Police released Jones from custody at the conclusion of the interview.

At Jones's second retrial, the People introduced into evidence an audio recording and a transcript of the August 16, 2003 interview. The audio recording and the transcript were both redacted so as not to include Jones's admission that he drove the vehicle used to carry out the shooting, because he made those statements after invoking his right to remain silent under *Miranda*. (See *Harrington*, *supra*, 829 F.3d at pp. 1134, 1136–1137 [holding that the detectives violated *Miranda* by continuing to interrogate Jones after he invoked his right to remain silent].)

4. Jones's second interview with detectives on October 19, 2003

Around 8:30 p.m. on October 19, 2003, Detectives Jolivette and Hollyfield interviewed Jones.[9] Near the beginning of the interview, Detective Hollyfield read Jones his *Miranda* rights, and noted that Jones had been arrested and that the detectives were interviewing him at a police station. Jones indicated he understood those rights. In response to certain questions subsequently posed by Detective Hollyfield, Jones admitted he owned a 1995 black two-door Ford Escort.

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[9] The interview transcript refers to these two detectives as "Jolivette" and "Holstein." At Jones's second retrial, Jolivette testified Detective Hollyfield actually participated in the interview, and any reference to Detective "Holstein" in the transcript was a typographical error.

Detective Jolivette later informed Jones that he had been arrested pursuant to a warrant for a murder charge, and that Jones would not be released at the end of this interview. Jolivette stated he had given Jones "an opportunity to tell [his] story the last time" and Jones "gave [the detectives] a Mickey Mouse explanation as to what happened." Jolivette admonished Jones that he needed to "start talking and telling the truth about what happened" if he "want[ed] to have a small chance of being a free man again." Jolivette added that he was "not guaranteeing [Jones] anything" or "making [Jones] any promises."

Jones initially denied admitting during the first interview that he was present at the time of the shooting. Jolivette then responded: "But you said you were there that day." When Jones again insisted that he did not make such an admission, Jolivette said: "Wait a minute. I got it on tape." Jolivette sought clarification by asking: "[Y]ou are telling me now that you weren't carjacked?"

At this point, Jones conceded he was present at the scene of the shooting. Jones claimed that an angry and sweating armed man, whom Jones had never seen before, jumped into his vehicle and ordered him to drive. Jones stated that as they arrived at the gas station, the armed man told him that "some guys right there had beat him up or something." Jones said that when they later reached the intersection of Florence and Western, the man started firing his weapon and exited Jones's vehicle. Jones explained that he did not report his encounter with the armed

man to police because the armed man had not harmed Jones. The detectives indicated they did not believe his story.[10]

A partially redacted audio recording and transcript of the October 19, 2003 interview were admitted into evidence at Jones's second retrial. The following was redacted from the transcript that was admitted into evidence: particular page numbers of the transcript; certain immaterial details concerning Jones's personal life (e.g., whether Jones pierced his earlobes); Detective Jolivette's references to former codefendant Hall, Jones's arrest warrant, and the August interview, including his reminder that Jones had previously admitted to being present at, and the driver in, the shooting, and Jolivette's claim that Jones gave a "Mickey Mouse explanation as to what happened"; and portions of the interview in which the detectives indicated they did not believe Jones's story. The audio recording admitted at trial is not in the record. The reporter's transcript indicates that the recording was played for the jury and that the People represented the recording included the same redactions as the transcript.

DISCUSSION

Jones argues that the trial court should have excluded his October 19, 2003 admission to being the driver because it was the product of leniency, threats, and other coercive police tactics. Jones objected to the admission of this evidence at his second retrial. Respondent counters that collateral estoppel bars Jones from relitigating this issue because another panel of this court

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[10] During the interview, Jones denied being a member of the Rollin 90's Neighborhood Crips, but suggested that he was a "follower" of the gang at an unspecified point in time.

had previously held that Jones's interview admissions were voluntary. We thus first decide whether collateral estoppel prevents us from considering Jones's voluntariness argument.[11]

A. The Prior Court of Appeal Opinion Does Not Collaterally Estop This Court from Determining the Voluntariness of Jones's Admissions

In the first appeal, our colleagues in Division Eight held, inter alia, that the totality of the circumstances of Jones's interviews demonstrated that his admissions during his interviews were voluntary because "the detectives made no improper threats or promises, both of the interviews were relatively brief, there were breaks during the longer first interview, and [Jones] was asked if he needed water or the bathroom." (*Jones I*, *supra*, B197793 [2008 WL 4060941, at p.* 9].) The *Jones I* court further held Jones's statements during his first interview that he did not want to talk " 'no more' " and that the detectives did not 'want to hear what [he was] telling [them]' " did not amount to an unambiguous invocation of his right to remain silent. (*Ibid.*) As previously noted, the Ninth Circuit disapproved of Division Eight's conclusion regarding the violation of Jones's *Miranda* rights, but did not address whether his statements were voluntary. Accordingly, it ordered the

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[11] Jones states in his reply that he "is barred on appeal from relitigating" this issue and that he raises this claim "solely to preserve it for any potential future federal review." We are not bound by this concession because the preclusive effect of the prior Court of Appeal decision is an issue of law. (*West Coast Air Conditioning Co., Inc. v. Department of Corrections & Rehabilitation* (2018) 21 Cal.App.5th 453, 467, fn. 8.)

district court to issue a writ directing the state to "either release Jones or grant him a new trial." (*Harrington*, *supra*, 829 F.3d at p. 1142.)

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The following elements must be satisfied for collateral estoppel to apply: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Ibid.*)

Respondent's reliance on collateral estoppel fails as to the element of a final judgment on the merits. A judgment that has been reversed or vacated is typically not final for purposes of collateral estoppel. (See *Regents of University of California v. Public Employment Relations Bd.* (1990) 220 Cal.App.3d 346, 356–357 ["res judicata and collateral estoppel] concern the binding effect of a *final judgment* [citation.] . . . 'The effect of an unqualified reversal ("The judgment is reversed") is to *vacate* the judgment, and to leave the case "at large" for further proceedings as if it had never been tried, and as if no judgment had ever been rendered' [citation]"].)

The Ninth Circuit's decision "effectively obliterated" the underlying judgment of conviction from Jones's first trial. (See *Grain Dealers Mutual Ins. Co. v. Marino* (1988) 200 Cal.App.3d 1083, 1085–1086, 1088–1089 [holding that there was no final

decision for the purposes of collateral estoppel because the Ninth Circuit affirmed an order granting habeas corpus relief, thereby "effectively obliterat[ing] the judgment in the criminal action"].)

Respondent's invocation of collateral estoppel, nonetheless, assumes that the Court of Appeal's affirmance of that judgment is *somehow* still "final" for the purposes of that doctrine. Yet, respondent has failed to provide us with any support for that assumption, even though the respondent bears the burden of establishing each element of collateral estoppel. (*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1326.) Accordingly, we take a fresh look at whether Jones's statements during his interviews were voluntary.

B. During the August 16, 2003 Interview, Detectives Coerced Jones to Admit That He Was the Driver

"Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial." (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) " ' "In general, a confession is considered voluntary 'if the accused's decision to speak is entirely "self-motivated" [citation], i.e., if he freely and voluntarily chooses to speak without "any form of compulsion or promise of rewards." ' " (*People v. Perez* (2016) 243 Cal.App.4th 863, 871 (*Perez*), quoting *People v. Tully* (2012) 54 Cal.4th 952, 985 (*Tully*).) "A statement is involuntary [citation] when, among other circumstances, it 'was " 'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, *however slight* . . . .' " ' " (*People v. Neal* (2003) 31 Cal.4th 63, 79 (*Neal*), quoting *Hutto v. Ross* (1976) 429 U.S. 28, 30, italics added.) A promise of leniency is coercive " ' "where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is

a motivating cause of the decision to confess." ' " (See *Perez*, at p. 871, quoting *Tully*, at p. 985.)

We apply an " 'independent standard of review' " to determine the voluntariness of a statement, which requires us to consider the totality of the circumstances, including the " 'characteristics of the accused' " and the conditions of the interrogation. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1078, quoting *Neal*, *supra*, 31 Cal.4th at p. 80.)

In *Jones I*, Division Eight acknowledged that detectives used a "ruse that [Jones's] car had been identified and the shooting appeared on videotape" but nonetheless found "the detectives made no improper threats or promises" that could render Jones's statements involuntary. (See *Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *9].) We respectfully disagree that the statements were voluntary.

The instant matter is analogous to *Neal*. There, a detective used a "bus metaphor" in which he threatened "to drop defendant off closer to Timbuktu than to home if he did not cooperate. [The detective] also promised defendant, if he did cooperate, to make it as good for him as he could." (See *Neal*, *supra*, 31 Cal.4th at pp. 84–85, fn. omitted.) Additionally, the detective said that if the defendant did not " 'try and cooperate' " then " 'the system [was] going to stick it' " to him " 'as hard as they can.' " (See *id.* at p. 73.) Our Supreme Court found that the detective's use of this promise and threat "weigh[ed] heavily against the voluntariness" of the defendant's subsequent confessions. (See *id.* at p. 84.) Indeed, *Neal* observed that "[p]romises and threats traditionally have been recognized as corrosive of voluntariness." (*Ibid.*)

Similarly here, the detectives described the purported consequences of Jones's refusal to cooperate using several metaphors, including being thrown "right in the mix," having "the book" thrown at him, being "hooked up to the max," and taking a long train ride. They further implied that Jones could avoid a lengthy prison sentence—which they euphemistically called a "heavy case"—if Jones confirmed that he played a "minor part" in the drive-by shooting by simply driving the vehicle involved in the shooting.

Unsurprisingly, soon after detectives gave him the choice between being "the guy that did it" or "the guy that was there and didn't know" the shooting would happen, Jones admitted to driving the vehicle, but claimed that an armed man had forced him to do so. This sequence of events confirms that the detectives' threats and implied promises of leniency constituted "a motivating cause" of Jones's inculpatory admission. (Cf. *Perez*, *supra*, 243 Cal.App.4th at p. 876 [finding that a promise of leniency was "a motivating cause" of a confession because the latter occurred "[i]mmediately after" the former].)

In addressing Jones's prior appeal, the Court of Appeal reasoned that *Neal* was distinguishable because of the following circumstances: Jones "was a relatively intelligent 19-year-old who had finished high school," Jones was employed at the time of his interview, he had taken breaks during this first interview, and the detectives "asked if he needed water or the bathroom." (*Jones I*, *supra*, B197793 [2008 WL 4060941, at pp. *8–9].) The court further contrasted Jones's circumstances with those in *Neal*: The defendant confessed "after being held in custody overnight without food, drink, and toilet facilities." (*Id.* at p. *9.)

Although we acknowledge these distinctions and that a person's education and the physical conditions during the interview are relevant factors, they are not dispositive. Threats and promises of leniency will render a confession involuntary "even when the defendant is well educated, rested, and fed." (See *Perez*, *supra*, 243 Cal.App.4th at p. 878.) Although the physical conditions of Jones's interrogation were not as harsh as those endured by the defendant in *Neal*, they nonetheless compromised the voluntariness of his statements. The detectives interviewed Jones during the early morning hours after he had been apprehended by police. (See also *Miranda*, *supra*, 384 U.S. at p. 467 [recognizing that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"].)

Adding to the coercive environment, at certain junctures of the interview, the detectives suggested that it could last for "days" if Jones did not admit his involvement in the shooting. For instance, the detectives stated, "If you lie to us, we'll be here for days, okay." They later asked, "Is it going to take two or three days for you to come to your senses?"

Further, in *Jones I*, the court cited *People v. Holloway* (2004) 33 Cal.4th 96 (*Holloway*), to support its conclusion that "[t]he detectives' frequent exhortations that [Jones] should tell the truth . . . were not accompanied by threats or promises." (See *Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *9], citing *Holloway*, at p. 115.)

Holloway is distinguishable from the instant case. There, a detective mentioned in passing to the defendant that he was

investigating a "death penalty case," and the detective obliquely alluded to avoiding the death penalty if defendant had accidentally committed the killings at issue or they had "resulted from an uncontrollable fit of rage during a drunken blackout." (See *Holloway*, *supra*, 33 Cal.4th at pp. 112–117.) In contrast, here, *throughout* Jones's August 16, 2003 interview, the detectives insinuated that Jones could avert a substantial prison term *only* if he told them he drove the vehicle but was unaware of the shooter's malicious intent.

In sum, the totality of the circumstances establishes that Jones's " 'will was overborne' " such that his admission in his first interview that he was the driver in the shootings was not voluntary.[12] (*People v. Peoples* (2016) 62 Cal.4th 718, 740.)

C. The Admission Made at the October 19, 2003 Interview Was the Tainted Product of the August 16, 2003 Interview

Although Jones's August 16, 2003 admission that he drove the vehicle was not admitted into evidence at his second retrial, the jury did hear a substantially similar version of that admission when a partially redacted audio recording and the

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[12] The *Jones I* court observed that it was "permissible for the detectives to utilize the ruse that the car had been identified and the shooting appeared on videotape." (See *Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *9], citing *People v. Smith* (2007) 40 Cal.4th 483, 505 (*Smith*).) Although the detectives in *Smith* utilized a ruse to procure a confession, they did not claim that the defendant would avoid a lengthy prison term if he cooperated with them. (See *Smith*, at pp. 505–506 [noting that the detectives falsely claimed that a gunshot residue test showed that the defendant had recently fired a gun].)

transcript of the October 19, 2003 interview were admitted at the second retrial. Jones argues that his admission during the October 19, 2003 interview was the direct product of the coerced statements in his August 16, 2003 interview. Accordingly, he contends that the trial court erred in admitting Jones's admission during his October 19, 2003 interview. " 'Previous decisions have acknowledged that where—as a result of improper police conduct—an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having " 'let the cat out of the bag by confessing.' " ' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 359 (*McWhorter*).) The prosecution may rebut this presumption by "establishing a break in the causative chain between the first confession and the subsequent confession." (*Ibid.*) " 'The degree of attenuation that suffices to dissipate the taint "requires at least an intervening independent act by the defendant or a third party" to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality.' " (*Id.* at p. 360.)

Respondent contends Jones's admission from the October 19, 2003 interview was admissible because: (1) "[t]he two month break in custody was amply sufficient to dissipate any custodial pressures from the first interview" and afforded Jones an opportunity to consult with counsel; (2) the detectives *Mirandized* Jones before he admitted to being the driver; (3) "the October interview was mainly conducted" by Detective Hollyfield; and (4) "[Jones] was motivated to speak with detectives because he believed that a videotape existed showing his . . . Ford Escort was involved in the murder." Concededly, the fact that the

detectives read Jones his *Miranda* rights does weigh against a finding that the second admission was involuntary, as does the two-month gap between the two interviews. (See *McWhorter*, *supra*, 47 Cal.4th at p. 360 [noting that such factors are relevant to the analysis].)

Respondent, however, has not established a break in the causative chain between the first and second interviews. At the October interview, Detective Jolivette refused to accept Jones's claim that he was not present at the scene of the shooting. Instead of employing the ruse from the first interview, Detective Jolivette reminded Jones that he had already admitted to being the driver and claimed that Jolivette had this admission "on tape." Jones confirmed that he drove the shooter only after Detective Jolivette reminded him of his prior inculpatory statements.

Thus, the record reveals that Jones incriminated himself because of " 'the psychological [or] practical disadvantages' " of having confessed during the prior interview, and not because of " 'an intervening independent act by the defendant or a third party.' " (See *McWhorter*, 47 Cal.4th at pp. 359–360.) For all these reasons, the trial court erred in admitting portions of the October 2003 interview in which Jones conceded that he was present at, and the driver in, the shooting.

D. The Trial Court's Erroneous Admission of the October 19, 2003 Interview Was Not Harmless

The harmless error test announced in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), is "generally applicable to error under the United States Constitution, including, specifically, the erroneous admission of involuntary statements." (*Neal*, *supra*, 31 Cal.4th at p. 86.) "The beyond-a-reasonable-

doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Ibid.*, quoting *Chapman*, at p. 24.) " 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' " (*Neal*, at p. 86, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*).) " '[T]he improper admission of a confession is *much more likely to affect the outcome of a trial* than are other categories of evidence' " because it often constitutes " 'persuasive evidence of a defendant's guilt' " that may " 'shatter[ ] the defense.' " (See *Neal*, at p. 86, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 503 (*Cahill*), italics added.) The erroneous admission of a confession is " 'likely to be prejudicial in many cases.' " (*Neal*, at p. 86, quoting *Cahill*, at p. 503.)

The erroneous admission of a confession may be deemed harmless in certain limited circumstances, including: " '(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime . . . .' " (See *Neal*, *supra*, 31 Cal.4th at p. 86, quoting *Cahill*, *supra*, 5 Cal.4th at p. 503.)

Respondent contends that even without Jones's admission to being the driver of the shooter, there was "overwhelming" evidence against him. At bottom, respondent argues that the following establishes Jones's involvement in the shooting: (1) the

circumstances of the offenses indicated that they were committed by members of the Rollin 90's Neighborhood Crips (e.g., the driver flashed gang symbols to the victims, the shooter shouted a gang epithet); (2) the People offered evidence showing that Jones was an active Rollin 90's gang member and that only 30 to 45 of the gang's members committed crimes for the gang; (3) Witnesses James F. and Henrico H. described the driver as a light-skinned African-American man, and an officer investigating this matter testified that Jones matched that description; (4) Jones told detectives he owned a black two-door Ford Escort that only he drove; and (5) James F. testified a black two-door Ford Escort was involved in the shooting and Henrico H. similarly testified a black vehicle was involved.

We fail to discern how this evidence is overwhelming, or how it would dispel prejudice under the *Chapman* standard. As the *Jones I* court itself recognized, Jones "was personally linked to the crimes largely through the admissions he made to detectives on August 16 and October 19." (*Jones I*, *supra*, B197793 [2008 WL 4060941, at p. *6].)

Respondent also contends James F. and Henrico H. "both identified [Jones's] vehicle as being involved in the shooting." Apparently, James F. and Henrico H. were identifying a car depicted in People's exhibit 12. This exhibit is not in the record. Further, the two passages from the reporter's transcript upon which respondent relies do not support the proposition that James F. and Henrico H. identified Jones's vehicle. In the first excerpt, James F. testified he positively identified one or more of the photographs in People's exhibit 12 "as being identical to the car from which the shooter shot." In the second excerpt, Detective Jolivette testified that Henrico H. and James F.

identified one or more of the photographs in People's exhibit 12 as the vehicle, and that the photographs therein were taken shortly after August 15.

Even if the People had properly established that People's exhibit 12 depicted Jones's vehicle, that would constitute only circumstantial evidence that he was the driver. Further, the jury could have afforded little weight to Henrico H.'s supposed identification of the vehicle, because Henrico H. was unsure whether the vehicle was a four-door or a two-door vehicle and whether it had any dents on it. James F.'s and Henrico H.'s purported identification of Jones's vehicle would not dispel under *Chapman* the prejudice created by the erroneous admission of Jones's coerced statements. (See *Neal*, *supra*, 31 Cal.4th at p. 86, italics added ["[T]he focus is what the jury actually decided and whether the error *might* have tainted its decision"].)

In addition, the fact that the jury from Jones's first retrial deadlocked 6-to-6 on all charges also suggests that the admission of Jones's inculpatory statements was not harmless. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [finding that the introduction of inadmissible evidence at the defendant's retrial was prejudicial in part because the first trial resulted in a hung jury].) This conclusion is further reinforced by the People's argument at trial that "the most compelling witness who puts Defendant Jones and his car at the intersection of Florence [and] Western when Doug Watson was murdered is the defendant himself."

The People repeatedly relied upon Jones's admission in their closing and rebuttal arguments. (See also *Neal*, *supra*, 31 Cal.4th at p. 87, quoting *Cahill*, *supra*, 5 Cal.4th at p. 505 [finding that the admission of the defendants' confessions was not

harmless because they "functioned as the veritable 'centerpiece of the prosecution's case in support of . . . conviction' "].)

For all these reasons, we cannot conclude that the erroneous admission of Jones's inculpatory coerced statements was " '*unimportant* in relation to everything else the jury considered on the issue in question . . . .' " (*Neal*, *supra*, 31 Cal.4th at p. 86, quoting *Yates*, *supra*, 500 U.S. at p. 403, italics added.)

DISPOSITION

The judgment is reversed. The People may retry Jones within the time limit set forth in Penal Code section 1382.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.