IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JAVANCE WILSON, Defendant and Appellant.	Case. No. S118775 Automatic Appeal (Capital Case) San Bernardino County Superior Court No. FVA 12968

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of San Bernardino

Honorable James A. Edwards, Superior Court Judge

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APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant was convicted of crimes on the basis of unreliable eyewitness identification testimony and the coerced, and subsequently recanted, testimony of his half brother, who could easily have committed the crimes himself. The trial court's erroneous admission of the suggestive identification and coerced testimony, as well as the erroneous exclusion of the recantation, denied appellant a fair trial and a panoply of other constitutional rights. Those and other reversible errors require that appellant receive a new trial.

STATEMENT OF THE CASE

On March 2, 2000, a one-count Felony Complaint was filed against appellant at the Fontana Division of the San Bernardino County Superior Court. The complaint accused appellant of leaving the scene of a car accident on February 18, 2000. (1 CT 1-3.) That complaint was amended twice. (1 CT 5-12, 30-42.) The Second Amended Felony Complaint, which was filed on May 10, 2000, charged appellant with the attempted murder, second degree robbery, kidnapping to commit a robbery, and carjacking of James Richards (Counts 1 through 4, respectively); the first degree murder, second degree robbery, kidnapping to commit a robbery, and carjacking of Andres Dominguez (Counts 5 through 8, respectively); the first degree murder of Victor Henderson (Count 10); and leaving the scene of a car accident (Count 9). (1 CT 30-42.) On June 7, 2000, the court granted the prosecution's motion to dismiss the leaving-the-scene charge. (1 CT 46.) At the conclusion of the preliminary hearing on August 31, 2000, the court held appellant to answer in Superior Court to all remaining counts and allegations.

On September 13, 2000, an Information was filed against appellant at the San Bernardino Superior Court. The Information charged appellant with the attempted murder, second degree robbery, kidnapping to commit a robbery, and carjacking of James Richards (Counts 1 through 4, respectively); the first degree murder, second degree robbery, kidnapping to commit a robbery, and carjacking of Andres Dominguez (Counts 5 through 8, respectively); and the first degree murder, second degree robbery, kidnapping to commit a robbery, and carjacking of Victor Henderson (Counts 9 through 12, respectively). The Information alleged the felony-murder and multiple-murder special circumstances, as well as firearm sentencing enhancements. (1 CT 277-287.) Pursuant to appellant's Penal Code section 995 motion, the court dismissed Counts 3, 6, 8, 10, and 12. (2 CT 360-361.)

The First Amended Information was filed on February 2, 2002. In this document, which was not amended further, the counts were renumbered. The Amended Information charged appellant with the January 7, 2000 attempted murder, second degree robbery, and carjacking of James Richards (Counts 1 through 3, respectively); the February 21, 2000 first degree murder and second degree robbery of Andres Dominguez (Counts 4 and 5, respectively); and the February 21, 2000 first degree murder and second degree robbery of Victor Henderson (Counts 6 and 7, respectively). The Information also alleged the robbery-murder and multiple- murder special circumstances. (2 CT 520-526.)

Jury selection for the first trial began on March 11, 2002. (4 CT 1062-1064.) The seated and alternate jurors were sworn on April 9, 2002. (4 CT 1156-1157.) The case was submitted to the jury for guilt-phase deliberations on May 22, 2002. (5 CT 1383-1384.) Due to a deadlocked jury, the court declared a mistrial on June 6, 2002. (6 CT 1619-1620.)

Jury selection for the retrial began on October 28, 2002. (6 CT 1710-1712.) On December 2, 2002, the seated and alternate jurors were sworn. (6 CT 1775-1776.) On February 5, 2003, the case was submitted to the jury for guilt-phase deliberations. (9 CT 2495-2497.) On February 13, 2003, the jury found appellant guilty as charged in Counts 1 through 6 and guilty of the lesser-included offense of attempted robbery for Count 7. The jury found true the multiple-murder and robbery-murder special circumstances and found true all allegations regarding sentencing enhancements. (9 CT 2554-2571, 2584-2586.)

The penalty phase began on March 4, 2003. (10 CT 2865-2866.) Penalty-phase deliberations commenced on April 8, 2003. (10 CT 2980-2981.) Eight days later, the jury informed the court that it could not reach a verdict. (10 CT 2987-2988.) But the following day, on April 17, 2003, the jury returned a death verdict. (11 CT 3047-3050.)

On August 27, 2003, the trial court denied appellant's motions for a new trial and his automatic motion to modify the death sentence. The court sentenced appellant to forty years plus life imprisonment with the possibility of parole on the noncapital counts and to death for the capital counts. On the capital counts, the court sentenced appellant to die and entered a death judgment. (11 CT 3166-3175.)

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, §1239, subd. (b); Cal. Rules of Court, rule 8.600(a).)

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STATEMENT OF FACTS

I. Guilt Phase

A. The Robbery of James Richards

1. Details of the Incident

At approximately 8:00 pm on January 7, 2000, Richards and his taxicab were dispatched to pick up a fare at Stater Bros. in downtown San Bernardino. At that location, Richards picked up the passenger, who asked Richards to drive him to Bloomington. After traveling for twenty to twenty-five minutes, Richards reached the requested destination at the end of Laurel Avenue in Bloomington. (15 RT 3843-3848.)

Richards turned around to tell the passenger that the fare for the taxicab ride was twenty dollars. The passenger pointed a handgun at Richards's head and told him to put his hands on his head. Richards gave the passenger $300, as well as his keys and cigarettes. At the passenger's demand, Richards walked behind his taxicab. The passenger told Richards to shut his eyes, and he put his gun in Richards's mouth. Richards heard a click, but the gun did not fire. (15 RT 3849-3853.)

Richards ran to a nearby house. As he was banging on the door, the assailant drove the taxicab toward Richards. He got out of the car. The perpetrator pulled the trigger again, but once more the gun did not fire. The residents of the house let Richards inside, and the assailant drove the taxicab away. (14 RT 3567-3572; 15 RT 3954-3858.) The taxicab was recovered at the Summer Breeze apartment complex on Seneca Road in Victorville. The radio and the GPS attached to it had been ripped out of the taxicab. (16 RT 4151-4152.)

2. Evidence Regarding the Perpetrator's Identity

a. James Richards's Identification

The assailant was not apprehended immediately after the incident. (15 RT 3861.) Law enforcement authorities had no leads regarding his identity until several weeks later, when two other taxicab drivers were killed on the same night in and near Bloomington.[1]

After learning of the other incidents, Richards called the police and informed them that Ray Bradford, whom Richards knew from a drug-rehabilitation program, looked a lot like the assailant. Based on Bradford's expressions and statements, Richards thought Bradford was the assailant. (15 RT 3866-3867, 3878; 17 RT 4592.)

Subsequently, Richards assisted a sketch artist to make a composite drawing of the perpetrator. (15 RT 3863.) Afterwards, police officers showed Richards multiple photo arrays. On February 27, 2000, Richards was shown a photo array containing six photos, but did not positively identify anyone as his assailant, although he thought that one of the photographs looked a bit like him. Appellant's photograph was not included among the photographs shown to Richards on that occasion. (7 RT 1664-1665; 15 RT 3868, 3914-3915; 16 RT 4165.) On March 2, 2000, Richards selected appellant's photograph from a different photo array. (15 RT 3869-3870.) There was inconsistent evidence regarding whether the photo array from which Richards identified appellant was the second or third photo array that he had been shown. (7 RT 1662; 15 RT 3884, 3888-3890; 16 RT 4187-4191; 17 RT 4445-4446.)

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[1]The incidents that occurred on the early morning of February 21, 2000, are described in a subsequent section of the statement of facts. (See *post*, at pp. 10-16.)

On March 14, 2000, Richards attended a live lineup. Although appellant was subject number two in the lineup, Richards did not identify him. However, Richards thought that subject number four looked a bit like the perpetrator. (15 RT 3870; 12 CT 3556.) Afterwards, he said that the perpetrator did not participate in the lineup. (17 RT 4462.) Five months later, Richards identified appellant at the preliminary hearing shortly after the prosecutor had shown him a copy of the photo array from which he selected appellant. (4 RT 957; 1 CT 180.)

Dr. Kathy Pezdek, an expert on memory and identification procedures, testified for the defense regarding the unreliability of Richards's identification of appellant.[2] (18 RT 4644-4703.) She explained that several acts of law enforcement officers were suggestive. Detective Franks, who administered the photo array in which Richards identified appellant, gave Richards two cues pertaining to appellant's photograph. (18 RT 4660-4662.) If Richards had been shown a total of three photo arrays, in which two included the same picture of appellant, Richards's identification would have been tainted. The identification could have been a product of seeing the same photo twice, rather than actually recognizing appellant as the person who had perpetrated the robbery. (18 RT 4670.) After Richards did not identify appellant at the live lineup, Detective Scott Franks noted that Richards selected the assailant in the photo array and told Richards that the perpetrator was in custody. (17 RT 4462.) Those remarks suggested to Richards that he had identified the correct person in the photo array. (18 RT 4675-4676.) Detective Franks should not have given Richards any feedback

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[2]She also testified at a pretrial hearing in support of appellant's motion to suppress Richards's identification. (4 RT 905-945; see also, *post*, Argument I.) Appellant asserts that the denial of that motion was erroneous and violated his constitutional rights. (See *post*, Argument I.)

after he indicated that the assailant was not present at the live lineup. (18 RT 4680.) Shortly before identifying appellant at the preliminary hearing, Richards was shown a copy of the photo array in which he had selected appellant. That tainted Richard's in-court identification of appellant. (18 RT 4677.)

Furthermore, Dr. Pezdek testified that commonly used identification procedures were inherently suggestive. She explained that showing six photos simultaneously in a photo array encouraged relative judgments that raised the risk of a misidentification. In addition, she explicated that when the person who administers a photo array knows the identity of the suspect, he can provide cues to the witness regarding whom to select in the photo array. She added that Detective Franks gave Richards two such cues when he administered the photo array from which Richards identified appellant. (18 RT 4654-4662.)

Other facts further undermined the reliability of Richards's identification. On the day of the incident, the sun set more than three hours before Richards picked appellant up at 8 p.m. In addition, the moon was barely visible that night. (18 RT 4781.) Moreover, the cross-racial nature of the identification compounded the unreliability of the identification; cross-racial identifications are 15 percent less accurate than intraracial identifications. (18 RT 4672-4674.) In addition, the San Bernardino Sheriff's Department prepared a wanted poster of appellant using the same photo that was in the photo array in which Richards identified appellant. (17 RT 4584-4585.) If Richards had seen that photo of appellant in another photo array or in a wanted poster, Richards's familiarity with that photo could have tainted his identification of appellant. (18 RT 4664-4671.)

Dr. Pezdek also found it noteworthy that Richards initially thought Ray Bradford might have been the perpetrator, because Bradford was

shorter, thinner, and lighter skinned than appellant. Witnesses rarely confuse people who do not look alike. Richards's suspicion that Bradford might have been the perpetrator suggested that Richards did not remember the assailant's appearance well. (18 RT 4672.)

In order to further challenge Richards's credibility as a witness, the defense presented evidence that in November 2000, Richards committed an armed robbery of a cigarette store in Fontana. (17 RT 4362-4386.) A warrant for Richards's arrest was outstanding for almost two years, until Richards finally surrendered and was released on his own recognizance. (18 RT 4722-4723.) At the time of the retrial, the case against Richards was still pending, having been continued multiple times. (18 RT 4723.)

b. Appellant's Alleged Admissions

Appellant's half brother, Sylvester Seeney, and Seeney's girlfriend, Phyllis Woodruff, testified that appellant had told them he had robbed a taxicab driver and stolen his taxicab. As will be discussed below (see *post*, at pp. 16-20), the credibility of their testimony was highly suspect. Nevertheless, their testimony comprised a critical part of the prosecution's case.

On the evening of January 7, 2000, Seeney, Woodruff, and appellant were together visiting Jennifer Wilson, who is Seeney and appellant's mother, in her room at the Desert Inn Motel. (14 RT 3646.) The Stater Bros. where Richards picked up his fare in San Bernardino was about 75 yards from that motel. (15 RT 3786.) At the preliminary hearing,[3] Sylvester Seeney testified that on January 7, 2000, appellant returned home to

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[3]Because Seeney invoked his Fifth Amendment privilege, the trial court declared Seeney unavailable at either trial. (6 RT 1511.) The prosecution introduced his preliminary hearing testimony at trial. (14 RT 3729-3763.)

Victorville from San Bernardino, and told Seeney and Woodruff that he had robbed a taxicab driver, and hit the driver in the head with his gun after the gun jammed when he tried to shoot him. (14 RT 3736-3740.)

Woodruff testified that appellant told Seeney and her about robbing Richards. When they expressed doubts about the veracity of appellant's claims, he showed them the taxicab, which was parked at the Summer Breeze apartment complex, located one block away from the apartment appellant shared with Seeney. (14 RT 3645-3650, 3736-3740.)

3. Evidence Regarding the Weapon

On January 6, 2000, someone broke into Joe Donovan Diaz's home in Victorville, and stole several firearms. One of the guns stolen was a .22-caliber semi-automatic Phoenix Arms pistol that jammed whenever Diaz tried to fire it. (15 RT 3779-3784.) The San Bernardino County Sheriff's Department subsequently seized that gun from the apartment where Seeney's close friends Brad and Cory McKinney lived. (14 RT 3642; 15 RT 3997-4001.) Diaz's home was two miles from appellant and Seeney's home. (16 RT 4155.

B. The Homicides of Andres Dominguez and Victor Henderson

1. Details of the Incidents

a. Andres Dominguez

Shortly before midnight on February 20, 2000, San Bernardino Yellow Cab received a telephone call from a young man asking to be picked up at Stater Bros., at 1055 West Bloomington Avenue in Rialto. The Yellow Cab dispatcher assigned the fare to Andres Dominguez. (14 RT 3580.)

Raul Gonzalez, who lived at 11224 Laurel Avenue in Bloomington, heard a gunshot shortly after midnight on February 21, 2000. He looked

outside and saw the shadow of a car driving away from the street. As his wife called the police, Gonzalez walked outside and found a dead person lying on the street. (15 RT 3773-3777.) Andres Dominguez died instantaneously from a shot to his head inflicted from close range. (15 RT 3811-3814.) San Bernardino County Deputy Sheriff Robert Dean concluded that Dominguez was on his knees when he was shot. There was no indication that any shots had been fired inside the taxicab. (16 RT 4175.)

This incident occurred on the same street as the robbery of James Richards. (14 RT 3567; 15 RT 3773-3774; 16 RT 4176.) When law enforcement officers responded to the scene of the shooting, Dominguez's cell phone was missing, even though he always carried it with him. (14 RT 3577; 16 RT 4176.)

b. Victor Henderson

At 1:40 am on February 21, 2000, Pomona Yellow Cab received a phone call for a fare at 2533 Hemlock Way in Pomona. Because the dispatch computer was not working, Henderson did not get dispatched for that fare until 2 am. (15 RT 3840-3841.)

At about 2:30 am, several people heard multiple gunshots in their neighborhood near the corner of Hemlock Way and Roderick Avenue in Pomona. (15 RT 3976-3979; 16 RT 4029-4030.) One person was seen chasing another person, and the person being chased fell to the ground immediately after a second series of gunshots were fired. (15 RT 4033, 4052-4053, 4058-4059.) Moments later, a man wearing a puffy white jacket got out of a taxicab from the rear passenger-side door, jogged toward another car, fell and seemingly injured himself when that car restarted too quickly, and finally got into the car before it drove away. (15 RT 3982-3985, 16 RT 4034-4038, 4055-4060.) When the man with the white jacket could not get into the car, he said either "hey hey," or "hold it." (15 RT

3984.) The driver said "hurry up, Trey." (16 RT 4039.) "Trey" was one of the names used by Cory McKinney, who was a close friend of Sylvester Seeney, appellant's half brother. (14 RT 3587-3608.)

Victor Henderson was lying on his back in the street. (16 RT 4053, 4062-4066.) He died from gunshot wounds to his chest and back. The wound in his back was consistent with having been shot while attempting to run away. The wound in his chest was consistent with someone having shot from above while Henderson was lying on the ground. (15 RT 3800-3803.)

The abandoned taxicab was located 470 feet away from Henderson's body. The headlights were still on, and the engine was running. (17 RT 4331-4332.)

2. Evidence Regarding the Perpetrator's Identity

There were no eyewitness identifications made with respect to these incidents. All the evidence pertaining to the identity of the perpetrator of each of these crimes was circumstantial.

a. The Location of the Incidents in Bloomington

As noted above, the crimes against Dominguez took place on the same street as the robbery of James Richards. Those incidents occurred a half-mile from the home of Seeney and appellant's great aunt and uncle, where they had often visited and occasionally lived. (16 RT 4157.)

b. Dominguez's Cellular Phone

Appellant's friend Sara Bancroft received a telephone call from appellant, and appellant later offered to let her use the cell phone he was carrying. (14 RT 3700, 3702.) Bancroft had known appellant for six months, but had never previously seen him with a cell phone. (14 RT 3696.) Telephone records confirmed that the calls made by appellant and Bancroft were from Dominguez's cell phone. According to telephone records, calls were also made from that phone to Arlene Best, Cory McKinney's friend,

and to a pay phone in Pomona that was a half mile from where the Henderson incident took place. (16 RT 4180-4181.) Appellant and Cory McKinney had a cell phone with them in the rental car in which they were riding the morning after that incident. (14 RT 3592.)

c. The Perpetrator's Jacket

In the late afternoon of February 20, 2000, Phyllis Woodruff's father, Henry Woodruff, hosted a barbecue at his home in Hesperia. Seeney and Phyllis attended the barbecue. Appellant and one other man were briefly at the barbecue as well. (14 RT 3627-3630, 3633.) Henry and Phyllis Woodruff observed Seeney give appellant his fluffy, white jacket. (14 RT 3630-3631, 3659.)

David and Michelle Sisemore, who lived near the scene of the Henderson homicide, observed that the man fleeing the scene wore a puffy white jacket. (16 RT 4034; 18 RT 4782.) However, that jacket appeared longer than the one Seeney gave to appellant. (14 RT 3630; 15 RT 3990.) The jacket worn by the man at the scene of the Henderson shooting went down to somewhere between the middle of the man's thighs and the top of his knees. (15 RT 3989; 16 RT 4035, 4054; 18 RT 4782.) When appellant tried Seeney's jacket on during the first trial, the jacket did not fall nearly as low on his body as the jacket on the man at the scene of the crime, even though appellant had lost a substantial amount of weight between the time of the incidents and the first trial.[4] (17 RT 4340; 18 RT 4782.)

d. Appellant's Purported Leg Injury

As discussed above, according to witnesses at the scene of the Henderson shooting, the fleeing assailant appeared to injure himself as he

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[4]Because appellant lost additional weight between the first trial and the retrial, the photos of appellant wearing the jacket at the first trial were admitted into evidence at the retrial. (17 RT 4340; Exhibits 228, 229.)

attempted to get into the getaway car. (15 RT 3984-3985; 16 RT 4039-4040.) Although appellant was arrested only nine days after the homicides, no law enforcement or corrections officer observed any indication that appellant had an injured leg. Indeed, Sergeant Robert Dean did not see appellant limp or otherwise appear injured when he brought appellant back from Ohio, where he had been arrested, to California.[5] (16 RT 4192; 17 RT 4587-4588.)

On February 20, 2000, appellant's friend Sara Bancroft observed that appellant was not injured. (14 RT 3698.) Sara Bancroft testified that appellant appeared to have an injured knee on February 21, 2000, when the two of them went to return a rental car. (14 RT 3706.) Bancroft's friend Tiffany Hooper also testified that appellant was limping badly when she saw him on February 21, 2000. That morning, she rode with Bancroft, Cory McKinney, and appellant from Victorville to San Bernardino.[6] (14 RT 3586-3588.) Hooper testified that appellant said he had been shot in Los Angeles. (14 RT 3593-3595.) However, when Hooper was interviewed by Sergeant Chris Elvert, she told him that Cory McKinney was the person who was limping and said he had been shot. (17 RT 4601.)

Appellant's friend Kristina Murphy testified that appellant was not injured on February 20, 2000, but had an injured leg and a scuffed sneaker

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[5]In contrast, Sergeant Dean saw scabs on Cory McKinney's leg two weeks after the homicides. Sergeant Dean accepted at face value McKinney's explanation that he had been bitten by a dog and scratched by a cat. (16 RT 4208, 17 RT 4591.)

[6]During this ride, appellant allegedly asked Bancroft and Hooper if they would tell on him if he had robbed a bank. (14 RT 3591, 3708.)

the following day.[7] Murphy also testified that appellant and Brad McKinney asked her if she had seen the news, and that appellant asked her how she would feel if she knew that he had shot somebody. (14 RT 3725-3727.) Her credibility was challenged because she had stolen several items from Albertson's and became belligerent when the security guard apprehended her. (17 RT 4387-4393.)

Significantly, none of the three witnesses who testified that appellant had a leg injury made any references to any injury when they first spoke to the police about these incidents. (16 RT 4164; 18 RT 4752.)

e. Appellant's Alleged Admissions

Sylvester Seeney testified at the preliminary hearing that appellant told him of his plan to rob taxicab drivers a couple of days before the homicides of Dominguez and Henderson.[8] Seeney stated that appellant told his wife, Melody Mansfield, and Seeney that he had killed two taxicab drivers. Seeney added that appellant said he had scuffed his sneakers and injured his leg when he was dragged as he was leaving the scene of the incident. Seeney also claimed appellant told him that he felt sorry for a taxicab driver who had begged for his life, and that appellant took one driver's cell phone. (14 RT 3732-3736.)

f. Trace Evidence

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[7]Because Murphy invoked her privilege against self-incrimination, the trial court declared Murphy unavailable at trial and admitted her preliminary hearing testimony into evidence at both trials. (6 RT 1511; 8 RT 1907-1912; 14 RT 3724-3728 .)

[8]As noted above (see, *ante*, at p. __, n. __), the trial court declared Seeney unavailable at either trial due to the invocation of his Fifth Amendment privilege. (6 RT 1511.)

The trace evidence at the crime scene did not inculpate appellant in any fashion. The cigarette butts found in Henderson's taxicab in Pomona had DNA that did not match appellant, Seeney, or either McKinney brother.[9] (17 RT 4562-4565.) A sneaker was found on the street near the scene. (17 RT 4334, 4408-4412, 4423-4425.) The sneaker was not analyzed for DNA. (17 RT 4567-4568.) Seeney's and Cory McKinney's feet would have fit the sneaker. (10 RT 2497; 17 RT 4587.) Appellant's foot would have been too large for it. (18 RT 4919; Exhibit 160.)

3. Evidence Regarding the Weapon

On February 15, 2000, Grant Fargon's home in Victorville was burglarized. Fargon lived one half-mile from appellant and Seeney. Six guns were stolen from his home. Among them was a .44-magnum Ruger Super Blackhawk pistol, which was the type of weapon used to shoot Andres Dominguez and Victor Henderson. (15 RT 3789-3792, 3945; 16 RT 4156.)

4. Appellant's Statements to Deputy Sheriffs

Appellant did not admit to committing or attempting to commit any robberies of taxicab drivers when he was twice interrogated.[10] Appellant, however, admitted to using Andres Dominguez's cell phone hours after the robbery and homicide in Bloomington. (18 RT 4869-4870.)

C. Sylvester Seeney

Appellant's half brother, Sylvester Seeney, was the prosecution's most pivotal witness. (14 RT 3729.) Seeney was eighteen years old when he

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[9]The prosecution did not test the cigarette butts' DNA until the retrial. (16 RT 4562, 4572.)

[10]Appellant asserts that his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 were violated during the interrogations. (See *post*, Argument VI.)

was arrested with appellant on March 3, 2000, in Ohio. (3 RT 787.) He turned nineteen prior to the preliminary hearing. (14 RT 3743.) When he was sixteen years old, Seeney was sent to the California Youth Authority (CYA) for a burglary he committed in 1997. (14 RT 3742-3744.)

Following his release, Seeney continued to commit burglaries, including residential burglaries connected to this case. He admitted that he committed multiple burglaries and thefts for which Phyllis Woodruff was the getaway driver. (14 RT 3745, 3762.) Seeney testified that he and appellant entered homes together. (14 RT 3763.) The murder weapon was among the items stolen during these burglaries. On March 17, 2000, Seeney took Detective Elvert to the locations where he, Woodruff, and allegedly appellant had committed residential burglaries. One of the homes Seeney showed Detective Elvert was Grant Fargon's house, from which the .44-magnum Ruger Super Blackhawk presumably used to kill Andres Dominguez and Victor Henderson had been stolen on February 15, 2000. (3 RT 815; 14 RT 3789-3795.)

On March 3, 2000, Seeney and appellant were arrested together near Cincinnati, Ohio. They were passengers in a commercial truck driven by appellant's wife, Melody Mansfield. (15 RT 3960-3965.) Seeney was arrested for violating his probation related to his juvenile burglary adjudication. (14 RT 3742-3743.)

Later that day, two Ohio State Troopers interrogated Seeney. The interrogators presented Seeney with a stark choice: He could implicate appellant for killing two taxicab drivers, or he could spend decades in prison as an accessory to murder.[11] (11 CT 3214-3239.) The threats scared

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[11]The facts and circumstances of this interrogation and those that followed it are discussed in great detail in Argument III, in which appellant (continued...)

Seeney; nevertheless, he did not implicate appellant during the interrogation. (14 RT 3748-3749.)

While traveling back to California with several law enforcement officers on March 6, 2000, a detective told Seeney that he knew Seeney possessed information pertaining to the homicides of Dominguez and Henderson. (14 RT 3751.)

That night, Detective Chris Elvert from the San Bernardino County Sheriff's Department interrogated Seeney twice. Detective Elvert told Seeney, who faced returning to CYA custody for three years, if his probation was violated, that he would talk to Seeney's probation officer, implying that Seeney could avoid a probation violation if he incriminated appellant. Detective Elvert also told Seeney that if he told the "truth," he would say he saw appellant with a gun. After Detective Elvert told Seeney what Phyllis Woodruff had said to him, Seeney said that he saw appellant holding a high-caliber revolver. (3 RT 807, 810-812, 827.) Thereafter, Seeney told Detective Elvert that appellant told him he had committed the crimes against Richards, Dominguez, and Henderson. (3 RT 814; 12 CT 3429-3454.)

To secure Seeney's testimony at the preliminary hearing, the prosecution provided Seeney with transactional immunity for the residential burglaries in which weapons were stolen. (12 CT 3579-3584.) Thereafter, Seeney incriminated appellant at the preliminary hearing. (1 CT 111-161.)

On December 10, 2001, during an interview with defense counsel Joseph Canty and defense investigator Ronald Forbush, Seeney recanted his

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[11](...continued)
asserts that the admission of Seeney's coerced out-of-court statements and testimony deprived appellant of a fair trial and infringed other constitutional rights. (See *post*, at pp.140-173.)

preliminary hearing testimony.[12] (3 RT 839; 1 Supp. CT 241-258.) Seeney explained that the interrogators scared him. (1 Supp. CT 241-244.) He said he believed that law enforcement officers could carry out their threats of imprisonment if he did not incriminate appellant. (1 Supp. CT 245.) He said that he incriminated appellant due to that fear. (1 Supp. CT 243.) Seeney stated that he did not see appellant or anybody else with a .44 magnum, or any other high-caliber weapon. He said he saw only a .25-caliber gun belonging to either Brad or Cory McKinney. (1 Supp. CT 254-255.) Lastly, Seeney said that appellant did not admit to robbing or killing any taxicab drivers. (1 Supp. CT 256.)

When appellant called Seeney as a witness in conjunction with his motion to suppress Seeney's statements and testimony, Seeney repeatedly invoked his privilege against self-incrimination. (3 RT 798-805.) Significantly, Seeney invoked his Fifth Amendment privilege against self-incrimination in response to defense counsel asking him if his preliminary hearing testimony had been true. Seeney's counsel told the court that Seeney would assert that privilege with respect to any question about his preliminary hearing testimony. (3 RT 801.)

Because Seeney indicated that he would invoke his privilege against self incrimination if called as a witness at trial, the trial court declared Seeney unavailable. (3 RT 802; 6 RT 1511.) The prosecution introduced Seeney's preliminary hearing testimony at the guilt phase of the trial and retrial. (8 RT 1957-1991; 14 RT 3729-3763.)

The circumstantial evidence that suggested appellant perpetrated the offenses pointed similarly toward Seeney's guilt. The location of the

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[12] The trial court excluded evidence of the recantation. (See *post*, Argument IV.)

incidents in Bloomington was familiar to both Seeney and appellant. (14 RT 3729; 21 RT 5674-5681.) The place in San Bernardino where Richards picked up his fare was one block from the hotel in which appellant and Seeney's mother lived, and both appellant and Seeney had been visiting her before Richards was dispatched to downtown San Bernardino. (14 RT 3644.) In addition, appellant could have received Andres Dominguez's cellular phone from Seeney, who testified that he committed thefts in partnership with appellant.

D. Phyllis Woodruff

As stated above (see *ante*, at p. 8), Phyllis Woodruff was Sylvester Seeney's girlfriend. She and Seeney were temporarily living together at the time of the Dominguez and Henderson homicides. (14 RT 3638-3641.)

As noted previously, Woodruff committed residential burglaries with Seeney and allegedly appellant. She was aware that burglaries and thefts were taking place: Besides driving Seeney and others to the homes that were burglarized, she would knock on doors to ensure the occupants were not home. Woodruff sold items stolen in these residential burglaries at a pawn shop. She also pawned off items that were taken in burglaries that she did not commit. (14 RT 3649-3656.)

Woodruff said nothing about having participated in residential burglaries until her last of several interviews with Detective Chris Elvert. (16 RT 4158-4159.) At the first trial, she explained she admitted committing burglaries because Detective Elvert already knew about them. (7 RT 1772-1773; 14 RT 3657.)

Woodruff received transactional immunity for the burglaries. (14 RT 3655-3656.) Armed with the immunity agreement, Woodruff testified at the preliminary hearing and at trial. She testified that appellant said that he stole

guns in home invasions, and she admitted that she participated in some of those burglaries.[13] (14 RT 3653-3656.)

E. Brad and Cory McKinney

Brad and Cory McKinney were close friends of Sylvester Seeney. They also used to spend time with appellant. (14 RT 3642.) There was a considerable amount of evidence indicating that either or both of them committed the offenses against the taxicab drivers.

On the morning of February 21, 2000, Cory McKinney joined appellant, Sara Bancroft, and Tiffany Hooper on their drive from Victorville to San Bernardino. During the ride, Seeney's white jacket and Dominguez's cell phone were located near him. When Cory and appellant walked out of the car, Cory grabbed the white jacket and cell phone. (14 RT 3592-3595; 17 RT 4601.) One of the calls dialed from Dominguez's cellular phone after it was stolen was made to Arlene Best, who was Cory McKinney's friend. (16 RT 4209.) Hooper initially told the police that Cory McKinney, not appellant, had been injured and had told Hooper he was shot in the leg in Los Angeles the previous night (February 20th). (17 RT 4601.)

When Tiffany Hooper met Cory McKinney on that ride, people called him Trey. (14 RT 3599.) After Victor Henderson was shot and killed, David and Michelle Sisemore heard the getaway driver say to the shooter, "Hurry up, Trey." (16 RT 4039, 4055.)

During the investigation of the February 21, 2000 incidents, Cory McKinney gave Sergeant Dean four or five alibis before one had

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[13]As mentioned above (see *ante*, at p. 8), Woodruff said that appellant admitted committing the Richards robbery to her and showed her the stolen taxicab. She testified that appellant showed her a stolen high-caliber gun and told her that it was going to put a big hole in someone. (14 RT 3645-3652.)

evidentiary support. (17 RT 4586, 4594; 18 RT 4742-4743.) Sergeant Dean observed that Cory McKinney had scabs on his leg two weeks after these incidents. Cory McKinney said he had been bitten by a dog and scratched by a cat, and Sergeant Dean did not inquire further. (16 RT 4208, 17 RT 4591.)

The .22-caliber gun, which was stolen from Donovan Diaz, that jammed during the Richards robbery was found during a search of the apartment where Brad and Cory McKinney lived. (15 RT 3998-4001; 16 RT 4192.)

At the retrial, Sergeant Dean testified that he had not dismissed Brad McKinney as a suspect in the offenses. (16 RT 4199.)

II. Penalty Phase

A. Aggravating Evidence

The prosecution presented evidence of three violent incidents involving appellant plus victim-impact evidence.

Appellant admitted his guilt for the voluntary manslaughter of Joseph Leonard Rodriguez on October 9, 1990. (19 RT 5116.) Rodriguez had a drug-sale transaction with appellant and appellant's brother Franklin Wilson. After Rodriguez became belligerent and wielded a knife, appellant shot him. (21 RT 5793.) Rodriguez sustained six gunshot wounds and died from internal bleeding. (19 RT 5118-5121.)

In February 2000, appellant told Roy Rowe Jr. that his daughter "fucked up [his] life" and threatened to kill him. Appellant punched and kicked Rowe, who was the father of someone with whom appellant had been sexually intimate. Rowe suffered a black eye and fractured ribs. (19 RT 5134-5136.)

On January 22, 2003, during the retrial, Deputy Sheriff Maria Brown took a dummy warrant, which is the Sheriff's Department paperwork for

inmates who need to be transported between jail and court, from appellant. Appellant got extraordinarily angry and told her that she would get hurt if she tried to snatch something from his hand again. (19 RT 5138-5143, 5149-5154.) Deputy Brown and appellant dealt with each other often and never had any other confrontations. (19 RT 5143-5148.)

Andres Dominguez's mother and two spiritual advisors provided victim-impact testimony. (19 RT 5184-5193, 5220-5225.) Victor Henderson's mother, wife, and daughter did the same. (19 RT 5194-5217.)

B. Mitigating Evidence

Appellant presented evidence of his social history from several relatives as well as mental-health experts Dr. Rahn Minagawa, Dr. Adrienne Davis, and Dr. Richard Dudley.

Psychiatric records showed that appellant's mother, Jennifer Wilson, suffered from paranoid schizophrenia and bipolar disorder. (20 RT 5291, 5370, 5440, 5533.) Her psychotic disorders were comorbid with her drug addiction. (20 RT 5533.) Among the symptoms from which she suffered were delusions, hallucinations, a distorted perception of reality, social withdrawal, and inability to care for herself and others. Dr. Richard Dudley, a psychiatrist, testified that self-medication through illegal drugs is a common coping mechanism. (19 RT 5238-5239; 20 RT 5291-5293, 5418 5441.) Dr. Dudley also noted that blood relatives of schizophrenics have a higher incidence of a wide range of psychological ailments, including schizoaffective disorder and paranoid personality disorder. (20 RT 5440, 5461-5462.) When overwhelmed, Jennifer Wilson would leave home unannounced for days and stay with her mother. (20 RT 5550-5552.) She kept a jar in the freezer that contained the names of the people against whom she had purportedly cast a spell. (21 RT 5734.)

While pregnant with appellant, Jennifer Wilson used drugs extensively. (20 RT 5430-5432.) Dr. Dudley and Dr. Joseph Wu, a neuropsychiatrist, opined that drug use while appellant was in utero might have been a source of appellant's developmental delays or brain damage. (20 RT 5430; 21 RT 5623.)

Appellant's father, Franklin Wilson Sr., drank heavily while he was married to appellant's mother. He was often imprisoned. Appellant was conceived during a conjugal visit. (19 RT 5265-5629.) Franklin Wilson Sr. was not ready for fatherhood, and Jennifer Wilson lacked the ability to be a mother. (19 RT 5276.) CYA records described appellant's childhood as chaotic. (20 RT 5371.)

Horrific abuse marred appellant's upbringing. (20 RT 5295-5296, 5310.) Appellant's mother once slammed appellant's hand down into an open flame. (20 RT 5385.) Her boyfriend Willy threw bleach in appellant's eye. (21 RT 5729.) Since appellant was nine years old, Franklin Jr. would beat appellant up often and leave his nose and mouth bloodied. (21 RT 5807, 5810.) Compared to his siblings and cousins close in age, appellant got beaten most severely. Appellant also received excessive discipline: He would get whipped with extension cords or hit with rosebush thorns. (21 RT 5728-5733.) Appellant's stepfather, Daniel Seeney, was an alcoholic who abused appellant's mother. (19 RT 5236.) He got into a plethora of physical confrontations with Jennifer Wilson; at times, police intervention was needed. In addition, he regularly whipped and beat appellant. (20 RT 5550-5551, 5564; 21 RT 5679, 5686.) He was not unique; Jennifer Wilson was abused by several paramours. (20 RT 5296.) In addition, Daniel Seeney punched appellant in the head many times. (21 RT 5809.) When appellant was injured from the abuse, his injuries exacerbated the trauma that resulted from the abuse. (20 RT 5453-5454.)

Unconscionable neglect defined appellant's childhood. Jennifer Wilson would leave for days at a time, and before she left she would remove the doorknob to lock her children in the home. Appellant's older brother, Franklin Wilson Jr., would escape though the window and steal food so they would not go hungry. (21 RT 5727, 5741.) Appellant received insufficient supervision and discipline. He would be permitted to walk around the neighborhood and was unusually street savvy when he was nine or ten years old. (19 RT 5260.) Jennifer Wilson would sleep until the early afternoon rather than wake, feed, and clothe her children and send them off to school. (21 RT 5672.) When the school district sought to correct appellant's truancy, Jennifer Wilson failed to cooperate and, by claiming that her children were visitors from out of state, impeded the school district's efforts to improve appellant and his siblings' attendance at school. (20 RT 5405-5406, 5436.) Appellant's clothing was rarely clean. In addition, the apartment in which appellant lived with his mother smelled of feces and urine. (19 RT 5255-5257; 21 RT 5672.)

Appellant was raised in an extraordinarily unstable home. Jennifer Wilson routinely was evicted from her homes for failing to pay the rent. In addition, she sometimes moved in order to escape domestic violence. For a brief period, she was homeless. Her older brother Sylvester Smith paid the first and last month's rent on a different home for her and her children approximately once per year. On one occasion, she was responsible for paying the mortgages for a family home into which she and her children moved. The bank that held the second mortgage foreclosed on that home eight months later. (21 RT 5670-5677.)

Appellant's older brother, Franklin Wilson Jr., was a bad influence on appellant. Franklin Jr. was a gang member who was often sent to prison. (19 RT 5239-5240, 5258; 20 RT 5305.) He glorified criminality, gun toting,

and gang violence to appellant. (21 RT 5747.) Franklin Jr. ultimately received two life sentences. He also involved his and appellant's cousin in his crimes, and the cousin is serving a 25-year-to-life sentence. Appellant followed his brother. (21 RT 5684-5685, 5689-5690.)

Learning disabilities hampered appellant's childhood and education. Appellant had attention deficit hyperactivity disorder (ADHD). (20 RT 5296, 5425; 21 RT 5772.) Dr. Rahn Minagawa, a psychologist, testified that people with that disorder act impulsively and aggressively and have difficulty concentrating at school. Appellant's school developed an individualized education program for appellant, but appellant's mother thwarted the school's efforts. (20 RT 5296-5298.) Appellant was prescribed Ritalin and Mellaril to control the ADHD. (20 RT 5371, 5431.) As an adult, appellant has had an impulse-control disorder. (20 RT 5425-5426.) Dr. Minagawa and Dr. Richard Dudley, a psychiatrist, testified that appellant's impulse-control disorder and impaired executive functioning were products of his ADHD, as well as the unstable, chaotic, abusive, and neglectful environment in which he was raised. (20 RT 5306-5307, 5426, 5433-5434, 5439-5440.)

Based on his analysis of PET scans of appellant's brain, Dr. Joseph Wu, a neuropsychiatrist, concluded that appellant had frontal-lobe damage to his brain[14]. (21 RT 5619-5623.) Dr. Wu could not determine the cause of appellant's frontal-lobe damage, but his childhood ADHD suggests that he had the impairments during his childhood. (21 RT 5626-5628.) Noting that the frontal lobe is the part of the brain that controls executive functioning,

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[14]Dr. Peter Conti, a rebuttal witness for the prosecution, disputed Dr. Wu's methodologies and conclusions. (21 RT 5823-5857.)

Dr. Wu analogized appellant's abnormally low frontal-lobe activity to a car with faulty brakes. (21 RT 5628-5631.)

Dr. Minagawa opined that in addition to ADHD and an unspecified learning disorder, appellant suffers from paranoid, antisocial, and narcissistic personality disorders.[15] (20 RT 5310-5311.) He opined that appellant being abused exacerbated his having a learning disability, ADHD, a schizophrenic mother, and a home environment replete with domestic abuse. (20 RT 5316.)

From neuropsychological testing, Dr. Adrienne Davis concluded that appellant had difficulty with attention, concentration, and auditory processing. Those frontal lobe deficiencies are consistent with appellant's lack of impulse control and aggressiveness. (20 RT 5362-5363.) Dr. Davis explained that appellant had many risk factors for criminal behavior: growing up with an absent parent, being raised in a violent home, having a learning disability, having a father with a criminal history, having a mentally ill, drug-using mother who became a parent as a teenager, and growing up amid residential instability and poverty. Appellant had an unusually large number of risk factors. These risk factors predisposed appellant to criminality and to associate with criminals, such as appellant's brother Franklin Wilson Jr. Furthermore, appellant learned in his childhood home that violence was the appropriate response to stress and frustration. (RT 5368-5373, 5397, 5402.)

According to Dr. Davis, the California Youth Authority exacerbated, rather than ameliorated, appellant's deficits. The CYA effectively removed youthful lawbreakers from the community, but failed to give wards insight

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[15]On rebuttal, Dr. Craig Rath opined that appellant had an aggravated case of antisocial personality disorder. (21 RT 5774-5781, 5801-5802.)

into their behavior, teach them a job skill, or prepare wards for the outside world to which they would be released.[16] (20 RT 5391; 21 RT 5701.) The rehabilitative services provided by the CYA were minimal at best. In its history, the CYA was most crowded when appellant was in its custody. (20 RT 5490, 5501.) Violence and gang activity marred the CYA during that time. (20 RT 5497-5499.) Without adequate rehabilitative services, the CYA had a prison-like subculture, within which wards became institutionalized and had a recidivism rate that exceeded ninety percent. The recidivism was so common that CYA employees would grimly joke that a ward who got killed in gang warfare following his release from CYA was a success story because he did not get convicted of a new offense. (20 RT 5511-5513; 21 RT 5607-5708.)

A CYA employee who knew appellant from the Stark Correctional Facility (formerly known as the Youth Training School) found appellant to be engaging and easy to work with. (21 RT 5705.) When appellant was twelve years old, a probation officer recommended that appellant be placed in a therapeutic environment in which he could receive medication and therapy; however, appellant never received those interventions. Instead, appellant was placed in institutional group homes. (20 RT 5302-5303.) Although over a quarter of CYA wards have mental illnesses, the majority of mentally ill wards receive no treatment. (20 RT 5353-5355.)

After appellant was released, following a decade in CYA custody, he was not remotely prepared to live outside an institutional environment. (20 RT 5309-5310; 21 RT 5692.) Appellant was recommended for parole

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[16]Judy Weiss, who was a prosecution witness on rebuttal, conceded some of CYA's failures, but generally testified that the CYA was not as ineffective or dangerous as appellant's witnesses had said. (21 RT 5858-5882.)

years before his release, but was denied parole due to his failure to complete programs that were not available. (20 RT 5372.)

Appellant had become a very different person by the time he was released by the CYA. He was jittery and hypervigilant, and he needed, but did not receive, psychiatric help. (21 RT 5690-5692.)

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I.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND A RELIABLE GUILT DETERMINATION BY THE ERRONEOUS ADMISSION OF UNRELIABLE IDENTIFICATION EVIDENCE

A. Introduction

The assault upon taxicab driver James Richards took place in the month of January, sometime between 8:00 and 8:45 p.m., when it was well after dark. During that time, except for a few brief moments, Richards was driving the taxicab with his eyes fixed on the road ahead. The perpetrator was a passenger in the back seat. When later events unfolded, still in darkness, the perpetrator had a gun trained on Richards and demanded money. While Richards tried hard to convince the jury that he *could see* the perpetrator — even going so far as to say that this crime took place when it was "still daylight" (15 RT 3844) — the facts, including Richards's own testimony, established otherwise. The circumstances of the crime make it highly unlikely that Richards was able to see the perpetrator well enough, or long enough, to form a reliable memory. In fact, a month after the robbery, Richards reported to the police that another man was "the same person who robbed him in January." (4 RT 1026.) Richards did not abandon that opinion until the police showed him multiple, identical photos of appellant, which led Richards to select that photo. However, if appellant had been the perpetrator, then Richards should have recognized appellant at a physical lineup a few days later, but did not. In fact, when Richards had an opportunity to see appellant in person, under closely monitored conditions, he stated that the perpetrator was not present. Richards's selection of appellant's photo, as well as the in-court identification, were not based upon a reliable memory; they were the product of suggestion from law enforcement and the prosecutor.

B. Procedural Background

On February 25, 2002, appellant filed a "Motion To Exclude Identification Testimony Of Witness James Richards." (3 CT 705-824.) The motion sought to exclude Richards's out-of-court selection of appellant's photo from a sheriff's photo array, as well as Richards's anticipated in-court identification of appellant at trial. (3 CT 714.) The motion was based on federal grounds [the identification was "unreliable and . . . admission of same would violate the Fifth, Sixth and Eighth Amendments to the United States Constitution"], as well as state grounds [the identification was "not relevant within the meaning of California Evidence Code section 352."]. (3 CT 705-706.)

The motion included three exhibits: (1) a 1998 article from *Law and Human Behavior,* by Dr. Gary L.Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*; (2) a 2001 directive from New Jersey Attorney General John Farmer to all police and prosecutors, adopting the guidelines recommended by Professor Wells regarding eyewitness identification procedures; and (3) a 1999 handbook from the United States Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement.* (3 CT 717-824.)

The State filed written opposition (4 CT 1065-1077) and the trial court held an evidentiary hearing on March 20, 2002. (4 RT 904-1045.) Following the hearing, which included testimony from law enforcement as well as eyewitness expert Dr. Kathy Pezdek, and after considering brief arguments of counsel (4 RT 1080), the trial court denied the motion to exclude Richards's identification testimony. The trial court ruled that any objections to the reliability of the identification evidence went "to weight, rather than admissibility." (*Ibid.*) While conceding that law enforcement could have used better procedures in this case, the trial court found no

evidence that the photo array was "so suggestive or impermissibly suggestive as to violate due process." (4 RT 1081.) Ultimately, it ruled:

> I do not believe there has been a sufficient showing *that this identification is worthless*, and therefore should be excluded. So I would deny the motion.

(4 RT 1082, emphasis added.) In light of this ruling, Richards was permitted to testify about his selection of appellant's photograph from the third photo array (15 RT 3869), and identified appellant in court as the perpetrator of the January 7, 2000 crime. (15 RT 3874.)

At the time of the first trial, shortly after this hearing, additional evidence was presented concerning the reliability of Richards's identification. Evidence that law enforcement authorities had prepared two photo arrays that included appellant's DMV photo was unknown to defense counsel at the time of the pretrial hearing, but was significant in establishing that Richards's identification was the product of suggestion, rather than a reliable memory of the perpetrator. Following appellant's conviction and death verdict, appellant filed a motion for a new trial, arguing again that his constitutional rights were violated by admission of Richards's unreliable identification. (11 CT 3063.) The trial court denied this motion as well. (22 RT 6034.)

C. Factual Background

Except as specifically noted, the evidence from the preliminary hearing, as well as from the two-day pretrial evidentiary hearing, established the following facts:

On the night of January 7, 2000, between 8:00 and 9:00 p.m.,[17]

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[17]At the preliminary hearing Richards affirmed the prosecutor's statement that the call came in "a little before 9:00 p.m." (1 CT 179-180.) However, based upon other testimony, including that of Richards in later

(continued...)

taxicab driver James Richards was dispatched to pick up a fare in front of a Stater Bros. Market in San Bernardino. The passenger, upon entering the taxicab, gave Richards directions to a location in Bloomington. (1 CT 180.) At the end of the ride, the passenger put a gun to Richards's head, robbed him of cash, and ordered him to walk outside of the taxicab. The assailant then put the gun in Richards's mouth. Richards heard a click, but the gun did not fire. Richards immediately ran to a nearby house for help, and the perpetrator, after unsuccessfully attempting to fire the gun once more, left in the taxicab. (1 CT 183-190.) That night Richards gave a deputy sheriff a description of the assailant. According to Sergeant Robert Dean, Richards described the perpetrator as a black male, in his thirties, six feet tall, and 220 pounds. (4 RT 1022.[18])

Following this incident Richards quit his job and entered a month-long drug treatment program. While living in this facility, he became acquainted with another participant, Ray Bradford, whom Richards began

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[17](...continued)
proceedings, the dispatch came at approximately 8:00 p.m. (15 RT 3843; 7 RT 1722.) Either way, however, in January it would have been completely dark outside by this time.

[18]At the preliminary hearing, Richards was not certain whether he described the robber's "facial features" in the initial report to the police, but did know that "at certain points I did, yes." (1 CT 194.) He believed he told the police that the man was a "light-skinned, black male, real clean cut, clean shaven, healthy looking." (1 CT 195.) When asked if he remembered anything else, he said no. When asked if he said the suspect had facial blemishes, he said he may have said his skin was rough, but had no memory of either saying, *or seeing*, "blemishes." (*Ibid.*) At the pretrial hearing, no one from law enforcement testified that Richards mentioned rough skin or blemishes when he was first interviewed. Unquestionably, by the time of the retrial, Richards had changed his story, claiming that both facial skin (pock marks) and a short goatee had been mentioned as identifying features. (15 RT 3859.)

to suspect was the man who had robbed him. (1 CT 190, 197-198.) However, Richards had no further contact with the police and did not notify them about Bradford "until after [Andres Dominguez and Victor Henderson] got killed." (1 CT 199.)

After Richards learned of the murders on the news, he telephoned Sergeant Robert Dean to say he believed that Ray Bradford was "the same person who robbed him" in January. (4 RT 1026; 1 CT 196, 200.) On February 27, 2000, two detectives came to Richards's home to show him a photo array. This array included the photo of a suspect named Samuel Mahan (4 RT 1033), but did not include either Ray Bradford's or appellant's photo. Richards made no selection from this first photo array (1 CT 198; 4 RT 1030-1033), but told officers that one of the photos resembled the perpetrator. (1 CT 207.)

Sometime after this first photo array, law enforcement showed Richards a second photo array. Richards testified that the second lineup was "the same type of thing," that is, a group of six photos. (1 CT 189.) When asked if he selected anyone from the *second* photo array, Richards replied, *"I never selected anybody until the third time.* The *first two times* I just — I'm not for sure which time, but I remember during those *first two times* saying that a couple of the guys resembled him, looked kind of like him." (1 CT 189, emphasis added.) At the pretrial hearing, no evidence was presented as to whether appellant's photo was included in the second photo array and neither of those first two arrays were offered as exhibits.

At trial, however, Richards was asked to identify both of these photo arrays, admitted as Exhibits 148 and 147,[19] respectively. (7 RT 1680).

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[19]Although the prosecution objected to the admission of Exhibit 147 because it "was never shown to Mr. Richards," the trial court overruled the (continued...)

While Richards knew he had been shown photo arrays of "six black males," he could not be certain that either of these displays was one he had been shown two years earlier. (15 RT 3890.) Detective Maxwell identified Exhibit 148 as the first photo array. (15 RT 3914.) Sergeant Dean identified Exhibit 147 as a photo array that had been prepared but possibly not used. That photo array had a driver's license photo of appellant obtained from the Department of Motor Vehicles (DMV) in the number two position. While Sergeant Dean believed Exhibit 147 had not been administered, he conceded it was possible that it had been shown to Richards, in addition to the other two photo arrays.[20] (8 RT 2130.)

The third photo array was shown to Richards on March 2, 2000, by the lead investigator Detective Scott Franks. At the preliminary hearing Franks identified Exhibit 20 as the photo array which he showed to Richards.[21] (1 CT 247.) According to Franks, Richards selected appellant's photo within ten seconds of seeing the array. (4 RT 996.) Franks asked Richards to circle appellant's photograph, which in that array was in position number five, and to sign and date the display, which he did. According to Franks, that this was the first photo array that he showed to

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[19](...continued)
objection and admitted it on the basis of Richards's testimony that it was possibly one of the three photo arrays he was shown. (7 RT 1680.)

[20]At the retrial, Detective Franks testified that Exhibit 147 was a photo array that was in his homicide file book, but claimed he did not show it to Richards. (17 RT 4446.)

[21]At the preliminary hearing, the third photo array was marked and admitted as Exhibit 20. (1 CT 247.) Later, at the pretrial hearing on the motion to exclude the identification evidence, this third photo array was identified as Exhibit 16. (4 RT 1008.) It remained Exhibit 16 through the retrial. (15 RT 3869.)

Richards. (4 RT 996-998; 12 CT 3550-3551.) Nevertheless, the prosecution conceded in its opposition papers that there were in fact *three* photo arrays:

> Richards identified defendant at the *third of three photo arrays* that law enforcement showed to him. At the *first and second photo arrays*, Richards was only able to point out individuals that resembled the suspect.

(4 CT 1066-1067, emphasis added.) At trial, Richards confirmed that he remembered officers coming to his house to show him pictures on three separate occasions: "I seem to remember it was three different occasions and the first two times I wasn't able to pick anybody out. The third time I picked him out immediately." (6 RT 1632.)

On March 14, 2000,[22] approximately two weeks after Richards had selected appellant's photo, Richards was brought to the county jail to view a live lineup in which appellant was standing in the number two position. (1 CT 199; 4 RT 1035.) Richards testified that "[e]verybody there, I think, kind of resembled [the suspect] a little but, but there was nobody that stood out at that time." (1 CT 201.) Richards was unable to identify anyone from the live lineup. (1 CT 200, 250.) When the lineup concluded, Detective Franks engaged Richards in a conversation about the procedure. In this tape-recorded conversation Franks compared the live lineup to the previous photo array and pointed out to Richards, "When you saw the . . . photo array, you had no problems picking the guy out." (12 CT 3555.) To this comment Richards responded, "But he [the perpetrator] wasn't here today." (*Ibid.*) Detective Franks questioned this by saying, "You didn't think so?" (*Ibid.*)

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[22]Detective Franks testified that the live lineup took place on March *13*, rather than March *14*, 2000. (4 RT 1009.) However, March 14 appears to be the correct date. (See transcript of audio tape, Exhibit 222, at 12 CT 3553.)

In addition, when asked whether Richards saw anyone who looked "similar to him," Richards said, "Number four looked similar. . . ." (12 CT 3555.) As noted above, appellant was suspect number two.

At the preliminary hearing, which was held approximately five months after the crime, Richards was called as a prosecution witness. Just before entering the courtroom, Richards told Deputy District Attorney Kent Williams that "he wasn't sure whether he would recognize" the person who robbed him. (4 RT 959.) While standing in the hallway, Williams then showed Richards a copy of Exhibit 16, the third photo array in which Richards had previously been asked to circle appellant's photo. To the surprise of no one, when Richards took the stand to testify shortly afterward, he identified appellant as the perpetrator. (1 CT 180.)

D. Expert Testimony, Scientific Research, and Documentary Evidence Supported Exclusion of Richards's Identification Testimony

In further support of the motion to exclude Richards's testimony, appellant presented the testimony of experimental psychologist, psychology professor, and eyewitness identification expert, Dr. Kathy Pezdek. (4 RT 905-945.[23]) As demonstrated by her *Vita* (Exhibit 7, 12 CT 3411-3416) one of her areas of expertise is the conduct of police lineups and how certain procedures can adversely affect the reliability of purported identifications. Dr. Pezdek conducts scientifically based research to determine the factors that affect the accuracy of memory, and in particular the accuracy and reliability of eyewitness memory. (4 RT 906.) While memory research has been going on for more than 100 years, in the last 20 to 30 years the

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[23]In addition to her testimony at the pretrial hearing, Dr. Pezdek also testified at the trial and retrial. (9 RT 2171-2254; 18 RT 4644-4702.) Her curriculum vitae was submitted at the pretrial hearing as Motion Exhibit 7, and at trial as Exhibit 251. (4 RT 905; 18 RT 4649.)

research has intensified, in part because of the emergence of DNA evidence and the increase of DNA exonerations. In light of recent evidence showing that up to 80% of the DNA exonerations have involved purported eyewitness identifications, researchers have been conducting extensive studies, both in an experimental setting as well as through reviewing thousands of actual cases, to discover the specific factors leading to misidentifications. (4 RT 907; 3 CT 718-723.) Numerous scientific journals, including the *Journal of Law and Human Behavior*,[24] have been regularly publishing peer-reviewed studies related to eyewitness identification, including recommendations for more reliable lineup procedures.[25]

Dr. Pezdek testified about the science of memory formation and retrieval. She explained that, contrary to popular thinking, human memory is not like a video recorder that can record information to be played back exactly as it was recorded; rather, it is malleable and subject to change and the influence of outside factors. (4 RT 908.) A common belief is that if someone has seen a face, there is a 100% chance that they will recognize that face if they see it again. Similarly, most people believe that if someone is shown a new face, there is no chance they will recognize that face as the

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[24]An article from this journal, "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," was attached as Exhibit 1 to appellant's motion to exclude Richards's identification. (3 CT 718-756.)

[25]In the late 1990s, motivated by a concern for the number of people wrongfully convicted based on false or mistaken eyewitness identifications, then United States Attorney Janet Reno convened a group of experts in the fields of law and psychology, to review the proper procedures for conducting lineups with eyewitnesses. This resulted in a Department of Justice published guide for law enforcement, suggesting the best practices in this area, in order to reduce the cases of mistaken identification and wrongful conviction. (See 3 CT 770-824; 18 RT 4648.)

one they saw before. However, that is not how human memory works. Knowing how memory works is important when procedures for testing eyewitness memory are being constructed. (4 RT 910.)

As will be discussed in greater detail, Dr. Pezdek's pretrial testimony focused on several distinct areas, including the differences between simultaneous and sequential lineups (4 RT 913-916); how blind administration eliminates "expectancy effect," which is the effect of administrator feedback on witness confidence (4 RT 916-921); and the effect of multiple lineups with repeated faces. (4 RT 922-925.) Dr. Pezdek also explained why identifications made at live lineups are more accurate than identifications made from photo arrays, and why in-court identifications are inherently suggestive. (4 RT 927.)

The record reveals that at the time of the pretrial hearing, neither Dr. Pezdek nor the defense appeared to have been aware of the existence of Exhibit 147, the second photo array that was shown to James Richards. When specifically asked about the number of photo arrays Richards was shown, Dr. Pezdek answered, "One photo array is my knowledge." (4 RT 941.) However, she immediately changed her answer to "two," after recalling that Richards "was reshown [a copy of the previously-circled photo array] before he went to court." (*Ibid.*) Dr. Pezdek had not been aware of Exhibit 147, the array that also contained appellant's DMV photo.

Dr. Pezdek had been told, however, that Richards had selected appellant's photo from a photo array, but less than two weeks later had failed to select appellant from a live lineup. Dr. Pezdek found these facts very difficult to reconcile:

> [I]t's just hard for me to figure out how that would happen, because if a witness remembers what a person looks like, they're much more likely to pick them out of the live lineup than the photographic lineup, but in this case, the opposite

> occurred. And why they didn't identify the person that they had identified previously doesn't make sense to me. So I can't put those facts together.

(4 RT 928.) Of course, at that time neither Dr. Pezdek nor the defense team had seen a copy of the second photo array, Exhibit 147. While this second array contained the same DMV photo of appellant that was in the third photo array, there is no evidence that the defense had any knowledge of this until shortly before the first trial, when defense counsel discovered it in the sheriff's case file. (16 RT 4201.)

In cross-examining Dr. Pezdek at the pretrial hearing, the prosecutor thus made no mention of Exhibit 147, and the record does not reveal whether the prosecution was aware of the existence of Exhibit 147 and whether it had been shown to Richards. However, in the prosecutor's cross-examination, he did address the issue of whether a "series of lineups where the *same picture is shown in each of the subsequent lineups*" could suggest to the witness that the repeated photo was the suspect. (4 RT 939, emphasis added.) When Dr. Pezdek was asked whether "witnesses have the ability to identify defects in their own potential identification and express the same" (4 RT 939-940), Dr. Pezdek confirmed that "source monitoring" errors — that is failing to recognize the source of one's recognition of another person — are extremely common. Witnesses often are unable to discern whether a face looks familiar because it was viewed at the crime scene, or whether it looks familiar because it had been seen in another context, such as in a previous photo array[26]. (4 RT 940.)

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[26]Indeed, Richards told Detective Franks, after failing to select someone at the live lineup, that he could not explain why he had selected appellant's photo previously from the photo array. Referring to appellant's DMV photo in the number five position, Richards said, *"for some reason* he (continued...)

The prosecutor continued with this line of questioning, and specifically asked Dr. Pezdek about previous *photo arrays* (plural), shown to Richards:

> Okay. So you have no information relating to *earlier photo arrays* being shown to [Richards] wherein he did not identify anyone?

(4 RT 941, emphasis added). Dr. Pezdek did not recall knowing that. When asked whether that fact, if true, would be significant, she confirmed that it would only be significant "if people from those earlier lineups *were repeated* in the lineups that we're talking about." (*Ibid.*, emphasis added.)

The prosecutor also posed a hypothetical in which a witness is shown three lineups, and no one is selected in the first two, but someone is selected in the third one. If the process had been suggestive, the prosecutor asked Dr. Pezdek how she could explain the witness's subsequent failure to select the same person from a live lineup. (4 RT 944.) Dr. Pezdek said she had the same question and found the anomaly "perplexing." (*Ibid.*) At a loss for providing a better explanation, she could only conclude that the witness simply had not formed a reliable memory of the perpetrator's face to begin with. (4 RT 945.)

Significantly, both the prosecutor and Dr. Pezdek assumed that Richards had never seen appellant's DMV photo until the third photo array. (4 RT 945 [Pezdek: "[A]nd I do understand that [lineup three is] the first lineup that included the suspect?" Prosecutor: "Yes."].) That assumption was soon shown to be false, but not until defense counsel discovered Exhibit 147 in the case file prior to the first trial. (16 RT 4201.) At the

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[26](...continued)
looked just like the guy to me." (12 CT 3556.) The most likely reason, of course, was that when he selected appellant's photo he had just seen the same photo in Exhibit 147.

pretrial hearing, had the defense and Dr. Pezdek been aware of the existence of Exhibit 147, the second photo array with the same DMV photo of appellant, Dr. Pezdek's response likely would have been much different. Had all the facts been available to the defense at the time of the hearing, Dr. Pezdek could have provided the same explanation that she gave when she testified at both trials, after Exhibit 147 had become available. (See discussion in section E. 4, *post,* and 9 RT 2214; 18 RT 4664-4667.)

Dr. Pezdek's testimony, along with the other evidence submitted by appellant prior to trial, provided substantial evidence that James Richards's identification of appellant was not based upon a reliable view and recollection of the perpetrator's face, but rather was the product of suggestive procedures carried out by both the police and the prosecutor. As discussed further below, those suggestive procedures included law enforcement's failure to use a "blind" administrator, its use of appellant's photo multiple times in successive lineups, the use of a simultaneous rather than sequential lineup, construction of the lineup in a way that caused appellant to "stand out" among the fillers, and suggestive feedback and prompting.

E. Richards's Identification of Appellant Was the Product of Unnecessarily Suggestive Procedures, Not an Independent View of the Perpetrator

Research convincingly shows that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined[27]. In a study conducted by the United States Department of Justice of 28 wrongful convictions, it determined that 85% of the erroneous

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[27]See Wells, et al., *Eyewitness Identification Procedures*, *supra,* 22 Law & Human Behav. at p. 6. (3 CT 723.)

convictions "were based primarily on the misidentification of the defendant by a witness. (Citations omitted.)" (*State v. Avery* (Wis. 2013) 826 N.W.2d 60, 86.)

In light of these compelling studies, state and federal courts are now recognizing that their "current approach to eyewitness identification has significant flaws." (*State v. Dubose* (Wis. 2005) 699 N.W.2d 582, 592; see also *United States v. Greene* (4th Cir. 2013) 704 F.3d 298, 305, fn. 3; *Young v. Conway* (2d Cir. 2013) 715 F.3d 79, 80-82 and fn. 2; *State v. Almaraz* (Idaho 2013) 301 P.3d 242, 251-253, and fn. 2; *State v. Lawson* [hereinafter "*Lawson*"] (Or. 2012) 291 P.3d 673; *State v. Henderson* [hereinafter "*Henderson*"] (N.J. 2011) 27 A.3d 872.) In response, a number of states have formulated better procedures, based upon the science of memory formation and retention, and relying on their own state evidentiary rules and state constitutions. (See e.g., *Lawson, supra*, and *Henderson, supra.*) In the present case, appellant challenged James Richards's identification testimony on both state and federal grounds. (3 CT 705-706.)

In general, the admissibility of evidence in a state court proceeding is a matter of state law and the reliability of a witness's testimony is typically left to juries. (*Perry v. New Hampshire* [hereinafter "*Perry*"] (2012) ___ U.S. ___ [132 S.Ct. 716, 720].) However, when police-arranged circumstances lead a witness to identify a particular person, the United States Supreme Court has recognized "a due process check on the admission of eyewitness identification" testimony. (*Ibid.*) In the face of a due process challenge to the admissibility of eyewitness identification evidence, California courts have followed the legal framework set forth in *Neil v. Biggers* (1972) 409 U.S. 188, and formally adopted in *Manson v. Brathwaite* [hereinafter "*Manson*"] (1977) 432 U.S. 98. (See *People v.*

Cunningham (2001) 25 Cal.4th 926, 989; *People v. Gordon* (1990) 50 Cal. 3d 1223; 1242.)

In *People v. Gordon, supra,* 50 Cal.3d at p. 1242, this Court coined the term "constitutional reliability," to describe the type of scrutiny that the trial court — rather than the jury — must provide when proffered eyewitness testimony is challenged on federal constitutional grounds. Constitutional reliability depends on (1) whether the identification procedure was unduly suggestive *and unnecessary*, and if it was, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. (*Ibid.*, citing *Manson, supra*, 432 U.S. at pp. 104-107.)

To apply the *Neil/Manson* test, the trial court must first determine whether the challenged identification procedure was suggestive, and if so, whether it was "unnecessarily suggestive." As explained in *Neil v. Biggers*:

> Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

(*Neil v. Biggers, supra*, 409 U.S. at p. 198.) An exception for suggestive, but necessary, procedures was recognized in *Stovall v. Denno* (1967) 388 U.S. 293, where the Court found that certain urgent situations made it virtually impossible to avoid suggesting a suspect to the witness (e.g., an arranged "show-up" of the suspect at a hospital where a dying victim lay critically injured). (*Id.* at p. 302.)

In a due process challenge, the initial burden is upon the accused to show that the police procedures were suggestive. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) In a lineup procedure, the question is whether anything causes the suspect to "stand out" from the others in a way that would suggest the witness should select the suspect. (*People v.*

Cunningham, supra, 25 Cal. 4th at p. 990, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 367.) If the accused shows that some part of the procedure was suggestive, and unnecessarily so, the burden then shifts to the State to show that the identification is nevertheless reliable standing on its own — i.e., that it "has independent reliability." (*Shirley v. Yates* (E.D. Cal. June 5, 2013) ___F. Supp. 2d___, 2013 WL 2434616.) This test was first articulated in *United States v. Wade* [hereinafter *"Wade"*] (1967) 388 U.S. 218.

In *Wade*, the United States Supreme Court held that post-indictment live lineups were a critical stage of the criminal proceedings and, if conducted without counsel present, were inadmissible at trial. (*Id.* at pp. 236-238.) In *Wade*, the lineup identification had been excluded, but the question still remained whether the witness's in-court identification was admissible or whether it should be excluded as the tainted product of the inadmissible lineup. In reversing the conviction and remanding the case back to the trial court, the Court held:

> We do not think this disposition can be justified without first giving the Government the opportunity to establish *by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.*

(*Wade, supra*, 409 U.S. at p. 240, emphasis added.) Thus, the tainted identification was only admissible if the State could show by "clear and convincing evidence" that the witness had identified the defendant *independent of* the previous improper lineup.

In California, "clear and convincing evidence" has been defined as evidence that is "'clear, explicit, and unequivocal'; that is 'so clear as to leave no substantial doubt'; and is 'sufficiently strong to demand the unhesitating assent of every reasonable mind.'" (*In re Michael B.* (1983)

149 Cal. App. 3d 1073, 1087, quoting *People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14.) If the State can meet that substantial burden and show that the identification was independent of the tainted procedure, the evidence may be admissible. (*People v. Ratliff* (1986) 41 Cal.3d 675, 689 [taint of suggestive lineup may be dispelled if State shows by clear and convincing evidence that identification had independent origin]; accord *People v. Caruso* (1968) 68 Cal.2d 183, 189.)

In *Manson*, the Supreme Court held that "reliability is the linchpin in determining the admissibility of identification testimony," and mandated that "the corrupting effect of the suggestive identification itself" must be weighed against the "indicators of [a witness's] ability to make an accurate identification." (*Manson, supra*, 432 U.S. at pp. 114-116.) In weighing these factors in the second part of the *Manson* test, the trial court must consider the "totality of the circumstances" including the following non-exhaustive factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the identification. (*People* v. *Cunningham, supra,* 25 Cal.4th at p. 989, citing *Manson, supra*, 432 U.S. at p. 114 and *Neil v. Biggers, supra,* 409 U.S. at pp. 199-200.)

Significantly, although *Manson* holds that reliability is the "linchpin" regarding the admissibility of eyewitness testimony, a trial court may not consider the "totality of circumstances" affecting reliability unless, as a threshold matter, the defendant establishes "unnecessarily suggestive" police procedures. (See *Perry, supra*, 132 S.Ct. at p. 728 [no trial court screening for reliability of eyewitness evidence without "taint of improper state conduct"].)

Although this Court reviews deferentially a trial court's findings of historical fact, especially those that turn on credibility determinations, a trial court's ruling as to whether a pretrial identification procedure is unduly suggestive is reviewed independently by this Court. (*People v. Alexander* (2010) 49 Cal.4th 846, 902; *People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

In this case, there is no indication the trial court ever considered the first step of the *Manson* test — whether the procedures were suggestive, and if so, whether they were unnecessarily suggestive. Instead, the trial court seems to have applied its own test: whether the procedures were so "impermissibly suggestive as to violate due process." (4 RT 1081.) As Justice Ginsberg explained in *Perry*, police identification procedures are only a matter of constitutional law if those procedures are suggestive *and* lead to an unreliable identification. (*Perry*, *supra*, 132 S.Ct. at pp. 724-724.) Although "constitutional reliability" is a two-step process, the trial court in this case approached the issue from some global perspective that seemingly collapsed the two components into one. Consequently, it is unclear what the trial court found as to the separate components of suggestiveness and reliability. In so doing, the trial court wrongly addressed only the constitutionality of the procedures themselves, an inquiry that is not part of the analysis.

Had the trial court applied the correct standard, it would have found, as this Court must, that the procedures used in this case *were suggestive*, and, because there was no investigative necessity for using such procedures, they were also *unnecessarily suggestive*. The question then should have been whether the State could show by clear and convincing evidence that, despite the flawed and suggestive procedures, James Richards's selection of appellant's DMV photo from the third photo array was "independent" of the

tainted procedures. Had the trial court held the State to the correct standard, the State would not have been able to meet it.

By skipping *Manson's* two-part test, the trial court concluded that the State's procedures did not violate due process, when the question was simply whether they were suggestive. Under *Manson*, a procedure that is only somewhat suggestive might still lead to an unreliable identification, if the witness had little or no opportunity to form a reliable memory. Conversely, even a highly suggestive procedure could lead to admissible evidence when measured against a witness's exceptional opportunity to form a reliable memory.

As explained further below, scientists have developed a large body of research on the extent to which the variables controlled by the State (the so-called "system variables") can affect a witness's ability to store and retrieve memories, and even cause witnesses to "misremember" faces and the circumstances under which they saw them. Many of the system variables that applied in this case were ones that did affect the reliability of Richards's identification of appellant. As more fully detailed below, the trial court had substantial evidence that the procedures used in this case were unnecessarily suggestive and tainted both the photo array and the subsequent in-court identification.

1. The "Non-Blind" Administration of the Photo Lineup Unnecessarily Tainted the Process

Detective Scott Franks was the case agent in charge of investigating this case. (10 RT 2471; 16 RT 4202.) On March 2, 2000, he went to the home of James Richards and showed him a six-pack photo array that included appellant's photo in position number five. (4 RT 996.) Detective Franks was fully aware that appellant was the primary suspect; he had procured appellant's DMV photo for the lineup, and was aware that his

photo was number five. (4 RT 1004-1005.) Detective Franks's job was to build a case against appellant.

An identification may be unreliable if the lineup procedure is not administered in "blind" or "double-blind" fashion. A double-blind administrator is one who does not know the identity of the suspect in a particular lineup. A blind administrator is one who *is* aware of the identity of the suspect, but shields himself from knowing where the suspect is located in the lineup. (*Henderson, supra,* 27 A.3d at p. 896.) In *Henderson, supra*, the New Jersey Supreme Court noted that double-blind lineup administration was believed to be "the single most important characteristic that should apply to eyewitness identification" procedures. (*Ibid*; see also Exhibit 2, attached to appellant's Motion to Exclude, 3 CT 761 [N.J. State Attorney General recommending that photo and live lineups be conducted by someone other than the primary investigator]; *Lawson, supra,* 291 P.3d at p. 686 ["Ideally, all identification procedures should be conducted by a 'blind' administrator."])

At the pretrial hearing, expert witness Dr. Pezdek explained that when a photo array is administered by a person who knows who the suspect is, there is an "experimenter expectancy effect" (4 RT 916-917) which often skews the results of the lineup. Researchers have described this effect as "the tendency for experimenters to obtain results they expect . . . because they have helped shape that response." (Rosenthal & Rubin, *Interpersonal Expectancy Effects: The First 345 Studies* (1978) 3 Behav. & Brain Sci. 377, 377.) This phenomenon has been recognized for many years, both by researchers and the courts. (See, e.g., *Moore v. Illinois* (1977) 434 U.S. 220, 224 ["Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused"].)

Suggestions from the administrator might be deliberate and flagrant, or so subtle and unintentional — such as a mere change in voice intonation — that neither party realizes it is happening. (4 RT 917.) Seemingly innocuous words or conduct — pauses, gestures, hesitations, or smiles — can unwittingly provide subtle clues and influence a witness's behavior[28]. As *Henderson, supra,* found, the consequences of a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. (*Henderson, supra,* 27 A.3d at p. 897.) As part of an effort to eliminate the experimenter expectancy effect, former United States Attorney General Janet Reno recommended blind administration of both live lineups and photo arrays. (4 RT 920; 9 RT 2192.)

2. Suggestive Administration of the Photo Array Steered Richards towards Appellant's Photo

The failure to use a blind or double-blind administrator can significantly affect the reliability of the lineup, and did so in this case. As noted above, Detective Franks was actively pursuing appellant's identification and arrest. At the time Franks administered the lineup, neither he nor Richards may have perceived that information was being improperly communicated. However, in reviewing the transcript of the audio-taped session (Exhibit 221), Dr. Pezdek noted several suggestive aspects. For example, the first person to mention appellant's photo (number five), was *not the witness* but was Detective Franks himself. Immediately after reading

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[28]R. M. Haw & R. P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy* (2004) 89 J. Applied Psychol. 1106, 1107; see also S. E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions* (2009) 15 J. Experimental Psychol.: Applied 63, 66-73.

the admonition, Detective Franks asked Richards, "What are you pointing to, number 5?" (12 CT 3550.)

Dr. Pezdek explained how the detective's knowledge that photo number five depicted the suspect may well have prompted him to ask this question and thereby encouraged the witness to focus on number five. By highlighting number five, the administrator may have suggested that number five was the target:

> And if the officer knew who the suspect was, which is true in this case. . . [the witness's] finger could have been moving across a number of faces, and then he kind of stops here. And the officer says, "Where are you pointing, number 5?" And that's like [Richards thinking], "Hmm. He didn't say that when my finger was over here or here or here or here or here, but if I'm kind of hesitating now at 5 and he's saying, 'Where are you pointing to, number 5?' It's kind of like, whoa, that's a little cue. Why did he stop me at that particular point."

(18 RT 4661.) A blind administrator may have simply asked the witness to explain what he was doing, in a neutral manner. Though neither Richards nor Detective Franks may have realized that clues were being communicated, numerous studies have confirmed that these subtle suggestions frequently take place and do affect the reliability of the identification.[29]

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[29]See Greathouse & Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification* (2009) 33 Law & Hum. Behav. 70, 71; Rosenthal & Rubin, *Interpersonal Expectancy Effects: The First 345 Studies* (1978) 3 Behav. & Brain Sci. 377, 377; Haw & Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy* (2004) 89 J. Applied Psychol. 1106, 1107; *see also* Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions* (2009) 15 J. Experimental Psychol.: Applied 63, 66-73.

According to Detective Franks's testimony at the preliminary hearing, when Richards viewed the display "he pointed initially to number 5." Detective Franks then testified about his own reaction to this: "And I said, 'Well, take your time.'" (1 CT 241.) Detective Franks further testified: "[Richards] looked at them again and went back to number 5. He said, 'That is him.'" (1 CT 242.) While this was Detective Franks's purported recollection of what happened, both the audio tape and its transcript show that Franks did *not* encourage the witness to take his time. To the contrary, the detective twice encouraged Richards to circle appellant's entire photo, depicted as number five. When Detective Franks was given an opportunity to listen to the tape recording of the procedure, he was forced to admit that the session had not been conducted as he had testified. (10 RT 2455 [asked whether his recollection was supported by the tape recording, Franks said, "No."].)

The tape, Exhibit 221, reveals that during this very brief encounter the witness himself never mentioned photo number five; but Detective Franks did — four times. (See tape transcript at 12 CT 3550-3551 ["What are you pointing to, *number five*?" What about *number five*?" "I want you to circle *number five* . . .the whole picture." "Then circle *number five*, the whole picture."].) Even when the witness indicated that he was "trying to look at everybody else real quick" — a time when it would have been appropriate for Detective Franks to have actually told Richards to take his time — Detective Franks instead was focused on wrapping things up. He simply told Richards again to "circle number five." (12 CT 3551.)

Under these circumstances, had there been a blind administrator, he might well have encouraged the witness to take his time, or to continue looking at "everybody else." Detective Franks did not do this, despite testifying that he had. As studies have shown repeatedly, non-blind

administrators routinely offer clues to the witness, often unwittingly. Detective Franks's comments to Richards during the administration of this photo array illustrated the suggestiveness that routinely results from not using a neutral administrator.

Law enforcement could have easily sent someone else to meet with Richards who would have had no ability to influence the outcome of the lineup process. Instead, the sheriff's department chose to send their case agent, the same person who had constructed the lineup with appellant's DMV photo. The administrator was not neutral; instead, he was someone fully invested in building a strong case against appellant.

Detective Franks also subtly validated Richards's selection of appellant in other ways. Dr. Pezdek testified that Franks's request that Richards circle the whole picture, was "an unusual procedure," and one that she had not seen before. The act of circling the picture focuses the witness's attention on the suspect's face, and increases the chances that the witness will identify that person in subsequent lineups. That becomes important in any case in which a witness is given multiple opportunities to make an identification, as was true in appellant's case. (18 RT 4662.) While Detective Franks may have believed he was giving no suggestions or feedback, Dr. Pezdek testified that Franks actually made numerous statements that reinforced Richards's selection of appellant's photo (number 5) and thereafter helped to bolster Richards's confidence in the accuracy of his selection.

If neither the witness nor the administrator is aware of these subtle clues, then it necessarily follows that attempting to expose these influences through cross-examination may be virtually impossible. A witness who has come to believe that his or her identification is based solely on the original view of the perpetrator, rather than the suggestive influences of the lineup

administration, will not likely change that view at trial. Leaving these matters for the jury to sort out is therefore not a helpful solution. "Jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness's false confidence in the accuracy of his or her identification." (*Perry*, *supra*, 132 S.Ct. at p. 737 (dis. opn. by Sotomayor, J.).)

Dr. Pezdek testified that this expectancy effect can be avoided entirely if lineups are administered by law enforcement personnel who have no information about the identity of the suspect. (4 RT 916-919.) However, in appellant's case, Detective Franks's administration of the photo array was both suggestive and unnecessary.

3. The Simultaneous Photo Array Procedure Used in This Case Was Also Unnecessarily Suggestive

As other jurisdictions as well as the United States Department of Justice have already recognized, eyewitnesses are less likely to misidentify innocent suspects when photos are presented to the witness sequentially, rather than simultaneously. (*Lawson, supra*, 291 P.3d at p. 686; *Henderson, supra*, 27 A.3d at p. 901; Department of Justice Guidelines, at 3 CT 770; 9 RT 2193.) At the pretrial hearing, Dr. Pezdek explained the difference between these two procedures. In a traditional simultaneous lineup all of the subjects are shown to the witness at the same time. The so-called "six-pack" photo array, as was used in the present case, is a typical example. The witness looks at a whole range of faces and makes a relative judgment, asking the question, "Of these six individuals, which is the closest match?" (4 RT 914.)

Dr. Pezdek compared this process to multiple choice test-taking. Though some people make the correct choice because they actually know

the answer, others are merely making an educated guess — searching for clues, trying to eliminate choices, and then picking from the answers that remain. Similarly, with a six-pack photo array, the witness may correctly select the perpetrator because he or she actually saw and remembered the face. However, the witness may also select the perpetrator's photo simply because it seems to be the "closest" face of those in the group, after eliminating those whose features clearly do not comport with his or her memory, however limited it might be. A sequential lineup procedure virtually eliminates this type of guesswork. (4 RT 914-919.)

A sequential lineup requires an "absolute judgment." The witness views one person, or one photograph, at a time. With each new photo the witness must make an independent evaluation, each time asking the question, "Is this person the perpetrator?" Each photo requires an up or down decision, and the process continues until a selection is made. Studies have demonstrated that the sequential lineup results in a higher "hit rate," that is, the rate of making accurate identifications. Just as importantly, the sequential procedure also results in a lower "false alarm rate," that is, the rate at which witnesses will misidentify someone. (4 RT 916.)

In this case, Richards was shown Exhibit 16, a photo array with two rows of three color photographs, numbered one through six. Although Detective Franks said that he read the admonition to Richards, which informed him that the suspect may or may not be present in the array, the research suggests that the admonition "has little effect" on how witnesses perceive the procedure and what they actually do.

> [The witnesses are] reading the cues, and they're trying to figure out — particularly with a simultaneous lineup — they're trying to make a relative judgment and figure out, "Okay, I've got these six guys. Which is the closest match?"

> Now, they're not necessarily aware that that's what they're doing, and if you ask witnesses, "Were you making a relative judgment, or were you making an absolute judgment," that's not something that they know. . . . [I]t's an unconscious kind of a process. It's a strategy that people are likely to use, and unfortunately the admonition has little impact on this.

(4 RT 914.)

Appellant was entitled to a sequential photo array procedure administered in double-blind fashion. The procedure used in this case was neither necessary nor reliable, but was one of the factors that led directly to Richards's selection of appellant from the photo array.

4. This Court Has Found the Re-Use of the Same Photograph in Successive Lineups, as Occurred Here, to Be Suggestive

Seeing the same photo in successive lineups within a relatively short period of time is another factor known to adversely affect the accuracy of an identification. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124; see also *Henderson, supra*, 27 A.3d at p. 900 [the rate of selecting an innocent person in a photo array more than doubles when the witness has seen that photo in a previous lineup]; Deffenbacher, et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference* (2006) 30 Law & Hum. Behav. 287, 299.)

At the pretrial hearing appellant raised the issue of multiple viewings of his photograph and presented the testimony of Dr. Pezdek who described her current research in this area. (4 RT 922-925.) In her study on the effect of intervening lineups on subsequent lineups, subjects were asked to look at a face for an entire minute, paying close attention so as to identify the face later. Sometime later, the subjects were shown a "blank lineup," that is, a lineup that did not contain the original face. The blank lineup used six

photos of new faces, which were generally similar to the original face. Some subjects made a selection, and others did not. (4 RT 923.)

A few weeks after this first photo array, the subjects were shown a second photo array. In the second display, the original face was included. However, the display also included a "repeated photo," that is, a photo that had been reused from the blank lineup. The remaining four photos were new fillers that had never been seen before.

Dr. Pezdek found that the subjects were "equally likely to pick the target person and the repeated face." (4 RT 923.) In other words, by the time the subject was shown the second photo array, the repeated face had become *as familiar* to the subject as the original face. "The probabilities are .25 and .25, exactly the same probability that people will pick out the target face and the repeated face once they get to that second lineup." (4 RT 924.) This is so even if the subject did not pick out that "repeated" face in the blank lineup.[30]

Given these statistics, it becomes impossible to discern whether the witness has identified the person because the face was repeated across lineups or because the face was remembered from the crime scene observation. (4 RT 925.) In Dr. Pezdek's study, the witness was just as likely to pick the repeated face as the original face, despite having been asked to commit that original face to memory.[31]

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[30]Specifically, Dr. Pezdek testified that "the people who did not pick out that repeated face initially in the intervening lineup, their probability of picking that person out when they saw them in the second lineup is .27. So these numbers are almost exactly the same." (4 RT 924.)

[31]Appellant has cited Dr. Pezdek's testimony from the pretrial hearing. However, Dr. Pezdek also explained the problem of seeing multiple photos in successive lineups at both trials, in greater depth. (See 9

(continued...)

Dr. Pezdek's study is particularly relevant to the facts of appellant's case. The first time James Richards testified was at the preliminary hearing in August 2000. He testified that he had been shown *three photo arrays* in the four-day period between February 27 and March 2, 2000, and repeatedly confirmed that he did not make a selection from either of the first two photo arrays, but did finally select a photo from the third one. (1 CT 190-191, 192, 196.) Only this third and final lineup was marked and shown to Richards for identification. (1 CT 204.) Neither the first nor second photo arrays were offered into evidence at the preliminary hearing, although Richards described the first as containing "six pictures put all on one piece of paper," (1 CT 195-196) and described the second lineup as being the "same type of thing." (1 CT 196.)

A year and a half later, when this issue was being litigated at the March 20, 2002 pretrial hearing, copies of the first and third photo arrays (Motion Exhibits 19 and 16, respectively)[32] were identified and offered into evidence. (4 RT 1031, 1008.) However, no one from law enforcement testified to having administered the additional photo array about which Richards had testified at the preliminary hearing. Consequently, other than Richards's general description of that second photo array, there was no evidence about its construction or even whether appellant's photo had been included in it.

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[31](...continued)
RT 2176, 2213-2217; 18 RT 4664-4671.)

[32]Motion Exhibit 19 was a photocopy of the photo array shown to Richards on February 27, 2000, that did not contain appellant's photograph. This exhibit was later offered at trial as Exhibit 148. (15 RT 389, 3914.) Motion Exhibit 16 was the original of the last photo array shown to Richards, in which he identified appellant and circled photo number 5. (4 RT 1008.)

However, sometime between the pretrial hearing and the first trial a few weeks later, defense counsel discovered the additional photo array. (7 RT 1666; 16 RT 4201.) The appearance of Exhibit 147 lent strong credence to James Richards's earlier sworn testimony that he had been shown not two, but three photo arrays by law enforcement. Although the prosecution had conceded in its opposition papers that law enforcement had shown Richards three photo arrays (4 CT 1066), by the time of the trial a short time later, the prosecution had changed its tune. At trial, prosecution witnesses admitted that they had constructed Exhibit 147 for use in this case, but stated that it was "possibly" never used or that they themselves had not shown it to Richards. (8 RT 2130 [asked whether it was "possible" that another lineup was shown to Richards, Sergeant Dean said it was possible, but he believed it did not occur]; 10 RT 2140 [Detective Franks claimed he did not show Exhibit 147 to Richards]; 16 RT 4190 [Sergeant Dean said Exhibit 147 "should not go out".])

Nevertheless, the trial court admitted Exhibit 147 into evidence after Richards testified that this photo array may have been the second photo array that he was shown by law enforcement. (7 RT 1666, 1680.) Though Richards could not recall the details of the second photo array specifically, he was equally unclear about the specifics of the first photo array, Exhibit 148, and explained that over two years had passed since he had been shown those photos. (7 RT 1664; 15 RT 3890.) Despite the controversy, Richards himself continued to believe that he was shown three photo arrays. Even when the prosecutor attempted to sway Richards with the leading question, "But you're not positive that [you were shown three]," Richards reasserted his belief that he *did see at least three separate photo arrays*:

> I think I was — I — I'm pretty sure I was shown at least three different papers with lineups on them. I don't know if it was

> three different times [Detective Franks] came to my house or two different times. One with a couple and one with one.

(7 RT 1688.) Although the evidence either way was not overwhelming, appellant submits that there are strong reasons to believe that James Richards was shown three photo arrays, and that before he selected appellant's photo in the third array (Exhibit 16), Richards had already viewed appellant's identical driver's license photo in a previous array (Exhibit 147).[33]

First, at the physical lineup Richards had an excellent opportunity to view appellant in person, under optimal lighting conditions, and from several angles. Nevertheless, Richards did not select appellant. This means that when Richards had a chance to actually view appellant in the flesh, appellant was completely unfamiliar to him. The only person who Richards noted looked "similar" to the suspect was filler number four (4 RT 1038), not appellant in the number two position. At the same time, Richards was able to immediately select appellant's driver's license photo when he saw it in Exhibit 16. In fact, Richards testified that appellant's photo in the third photo array "just jumped right out" at him. (12 CT 3551.) At trial Dr. Pezdek described this phenomenon, and referred to it as the "pop-out effect[34]."

Richards's reaction suggests that it was appellant's *DMV photo,* used in both photo arrays, that actually looked immediately familiar to Richards,

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[33]It was undisputed that Richards did not make a selection from any of the photo arrays until the last array, Exhibit 16.

[34]Dr. Pezdek explained that when someone has seen a particular photo, and then that exact photo is used again in a successive lineup, "the photograph should *jump off* the page at them. It's actually called a pop-out effect. . . . It *jumps out* at you because it matches something that is in your head. This is in your memory." (18 RT 4671.)

but not appellant himself. This strongly suggests that the photo, but not the person, was familiar to Richards simply because Richards had just seen the very same photo in the previous photo array, Exhibit 147, and thus provides the most reasonable explanation for why only the photo, but not the person, looked familiar. If Richards had actually formed an accurate memory of appellant from the night of the crime, then ostensibly Richards would have had no trouble picking him out of the physical lineup, when he saw appellant in the flesh.

Second, had Richards formed a reliable memory of the perpetrator, Richards would not have immediately believed that Ray Bradford was the culprit. Richards's call to the police in late February 2000, in which he stated that Bradford was the "same guy" who had robbed him in January, raises serious questions about the reliability of Richards's selection of appellant's photo just a few days later. As can be seen by comparing Bradford's DMV photo with appellant's DMV photo, the two men look nothing alike. Furthermore, "Bradford is 5'9" and weighs 195, and appellant is 6'1" and weighs 225. (18 RT 4672; see also Exhibits 16, 18.)

Finally, had Richards actually formed a reliable memory of the person who attacked him, then Richards should not have been concerned before testifying at the preliminary hearing that he would not be able to identify the perpetrator in court. Richards's statement to the prosecutor that he was not sure he would recognize the assailant is strong evidence that Richards himself knew he had not formed a reliable memory and believed he would need assistance to identify appellant in court. The prosecutor obliged, by showing Richards a copy of Exhibit 16, the photo array with appellant's DMV photo circled. Once again, the evidence suggests that Richards's ability to identify appellant in court was not based upon an independent memory of appellant. Richards's ability to identify appellant

appears to have been tied to the suggestive photo array procedure (i.e., seeing the same photo twice), and his selection of appellant's photo to have been based on having seen the photo previously, rather than from having formed an accurate memory of appellant at the time of the crime.

Dr. Pezdek testified that live lineups are generally preferable to photo arrays because live lineup have proven to be more accurate and less susceptible to misidentifications. (9 RT 2193.) Chief Justice Traynor confirmed this view when he wrote: "[I]dentification from a still photograph is substantially less reliable than identification of an individual seen in person." (*People v. Gould* (1960) 54 Cal.2d 621, 631, citing 3 Wigmore, Evidence, § 786a (3d ed 1940) 164-166.) In Dr. Pezdek's words,

> when we remember a person, we don't just remember a face shot of that person. We remember their body. Their stature. How they move. How they carry themselves. Their build. A lot of things like that. All of that information is available when a witness looks at a someone in a live lineup. That information is not available when a witness looks at someone in a still, two-dimensional photographic lineup.

(9 RT 2202-2203.) In this case, however, Richards claimed to have been able to immediately identify appellant from the DMV photo, but then failed to identify him when he saw appellant in person. Richards's failure to identify appellant in person raises the inference that Richards did not, in fact, form an accurate or reliable memory of appellant. (See 4 RT 945 [testimony of Dr. Pezdek supporting this explanation].) Richards's memory was only of the DMV photo. That photo was burned into his memory because he had just seen it in Exhibit 147.

Although the prosecution claimed that appellant's appearance had changed dramatically between January 7 and March 13, 2000, when the lineup took place, the evidence was not there. Comparing appellant's DMV photo in Exhibit 16 with the photo of appellant as he looked in the live

lineup (Exhibit 188), it is apparent that the license photo differs very little. They are very similar except for the amount of facial hair on appellant's chin. In both photos, appellant has a well-developed dark mustache, and short-cropped hair. His hairline, forehead, eyebrows, eyes, nose, lip area and mouth are exactly the same in both photos. In the DMV photo appellant has a small growth of beard between his bottom lip and chin; in the live lineup appellant has a goatee, but clearly not a full beard. The difference in facial hair growth, as Dr. Pezdek correctly noted, was "relatively trivial." (9 RT 2202.)

Moreover, studies show that when people look at faces, they tend to look at the upper part of the face — eyes, nose, forehead and hairline, rather than the lower part of the face. Changes to the upper part of the face will hamper identifications much more than changes that cover lower facial features. (9 RT 2199-2200.) The small change to the amount of hair on appellant's chin, the lone difference ni appellant's appearance in the photo array and live lineup, should not have completely undermined Richards's ability to identify appellant, if in fact appellant was the assailant and Richards had formed a reliable memory. (Compare Exhibits 16 and 188.)

At the pretrial hearing, Dr. Pezdek explained that witnesses who are testifying as to the identity of a person, unless they are very familiar with that person, generally do not have the ability to identify the source of their recognition. This is referred to as "source monitoring."

> If I see someone that I've only seen one time before, remembering who that person is, and where I know them from, is a very easy mistake to make. And source monitoring errors are . . . very common.

(4 RT 940.) Thus if a witness is shown successive photo arrays, and each photo array contains an identical photograph of a particular suspect, the witness may form a belief that he recognizes that particular suspect, without

realizing the source of the familiarity was having been shown the suspect's photograph in successive displays. This Court has recognized the suggestive nature of such a process as well. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 124.) In *Yeoman*, this Court held that using a suspect's image in successive lineups might be suggestive "if the *same photograph were reused* or if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup." (*Id.* at p. 124, emphasis added.) In *Yeoman*, the successive lineups had been separated in time by a month and the photo of the defendant which was used in the first photo array was a significantly different photo from the one used in the second array. According to the trial judge in that case, the photos appeared to show "two different human beings," and thus the first photo did not suggest the second photo. (*Id.* at p. 124, fn. 6.) Under those circumstances, this Court refused to find that the successive procedures were inherently suggestive. (*Id.* at p. 124.)

However, if the *identical* photo is used, and the successive lineups take place within a very short time period, as occurred in this case, the effect can be quite significant. In fact, a witness is just as likely to select the photo that "jumps out" at him because he has seen it recently, as he is to select the actual assailant. (4 RT 924; 18 RT 4670.)

5. Franks Gave Richards Post-Lineup Feedback That Let Him Know His Selection of Appellant's Photo Had Been "Correct" and Falsely Inflated Richards's Confidence in the Identification When He Testified

The prosecution's evidence established that up until the time of Richards's testimony at the preliminary hearing, he had selected appellant's photo only once: at the March 2 photo array administered by Detective Franks. There were no witnesses to this procedure; only Richards and

Franks were present. Because this was a pre-arraignment lineup, neither appellant nor his counsel had any opportunity to monitor it or otherwise assure that it was administered in a fair, neutral and non-suggestive manner. However, as Dr. Pezdek testified, the evidence suggested that the administration of the photo array was far from fair.

Twelve days later, however, when the live lineup was held, members of the defense team were present and had the opportunity to observe it[35]. Defense counsel could assure that the fillers in this live lineup fit the reported general description of the perpetrator, that no subtle suggestions were communicated to the witness, and that the witness had a full, unencumbered view of those in the lineup. Under these arguably optimal conditions, in which the witness was able to study each person carefully and from several angles, *Richards made no selection.* (1 CT 200.) In response to this development, Detective Franks once again interjected himself into the process.

On the drive back to Richards's home, Detective Franks turned on his tape recorder and initiated the following conversation with Richards, specifically bringing up the March 2, 2000 photo array:

Officer: When you saw the lineup, *the photo array, you had no problems picking the guy out.*

Male: But he wasn't here today.

Officer: You didn't think so?

Male: I didn't — I don't think so.

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[35]Ronald Forbush, appellant's trial investigator, testified that he was present for the live lineup. (4 RT 1035.) The record is not clear that Mr. Canty was actually present, but certainly he was notified and, at the very least, his representative was there to monitor.

(12 CT 3555, emphasis added.) Through this very brief exchange, Detective Franks immediately communicated the following information to Richards: (1) Detective Franks knew who the suspect was, and therefore knew who the "correct" choice was; (2) Richards had *correctly selected appellant's photo* from the March 2 photo array, noting that he had had "no problems" doing so; and (3) in the process of telling Richards his previous selection had been correct, Detective Franks also let Richards know that he had "missed" the correct selection in the live lineup.

After being offered this significant information by the detective, Richards attempted to explain why he had made no selection at the live lineup: "But he wasn't here today." Rather than simply let this statement go by, Detective Franks continued in the same vein by challenging Richards's statement that the perpetrator *had not* been in the live lineup. When Franks asked, "You didn't think so?" he gave Richards another clue — that the perpetrator *actually was* in the live lineup. After this, Richards moved from an affirmative statement that the perpetrator was *not* present, to a more tentative position that he "didn't *think* so." Regardless of whether Detective Franks had intended to provide this critical feedback, or whether either individual had perceived it as feedback (15 RT 3894 [Richards testified that "as far as I remember, the detective wouldn't tell me anything"]), the transcript shows that Detective Franks gave Richards important information. Richards came away from the live lineup knowing that his previous selection of appellant's DMV photo in Exhibit 16 was "correct," even though Richards had missed appellant in the live lineup.

The *Henderson* court found that this type of feedback can reduce doubt, engender a false sense of confidence in a witness, and "falsely enhance a witness's recollection of the quality of his or her view of an event." (*Henderson, supra*, 27 A.3d at pp. 899-900.) In fact, there is

substantial research about confirmatory feedback, including a meta-analysis of 20 studies encompassing 2,400 identifications that found that witnesses who received feedback "expressed significantly more . . . confidence in their decision compared with participants who received no feedback." (See Douglass & Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect* (2006) 20 Applied Cognitive Psychol. 859, 863.) Scientific research shows that

> those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to *suggest better witnessing conditions at the time of the crime*, stronger memory at the time of the lineup, and sharper memory abilities in general.

(*Id.* at pp. 864-865, emphasis added.)

In a 2007 field study, researchers asked eyewitnesses to real crimes about their view, attention, and how much of a basis they had to make an identification, both before or after the witnesses learned whether they picked the suspect or a filler.[36] When witnesses were told they had picked the suspect, it increased their ratings of how closely they had been paying attention, and how clear their view of the perpetrator had been. Conversely, when witnesses were told they had picked a filler, they were more likely to report that they had not had a good view of the assailant. Even though the experimenter did not ask the witnesses about their certainty in their identifications, there were still reliable and large effects of post-identification feedback on what witnesses said about the attention they had paid to the crime and their opportunity to view the assailant.[37]

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[36]Wright & Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses* (2007) 18 Psychol. Sci. 172, 175.

[37]The research also shows the low correlation between confidence

(continued...)

The feedback effect marred the identification in this case. For example, when Detective Franks let Richards know that he had not selected appellant from the live lineup, Richards was quick to claim that his ability to get a good view of the perpetrator was hampered, both by darkness and the limited time he had to see the perpetrator's face. As he explained to the officer, "It happened so — you know — it was, like, dark and it was so fast." (12 CT 3556.) However, after the prosecutor reinforced Richards's selection of appellant's photo in the third photo array, by showing Richards the circled photo just prior to his testimony, Richards appeared confident in his selection — so much so that he completely changed his story about the viewing conditions. In front of the jury, Richards not only lied about it being "still daylight" outside at 8:00 p.m. in January (15 RT 3844), he also claimed he had many opportunities to see the perpetrator very well. (6 RT 1614.)

6. After Richards Expressed Doubt That He Would Be Able To Identify the Perpetrator in Court, the Prosecutor Further Tainted the Identification by Immediately Showing Appellant's Photo to Richards

Seven months after the live lineup, Richards was called to testify at the preliminary hearing. Just before going into the courtroom, Richards told the prosecutor that he was not sure he would be able to recognize the accused in court. The prosecutor immediately pulled out the photo array that showed appellant's photo already having been circled by Richards. In doing so, the prosecutor reacquainted Richards with appellant's face and

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[37](...continued)
and accuracy. See, e.g., Sporer, et al., *Choosing Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies* (1995) 118 Psychological Bulletin 315.

virtually guaranteed that Richards would be able to convincingly identify appellant in court. Rather than use the preliminary hearing as an opportunity to fairly test the sole eyewitness's memory from the night of the crime, the prosecutor took affirmative steps to ensure that Richards, despite his expressed uncertainty, would not make the same mistake he had made at the live lineup and fail to identify the person the State had concluded was responsible. The prosecutor thereby tainted Richards's in-court identification of appellant. (*People v. Contreras* (1993) 17 Cal.App.4th 813 [finding suggestive procedure when witness had failed to identify defendant from photo array and deputy district attorney showed him a single photo of defendant two days before preliminary hearing].)

7. Insofar as Both Photo Arrays Caused Appellant to "Stand Out," They Were Impermissibly Suggestive

A pretrial identification procedure is unfair if it suggests in advance the identity of the suspect. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Carpenter, supra,* 15 Cal.4th at p. 367; *People v. Yeoman, supra,* 31 Cal.4th at p. 124; *People v. Cunningham, supra,* 25 Cal.4th at p. 990.) In order to determine whether the photo arrays in this case were constructed in a manner that caused appellant to "stand out" from the fillers, this Court need only review and compare the second and third photo arrays which were shown to Richards, Exhibit 147 and Exhibit 16, respectively. (See photocopies at 12 CT 3491 and 3419.) The comparison reveals that *both lineups contain the same DMV photo of appellant.* Moreover, of all of the photos used in the two successive lineups, only appellant's photograph was reused. Each filler was used just once. Dr. Pezdek's study demonstrated that seeing appellant's photo twice would make it just as likely that Richards

selected appellant's photo because he had just seen the same photo, as it was that he selected the photo because appellant had actually been the perpetrator. (4 RT 923-924.)

In addition, a review of Exhibit 147, the second photo array, reveals that appellant's photo did in fact "stand out" from the other photos, on several scores. (See actual color exhibit rather than black and white photocopy contained in CT.) Exhibit 147 contains six color photographs arranged in two horizontal lines of three. Each photograph is numbered, one through six, and appellant's DMV photo is shown in position number two. This photo is noticeably different from the fillers. While the other five photographs depicted very dark-complected African-American males, appellant's photo was the only one depicting a very light-complected male. Richards had identified the perpetrator as a "light complected" black male. In appellant's photo, his skin had a decidedly pinkish or tan hue, while the fillers were all uniformly quite dark-skinned. This difference would naturally cause appellant's photo to stand out from the others and cause the witness to focus his attention on appellant.

Appellant's photograph was also noticeably different from the others because his face and head appear much larger than the others. Appellant's photograph appears to be taken from a closer position, with different lighting, and perhaps with a different camera. This makes appellant's face appear larger and more prominently displayed. Appellant's photo was a driver's license photo (4 RT 1005), but the fillers in Exhibit 147 may have been booking photos. Whatever the reason, appellant's photo stands out. While the shirts and shirt collars of the other five individuals can all be viewed because their photos are smaller, appellant's clothing is not visible at all, because his head and face take up the majority of the photo. In terms of its size and color, appellant's photo stands out and draws attention.

Nevertheless, Richards made no selection from the second photo array. (1 CT 200.) This fact is difficult to reconcile since Richards saw the same photo in the third lineup and testified that the photo "jumped out" at him. Had Richards formed an accurate memory of his assailant, *and* if appellant had been that assailant, then Richards should have been able to identify appellant when he viewed the same photo in the second six pack. That he did not, suggests that his later selection of the identical DMV photo was based upon something other than an accurate memory of appellant.

On March 2, 2000, when Detective Franks visited Richards at his home and showed him the third photo array, Richards had already seen the first two photo arrays and had not made a selection. (1 CT 196.) There is strong reason to believe that, prior to this, Richards saw the second photo array with appellant's DMV photo. No other photo array, other than Exhibit 147, was produced as being the second photo array. Although the head sizes in the third lineup were more uniform compared to the previous display,[38] appellant's photo again stood out for two reasons. First, appellant was still the only light-complected black male in the photo array. Second, appellant's photo stood out because Detective Franks had reused the photo.

Even if Richards had never been shown Exhibit 147, the photo arrays were administered suggestively. The combination of appellant being the lightest-complected subject in the photo array and Detective Franks giving cues to Richards when he administered Exhibit 16, tainted Richards's selection of appellant.

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[38]Detective Franks testified that in the final photo array which he administered to Richards, all of the filler photos except one were DMV photos, making the photos appear more uniform in size. (10 RT 2419.) Nevertheless, as the most fair-skinned man in the array (Exhibit 16), appellant again stands out among the fillers.

In light of all of the evidence that the identification procedures used in this case were suggestive, and that law enforcement steered Richards in multiple ways towards identifying appellant, the burden shifted to the State to establish that Richards's testimony was nevertheless reliable. (*People v. Ratliff, supra*, 41 Cal.3d at p. 689; *Manson, supra,* 432 U.S. at p. 114.)

F. Richards's In-Court Identification Was Not Independent of the Suggestive Lineup. The Evidence Was Substantial That Richards Did Not Form a Reliable Memory of the Perpetrator

Appellant has demonstrated that the procedures used by the police and the prosecutor in this case encouraged Richards to focus on and select appellant's photo. There was also strong evidence that Richards saw three photo arrays, and that two contained the identical DMV photo of appellant. After this DMV photo "jumped out" at the witness, Detective Franks gave confirming feedback, both by having Richards circle that photo, sign and date it, and also by telling Richards after the live lineup that Richards had "had no problems" with the photo array. (12 CT 3555.) Conversely, when Richards failed to select appellant at the live lineup, Franks immediately questioned the decision, again signaling to Richards that his failure to identify appellant had been in error. The final assistance from the State came just before Richards was to testify, when the prosecutor showed Richards the same photo array, with appellant's DMV photo circled. By confirming that Richards's identification was correct, the prosecutor made it impossible for any in-court identification after that to be anything but tainted.

Appellant has thus made a showing that Richards's identification was tainted by suggestive procedures, and that none of these suggestive procedures were "necessary" under the circumstances. As discussed in subsection E, *ante*, once the defendant meets that initial burden, the burden

shifts to the State, as the proponent of the evidence, to establish by "clear and convincing evidence" that the identification had an independent origin. (*People v. Ratliff, supra,* 41 Cal.3d at p. 689.) The court then determines whether the "indicators of [Richards's] ability to make an accurate identification" are "outweighed by the corrupting effect of the challenged identification itself." (*Manson, supra*, 432 U.S. at p. 116.)

In appellant's case, before the trial court could admit Richards's identification testimony, the State had to prove by clear and convincing evidence that Richards had been able to form a reliable memory on the night of the crime. The trial court appeared to have imposed no such burden on the State, and made no findings about the circumstances under which Richards viewed the perpetrator. A review of these factors (the so-called "estimator variables" (*Lawson, supra*, 291 P.3d at p. 687)) shows that Richards's selection of appellant's photo was more likely the product of suggestion than a reliably formed memory of the perpetrator.

1. Richards Had Little Opportunity to View the Perpetrator. It Was Dark, Richards Was Driving, and the Perpetrator Was in the Back Seat

The taxicab ride in this case took place during a half-hour period between 8:00 p.m. and 8:45 p.m., in early January[39]. The drive began no earlier than 8:00 p.m., when it was fully dark outside. Richards, however, testified that when he picked up the passenger "it was still daylight. It was right before dusk." (15 RT 3844.) Although Richards had told the officer at the live lineup, after failing to select someone, that the crime happened really fast and that it was dark, after Richards had been told that his

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[39]The homeowner who provided refuge to Richards moments after the robbery, testified that Richards was at his door at 8:45 p.m. (7 RT 1722; 14 RT 3568.)

selection of appellant's photo had been correct, Richards's description of the circumstances changed completely. Richards testified that it was still light out at 8:00 p.m., in January, in order to make his purported identification appear credible.

While Richards spent somewhere between thirty and forty minutes with this passenger,[40] for most of the time Richards was driving, looking forward at the road, and unable to pay close attention to the passenger's face. At most, he looked over his shoulder a few times, while talking with the passenger in the dark. (15 RT 3847.) After Richards stopped the taxicab and asked for his fare, the passenger pointed a gun at Richards. As Dr. Pezdek testified and numerous studies have shown, high levels of stress or fear can have a negative effect on a witness's ability to make an accurate identification. (9 RT 2241; *Henderson, supra*, 27 A.3d at p. 904.). Similarly, the presence of a weapon, a concept known as "weapon focus" (*Henderson*, at pp. 904-905) is also widely known to significantly impair a witness's ability to make a reliable identification,[41] a fact confirmed by Dr. Pezdek. (9 RT 2210.)

After Richards got out of his taxicab in a sparsely populated area which he described as being "a little country," he could not "remember there being street lights or anything." Richards only remembered it being "pretty dark." (1 CT 185.) After being assaulted and running for help with the assailant in pursuit, Richards would not have been paying close attention to the face of the perpetrator. His focus was on escaping as fast as

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[40]Richards said the taxicab ride from beginning to end was about 20 to 25 minutes, with a short stop for gas along the way. (15 RT 3848, 3844.)

[41] See, e.g., N.M. Steblay, *A Meta-Analysis Review of the Weapon Focus Effect* (1992) 16 *Law & Hum. Behav.* 413, 415-417.

possible and reaching a place of safety. The record shows that Richards would have had little reason, and then later little opportunity, to get a complete view of the perpetrator's face or to otherwise form a reliable memory. Richards's belief that Ray Bradford was the man who robbed him, as well as Richards's failure to recognize appellant in the live lineup, both strongly suggest that whatever memory Richards did form of the perpetrator, the memory was not of appellant. Richards's rapid selection of appellant's DMV photo on March 2 was more likely the result of having seen the *very same DMV photo* in the second photo array; or of appellant having the lightest complexion of anyone depicted in the photo arrays; or of Detective Franks's cues — or a combination of all of those factors.

2. Richards's Initial Description of the Robber Was Very General and Not Specific Enough for Richards to Have Excluded Ray Bradford

Another critical "estimator variable" for consideration when evaluating the validity of a purported eyewitness identification is the witness's initial description of the perpetrator reported to the police. (*Neil v. Biggers, supra*, 409 U.S. at p. 199.) At the retrial in October 2002, Richards testified that he gave very complete and specific information to the police on the night of the crime. (15 RT 3858-3859.) However, when Sergeant Dean was asked about that initial description, the description was far more general than Richards had recalled. According to Dean, Richards had described the suspect as a black male, in his thirties, six feet tall, and 220 pounds. (4 RT 1022.)[42] Except that appellant was only in his twenties

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[42]At the preliminary hearing, Richards was not certain whether he described the robber's "facial features" when he originally reported the crime, but did know that "at certain points I did, yes." (1 CT 194.) He remembered reporting that the man was a "light-skinned, black male, real

(continued...)

(12 CT 3363), this description might have roughly fit appellant, who was 6'1" and 225 pounds. (18 RT 4672.) However, it could have also described countless other black men.

Significantly, however, it did *not* describe 5'9" Ray Bradford (18 RT 4672), the man in the residential drug rehabilitation facility with Richards. Nevertheless, after hearing about the two murders in February, Richards contacted the sheriff's department to say he believed that Bradford was "the same person who robbed him" in January. (4 RT 1026; 1 CT 196, 200.)

As Dr. Pezdek explained, Richards's inability to differentiate between Ray Bradford, someone he lived with for a month, and appellant, who looked nothing like Bradford except for being an African-American male,[43] suggests either that Richards did not form a reliable memory of the perpetrator in the first place, that Richards was particularly inept at recognizing faces, or both. Dr. Pezdek testified that Richards, being white, may have also had difficulties recognizing black faces. (15 RT 4672-4673.)

A number of studies have established that cross-racial identifications are more likely to be inaccurate than identifications within the same race. (15 RT 4673-4674.) Richards's belief that Bradford, who bore no

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[42](...continued)
clean cut, clean shaven, healthy looking. He didn't look like a gang banger." (1 CT 195.) Asked if he could remember anything else, he said no. When asked if he had described the suspect as having facial blemishes, he said he may have said that his skin was rough, but he had no memory of either saying, *or seeing*, "blemishes." (*Ibid.*) At the pretrial hearing, none of the witnesses, including those from law enforcement, testified that rough skin or blemishes had been mentioned when Richards was first interviewed. However, by the time of the retrial, appellant's facial skin, as well as a goatee, were being included as identifying features. (15 RT 3859.)

[43] Dr. Pezdek said the two men were "very different looking people" (18 RT 4672), as a comparison of Exhibit 16 and Exhibit 18 demonstrates.

resemblance at all to appellant, was the man who had robbed him, casts doubt on whether Richards ever formed a reliable memory of the perpetrator beyond his initial general description that could have described a multitude of African-American men.

3. The Witness's Degree of Certainty, While Once Considered a Valid Factor for Consideration, Has Been Shown to Bear Little Relation to Accuracy

In *Manson,* the Court cited the witness's level of certainty demonstrated at "the confrontation," as one of the factors to be considered in evaluating the reliability of the identification. (*Manson, supra*, 432 U.S. at p. 114.) A witness's confidence also has a strong influence on jurors. Indeed, consistent evidence indicates that the confidence an eyewitness expresses in his identification during testimony *is the most powerful single determinant* of whether or not jurors will believe that the eyewitness made an accurate identification[44]. (See *Henderson, supra*, 27 A.3d 872, 911 [in study, mock jurors were insensitive to the variables that adversely affected an identification but "gave disproportionate weight to the confidence of the witness"].)

Nevertheless, contrary to the *Manson* Court's apparent assumption, witness confidence under most circumstances is a poor indicator of identification accuracy. (See *United States v. Greene* (4th Cir. 2013) 704

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[44]See, e.g., Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence* (1990) 14 Law & Hum. Behav. 185; Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre- Identification Memory Feedback Under Varying Lineup Condition* (2009) 33 Law & Hum. Behav. 194; Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?* (1981) 66 J. Applied Psychol. 79; Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications* (1979) 64 J. Applied Psychol. 440.

F.3d 298, 309 [noting that the *Neil/Manson* witness-certainty factor "has come under withering attack as not relevant to the reliability analysis. While acknowledging that under current law an eyewitness's level of certainty in his identification remains a relevant factor in assessing reliability, many courts question its usefulness in light of considerable research showing that an eyewitness's confidence and accuracy have little correlation"]; *Lawson, supra*, 291 P.3d at p. 688; *State v. Outing* (Conn. 2010) 3 A.3d 1, 47 (Palmer, J., concurring) ["Most people believe that the more confidence that an eyewitness demonstrates in his identification, the more likely it is that his identification is accurate. Similarly, the average person is likely to think that an eyewitness who had been held at gunpoint . . . is likely to have been acutely observant . . .and, as a consequence, more accurate in his identification. In fact, neither of these beliefs is true"].)

Well-settled scientific research[45] demonstrates: (1) there is a statistically weak correlation between witness certainty and the accuracy of the identification[46] and (2) witness confidence is inflated by suggestive procedures and confirmatory feedback[47]. In the words of the *Lawson* court:

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[45]In his dissent in *Manson*, Justice Thurgood Marshall recognized this phenomenon well before the decades of scientific research proved the point: "the witness's degree of certainty in making the identification is worthless as an indicator that he is correct." (*Manson, supra*, 432 U.S. 98 at p. 130 (dis. opn. by Marshall, J.).)

[46]See, e.g., Brewer & Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates* (2006) 12 J. Experimental Psychol.: Applied 11, 15; Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies* (1995) 118 Psychol. Bull. 315, 315-19, 322.

[47]See, e.g., Wells & Bradfield, "*Good, You Identified the Suspect*": (continued...)

"Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable." (*Lawson*, *supra,* 291 P.3d at p. 688.)

In this case, suggestive procedures and the confirming feedback from Detective Franks necessarily require this Court to view skeptically Richards's strong level of certainty. That law enforcement inflated Richards's apparent certainty can be seen throughout the record. Detective Franks all but told Richards directly that he had correctly chosen appellant's photo from the photo array, but that he had failed to recognize appellant in the live lineup. These strong clues let Richards know that, at least in the State's view, the perpetrator was the man depicted in the DMV photo. Although Richards later doubted his ability to make an identification of the perpetrator in court, as soon as Richards was shown the circled DMV photo, his certainty level hit 99%. (1 CT 191; 6 RT 1635.)

However, when Richards realized he had failed to pick appellant out of the live lineup, he immediately (and appropriately) lost confidence in his ability to have formed a reliable memory. He explained to the officer that it was "dark" and it happened "so fast." (12 CT 3556.) Still, the jury never heard this uncertainty from Richards about the conditions on the night of the crime. Instead, the jury heard that Richards had a clear view of the suspect when it was "still daylight." (15 RT 3844.)

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[47](...continued)
Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, *supra*, 83 J. Applied Psychol., at p. 360.

4. A Significant Period of Time, Nearly Two Months, Passed Between the Crime and the Confrontation

The final factor considered relevant under the *Manson* reliability test is the length of time that passes between the witness's view of the perpetrator at the time of the crime, and when the witness is asked to retrieve that memory at the first confrontation. In *Manson*, the witness had given a description of the perpetrator within minutes of the crime, and then made a photographic identification two days later. (*Manson, supra*, 432 U.S. at p. 116.) Finding this brief two-day period significant, the Court noted: "We do not have here the passage of *weeks or months* between the crime and the viewing of the photograph." (*Ibid.*, emphasis added.) However, in appellant's case, nearly two months elapsed between January 7 and March 2.

It stands to reason that memories fade with time. This estimator variable is known as "memory decay" by the scientific community. Courts now recognize that memory decay is irreversible, and that memories never improve. The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken. (*Henderson, supra*, 27 A.3d at p. 907.) While these concepts may seem obvious, what is not commonly known is just how quickly memories do decay.

For example, a meta-analysis of 53 studies predictably found that the longer the time period between a witness seeing a face and being asked to identify the face, the less likely the witness was to recognize the face and the lower the accuracy rate. Most surprising, however, was the finding that *the majority of memory loss happened during the first day*; memory dropped to 80% after about two hours, decreased to 70% over a 24-hour period, and then fell to 50% after one month. (See Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's*

Memory Representation (2008) 14 J. Experimental Psychol.: Applied 139, 147-148.) Another meta-analysis also found an association between longer retention intervals and fewer correct identifications. (See Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies* (1986) 100 Psychol. Bulletin 140.)

In appellant's case, there is no indication that the trial court considered the length of time that passed between the crime on January 7 and the photo array on March 2. This factor, along with those discussed above, weighs heavily against a finding that Richards's identification of appellant in a photo array was reliable. Richards's in-court identification seven months later, after just having been shown a copy of the photo array in which he had circled appellant's picture, was also the tainted and unreliable product of suggestion.

G. The Trial Court Applied the Wrong Test in Concluding That the Jury Could Determine Whether the Identification Was Reliable

Under the test articulated in *Manson v. Brathwaite, supra,* the trial court must exclude identification testimony if the police procedures were unnecessarily suggestive and the resulting identification was unreliable. (*People v. Yeoman, supra*, 31 Cal.4th at p. 123.) Under this two-part test the trial court's duty is to act as a gatekeeper — screening, limiting, and/or excluding evidence that is extremely persuasive to a jury, but highly susceptible to error.

At the time of the pretrial hearing on appellant's motion to exclude Richards's identification testimony, the trial court had sufficient evidence to find that Detective Franks conducted an unnecessarily suggestive photo array with Richards. After pointing out that the photo array was not administered in a blind, sequential fashion, and that Franks had given

suggestive clues to Richards throughout the process, Dr. Pezdek found the procedures "flawed." However, the prosecution presented no evidence that these flawed procedures were necessary to its investigation.

In addition, Dr. Pezdek presented uncontradicted evidence that a witness who is shown the same photo in successive lineups will choose the repeated photo, just as often as he will choose the photo of someone previously committed to memory. Because Richards had testified to being shown two previous photo arrays before selecting appellant's photo from the third six pack, the trial court had before it sufficient evidence to find that the procedures used in this case were unnecessarily suggestive. The burden then should have shifted to the State to prove by clear and convincing evidence that Richards's identification of appellant was nonetheless constitutionally reliable. (See *People v. Ratliff, supra*, 41 Cal.3d at p. 689.)

The trial court should have determined whether the "indicators of [Richards's] ability to make an accurate identification" were "outweighed by the corrupting effect of the challenged identification itself." (*Manson, supra,* 432 U.S. at p. 116.) The trial court failed to apply this two-step process and, in so doing, abdicated its gatekeeper role. Although the trial court found there was "a lot of evidence" that the police could have used better methods for conducting the lineup, it concluded that the lineup was not so "*impermissibly suggestive as to violate due process.*" (4 RT 1081.) This was not the proper standard.

The question was not whether the *procedures* violated due process; the question was whether the admission of state-tainted unreliable evidence violated due process. Answering that question required an initial determination that the procedures were suggestive, and if they were, whether they were needlessly suggestive. If they were, then the trial court

needed to determine whether the "indicators" favoring reliable memory formation outweighed the evidence of suggestion.

Not only did the trial court skip that critical step, it appeared to place no burden whatsoever on the State to show that its own critical evidence was reliable. Instead, the trial court believed it was appropriate to simply allow the jury to determine the reliability of the identification, despite the suggestive procedures. In ruling against appellant, the trial court found there had not been a "sufficient showing that this identification is worthless, and therefore should be excluded." (4 RT 1082.) Again, this was an erroneous standard. Appellant only had to show that the lineup procedure was suggestive, not that Richards's testimony was completely "worthless." Once appellant made that showing, the burden shifted to the State to show that Richards's testimony was the product of an accurate memory, rather than the product of repeated exposure to appellant's photo, and law enforcement's suggestions and feedback. The trial court applied the wrong standard and, in so doing, came to the wrong conclusion.

Though Richards had a general idea of the height, weight, and skin complexion of the perpetrator, and could have testified that appellant had similar characteristics, Richards's memory was not sufficient to support a reliable, specific identification of appellant.[48] Because Richards was the only eyewitness to connect appellant to two capital murders, the trial court had a duty to make sure that only constitutionally reliable evidence was admitted at trial. Richards's selection of the DMV photo and his later identification of appellant in court were the products of police suggestion

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[48]See, e.g., *Lawson, supra*, 291 P.3d at p. 693 ["trial court permissibly could find that the witness had personal knowledge of the height, build, clothing, and hair color of the perpetrator, but no more, and limit the testimony accordingly"].

and feedback. The evidence should have been suppressed. Alternatively, the trial court should have at least required the State to establish by clear and convincing evidence that Richards's identification of appellant was reliable.

Even if this Court should find that at the time of the pretrial hearing the trial court did not have sufficient evidence to find the lineup procedures suggestive, by the end of both trials, there was more than enough evidence to support such a finding. For example, by the time of the motion for a new trial, the trial court was fully aware of the existence Exhibit 147, the second photo array, which included the same DMV photo that was used in the third photo array. The trial court could see for itself that only one photo — appellant's — was reused in successive six packs.

All of the evidence taken together strongly supports a finding that James Richards had in mind only a general description of the perpetrator following the crime. As Dr. Pezdek testified, the selection of appellant's photo was as likely to have been the product of suggestion as it was to have been the product of a previous reliable memory. After Richards failed to select appellant in the live lineup, under optimal viewing conditions but without the opportunity for police suggestion because it was being monitored by the defense, the evidence became even stronger that Richards had not formed a reliable memory of appellant as the assailant.

Compared to his DMV photo, appellant at the live lineup had slightly more facial hair around his chin. However, facial recognition has little to do with the lower area of the face. (9 RT 2199-2200.) Aside from the suggestiveness of the administration of the photo array, there simply was no reasonable explanation as to why Richards could not recognize appellant in the live lineup, if in fact appellant had been the perpetrator. The prosecutor, the expert witness, and even Richards himself appeared perplexed by this anomaly. The most reasonable explanation is that

Richards had just seen appellant's DMV photo in the second photo array, making that photo immediately familiar to Richards when he viewed the third array.

Richards demonstrated over and over again that he had *not* formed a reliable memory of the perpetrator. Initially, Richards reported to the police that Ray Bradford was the "man who robbed him." When Richards came face to face with appellant, Richards told the police the perpetrator was not present. (12 CT 3555.) Before going into court, Richards expressed concern that he would not recognize the accused, and his concerns were well-founded. In fact, the only time Richards reacted immediately to a lineup that included appellant was after Richards had already seen appellant's DMV photo. Of course, when he saw it the second time, it immediately stood out as familiar. However, appellant was not familiar to Richards when he saw appellant in person.

The trial court erred in denying the motion for a new trial on the grounds that Richards's identification testimony should have been excluded as constitutionally unreliable. Short of a coerced confession, it is hard to imagine evidence more prejudicial in jurors' eyes. Appellant's motion for a new trial should have been granted.

H. In Ruling on Evidentiary Challenges under State Law, California Should Modify the Federal *Manson* Test. It Unnecessarily Restricts the Trial Court's Ability to Screen out Unreliable Evidence and No Longer Comports with Widely Accepted Research on Human Memory

Appellant moved to exclude the testimony of James Richards on two grounds: (1) that unnecessarily suggestive police procedures led to the identification, in violation of the Due Process Clause, and (2) that the evidence should have been excluded as a matter of state evidentiary law. (3 CT 715.) As discussed in Section E, *ante*, most courts, including California,

have applied the two-part test set forth in *Manson v. Brathwaite, supra,* when ruling on the admissibility of eyewitness testimony. Applying federal due process principles, the *Manson* test places the initial burden on the defendant to establish that the State used unnecessarily suggestive procedures. This burden on the defendant is strictly the result of federal jurisprudence, rather than state evidentiary concerns. (*See Perry, supra,* 132 S.Ct. at p. 724 ["due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary."].) Even then, under the *Manson* test, if a defendant is able to establish that the police did use unnecessarily suggestive procedures, the identification evidence is still admissible if the State can show that, despite the taint of suggestion, the evidence was otherwise reliable under the totality of the circumstances. What this means, as a practical matter, is that the reliability of an identification (and specifically the trial court's review of the "estimator variables,") is of no concern to the trial court under the *Manson* test, *unless* the defendant has established wrongdoing on the part of law enforcement. And then, even if that case is made, the State can still overcome the taint of the wrongdoing by showing that the identification bears sufficient indicia of reliability.

Appellant has shown that the trial court failed to properly apply the *Manson* test and erroneously admitted Richards's testimony because appellant had not made "a sufficient showing that this identification is worthless." (4 RT 1082.) Even the *Manson* standard does not go that far. Appellant has also established that the police *did use* unnecessarily suggestive procedures and that the trial court should have therefore taken into account the many factors (both system variables and estimator variables) that showed Richards had never formed an accurate or reliable memory. Had the trial court considered the totality of the circumstances, as

it was required to do under the *Manson* rationale, it should have found that Richards's identification was not independent, but was rather the product of suggestive procedures and improper feedback from the police.

However, should this Court find that the trial court properly applied the *Manson* test in ruling on the due process question, appellant nevertheless urges this Court to reconsider its adoption of that test when determining whether eyewitness identifications are admissible under California's Evidence Code. Not only does the *Manson* test place an unreasonable (and unnecessary) burden on the defendant to come forward with evidence that is generally under the control of the police and the prosecutor before considering the reliability of the evidence, the test is also premised upon a number of beliefs about human memory that have been repeatedly debunked by current scientific studies. As the Court of Appeals for the Fourth Circuit recently observed:

> The New Jersey and Oregon opinions[49] represent a growing awareness that the continuing soundness of the *Manson* test has been undermined by a substantial body of peer-reviewed, highly reliable scientific research. See also Brandon L. Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev. 451, 453 (2012) ("When *Manson* was decided, social scientists had just embarked on a course ofexperimental research that would revolutionize our understanding of human memory.")

(*United States v. Greene* (4th Cir. 2013) 704 F.3d 298, 305, fn. 3.) It is therefore time for California to join the ranks of the growing number of states that are reconsidering the *Manson* approach, in favor of a state standard that places a premium on the reliability of eyewitness identification. As explained further below, had the trial court applied a modified version of the *Manson* test, applying traditional rules of evidence,

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[49] *Lawson, supra*, 291 P.3d 673; *Henderson, supra*, 27 A.3d 872.

the burden would have properly been on the State to first establish that the eyewitness testimony was relevant, at which time both parties would have been able to litigate the reliability of the identification.

1. Other Jurisdictions Have Modified the *Manson* Test to Better Protect Against Unreliable Eyewitness Identification Evidence

A number of states, including most notably Oregon and New Jersey (*State v. Lawson* (Or. 2012) 291 P.3d 673; *State v. Henderson* (N.J. 2011) 27 A.3d 872), have now recognized that the vast body of scientific research conducted over the past 35 years concerning human memory has cast serious doubt on many commonly held beliefs about memory. (See also *State v. Almaraz* (Idaho 2013) 301 P.3d 242, 251-253; *State v. Dubose* (Wis. 2005) 699 N.W.2d 582, 592; *State v. Hunt* (Kan. 2003) 69 P.3d 571, 576; *Commonwealth v. Johnson* (Mass. 1995) 650 N.E.2d 1257, 1264-65; *State v. Ramirez* (Utah 1991) 817 P.2d 774, 780; *People v. Adams* (N.Y. 1981) 423 N.E.2d 379, 384.) This same research "calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications," (*Henderson, supra*, 27 A.3d at p. 877), and has led a number of states to craft new standards to address the dangers of misidentification. (See also, K.A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence* (2013) 47 Georgia L. Rev. 723, 726 ["Drawing on the emerging empirical data, . . . the system can and should be adjusted to do a better job of guarding against undue reliance on flawed evidence."].)

For example, the New Jersey Supreme Court recently weighed in on the continued value of the *Manson* test. In February 2010, that court appointed a Special Master to conduct an in-depth review and evidentiary hearing "to consider and decide whether the assumptions and other factors

reflected in the two-part *Manson/Madison*[50] test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence." (See *State v. Henderson* (N.J. Sup. Ct. [A-8-08].). The New Jersey special hearing probed testimony by seven experts and produced more than 2,000 pages of transcripts, along with hundreds of scientific studies. The Special Master then published an extensive report. (See a copy of the report online at http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF.)

The Special Master concluded that "the scientific findings can and should be used to assist judges and juries in the difficult task of assessing the reliability of eyewitness identifications" and that the *Manson* test "falls well short of attaining that goal, for it neither recognizes nor systematically accommodates the full range of influences shown by science to bear on the reliability of such testimony." (*State v. Henderson*, Report of Special Master, at p. 76.) In fact, rather than act as a deterrent to manipulative police practices, *Henderson* found that the *Manson* test may unintentionally reward suggestive police practices:

> The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

(*Henderson, supra*, 27 A.3d at p. 918.)

The "patent inadequacies" of the *Manson* test that the *Henderson* Special Master identified included:

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[50]In *State v. Madison* (1988) 109 N.J. 223, 536 A.2d 254, the New Jersey Supreme Court adopted and applied the *Manson* test.

> • The first prong ignores the existence of estimator variables [those factors which affect the witness's initial formation of memory] unless the court finds "unnecessary suggestion" on the part of state actors. This requirement fails to assure that a defendant is able to discover and expose all of the facts and factors that bear on the reliability of an identification.
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> • Judges and juries are "largely left to their own intuitions to decide what is suggestive, what the impact of any perceived suggestion might be or what 'circumstances' are relevant to or probative of reliability."
>
> • Judges have rarely suppressed eyewitness identifications under the existing standards. "Because the test allows . . . a finding of reliability notwithstanding impermissible suggestiveness, it appears to be of little value in weeding out unreliable identifications."
>
> • Three of the five factors[51] of the *Manson* "reliability" analysis have been shown themselves to be unreliable, "for they are strengthened by the suggestive conduct against which they are to be weighed." The short answer to the [New Jersey court's] question whether the *Manson/Madison* test and procedures are "valid and appropriate in light of recent scientific and other evidence" is that they are not.

(*Henderson*, Report of Special Master at 77-79 [internal citations omitted].)

Recognizing that the *Manson* test was no longer adequate for guarding against mistaken eyewitness identifications, the *Henderson* court looked to the due process rights guaranteed under its own state constitution for fashioning a more useful test. (*Henderson, supra*, 27 A.3d at p. 919, fn. 10.) Under the revised test, to obtain a pretrial hearing on the admissibility

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[51]The studies relied upon by the Special Master uniformly showed, and the testifying experts unanimously agreed, that confidence is not closely correlated to accuracy, that confidence is easily enhanced by suggestive procedures and post-identification feedback, and that witness self-reports concerning degree of attention and opportunity to view are inflated in tandem with inflated confidence. (Report of Special Master, at p. 79.)

of eyewitness testimony, the defendant need only show "some evidence of suggestiveness that could lead to a mistaken identification." (*Id.* at p. 920.) The State must then come forward with proof that the proffered eyewitness identification is reliable. This will involve accounting for "system and estimator variables" and be subject, at any time, to the trial court concluding the hearing if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. The ultimate burden is on the defendant to show a very substantial likelihood of irreparable misidentification. If that burden is met, the trial court should suppress the identification evidence. (*Ibid.*)

In 2012, the Oregon Supreme Court followed a similar path in Lawson. In that case, the victim had initially told emergency personnel that she had not seen the face (or faces) of the perpetrators and did not know their identity. The next day, when shown several photo lineups that included the defendant, she did not make a selection. Nevertheless, by the time of the trial two years later, the victim was absolutely certain about her identification of the defendant, testifying that she would "never forget his face as long as I live." (*Lawson, supra*, 291 P.3d at p. 680.)

Applying the two-part test it had adopted from *Manson, supra*, 432 U.S. 98, the trial court in *Lawson* denied the motion to suppress the identification and the Court of Appeal affirmed, concluding that the reliability of the identification was a question properly left to the jury. (*Lawson, supra*, 291 P.3d at p. 681.) The Oregon Supreme Court granted review to determine whether the *Manson/Classen*[52] test was "consistent

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[52]In *State v. Classen* (Ore. 1979) 590 P.2d 1198, the Oregon Supreme Court adopted *Manson* test for determining the admissibility of eyewitness identification testimony. At that time, Oregon did not have a

(continued...)

with the current scientific research and understanding of eyewitness identification." (*Id.* at p. 678.) After conducting a thorough review of the eight system variables and the ten estimator variables known to affect the reliability of eyewitness identification (*Id.* at pp. 686-688), *Lawson* concluded that the *Manson* test should be revised to add procedures which were based generally on applicable provisions of the state evidence code for determining the admissibility of eyewitness identification evidence.

Lawson began by recognizing that the first prong of *Manson*, requiring a defendant to come forward with evidence of unnecessarily suggestive police procedures, placed an undue burden on the defendant, because "the state — as the administrator of that procedure — controls the bulk of the evidence in that regard." (*Lawson, supra*, 291 P.3d at p. 689.)

Moreover, scientific research has now shown that identifications can be inaccurate even in the absence of unnecessarily suggestive police procedures, rendering the *Manson* test an ineffective tool for assessing whether an identification yields reliable evidence. The Due Process Clause may be limited to state action (see, e.g., *Perry v. New Hampshire*, *supra*, 132 S.Ct. at pp. 725-727; *United States v. Morrison* (2000) 529 U.S. 598, 620-621), but there is no such limitation under the state evidence code. As a matter of state law, "there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability." (*Lawson, supra*, 291 P.3d at p. 688.) In other words, from a purely state-law standpoint, it makes no difference whether an identification is unreliable because the police manipulated it or because the witness was operating in total darkness.

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[52](...continued)
statutory evidence code.

Manson's requirement that the accused first come forward with the evidence of suggestiveness improperly shifts the burden:

> A trial court tasked with determining a constitutional claim must necessarily assume that the evidence is otherwise admissible; were it inadmissible on evidentiary grounds, the court would never reach the constitutional question. However, a trial court tasked with considering a question of evidentiary admissibility clearly cannot begin by assuming admissibility. In sum, [*Manson*'s] burden-of-proof structure improperly requires defendants who have filed pretrial motions to exclude eyewitness identification evidence to first establish that an identification procedure was suggestive, even though the state — as the administrator of that procedure — controls the bulk of the evidence in that regard.

(*State v. Lawson, supra*, 291 P.3d at p. 688.) To fix this problem, the Oregon Supreme Court constructed a new test that properly places the initial burden on the party proffering the evidence, in most cases, the state.

Beginning first with the proposition that only relevant evidence is admissible, *Lawson* noted that eyewitness testimony is a type of lay opinion testimony. As such, the trial court can require the proponent to first establish the "preliminary fact" that the witness's lay opinion is "rationally based" upon the witness's perception, and that the opinion is helpful to the trier of fact. In addition, witnesses may only testify to matters that are within their personal knowledge. When eyewitness testimony is challenged in a pretrial motion, the trial court must require the proponent to establish, by a preponderance of the evidence, that the identification is based upon the witness's first-hand perception and personal knowledge, rather than from some other source. (*Id.* at p. 693.)

If the state meets that initial burden, the party opposing admission of the evidence may still show that the relative probative value of the evidence is outweighed by "the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." (*Id.* at p. 694.) At that juncture, the trial court's task is to determine the probative value of the identification evidence.

> Probative value is essentially a measure of the persuasiveness that attaches to a piece of evidence. [Citation omitted.] The persuasive force of eyewitness identification testimony is directly linked to its reliability. The more reliable a witness's testimony, the more persuasively it will establish a particular fact at issue. Conversely, the less reliable a witness's testimony, the less persuasive it will be. Thus, in applying [the Evidence Code] to eyewitness identification issues, trial courts must examine the relative reliability of evidence produced by the parties to determine the probative value of the identification. The more factors — the presence of system variables alone or in combination with estimator variables — that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have.

(*Lawson, supra*, 291 P.3d at p. 694.) Noting that "[p]robative value is not an all-or-nothing proposition," *Lawson* held that even though the initial burden was on the proponent of the evidence to establish what it called "a minimum baseline of reliability," the trial court must still conduct a "thorough examination of all the pertinent factors," i.e., the relevant system and estimator variables, to determine the probative value of the evidence.

This common sense approach to eyewitness identification testimony incorporates current science and uses the state evidence code to help ensure that the proponent of the evidence bears the initial burden of establishing its minimal reliability. After that, both parties have an opportunity to bring to the court's attention all of the many variables that are now known to affect human memory formation, retention and retrieval.

Had the trial court in this case evaluated the admissibility of the identification testimony by applying state evidentiary rules, rather than the federal test for due process challenges under *Manson*, the initial burden would have been on the prosecution, not appellant, to establish by a preponderance of the evidence that the evidence was more probative than prejudicial. To do so, the prosecution had to first establish that Richards's testimony was relevant.

2. California's Evidence Code Provides for the Exclusion of Eyewitness Testimony That Fails to Meet Reliability Standards Supported by the Current Science. Richards's Testimony Should Have Be Excluded Using A Modified *Manson* Test

Under California's Evidence Code, the party proffering the evidence generally bears the initial burden of establishing its admissibility. (See Evid. Code § 110 [providing that "[b]urden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue"].) Under Evidence Code section 350, only relevant evidence is admissible. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although eyewitness testimony will often meet this standard of relevance (*Lawson, supra*, 291 P.3d at p. 691), the Evidence Code nevertheless contains a number of conditions to admissibility that can override those general considerations, including the requirement of personal knowledge contained in Evidence Code section 702, as well as the requirements for lay opinion testimony under Evidence Code section 800.

Evidence Code section 702 provides that a witness may not testify as to a particular matter "unless he has personal knowledge of the matter." If an objection is raised to the admission of the testimony on the grounds that

the witness lacks personal knowledge, "such personal knowledge must be shown before the witness may testify concerning the matter." A witness's personal knowledge may be shown by any other admissible evidence, including the witness's own testimony. (Evid. Code, § 702, subd. (b).)

In addition, Evidence Code section 800 provides:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

(Evid. Code, § 800.)

A statement of identification is a kind of lay opinion testimony, based upon a number of assumptions and inferences that the witness makes about his perceptions. (See *People v. Perry* (1976) 60 Cal.App.3d 608, 612.) The witness's opinion that the person whom the witness saw at the scene of the crime is the same person who is on trial, is the ultimate conclusion in an eyewitness's identification. Before a party may introduce such lay opinion testimony, the party must be able to establish that the witness's opinion is rationally based upon the witness's perception, and that his opinion is helpful to his testimony. In the present case, the trial court placed the entire burden upon appellant to establish that the police procedures leading to Richards's selection of appellant's photo were suggestive, rather than requiring the State, as the proponent of the testimony, to establish that Richards's opinion was rationally based upon his perceptions and personal knowledge.

3. The State Failed To Prove the Preliminary Facts By a Preponderance of the Evidence

Evidence Code section 400 defines "preliminary fact" as a fact upon which the admissibility or inadmissibility of evidence depends; it includes "the qualification or disqualification of a person to be a witness." Under Evidence Code section 403, when the relevance of evidence depends upon the existence of a preliminary fact, the party proffering the evidence has the burden of producing the evidence in support of the preliminary fact. In addition, when a witness is asked to testify concerning a certain subject matter, the proponent of the evidence must establish the preliminary fact that the witness has personal knowledge of the subject matter.

> [T]he initial factual determination to be made upon a challenge to the reliability of incriminating evidence is not a determination of the question of reliability itself, but rather a determination of a collateral factual question only after which the trier of fact may or may not consider the merit of the challenge to reliability.

(*People v. Tewksbury* (1976) 15 Cal.3d 953, 965, fn. 11.)

In this case, the prosecution had the burden of proving the preliminary facts necessary to allow Richards to identify appellant as the perpetrator. The prosecution had to prove that Richards (1) had personal knowledge of the physical appearance of the perpetrator and (2) that his opinion that appellant was the perpetrator was rationally based upon Richards's perception. Those facts had to be proved by the prosecution before the Richards's testimony could be deemed relevant and, therefore, admissible. "The general rule is that '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.'" (*People v. Tewksbury, supra*, 15 Cal.3d at p. 963 quoting Evid. Code § 115.)

In this case, the trial court began by assuming the evidence was relevant and admissible and placed the entire burden upon appellant to establish otherwise. However, the State, as the proponent of the testimony, had to prove by a preponderance of the evidence that Richards's original view of the perpetrator had been sufficient to support Richards's lay opinion that appellant was that person. The State was never asked to meet this burden. In fact, the trial court specifically found that the evidence should be admitted because appellant had failed to make "a sufficient showing that this identification is worthless." (4 RT 1082.) The trial court placed no burden on the State, as the proponent of the evidence, to make any showing at all that Richards had personal knowledge of the crucial information about the perpetrator's identity sufficient to identify appellant.

The trial court had an obligation under the Evidence Code to consider what the witness actually perceived, and then determine whether the witness's identification of appellant was "rationally based" (Evid. Code § 800, subsec. (b)) on those perceptions. Human facial features will ordinarily be sufficiently distinctive to serve as a rational basis for an inference of identification. "Conversely, nonfacial features like race, height, weight, clothing or hair color, generally lack the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw." (*Lawson, supra*, 291 P.3d at p. 693.) As the *Lawson* court explained:

> If, for example, a witness testified to observing a tall, dark-haired man of medium build from behind as he ran from the scene of the crime, the trial court permissibly could find that *the witness had personal knowledge of the height, build, clothing, and hair color of the perpetrator, but no more*, and *limit the testimony accordingly.*

(*Ibid.*, emphasis added.) Such a limit on testimony would have been appropriate in this case, where Richards was only able to provide a very general description of the perpetrator (height, weight, and skin color) and some clothing description. The trial court had a duty to determine if that limited information was sufficient "personal knowledge" for Richards to then made a positive identification in court. In light of Richards's complete inability to recognize appellant at the live lineup, the trial court had good reason to exclude Richards's in-court identification. Richards's ability to form a reliable memory was never addressed by the trial court.

When identification testimony is challenged on state evidentiary grounds, the trial court, as the gatekeeper, must assure that the testimony is relevant, based upon personal knowledge and an adequate ability to perceive, and sufficient to render a lay opinion as to identification. If there is competing evidence challenging the inference that the memory was based upon an adequate perception, the prosecution, as the proponent of the evidence, "must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures." (*Ibid.*)

In the present case, appellant presented substantial evidence that James Richards did not form a reliable memory of the perpetrator. Richards was confused from the beginning, and first believed that Ray Bradford was the man who robbed him. In subsequent photo arrays, Richards pointed to one or more individuals who looked similar to the perpetrator, but it was not until the third six pack, after already having seen appellant's DMV photo once before, that appellant's photo "jumped out" at Richards.

Richards's inability to identify appellant in a live lineup twelve days after selecting him in a photo array undermines the contention that Richards made a valid identification of appellant. Under optimal viewing conditions,

when Richards came face to face with appellant, appellant apparently looked completely unfamiliar to Richards and he concluded that the perpetrator had not been present in the physical lineup. Law enforcement then further infected an already tainted process by letting Richards know that he had "correctly" chosen appellant's photo in the photo array, but had failed to select appellant in the physical lineup.

Armed with this critical feedback, Richards knew that the man depicted in the DMV photo was the targeted suspect. Going into the preliminary hearing Richards was understandably concerned that he would be unable to recognize the defendant in that proceeding. To ensure that Richards would have no second thoughts, the prosecutor showed Richards the circled photo of appellant. A short while later, Richards positively identified appellant in court.

These circumstances, considered together, present strong evidence that Richards's identification testimony was not based upon personal knowledge, but rather was based upon the suggestive procedures carried out by the State. The trial court never required the State to come forward with proof by a preponderance of the evidence that Richards had perceived the perpetrator well enough to make an accurate identification.

It is time for California to join the ranks of the growing number of states that are reconsidering the *Manson* approach, in favor of a state standard that places a premium on the reliability of eyewitness identification. Under such a standard, applying traditional evidentiary rules of admissibility, as the Oregon Supreme Court did in *Lawson*, the prosecution in this case would not have been able to meet its burden of proof, for all of the reasons discussed above. Richards's testimony should therefore have been excluded, or at the very least limited to the general characteristics that he observed. (See e.g., *Lawson, supra*, 291 P.3d at p.

693 [proposing the limiting of testimony where view of perpetrator was limited].)

I. The Jury's Consideration of Richards's Unreliable Identification of Appellant Undermined the Reliability of Its Guilt and Penalty Determinations Regarding the Capital Crimes

In addition to depriving appellant of a fair trial with respect to the charges involving Richards, the erroneous admission of James Richards's tainted identification of appellant undermined the reliability of the jury's guilt and penalty verdicts with respect to the capital offenses.

Due to the similarities between all three offenses, and the fact that the Richards crime and the Dominguez crime took place on the same street in Bloomington, the prosecutor argued — and the jury likely concluded — that all three crimes were committed by the same person:

> Now, the January 7th attempted murder of Mr. Richards, exact same location. What kind of connection is there between Richards and the two consummated or completed murders? Well, overwhelming thing is the exact same location, this kind of obscure, residential street in the City of Bloomington. Exact same place as the Andres Dominguez murder. We know that Mr. Richards was robbed of a couple hundred dollars, and he was taken out of his cab. That is where Mr. Wilson attempted to shoot him as the two murder victims were and, but for the gun having jammed, Mr. Richards would be dead. You and I might think of this as an M.O., the M.O. or the modus operandi. The overall flavor and enough of the specifics are similar in the murders that you would have to say it's the same M.O., and that's absolutely right. ¶ So there's overwhelming inference from that that the Richards incident is connected to the Dominguez incident, because it occurred at the exact same location, and both were cab drivers with the attempt being made outside the car, which is quite a bit of sufficient distinction in terms of how the crime was perpetrated; and then by extension, it would be connected to the Henderson incident by virtue of the fact that we already know the Dominguez incident and the Henderson

> incident are connected. ¶ Now, the next question is, what kind of connection do we have with Mr. Wilson and these three crimes? We know the three crimes are connected.

(18 RT 4848.)

Although the prosecutor attempted to minimize the importance of Richards's identification of appellant (18 RT 4848), the jury was nevertheless able to consider it in deciding whether appellant was guilty of all three crimes. Because Richards's identification of appellant was tainted, and therefore unreliable, its admission undermined the reliability of the jury's guilt determination with respect to the robbery and murders of Dominguez and Henderson. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [Eighth Amendment requires reliable determination of guilt in capital cases].)

Furthermore, in the penalty phase, the prosecutor argued at length that the Richards offense constituted "a large part of circumstances of the two murders" justifying imposition of the death penalty:

> We know the Richards incident, which occurred a month and a half before the murders, *it gives us a certain amount of insight, and it certainly is a large part of the circumstances of the two murders*. Mr. Richards, referred to by Mr. Wilson as "click-click-click" in his interview, that particular attempted murder occurred only four and a half months after Mr. Wilson gets released from CYA. The characteristics of that particular attempted murder are about as horrifying as you'd be able to find. Get out of the car. Come back here behind the car. Get down on your knees. Open your mouth. Close your eyes. Inserting the gun into the man's mouth for goodness sakes. ¶ And then when the gun misfires, just the — just the inclination of Mr. Richards to get up and run down the street and bang on a door, and Mr. Wilson actually has the audacity to get in his car, follow, pull in front of that house and try to shoot him again as the homeowner Tom Day is actually letting Mr. Richards in. Sadistic, yes. Ritualistic, yes. Very, very terrifying circumstance of the crime. Scary, big time. ¶

> There is no practical function to doing that. Let's say you're a robber you need money. You want money. You're willing to do what it takes to get money from robberies. When the cab driver gets out of the car, you have a concern about maybe he's going to identify me. You shoot him. What does Mr. Wilson do? No. He does his ritual. ¶ And then that evening he's back at his apartment bragging and laughing about the event, finding it very amusing that Mr. Richards made it. "I was going to get him," he says. And he actually shows off the cab at the neighboring complex. *It gives us a great deal of insight into the circumstances of these crimes.* ¶ Month and a half later. Exact same location. Andres Dominguez...

(22 RT 3934-3935, emphasis added.) Thus, under the circumstances of this case, admission of the tainted identification undermined the reliability of the jury's guilt determinations with respect to all three incidents and deprived appellant of his constitutional right to a capital-sentencing determination based upon reliable evidence. (See *Gardner v. Florida* (1977) 430 U.S. 349, 359 [Eighth Amendment requires that evidence considered by sentencer in death penalty case be reliable]; cf. *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-590 [jury's consideration of invalid conviction as aggravating factor undermined reliability of jury's death verdict, in violation of the Eighth Amendment].)

J. The Denial of the Motion to Suppress Richards's Identification Was Prejudicial

The trial court's ruling admitting Richards's testimony, as well as its denial of appellant's motion for a new trial, was extremely prejudicial. It has been long recognized that eyewitness identification evidence has tremendous influence on juries:

> The persuasive effect of eyewitness identification testimony has been remarked upon by lawyers and commentators for

> decades. In his dissent in *Watkins*,[53] Justice Brennan explained that he believed that jurors should know nothing about eyewitness identifications subject to suppression because of "[t]he powerful impact" that much eyewitness identification evidence has on juries. Justice Brennan quoted Professor Elizabeth Loftus's seminal work, Eyewitness Testimony: "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" Subsequent scientific research has further confirmed that Justice Brennan's concerns were well-founded. Jurors have a poor understanding of factors that can undermine the reliability of eyewitness identification. Even more troubling, jurors tend to "over-believe" eyewitnesses. Studies demonstrate that jurors have difficulty distinguishing accurate from inaccurate witnesses. In one study, mock jurors believed 62% of eyewitnesses witnessing in poor conditions, when only 33% of such witnesses were in fact accurate. In another study, eyewitness confidence was a better predictor of conviction by mock jurors than eyewitness accuracy. In that study, eyewitnesses who identified an innocent suspect convinced 70% of mock jurors to convict, while eyewitnesses who identified a guilty party produced only a 68% rate of conviction. In short, jurors believe eyewitnesses, even when they are wrong, and find eyewitness identification testimony so persuasive that it may well color their view of all of the other evidence in the case.

(O'Toole and Shay, Manson v. Braithwaite *Revisited: Towards a New Rule of Decision For Due Process Challenges to Eyewitness Identification Procedures* (2006) 41 Val. U. L. Rev. 109, 135.) Furthermore, as discussed above, jurors place disproportionate value on the degree of confidence an eyewitness expresses in his or her identification. As the Oregon Supreme Court observed in *State v. Lawson*:

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[53] *Watkins v. Sowders* (1981) 449 U.S. 341.

> Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification. See, e.g., Gary L. Wells et al., Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, 64 J. Applied Psychol. 440, 446 (1979); Michael R. Leippe et al, Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre–Identification Memory Feedback Under Varying Lineup Conditions, 33 Law & Hum. Behav. 194, 194 (2009) (summarizing prior research). Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback. See, e.g., Tanja R. Benton et al., Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts, 20 Applied Cognitive Psychol. 115, 120 (2006) (finding that only 38 percent of jurors surveyed correctly understood the relationship between accuracy and confidence and only 50 percent of jurors recognized that witnesses' confidence can be manipulated). As a result, jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications.

(*Lawson*, *supra,* 291 P.3d at p. 705.)

In the instant case, by the time Richards testified in the retrial, he expressed absolute certainty that appellant was the man who had robbed and attempted to shoot him. (15 RT 3906.) Under the circumstances, it is highly probable that his identification of appellant influenced the jury's verdict in this case.

Furthermore, because there were no other eyewitnesses who identified appellant and no trace evidence that tied appellant to commission of the offense, had Richards's identification been suppressed, the prosecution's case against appellant would have been very weak. Without Richards's identification, the prosecution's evidence would have been

limited primarily to the testimony of two witnesses, appellant's half-brother Sylvester Seeney and Seeney's girlfriend, Phyllis Woodruff, both of whom the defense established had motives to perjure themselves and incriminate appellant.

Seeney claimed appellant told him he had robbed a taxicab driver, and showed Seeney the stolen taxicab, which was parked in an apartment complex in Victorville that was one block from where Seeney and appellant lived.[54] (14 RT 3736-3738.) However, Seeney was an alleged alternative perpetrator with a strong motive to shift the blame from himself to appellant. He implicated appellant after having been repeatedly threatened with incarceration,[55] and he received transactional immunity for residential burglaries he had committed, in exchange for testifying against appellant at the preliminary hearing. (14 RT 3741, 3748-3749; 12 CT 3579-3584.)

The second witness was Seeney's girlfriend, Phyllis Woodruff. She also testified that appellant admitted to robbing Richards. (14 RT 3653-3656.) But like Seeney, Woodruff — who had also been a participant in the residential burglaries — was offered transactional immunity in exchange for her testimony. (14 RT 3655-3656.) Furthermore, because there was circumstantial evidence linking Seeney to the taxicab crimes, Woodruff also

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[54]Prior to the first trial, Seeney recanted his testimony. (1 Supp. CT 241-258.) Seeney invoked his privilege against self-incrimination at a pretrial hearing and announced that he would do so again if called as a witness at trial. (3 RT 798-805.) The trial court thereafter declared Seeney unavailable and admitted his preliminary hearing testimony into evidence. (6 RT 1511; 14 RT 3736-3738.) The trial court excluded evidence of Seeney's recantation. (17 RT 4497-4498; see *post*, Argument IV [asserting that the exclusion of the recantation was erroneous, unconstitutional, and prejudicial].)

[55]See *post*, Argument III [asserting that Seeney's statements to police and testimony were coerced and should have been suppressed].

had a clear motive to lie to protect her boyfriend from prosecution for those offenses.

In his guilt-phase closing argument, defense counsel urged the jury to discredit what Seeney and Woodruff told the police, because of their strong incentive to give the detectives what they wanted in order to protect themselves:

> Now, keep in mind the atmosphere created by the police when they conducted these interviews was that these people were almost like suspects, they were thought to be involved or to know something about it and they were going to be in trouble if they didn't tell something about it and, of course, the converse of that is if you do tell us, you won't be in trouble. So early on there is a message there that is given to those people which is that, you know, talk to us, no trouble; don't talk to us, you are in big trouble, and so what is conveyed to them is that maybe some of the things that they have done such as burglaries will be ignored if they simply give information to the police.

(18 RT 4903-4904.)

Although Seeney was incarcerated between the time of his arrest and appellant's preliminary hearing (14 RT 3742), Woodruff spoke to Seeney over the telephone and in person before she implicated appellant in the Richards offense. (14 RT 3670, 3672.) Thus, as defense counsel sarcastically suggested, an inference could be reasonably drawn that Woodruff and Seeney conspired to incriminate appellant to protect themselves:

> Now, we know that Seeney and Phyllis had a phone conversation and that occurred while Mr. Seeney was still in Ohio before he was brought back to California. We have evidence from Phyllis that she talked to him on the phone and she also told you she visited him in the county jail. Of course, they didn't talk about the case.

(18 RT 4895.)

The prosecution also presented circumstantial evidence of appellant's guilt, but such evidence pointed equally to Seeney and his good friends Cory and Brad McKinney. For example, the robbery and attempted murder of Richards was carried out in the neighborhood in which appellant and Seeney's aunt and uncle lived (16 RT 4157), and after the incident Richards's taxicab was parked near appellant and Seeney's apartment. (16 RT 4151.) These locations were therefore as familiar to Seeney as they were to appellant, and because Seeney regularly spent time with the McKinney brothers (14 RT 3642), the locations would also have been familiar to them. Furthermore, a stolen gun that had a tendency to jam was seized during a search of the McKinney brothers' apartment (14 RT 3642; 15 RT 3997-4001); this constituted further circumstantial evidence of third-party culpability. Although appellant made the comment, "click, click, click," in reference to the Richards offense during his interrogation (12 CT 3327), this tended to prove only that he had knowledge of the gun jamming, a detail that Seeney also knew. (14 RT 3738.) Although Seeney claimed his knowledge of that detail came from appellant, given the circumstances of Seeney's cooperation with law enforcement and the prosecution, he was shown to have a substantial motive to lie.[56]

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[56]The circumstantial evidence against appellant for the robbery and murders of Andres Dominguez and Victor Henderson also raised the inference of third-party culpability. Andres Dominguez was robbed and murdered on the same street in Bloomington as the robbery and attempted murder of Richards, approximately a half mile from appellant and Seeney's aunt and uncle's home. (16 RT 4157.) Again, this was circumstantial evidence that tended to incriminate Seeney as much as it did appellant. It could also have pointed to the McKinney brothers, given their close association with Seeney. In addition, despite evidence appellant used Dominguez's cell phone, Cory McKinney also used the phone, and it appeared to be in McKinney's possession the morning after the crime. (14

(continued...)

Finally, this was a close case, as demonstrated by the first trial resulting in a hung jury (see Leslie Shea Riggsbee, *United States v. Burgos: Balanced Blasting for Deadlocked Juries* (1996) 74 N.C. L. Rev. 2036, 2054 [noting that hung juries typically occur in close cases]), and the retrial jury deliberating over the course of several days before reaching guilty verdicts. (See *Parker v. Gladden* 1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 [concluding ten-hour deliberations showed closeness of case].) Furthermore, the jury requested readbacks of Seeney and Woodruff's testimony (9 CT 2503, 2544), which indicates that at least some jurors had questions regarding their credibility. It is therefore apparent that Richards's eyewitness identification of appellant was crucial in convincing the jury that appellant, rather than Seeney or one of the McKinney brothers, was the man who robbed and attempted to shoot him.[57]

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[56](...continued)
RT 3592-3595; 16 RT 4209; 17 RT 4601.) Moreover, the getaway driver who picked up Victor Henderson's killer, called the latter "Trey," which was Cory McKinney's nickname (14 RT 3599; 16 RT 4039, 4055), and a shoe found near the scene of that crime was both Cory McKinney and Seeney's size, but not appellant's. (10 RT 2497; 17 RT 4587; Exhibits 126, 160.)

[57]Richards not only expressed greater confidence in the accuracy of his identification at the retrial than he had in the first trial, but in the first trial the defense was better able to challenge the reliability of the identification by introducing evidence tending to prove that Detective Franks, despite his denial, showed Richards two photo arrays with appellant's DMV photo. Due to the trial court's exclusion of that evidence prior to the commencement of the retrial, appellant was not able to successfully demonstrate that Richards's identification of appellant had been tainted by suggestive procedures. (See *post*, Argument II [exclusion of misconduct evidence to impeach Detective Franks].)

Accordingly, for all of the reasons discussed above, respondent cannot meet its burden of proving beyond a reasonable doubt that appellant's conviction for the robbery, carjacking, and attempted murder of James Richards was unattributable to the erroneous admission of Richards's suggestive and unreliable identification of appellant. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [*Chapman* inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error].) Respondent similarly cannot prove that appellant's conviction of the two capital crimes and the jury's death verdict were unattributable to that error.

However, even if this Court finds only that Richards's identification of appellant should have been excluded under the Evidence Code but that its admission did not deprive appellant of any constitutional rights, given the importance of Richards's identification to the prosecution's case, and the weakness of its case without that evidence, the error was not harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836, because there is a reasonable probability that but for its admission appellant would not have been convicted.

In any event, appellant's conviction for the robbery, carjacking and attempted murder of James Richards must be reversed. Furthermore, because of the prejudicial impact of eyewitness identification evidence on the jury's guilt and penalty determinations with respect to the murders of Andres Dominguez and Victor Henderson, appellant's conviction of both those offenses and his death sentence must also be reversed.

II.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AT THE RETRIAL BY EXCLUDING EVIDENCE OF DETECTIVE SCOTT FRANKS'S MISCONDUCT TO IMPEACH HIS CREDIBILITY

A. Introduction

As discussed in the previous argument (see *ante* at pp. 29-110), the reliability and accuracy of James Richards's identification of appellant as the man who robbed and attempted to shoot him on January 7, 2000, was a hotly contested and critical issue in both of appellant's trials. Richards identified appellant from a photo array administered by Detective Scott Franks. (15 RT 3869-3870.) However, there was conflicting evidence regarding whether Detective Franks had shown Richards one photo array, or two photo arrays, both containing the same photograph of appellant. According to defense eyewitness identification expert Dr. Kathy Pezdek, showing Richards two different photo arrays with identical photos of appellant would have been extraordinarily suggestive and therefore could have influenced Richards to mistakenly identify appellant as his assailant. (17 RT 4664-4671.)

Appellant sought to impeach Detective Franks's claim that although there were two photo arrays in the police file that included the same photograph of appellant (Exhibits 147 and 16), he showed only Exhibit 16 to Richards. (17 RT 4445-4446.) In the first trial, appellant impeached Detective Franks's credibility with evidence of two incidents of misconduct involving dishonesty. (10 RT 2467-2470.) However, in the retrial, the prosecutor successfully moved to exclude this evidence under Evidence Code section 352. (12 RT 3077-3079.)

As appellant will establish below, the probative value of the misconduct evidence to impeach Detective Franks's credibility was substantial, and the prejudice to the prosecution in its admission was *de minimus*. Consequently, the trial court abused its discretion in excluding the evidence, and prejudicially deprived appellant of his constitutional rights to confront witnesses, to present his defense, to a fair trial, and to a reliable guilt and penalty determination.

B. Facts and Procedural History

The robbery, carjacking, and attempted murder of James Richards occurred on the night of January 7, 2000. He did not attempt to identify anybody for the next month and a half.

After the murders of Andres Dominguez and Victor Henderson on the early morning of February 21, 2000, the San Bernardino County Sheriff's Department solicited assistance solving the crimes. Having been the victim of a similar crime at the same location as one of the homicides, Richards called the Sheriff's Department and said that he suspected that Ray Bradford, whom he knew from his drug rehabilitation program, may have been the assailant. Richards said that Bradford talked about having committed robberies, and resembled the person who had robbed him.

On February 27, 2000, Detectives Chris Elvert and Allen Maxwell from the Pomona Police Department showed Richards a photo array consisting of six photos that did not include appellant's photo. (Exhibit 148). Richards did not select anybody in that photo array. (4 RT 1030-1033).

On March 2, 2000, Detective Franks went alone to Richards's home to learn whether Richards would identify appellant in a photo array. Richards identified appellant. (Exhibit 16.) Twelve days later, Richards attended a live lineup that included appellant. Richards did not identify

appellant and later commented that the perpetrator had not been present in the lineup. (15 RT 3870; 17 RT 4462.) On August 30, 2000, Richards identified appellant at the preliminary hearing shortly after the prosecutor showed him a copy of Exhibit 16. (4 RT 957; 1 CT 180.)

When he testified at the preliminary hearing and again at the first trial, Richards stated he was shown three photo arrays and did not identify appellant until he was shown the third photo array. (1 CT 191; 7 RT 1662.) The Sheriff's Department case file contained a third photo array (Exhibit 147), which also used the same driver's license photo of appellant that Richards selected in Exhibit 16. Detective Franks prepared Exhibit 147, but Sergeant Dean told him not to use it, because some of the photos depicted men without facial hair and appellant had facial hair in his photo. (8 RT 2131.)

On redirect examination at the first trial, Richards testified he was unsure if he had been shown a third photo array. (7 RT 1668.) At the retrial, he testified that either two or three photo arrays had been administered to him. (15 RT 3887.)

At both trials, eyewitness identification expert Dr. Kathy Pezdek testified that if Richards had been shown another photo array containing the same photo of appellant before he was shown Exhibit 16, it would have tainted his identification of appellant in Exhibit 16 and seriously undermined its reliability. (9 RT 2176, 2214-2216; 18 RT 4665-4670.)

At both trials, Detective Franks testified that he did not show Richards Exhibit 147. (10 RT 2420; 17 RT 4445-4446.) As a result, appellant sought to impeach Detective Franks's assertions as part of his

effort to prove that Richards's identification of appellant had been tainted, and was therefore unreliable.[58]

Detective Franks first testified about Richards's identification of appellant at the preliminary hearing. As a prosecution witness, he testified he showed Richards Exhibit 16, and that Richards pointed to photo number 5, which was appellant's photo. (1 CT 247-248.) Franks testified to this again at the hearing on appellant's motion to suppress James Richards's identification of appellant. (4 RT 996.) No mention was made during either of these proceedings of Exhibit 147, the existence of which had not yet been discovered by the defense. However, prior to the first trial, defense counsel found that photo array in the Sheriff's Department case file. (16 RT 4201.)

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[58]Dr. Pezdek testified about other actions by Detective Franks that made Richards's identification of appellant the product of suggestive procedures. While administering the photo array in which Richards identified appellant, who was in the fifth position of the photo array, Detective Franks asked "What are you pointing to, number 5?" and "What about number 5?" (Exhibit 221.) According to Dr. Pezdek, these were cues that could have influenced the identification. (17 RT 4661.) In addition, by utilizing the unusual procedure of having Richards circle the photo of appellant Detective Franks caused Richards to pay particularly close attention to the photo and increased the likelihood that he would identify appellant subsequently. (17 RT 4662.) After Richards failed to identify appellant in the live lineup, Detective Franks further tainted Richards's future identification of appellant by telling Richards that the perpetrator was in custody, which strongly hinted that Richards had selected the right person in the photo array. (17 RT 4676.) Furthermore, by giving Richards positive feedback about the accuracy of the identification in the photo array, Detective Franks likely increased Richards's confidence in the accuracy of his identifications. (17 RT 4678.) Moreover, the prosecutor himself tainted Richards's in-court identifications of appellant. By showing Richards a copy of that photo array just before Richards took the witness stand at the preliminary hearing, the prosecutor made it likely that Richards identified appellant in court based on his recollection of the photo array rather than the incident. (17 RT 4677.)

Having lost his motion to suppress Richards's identification, appellant sought to establish that Richards's identification of appellant was unreliable and inaccurate due to the suggestive techniques employed by Detective Franks. In the first trial, the defense called Detective Franks as a witness to establish the details of Richards's identification, and confronted him with Exhibit 147. (10 RT 2415-2426, 2453.)

Detective Franks denied that he had shown Exhibit 147 to Richards in addition to Exhibit 16. (10 RT 2420.) Consequently, in order to prove that Richards had been shown that third photo array, appellant needed to impeach Detective Franks's testimony. Defense counsel therefore challenged Franks's credibility by questioning him — without objection from the prosecution — about two recent incidents of misconduct in which Franks had been dishonest. In the first incident, Franks impersonated a detective with the Colton Police Department in order to photograph a private home under false pretenses. In the second incident, he lied to his superiors to hide the fact that he was moonlighting as a private security guard, in violation of department policy. (10 RT 2467-2470.)[59]

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[59]Appellant also challenged Detective Franks's credibility by establishing that Franks had testified falsely at the preliminary hearing regarding the details surrounding Richards's selection of appellant's photo from Exhibit 16, and the details of his conversation with Richards following the live lineup. (17 RT 4453-4456, 4459-4473.) Franks testified at the preliminary hearing that when he showed Richards Exhibit 16, he told Richards to take his time in looking it over. (1 CT 248.) However, this testimony was refuted by the tape recording of the interview during which Richards was shown Exhibit 16. (17 RT 4453-4456; Exhibit 221.) Not only did Franks not tell Richards to take his time in looking over the photos, but from the recording it appeared that he was giving Richards a cue to select appellant's photo. (Exhibit 221; 17 RT 4661.) Franks further denied that Richards, after failing to identify appellant at the live lineup, commented that his assailant was not in the lineup. (1 CT 250.) This testimony was also

(continued...)

Both of these incidents of misconduct occurred shortly after Detective Franks investigated the instant case. (12 RT 3067.) Defense counsel elicited the following testimony from Franks regarding his misconduct:

> Q. Am I correct, sir, that sometime last year you had a problem with falsely identifying yourself as a Colton police officer or detective —
>
> A. Yes, I did.
>
> Q. — to a person? And you went to a lady's house and did some kind of investigation and took some pictures and then represented yourself to be a Colton detective?
>
> A. Yes, I did.
>
> Q. And is it also true that when the lady involved called the Colton Police Department and reported this because she was suspicious, that you were contacted by a Colton detective about it?
>
> A. No, it wasn't the lady that called, it was Child Protective Services that called Colton Police Department.
>
> Q. And am I correct that the — that you lied to the Colton detective about the reason you were at the house?
>
> A. I didn't lie to him.
>
> Q. Did you tell the Colton detective that you were there in order to get a description of the house?
>
> A. Yes.
>
> Q. For the purposes of obtaining a search warrant?

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[59](...continued)
refuted by a tape recording. (17 RT 4462-4463; Exhibit 222.)

A. Yes.

Q. That wasn't true, was it?

A. Not at the time, no.

Q. So you did lie to the Colton detective?

A. If you want to say that, yes, sir.

Q. Well, if you said something —

A. Yes, sir.

Q. that isn't true, is that lying to you?

A. Yes, sir.

Q. And am I also correct that you had a problem with having lied to a supervisor or a sergeant in connection with an incident being called out with — when you were on call as a homicide detective?

A. I wasn't a homicide detective then.

Q. Well, do you know the incident I am talking about?

A. Yes, sir.

Q. And in that situation, you as I understand it were supposed to be on call to respond to situations that required a detective to be present.

A. Yes, sir, I was some place I wasn't — I wasn't in, I guess, a 30 minute response period to call and I got dinged for giving a supervisor a misleading statement.

Q. Well, as I understand it, the rules involved had to do with you being, as you said, 30 minutes response time and there was also a rule having to do with moonlighting?

A. Right.

Q. And at the time that this call came in, you were working as a private security officer as some, I think it was Sony?

A. I was doing security for Drew Carey.

Q. And so when the call came in, you were a long ways away?

A. Absolutely.

Q. And you were doing something you weren't supposed to do, working on another job?

A. Right.

Q. And so when you got the call from the, I think it was the detective supervisor, you lied to him about what you were doing?

A. I told him I was at my mother's and it would take me about 45 minutes to get there. It actually took me about 45 minutes to get there.

Q. And you later learned that the sergeant had talked to your wife and that she had told him what you were really doing, is that right?

A. Down the road, yes.

Q. And then actually I think you talked to two people that night, you tried to get somebody to cover for you, is that right, in terms of —

A. Well, the sergeant told me to call and see if I could get somebody to cover the shift for me, the call, and I did and he was unavailable so I responded.

Q. So but in the course of that, you lied to two different people who were higher ranking officers than you were, is that right?

A. Higher rank? Well, you can call it — yeah, I did.

Q. One was a sergeant?

A. I did, I did.

Q. One was a sergeant?

A. I did.

Q. And the other was an, I guess, a detective who was an acting supervisor at the time?

A. Right.

(10 RT 2467-2470.)

In his guilt-phase closing argument, defense counsel did not specifically mention either of the two incidents of misconduct. However, he argued at length that Detective Franks not only used suggestive tactics to secure Richards's identification of appellant, but also that he was fundamentally dishonest, and therefore lied about having done so. (11 RT 2758-2764.) Counsel argued:

> And we know from listening to Detective Franks, with some people the ends justify the means. If the cause is noble, it's okay to lie . . . the problem with Detective Franks is that he doesn't value the truth enough.

(11 RT 2758.)

With respect to the question whether Detective Franks showed Richards Exhibit 147 before Richards identified appellant from the photos included in Exhibit 16, defense counsel suggested that Detective Franks was not telling the truth about whether he showed Richards Exhibit 147:

Now, what about that third lineup, No. 147? Sergeant Dean says it never went out. Detective Franks said I never showed that to anybody, but it looks like Detective Franks did prepare it, and it was in the case file, and Detective Franks is the case agent, and he maintains the case file. So I guess it's legitimate to ask if this lineup was never shown to anyone, why is it in the case file? And we do have discrepancies in Mr. Richards' testimony about how many lineups he was shown. He apparently did state back in March of 2000 he was shown two lineups when he was talking to the defense investigator. He comes to court in August and says there were three. Very definitely there were three. He said in this trial there were three. So I guess then the question becomes, well, was there anything else in the case file in the way of lineups if Mr. Richards was shown three? Is there anything else in the case file that could have been the lineup he was shown other than this one? And the answer was no. If he was shown three, this is the only other one it could have been.

So I did ask Dr. Pezdek to talk a little bit about, well, what if — what if he was shown No. 147 at some point before he made the selection in Exhibit 16. What if? Well, Mr. Wilson's picture, it's a little bit different coloration. It's basically the same picture. A little smaller in the position No. 2 in 147, and he appears to be the only person who's the same.

If he had been shown No. 147, and had failed to make an identification, and then later is shown No. 16, it's reasonable to believe that the picture that would, as he put it, jump out at you, would be the one you'd seen before. He might not know that. He might not even say to himself, oh, I've seen this picture before in another lineup. His memory is just telling him, this is a face I've seen before.

Now, let me say some things about why it's important to think about all of these things, about manipulation of lineups, and inaccurate testimony, and things of that sort. Detective Franks, as I said, is a sworn officer of the law. He's a member of a team of homicide detectives. They investigate the most serious crimes. Providing accurate investigative information

> is extremely important. This young man over here is on trial for an offense punishable by death. This could not be more serious.
>
> . . . [R]eports should be accurate. Testimony should be accurate. But if you have a mind set that Mr. Wilson is the target, it dictates the form and shape of the investigation.

(11 RT 2763-2764.)

The prosecutor acknowledged Detective Franks's misconduct in his guilt-phase closing argument, but argued that it did not prove Franks had lied in the instant case:

> I won't defend what Detective Franks did. We expect police officers to play by the rules. We expect every citizen to play by the rules and we think less of them when they don't, but particularly a police officer. The hypocrisy is the thing that really irritates us I think. They are in the business of holding other people accountable for living by the rule of the law and when they don't do it, it is just hypocrisy and Mr. Canty was able to establish through Detective Franks that there has been two different instances where he has done things that he wasn't supposed to. Whether they are criminal or not is probably hard to say, but they are clearly dishonest and that is the more important thing.
>
> But what I want you to do and would ask you to bear this thought in mind, keep in check the prejudice that we all have against police officers that are dishonest. These are roguish acts. We all have a stereotype and a fear of roguish cops, roguish detectives, but in this case, there has been a fairly extensive examination of Detective Franks' role and I suggest to you that nothing about that character flaw, let's call it, has implicated this case at all.

(11 RT 2701.)

The jury deadlocked on all counts at the guilt phase of the first trial, and the trial court declared a mistrial. (11 RT 2838-2840.)

Prior to the retrial, the prosecution moved to exclude evidence of Detective Franks's above-described incidents of dishonesty.[60] (6 CT 1676-1679.) At the argument held on the motion, the prosecutor asserted that the misconduct evidence was prejudicial:

> This kind of incendiary subject matter is — is very, very potent. It's the kind of stuff that distracts jurors, particularly jurors that have a resentment toward law enforcement or an inclination to believe that law enforcement does stuff like this all the time.

(12 RT 3067.) The prosecutor further argued that there was no evidence that Detective Franks had committed misconduct in this case, and claimed that the evidence conclusively established that Detective Franks did not show Exhibit 147 to James Richards. (12 RT 3068-3069.)

Defense counsel responded, as follows:

> The defense is entitled to reasonably argue that since the witness himself has twice under oath said that there were three lineups, and since there is in fact a third lineup in the Sheriff's file, and since — if that was shown, it could have significantly affected the identification that was ultimately made as Dr. Pezdek would testify. We're entitled to attempt to establish that reasonable inference.
>
> Part of establishing that is to demonstrate that this officer, who is on the stand not just as a witness, but as an investigator, is of dishonest character. He is the kind of person who the jury may infer could have in fact clandestinely shown a third lineup and not now admit it because he knows it would affect the validity of his evidence. He's the kind of person who would be prepared to do that even though he's a police officer because he has lied in his capacity as a police officer on other occasions. So that's — that's what I'm attempting to establish through his testimony.

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[60]The prosecution also moved to exclude Dr. Kathy Pezdek's eyewitness-identification expert testimony from the retrial; however, the trial court denied that request. (6 CT 1672-1676; 12 RT 3064-3065.)

(12 RT 3075.)

In response to the trial court's remark that appellant could argue that James Richards was shown Exhibit 147 if the misconduct evidence were excluded, defense counsel replied:

> Except that Detective Franks takes the position that he was only shown two, and the jury will then sit there without knowing that Detective Franks has done other things that are dishonest, and because he's a police officer, will tend to believe him when he says that. And I have a right, I believe, to demonstrate to the jury that when Detective Franks says, no, there were only two, that that's something they may want to question, because he has honesty issues.

(12 RT 3077.)

Immediately thereafter, the trial court granted the prosecution's motion to exclude all extrinsic evidence of Detective Franks's misconduct. (12 RT 3077.) The court explained the basis for its ruling, as follows:

> The third lineup, I guess arguably there is an issue as to whether it was shown or not, and so it has some probative value. The question under 352 is, is the probative value outweighed by the time that it would take to get into this — and I would agree it wasn't a great amount of time — or the other prejudicial or confusing aspect of this. And as Mr. Williams points out, and I think validly, if we dirty Detective Franks enough, maybe some of that dirt is going to rub off on other investigators or other officers that participated in this investigation when there's really no evidence that that was the case.

(12 RT 3078.) The court thus concluded that "the probative value is slight in comparison with the potential to confuse or distract the jury." (12 RT 3079.)

At the retrial, the defense again called Detective Franks as a witness, and attempted to show, through Detective Franks's testimony, that Richards's identification of appellant had been tainted by suggestive tactics,

and was therefore unreliable. (17 RT 4445, 4454-4456, 4459-4465.) However, the trial court's exclusion of the misconduct evidence prevented defense counsel from making a persuasive case that Detective Franks was deliberately lying when he denied using suggestive tactics with Richards to obtain his identification of appellant. Although counsel argued that in his testimony Franks had "[covered] up the actual events and [stated] falsehoods" (18 RT 4882), he was not able to establish Detective Franks's character for dishonesty, and argue, as he had in the first trial, that Detective Franks "doesn't value the truth" (11 RT 2758). In addition, defense counsel had little basis to argue convincingly that Detective Franks lied when he told Sergeant Dean, the judge, and the jury that he did not show Exhibit 147 to James Richards. (18 RT 4912-4914.)

Rather than attempt to defend Detective Franks's credibility as he did, at some length, in his guilt-phase closing argument in the first trial, the prosecutor, in his rebuttal argument in the retrial, asserted that Detective Franks's inaccurate testimony regarding what he had said to James Richards arose from mere misrecollection. The prosecutor accused defense of having "blindsided" Detective Franks with the tape recordings of his interactions with Richards when Richards identified appellant in a photo array and during and after Richards did not identify appellant at the live lineup. (18 RT 4923-4925.)

The jury at the retrial convicted appellant of all charges[61]. (9 CT 2554-2571.)

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[61]Appellant's conviction on Count 7 was for the lesser-included offense of attempted robbery. (9 CT 2570.)

C. The Trial Court Abused Its Discretion in Excluding Evidence of Detective Franks's Misconduct That Revealed His Dishonesty

The evidence of Detective Franks's prior incidents of misconduct was relevant, probative, and not unduly prejudicial. The evidence cut to the heart of Detective Franks's credibility and had no spillover effect on the other law enforcement officers involved in this case. Under the circumstances, the trial court abused its discretion in granting the prosecution's motion to exclude it under Evidence Code section 352.[62]

Fundamentally, a witness's credibility is material. Accordingly, evidence pertaining to a witness's credibility is relevant. (See, e.g., *People v. Laverge* (1971) 4 Cal.4th 735, 742.) Moreover, "[u]ncharged misconduct is also admissible as long as it is relevant to credibility." (Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases* (1991) 24 Loyola L.A. L.Rev. 621, 652.) As this Court explained in *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296, "[m]isconduct involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction."

Both incidents of misconduct that appellant sought to introduce into evidence involved dishonesty. In one incident, Detective Franks impersonated an officer in the Colton Police Department so he could enter

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[62]Evidence Code 352 provides, as follows:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

and photograph a private home to which he should not have had access. He subsequently lied to a detective from the Colton Police Department about his purpose for going into the home. In the second incident, he improperly worked at a second job, which caused him to be late in arriving at a crime scene, and then concealed his whereabouts when questioned about his tardiness. (10 RT 2467-2470.) Lying to law enforcement officers and perpetrating fraud are both matters of moral turpitude that reflect on a person's credibility. (See *People v. Ayala* (2000) 23 Cal.4th 225, 271 [lying to law enforcement officers]; *People v. Barnett* (1998) 17 Cal.4th 1044 , 1128 [fraud].) Accordingly, Detective Franks's misconduct related to his credibility as a witness and, thus, was relevant and admissible.

Detective Franks's credibility was manifestly material. His testimony that he followed Sergeant Dean's order not to show Exhibit 147 to James Richards (17 RT 4445-4446), if believed, would have refuted the defense's theory that Richards's identification of appellant in Exhibit 16 was tainted by Richards having previously seen the same photograph of appellant. Thus, appellant needed to show that Detective Franks was not telling the truth.

In addition, Detective Franks's prior misconduct was relevant for reasons that went beyond his status as a witness. As Dr. Pezdek explained, whether James Richards had been shown all three photo arrays in the case file, two of which contained the same photograph of appellant, constituted an important factor in the reliability of the lone eyewitness identification in this case. (18 RT 4665-4771.) Sergeant Dean testified that he told Detective Franks not to administer Exhibit 147 and that he had no indication that

Exhibit 147 had been shown to Richards. (16 RT 4190[63].) The inference that Richards had been shown only two photo arrays was therefore premised on the assumption that Detective Franks followed Sergeant Dean's directive. However, evidence indicating that Detective Franks habitually flouted departmental rules and disobeyed his supervisors when advantageous, and then lied about it, would have cast doubt regarding the validity of that assumption. Evidence regarding a police officer's prior misconduct is admissible when offered to prove the officer habitually engages in that type of behavior. (See *People v. Memro* (1985) 38 Cal.3d 658, 681 [complaints regarding police officers' use of violence to coerce confessions in other cases admissible under Evidence Code section 1105 to show that this was officers' habitual practice], overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 59 [police officer's prior acts of dishonesty in falsely reporting or embellishing facts and circumstances surrounding arrests admissible to establish officer's "character, habit and custom of dishonesty"].)

Moreover, the audiotapes of Detective Franks administering the live lineup, at which Richards did not recognize appellant, and the photo array from which Richards selected appellant, shed no light on whether Detective Franks showed Richards the third photo array contained in the case file. Consequently, contrary to the prosecution's argument, the presence of audiotapes of the administration of Exhibits 16 and the live lineup did not obviate the probative value of the misconduct evidence.

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[63]Sergeant Dean testified that when a detective shows a witness a photo array, the detective should have the witness initial the photo array. Because there were no initials written on Exhibit 147, Sergeant Dean assumed it had not been shown to Richards. (16 RT 4190-4191.)

Accordingly, the trial court abused its discretion in concluding that evidence pertaining to Detective Franks's credibility had little probative value.

Furthermore, the risk of prejudice to the prosecution was *de minimus*. As the trial court recognized, the misconduct evidence was not time-consuming. The potential for confusion was overblown. A limiting instruction could have explained that the misconduct evidence was relevant only to Detective Franks's credibility as a witness and as a hearsay declarant. Because we presume that jurors follow their instructions (see, e.g., *People v. Homick* (2012) 55 Cal.4th 816, 901), there is no basis from which to conclude that the jury would have used the misconduct evidence inappropriately.

Likewise, the misconduct evidence was not likely to distract the jury. The prosecutor offered no explanation why the misconduct of one detective would rub off on the other law enforcement officers. The prosecutor's view that the misconduct evidence led the jury astray at the first trial was premised on two dubious propositions: (1) that Detective Franks undoubtedly showed only two photo arrays to Richards, and (2) that the jurors shared a latent anti-law-enforcement bias that the misconduct evidence brought to the fore. (12 RT 3066-3070.) Whether Detective Franks had shown James Richards a third photo array was an open question for which the answer bore directly upon the reliability of the identification. Furthermore, the proposition that the jury had an anti-law-enforcement bias was far-fetched; jurors tend to give great deference to police officers who testify at a trial.[64] (See Jihan Younis, *Agent-Experts in Criminal Trials: The*

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[64]Indeed, an article in a trial-advocacy journal article instructs attorneys to use police officers as witnesses whenever possible precisely

(continued...)

Ultimate Issue Rule As A Defense to the Imprimatur Problem (2010) 47 Cal. Western L.Rev. 213, 243-244; Benjamin J. Branson, *"Good Cop, Bad Cop?" Anyone's Guess: A Review of the* Pitchess *Motion for Criminal Discovery in the State of California* (2009) 31 Whittier L. Rev. 279, 314; Tara L. Senkel, *Civilians Often Need Protection from the Police: Let's Handcuff Police Brutality* (1999) 15 N.Y.L. Sch. J. Hum. Rts. 385, 403; Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive To Lie: A New Approach to Police Perjury* (1998) 59 U. Pitt. L. Rev. 233, 245.)

This Court has recognized that a police officer's misconduct in collateral matters is probative toward his credibility. In *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 25, this Court explained that reports of alleged police misconduct likely contain admissible impeachment evidence against a police officer. The admissibility of such evidence is the basis for permitting defense discovery of a police officer's misconduct. (See *People v. Gaines* (2009) 46 Cal.4th 172, 179 [noting defendants can discover some collateral evidence of police misconduct in case where defendants assert that police officer acted improperly].)

Cases from other jurisdictions that have considered, under similar evidentiary rules, the admissibility of collateral police misconduct evidence illustrate why the trial court erred by excluding the evidence in this case. In *Longus v. United States* (D.C. 2012) 52 A.3d 836, 853-854, the District of Columbia Court of Appeals reversed a conviction because the trial court in

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[64](...continued)
because of their credibility. (See Gary B. Pillersdorf, *Sweet Visuals to Sway Jurors: A Jelly Doughnut As A Stand-in for A Herniated Disk? By All Means, If It Helps Jurors Understand Your Client's Injury. Get Creative to Strengthen Your Auto Collision Cases Without Spending a Bundle on Demonstrative Evidence*, Trial, June 2007, at pp. 56, 57.)

that case made the same error as the court below in the instant case. In *Longus*, the trial court permitted the defense to ask a police officer whether he was under investigation for coaching a witness in a separate case, but barred the defense from eliciting any evidence regarding the underlying investigation. The Court of Appeals concluded that the excluded evidence pertained to the police officer's credibility, as well as whether he was biased in favor of the prosecution because he was under investigation. For those reasons, the Court of Appeals held that the limitations the trial court imposed on the defendant's cross-examination of thee police officer violated the defendant's right to a defense and thereby reversed the conviction. (*Id.* at pp. 850-854.)

United States v. Davis (3d Cir. 1999) 183 F.3d 231, 257, amended (3d Cir. 1999) 197 F.3d 662, is also instructive. In that case, the Third Circuit Court of Appeals upheld the cross-examination of a police officer regarding unrelated instances of police misconduct that pertained to the officer's credibility. Similarly, the Delaware Superior Court in *State v. Watson* (Del. Super. 2002) 846 A.2d 249, 256 noted that "police misconduct involving allegations of dishonesty" in a separate case can be used to cross-examine a former police officer.

Detective Franks's misconduct squarely reflected on his credibility in this case. As a witness and a law enforcement officer entrusted to follow Sergeant Dean's orders with respect to the third photo array, Detective Franks's misconduct in collateral matters was probative of his lack of credibility. In view of the meager potential for prejudice, the trial court abused its discretion when it excluded the evidence.

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D. The Exclusion of the Evidence Violated Appellant's Constitutional Rights

The trial court's erroneous exclusion of evidence of Detective Franks's misconduct violated appellant's Sixth Amendment rights to confront witnesses and to present a defense, as well as his rights to a fair trial and to a reliable penalty determination under the Fifth, Eighth and Fourteenth Amendments.

1. Confrontation Clause Violation

This Court has articulated the standard for when restrictions of credibility-based cross-examination crosses the Sixth Amendment's line: "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." *(People v. Quartermain* (1997) 16 Cal.4th 600, 623-624, quoted in *People v. Whisenhunt* (2008) 44 Cal.4th 174, 208; see also, *Delaware v, Van Arsdall* (1986) 475 U.S. 673, 678-679 [explaining that confrontation clause circumscribes trial court's discretion to control cross-examination].) That standard has been met in this case.

Because Detective Franks was an adverse witness, the trial court's limitations on the defense's questioning of Detective Franks implicated the confrontation clause, notwithstanding the fact that it was appellant who had called him as a witness. As the United States Supreme Court has explained:

> The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against."

(*Chambers v. Mississippi* (1973) 410 U.S. 284, 297-298; see also, *Longus v. United States*, *supra*, 52 A.3d at pp. 849-854 [holding trial court's restrictions on cross-examination of police detective regarding his credibility violated defendant's confrontation clause rights although detective was defense witness].)

Although the first jury was aware that Detective Franks had a history of disobeying his superiors and then lying to them, the second jury had no evidence to support the conclusion that Detective Franks was lying when he told Sergeant Dean — and the jury itself — that he did not show Richards Exhibit 147, the photo array that he had prepared and Sergeant Dean rejected. Although the defense attempted to impeach Detective Franks in the second trial with inaccuracies and discrepancies in his testimony (17 RT 4453-4456, 4462-4463), without the excluded evidence, the jury had no reason to believe that these inaccuracies and discrepancies were caused by anything more than innocent misrecollection. Had the second jury heard evidence of Detective Franks's history of dishonesty, they would clearly have had a significantly different perception of his credibility. Accordingly, by preventing the defense from examining Detective Franks about his prior dishonesty, the trial court violated appellant's Sixth Amendment right of confrontation.

2. Violation of the Right to Present a Defense

By not allowing appellant on retrial to question Detective Franks about his misconduct, the trial court also violated appellant's Sixth Amendment right to present his defense. (See *Green v. Georgia* (1979) 442 U.S. 95, 97.) The compulsory process clause of the Sixth Amendment and article I, section 15 of the California Constitution, and the due process clause of the Fourteenth Amendment and article I, sections 7 and 15 of the California Constitution provided appellant with the right to present a

complete defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Notions of fundamental fairness inherent in the due process clause require "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*Trombetta*, at p. 485, quoted in *Crane*, at p. 690.)

The Constitution does not tolerate bars on defense evidence if the evidentiary bar violates a defendant's weighty interest and is arbitrary or disproportionate to the purposes the evidentiary bar was designed to serve. (*Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324.) United States Supreme Court precedents establish that exclusions of defense evidence violate a defendant's right to present a defense if the evidence is exculpatory and critical to the defense, so long as the state lacks an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence. In finding a violation of the right to a defense, the United States Supreme Court has emphasized the centrality of the excluded evidence to the defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 57; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *Chambers v. Mississippi*, *supra*, 419 U.S. at p. 302.) To ensure that the exclusion of evidence prejudiced a defendant, the excluded evidence must be favorable to the defense. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.)

The misconduct evidence was exculpatory and crucial to the defense. As the only surviving victim of a crime that was similar to the two charged capital crimes, James Richards's identification of appellant was pivotal to the prosecution's case. Aside from appellant's purported admissions made

to accomplice witnesses who testified under grants of immunity, James Richards's identification provided the prosecution with its strongest evidence against appellant. It was therefore essential for the defense to challenge the reliability of the identification. The evidence of Franks's dishonesty, when coupled with evidence that Detective Franks made, but denied making, suggestive remarks to Richards, would have cast doubt on the credibility of Detective Franks's statements and testimony that he did not show Richards Exhibit 147 — the third photo array. Because showing Richards both Exhibits 16 and 147 would have rendered his identification of appellant unreliable, impeaching Detective Franks was critical to appellant's defense.

Moreover, as discussed above, the State did not have a legitimate countervailing interest in excluding the testimony. The prosecutor contended that the evidence of Detective Franks's misconduct introduced in the first trial sullied all of the law enforcement officers involved in the case, but there was no support for that dubious contention other than the prosecutor's speculation. Significantly, appellant neither challenged the credibility nor impugned the integrity of any other law enforcement officer involved in the case. Likewise, defense counsel never suggested, or even insinuated, that Detective Franks's dishonesty extended to other aspects of the investigation.

Furthermore, the state's interest in maintaining the integrity of the adversarial process does not extend to having the finder of fact accept its version of the facts. (See *Washington v. Texas* (1967) 388 U.S. 14, 19 [explaining that the United States Constitution provides "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"].) Although the prosecutor seemed absolutely certain that James Richards had not been shown Exhibit 147, it

was Richards — a prosecution witness — who testified on more than one occasion that he had been shown three photo arrays. Even the prosecution, in its opposition to appellant's motion to suppress Richards's identifications of appellant, stated that law enforcement officers had shown Richards a total of three photo arrays. (4 CT 1066.)

3. Denial of Due Process and a Fair Trial

Exclusion of the misconduct evidence also unfairly restricted appellant's ability to contest the reliability of Richards's identification of appellant, and thus deprived appellant of his Fourteenth Amendment right to due process and a fair trial on the charges pertaining to the robbery and attempted murder of Richards. The United States Supreme Court has recognized that a defendant cannot have a fair trial if denied the opportunity to contest the reliability and fairness of an eyewitness's identification. (See *United States v. Wade*, *supra*, 388 U.S. at pp. 227-237.)

4. Unreliable Guilt and Penalty Determinations

The trial court's erroneous exclusion of the misconduct evidence not only deprived appellant of a fair trial with respect to whether he was guilty of robbing and attempting to murder James Richards, but it also deprived him of his Eighth and Fourteenth Amendment rights to reliable guilt and penalty determinations with respect to the capital crimes. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case]; see also Christopher K. Tahbaz, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings* (1989) 89 Colum. L. Rev. 1345, 1367 [articulating relationship between impeaching adverse witnesses and guaranteeing a reliable capital-sentencing determination].)

The exclusion of the impeachment evidence prevented appellant from effectively challenging the accuracy of Richards's identification.

Because it would have been reasonable for a factfinder to infer that the person who robbed James Richards was the same person who robbed and murdered Andres Dominguez and Victor Henderson,[65] it was crucial for appellant to establish that Richards's identification of appellant was tainted by Detective Franks's use of suggestive procedures. Consequently, the trial court's error in restricting appellant's impeachment of Detective Franks undercut the defense's ability to do that, and thus undermined the reliability of the jury's guilt determination regarding the capital crimes, in violation of the Eighth Amendment. (See *Beck v. Alabama*, *supra*, 447 U.S. at p. 638 [Eighth Amendment requirement of reliability in capital case applies to both guilt and penalty phases].) Furthermore, the jury's consideration of the Richards crime — and the evidence offered to prove appellant's identity as the perpetrator of that crime — as an aggravating factor in the penalty phase undermined the reliability of its death verdict. (See *Gardner v. Florida*, *supra*, 430 U.S. at p. 359 [Eighth Amendment requires that evidence considered by sentencer in capital case be reliable].)

The error, in turn, undermined the reliability of the jury's penalty determination concerning the capital crimes. Having found appellant guilty of the robbery and attempted murder of James Richards, the jury was permitted to consider that offense as an aggravating factor under Penal Code section 190.3, subdivisions (a), (b), and (c) in making its capital-sentencing determination.

E. The Erroneous Exclusion of the Evidence Was Prejudicial

As appellant has argued elsewhere in this brief, Richards was the only purported eyewitness to link appellant to any of the crimes, and as

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[65]All three crimes were carried out in a similar manner, and the attacks on Richards and Andres Dominguez took place on the same street in Bloomington.

such, his identification of appellant as the man who robbed and tried to kill him was the centerpiece of the prosecution's case. However, there were multiple reasons to doubt the reliability and accuracy of Richards's identification of appellant. (See *ante*, Argument I.)

The fact that Richards selected appellant's photo from Exhibit 16, yet did not identify him in the live lineup, suggested that he recognized the photo, but not actually the person who robbed and tried to shoot him. The fact that there was another photo array (Exhibit 147) containing the same photo as the one used in Exhibit 16 in the Sheriff's Department case file, together with Richards's testimony at the preliminary hearing and first trial that Exhibit 16 was the third photo array he was shown, indicates that Detective Franks showed Richards Exhibit 147 before he showed him Exhibit 16. However, Sergeant Dean testified that he had instructed Detective Franks to not use Exhibit 147 (16 RT 4190), and Detective Franks insisted that he did not show it to Richards. (17 RT 4445-4446.) Thus, in order to establish reasonable doubt as to the accuracy of Richards's identification of appellant, the defense needed to impeach Franks's testimony.

That appellant successfully accomplished this in the first trial — in which he impeached Detective Franks with evidence of his misconduct and dishonesty — is reflected by the fact that the jurors were deadlocked on the issue of guilt. However, in the retrial, from which the misconduct evidence was excluded, the defense did not succeed in impeaching Detective Franks, as reflected by the guilty verdicts.

Indeed, the key difference between the evidence adduced at the two trials was that appellant was able to present evidence of Detective Franks's misconduct in the first trial, but was not permitted to do so in the retrial. Consequently, in the first trial appellant was able to argue that Detective

Franks defied his supervisor by showing Richards Exhibit 147, and then lied about it. (11 RT 2763-2764.) However, he had no actual support for such an argument in the retrial.

Thus, even though the defense exposed Detective Franks's false testimony with respect to certain details surrounding James Richards's identification of appellant, by introducing tape recordings that refuted Detective Franks's claims (see *ante*, at p. 115, fn. 59), without the misconduct evidence establishing Detective Franks's character for dishonesty, the prosecutor was able to successfully attribute the discrepancies to innocent misrecollection on Franks's part. (18 RT 4923-4925.) Indeed, in the hearing to exclude the misconduct evidence, defense counsel warned that barring the evidence would have this effect. Counsel argued that Detective Franks would explain his false testimony was benign. He noted that Detective Franks already "attempted to write those off as, 'Well, I forgot.' Or, 'I wasn't prepared.'" (12 RT 3071.) By taking the latter excuse and running with it, the prosecutor proved defense counsel prophetic.

Contrary to the prosecutor's assertion (12 RT 3060), the eyewitness identification evidence was the heart of the prosecution's case against appellant with respect to the robbery and attempted murder of Richards. Furthermore, because of the similarities between the Richards robbery and attempted murder, and the robbery-murders of Andres Dominguez and Victor Henderson, Richards's identification of appellant undoubtedly influenced the jury's verdict with respect to those crimes. Without Richards's identification of appellant, the prosecution's case against him for that crime, as well as its case against appellant for the robbery-murders of Dominguez and Henderson, would have rested primarily upon the testimony of Sylvester Seeney and his girlfriend, Phyllis Woodruff,

regarding incriminating admissions allegedly made by appellant. However, both of these witnesses had received immunity, and had ample reason to lie about appellant's guilt. In addition to being culpable for residential burglaries and gun thefts, Seeney was a potential alternative perpetrator. Seeney could have implicated appellant in order to avoid being convicted of the taxicab-driver crimes himself. In addition, Seeney was facing years of incarceration because he had violated his probation by traveling out of state. (3 RT 798-799, 827.)

Woodruff had the motive to protect her boyfriend, Seeney, and was also a likely coconspirator. Her knowledge of the details of the crimes could have come from Seeney instead of appellant.

Under the circumstances, respondent cannot prove beyond a reasonable doubt that the jury's guilty verdicts upon retrial were unattributable to the trial court's erroneous exclusion of the misconduct evidence, and that the error was therefore harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [*Chapman* inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"].)

However, even if this Court finds that the state-law error committed by the trial court did not deprive appellant of any federal constitutional right, the error was still prejudicial under the standard set forth by the Court in *People v. Watson*, *supra*, 46 Cal.2d at p. 836, because there is a reasonable probability that but for the erroneous exclusion of the evidence of Detective Franks's misconduct, appellant would not have been convicted of any of the crimes with which he was charged.

Accordingly, appellant's convictions and death sentence must be reversed.

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III.

ADMISSION OF SYLVESTER SEENEY'S COERCED AND UNRELIABLE OUT-OF-COURT STATEMENTS AND PRELIMINARY HEARING TESTIMONY DEPRIVED APPELLANT OF A FAIR TRIAL AND A RELIABLE DETERMINATION OF GUILT

A. Introduction

Sylvester Seeney, appellant's half brother, was the key witness in the prosecution's guilt-phase case-in-chief. Along with Seeney's girlfriend Phyllis Woodruff, Seeney provided the only testimony of appellant's alleged admissions to the crimes committed against the three taxicab drivers. Incarcerated for a probation violation and threatened with a lengthy prison term for this case, Seeney faced great pressure to inculpate appellant during his second interrogation. When given the apparent opportunity to have his probation violation excused if he agreed to testify against appellant and incriminate him, Seeney told his interrogators what they wanted to hear. With an immunity agreement in hand, Seeney testified against appellant at the preliminary hearing. His testimony was similar to what he had told the detectives during the second interrogation. The trial court denied appellant's motion to suppress Seeney's testimony and statements due to coercion and unreliability. Seeney invoked his Fifth Amendment privilege against self-incrimination at the hearing on the suppression motion, and the trial court subsequently declared Seeney unavailable to testify, and admitted Seeney's preliminary hearing testimony in both trials.

The admission of Seeney's testimony and evidence regarding his statements violated appellant's rights to due process, a fair trial and a reliable determination of guilt, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and requires

reversal of appellant's first degree murder conviction, special-circumstance and gun-use findings and penalty verdict. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206-207; *Lyons v. Oklahoma* (1944) 322 U.S. 596, 602-603; *People v. Badgett* (1995) 10 Cal.4th 330, 347; *People v. Douglas* (1990) 50 Cal.3d 486, 499-504; *People v. Brommel* (1961) 56 Cal.2d 629, 630-634.)

B. Facts and Procedural History

On March 3, 2000, Ohio State Trooper Richard Noel stopped the big-rig truck driven by appellant's wife, Melody Mansfield. The San Bernardino Sheriff's Department had informed the Ohio State Troopers that a person wanted for questioning in a murder was riding in the truck. Because it was a felony stop, the troopers had their weapons drawn and ordered the occupants to leave the truck. Appellant and Mansfield left the truck as instructed, but Seeney hid under coats and jackets in the sleeper berth. After Trooper Noel discovered him, Seeney alighted from the truck. (15 RT 3960-3965.) Seeney was arrested for violating his juvenile probation, which he had been given after his incarceration for a burglary he committed in 1997, when he was sixteen years old. (14 RT 3742-3744.) Seeney was only eighteen years old in March 2000. (3 RT 787.)

Starting at approximately 7 p.m., two officers from the Ohio State Highway Patrol, Lieutenant Kelly Hale and Sergeant James Ertel, interrogated Seeney at the Hamilton, Ohio, State Highway Patrol barracks for an hour and a half. The law enforcement officers recorded the interrogation. After hearing the *Miranda*[66] warnings, Seeney signed a waiver of his *Miranda* rights. (3 RT 779-782; 15 RT 3971-3973.)

During the interrogation, Lieutenant Hale and Sergeant Ertel told Seeney that evading questions had serious consequences and suggested that

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

he would go to prison if he did not cooperate with them. (3 RT 784-789.) Sergeant Ertel told Seeney, "[Y]ou ain't far away from joining your brother." (11 CT 3214.) Sergeant Ertel later expanded on that theme:

ERTEL: You can only help yourself here. You can join the rest of your family in prison.

SEENEY: I don't want to.

ERTEL: Well, what you want and what you get are two separate things. You can either do that or you can help yourself.

(11 CT 3221.)

After Seeney denied personal involvement in the murders, he received additional threats of incarceration:

ERTEL: Eighteen years old. Of course, they teach auto body in prison, don't they.

HALE: Yeah, they also teach you how to make license plates to put on them.

(11 CT 3232.)

A moment later, the pressure increased:

HALE: [T]ell us what you know about it and then we'll tell them you helped us.

ERTEL: Tell us how you're not involved in it? Tell us how you know you're not involved in it or what you know?

HALE: Or what you know that can help.

ERTEL: We'll help you, otherwise, it's you and California and we'll give them [what] we know.

HALE: I, trust me, they ain't going to believe you.

SEENEY: I told you, I don't

ERTEL: They already think you're, you're deep in it. Your picture, let's put it this way, your picture ain't no surprise to me. Your face is not the first time I've seen it. So you need to help yourself or not.

(11 CT 3232.)

The interrogation continued in this vein:

HALE: Well, it's nothing personal, Armand,[67] but I don't believe you and California don't believe you.

ERTEL: And we don't believe you, because we've got good reason not to believe you.

HALE: Right. There's a lot of things that tell us that we shouldn't believe you. A lot of things that we already know about.

ERTEL: All I'm doing is giving you the opportunity to tell us your side or you're going to have to suffer with what's already known and the things that have already been said and they're going to piece it together and they're going to use it. And you're going to go down. And it's going to be in California, not—

HALE: And trust me, California can make it happen without you even talking to them. So that's why I'm giving you the opportunity to tell us straight out what you know about it and what part of it you did and what part of it you didn't do. That's the only thing that's going to save your butt.

(11 CT 3235.)

The interrogation continued further:

HALE: So, when you want to start, that's fine; if you

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[67]Sylvester Seeney was often addressed by his middle name, Armand. (7 RT 1753.)

don't want to, that's fine, too. But that's up to you. Because we ain't the one that's looking to go on an eight-hour flight back home, for a long time. Ain't going to be no more road trips. Eighteen, twenty years, thirty-eight years old, that's how old you're going to be, if you're lucky. Unless you do something stupid in prison and they give you a bad time.

ERTEL: Or you keep screwing up and you go to the parole board and they keep flopping you and you just stay, and you stay and you stay and you stay.

(11 CT 3235-3236.)

Lieutenant Hale and Sergeant Ertel put additional pressure on Seeney:

HALE: In California, just like Ohio, you can be arrested for being an accessory to murder. You don't have to commit the murder, but if you're there and you have knowledge of it, you're just as guilty as the other person, in the eyes of the law. All you've got to do is be there.

ERTEL: That's jail time.

HALE: And you're done.

(11 CT 3237.)

A short while later, the interrogation ended:

ERTEL: You're going to see, you ain't going to get out. Right now, you might be, you might come out at a decent age, 38, twenty years, but if your brother isn't as tight as you think, if he tries to save himself from getting shocked a little bit, then you're cooked. You better think about that. You better hope he's as tight as you think he is.

SEENEY: I'm telling you I don't have nothing to do with that.

ERTEL: Okay.

HALE: All right. We're done.

(11 CT 3238-3239.)

These threats frightened Seeney; however, he did not implicate appellant at this time. (14 RT 3748-3749.)

San Bernardino County Sheriff's Department and Pomona Police Department officers escorted Seeney and appellant from Ohio to California on a sheriff's jet on March 6, 2000. While Seeney was handcuffed and sitting on the small airplane, one of the detectives told Seeney that he knew Seeney had information regarding the incidents against the taxicab drivers. Seeney did not respond at that time. (14 RT 3751-3752.)

Soon after they arrived in San Bernardino, Detective Chris Elvert twice interrogated Seeney. (3 RT 807.) As revealed during defense counsel's examination of Detective Elvert at the hearing to suppress Seeney's out-of-court statements,[68] during his first interrogation of Seeney, Detective Elvert suggested that Seeney could avoid punishment for his probation violation if he told the truth during the interrogation:

SEENEY: So what's going to happen to me?

ELVERT: If everything you're telling me is the truth, you got that violation of probation, leaving the state. It's pretty easily explained away, isn't it? But if I keep — if I go out digging, and I find out that you're lying and not telling the truth, then, yeah, you'll have more problems. This is the truth

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[68]The Clerk's Transcript does not contain Detective Elvert's first interrogation of Seeney. At the suppression hearing, defense counsel in his direct and redirect examination of Detective Elvert elicited verbatim quotations from that interrogation. (3 RT 806-819, 827-828.) All excerpts from that interrogation quoted in this brief are derived from Detective Elvert's testimony.

time. This is the time to, you know, get it all out. You got anything else you should get off your chest?

(3 RT 827.)

In addition, Detective Elvert told Seeney he would be talking to Seeney's probation officer. (3 RT 810.) Furthermore, Detective Elvert informed Seeney what constituted the "truth":

ELVERT: You know what's going to happen when you tell us the truth?

SEENEY: What's going to happen?

ELVERT: You're going to see your brother with a gun.

SEENEY: So, I mean, what am I going to get out of this?

ELVERT: Right now you're just held on a probation violation. We're still investigating to determine what happened.

(3 RT 810-811.)

Not surprisingly, Seeney shortly thereafter told Elvert he saw appellant with a .44 Magnum revolver.[69] (3 RT 813.) After taking Seeney to the Central Detention Center, Detective Elvert asked him if he had told the truth. Seeney momentarily stopped walking. From that, Detective Elvert suspected that Seeney had not been truthful. Detective Elvert told Seeney

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[69]The precise amount of time between when Detective Elvert told Seeney,"You're going to see your brother with a gun" and when Seeney stated that he saw appellant in possession of a revolver was not definitively established on the record. However, from Detective Elvert's testimony, it can be inferred that it took merely a matter of minutes. After Detective Elvert told Seeney that he would see his brother with a gun, Seeney asked how he would benefit from saying that. Detective Elvert then confronted Seeney with the information that Phyllis Woodruff had given him. After that, Seeney said that appellant had possessed a firearm. (3 RT 810-812.)

that he could have a second chance and return to the sheriff's station. They subsequently returned to the interrogation room. (3 RT 812-813.)

During Detective Elvert's second interrogation of Seeney, which took place in the early morning hours of March 7, 2000, he placed additional pressure on Seeney to implicate appellant:

> SEENEY Can you talk to my probation [officer]?
>
> ELVERT: Oh yeah, oh yeah, I'll talk to her tomorrow. She's waiting to hear from us. And go ahead and finish up man.

(12 CT 3460.)

Detective Elvert also warned appellant that he could be prosecuted for having sex with a 12-year-old girl:

> ELVERT: And you gotta, when you get out from under this, you know when you get out after this probation violation or whatever, you got to watch playin' with them little girls too, no matter how much they want it. And that's, um, that's a hurdle that we're not gonna take tonight, but, I'll have the other detective come talk ya, not unless you want to get it all behind ya right now.
>
> * * *
>
> ELVERT [T]here's some other girls runnin' around there and they, that's gonna, that's gonna have to get, that's gonna have to get to the bottom of. And you know and I know it. I know you slept with Desiree, but we're not gonna go there. But that's still a hurdle you got to get over. It's not all behind ya.

(12 CT 3477.)

A short while later, Detective Elvert reiterated: "I know you slept with Desiree, but that's up to you to work that out with the other two

detectives."[70] (12 CT 3480.)

During this interrogation, Seeney contended that appellant admitted to him that he had committed the three incidents against the taxicab drivers. (3 RT 814; 12 CT 3429-3454.)

On March 17, 2000, Seeney took Detective Elvert to the locations where he, Phyllis Woodruff, and allegedly appellant had committed residential burglaries. One of the homes Seeney showed Detective Elvert was Grant Fargon's house, from which the .44 magnum Ruger Super Blackhawk used to kill Andres Dominguez and Victor Henderson had been stolen on February 15, 2000. (3 RT 815; 14 RT 3789-3795.)

At the preliminary hearing, the prosecution and Seeney reached an immunity agreement. In its Petition and Request for an Order Requiring Witness To Answer Questions and Produce Evidence Under Section 1324 of the Penal Code of California, the prosecution averred:

> [P]etitioner believes [Seeney] will testify in substance as follows:
>
> That said witness was with defendant at the time when the murder weapon was stolen in a residential burglary.
>
> That defendant advised witness prior to the murders that he was going to rob some "cabbies."
>
> That defendant admitted on two occasions to witness after the murders that he killed the cabbies.
>
> That defendant showed witness a stolen cab and wallet taken in an earlier robbery, whereat victim would have been executed but for defendant's pistol jamming. Defendant described this event to witness.

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[70]Seeney was interrogated with respect to the alleged statutory rape by a different detective on March 9, 2000. Seeney denied having intercourse with the 12-year-old girl. (2 CT 565.)

(2 CT 570; 12 CT 3579-3580.)

The prosecution's petition gave Seeney transactional immunity for the residential burglaries in which guns were stolen, in exchange for Seeney's consent to an order compelling him "to answer such questions and produce such evidence" that Seeney could otherwise withhold pursuant to his privilege against self-incrimination. (2 CT 571; 12 CT 3580.)

With a transactional immunity agreement in hand,[71] Seeney testified at the preliminary hearing. His testimony was consistent with what the prosecution had anticipated. According to his testimony, appellant went to a barbeque at Seeney's girlfriend's home on February 20, 2000, and asked Seeney to switch coats with him. (1 CT 116.) Seeney agreed to do so. (1 CT 117.) At that time, appellant told Seeney that "he was just going to do some business," and told Seeney to watch the news. (1 CT 116, 119.) Appellant had previously talked to Seeney about robbing taxicab drivers. (1 CT 118.) When Seeney was traveling with appellant and his wife, Melody Mansfield, before the arrests, appellant told them that he killed two taxicab drivers.[72] (1 CT 122.) Appellant previously told Seeney that he robbed and killed taxicab drivers because he needed to make money. Appellant said he felt sorry for a taxicab driver who had begged for his life before appellant killed him. (1 CT 123.) Appellant said he scraped his knee and his shoe when he got dragged by the getaway car. (1 CT 123-124.) On January 7, 2000, appellant told Seeney that he robbed a taxicab driver so he could get home to Victorville from San Bernardino, where their mother lived. (1 CT 126.)

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[71]The preliminary hearing court overruled defense counsel's objection to the immunity agreement as being vague. (1 CT 113-114.)

[72]Before answering the pertinent question, Seeney was emotional and in tears for about one minute. (1 CT 122.)

Appellant told Seeney that he hit the taxicab driver in the head with a gun because the gun jammed. (1 CT 127-128.) Appellant showed Seeney the taxicab he had stolen and taken to an apartment complex near their home in Victorville. (1 CT 127).

Prior to the first trial, appellant moved to exclude Seeney's testimony and out-of-court statements, on the grounds that they were coerced, and therefore unreliable, and that their admission would violate his constitutional right to due process and a fair trial. Appellant argued that because the police effectively threatened Seeney with a lengthy prison term if he refused to incriminate appellant, and then told him what to say, Seeney's statements to the police were coerced, and thus inherently unreliable. Appellant further argued that Seeney's testimony would also be unreliable because his statements to the police were coerced, and because his immunity agreement implicitly required that he testify consistently with those statements. Appellant also argued that Seeney's youth (he was nineteen years old at the time of the preliminary hearing) coupled with the fact that the prosecutor led him through his testimony, comprised additional factors demonstrating that Seeney's testimony was coerced and unreliable. (2 CT 563-577.)

In its response to appellant's motion, the prosecution argued that the interrogation tactics employed by the police did not render Seeney's statements coerced or unreliable; that the impact of any coercion had dissipated by March 17, 2000 (the date of Detective Elvert's final interrogation of Seeney); and that Seeney's preliminary hearing testimony was neither coerced nor unreliable. The prosecution argued that the anticipated-testimony section of the immunity agreement was required by Penal Code section 1324, and did not incorporate a requirement that immunity was conditioned on Seeney testifying consistently with his

anticipated testimony. (3 CT 677-703.)

Sylvester Seeney was called as a witness at the hearing on the motion to exclude his testimony and statements. During that hearing, Seeney repeatedly invoked his Fifth Amendment privilege against self-incrimination and, significantly, refused on Fifth Amendment grounds to answer whether his preliminary hearing testimony, in which he inculpated appellant, had been truthful. (3 RT 798-805.)

The trial court denied appellant's motion to exclude Seeney's statements and testimony. The court concluded that Seeney was not coerced during any interrogation. The court stated that the interrogators in Ohio mentioned the possibility of a long prison term, encouraged Seeney to tell the truth, and did not put words in Seeney's mouth. The court noted that the interrogators in San Bernardino did not suggest Seeney had committed the murders, and had simply told Seeney that not telling the truth would look bad at his probation revocation hearing. (4 RT 1062-1064.) The court added: "The detectives were, in the court's opinion, good about not making any promises, other than telling his probation officer and his girlfriend and her father that he had told them the truth." (4 RT 1064.) The court continued:

> As for putting words in Seeney's mouth, there are times when Detective Elvert suggests that Seeney should tell him he saw defendant with a handgun, and that it was a 6-inch revolver. However, after reading the transcript, it appears that the information given by Seeney was within Seeney's personal knowledge, rather than something created by Elvert's suggestions.

(4 RT 1065.)

The trial court also found that there was no coercion during the March 7, 2000 interrogation, in which Seeney spoke at length about admissions appellant had allegedly made. The court concluded that the

interrogators did not imply to Seeney that he had to cooperate by incriminating appellant, in order to avoid prosecution for statutory rape with respect to a sexual encounter he had with a 12-year-old girl. (4 RT 1066-1067.) The trial court also ruled that the immunity agreement with Seeney was not coercive. (4 RT 1068-1069.) The court stated:

> The language contained in the petition and accompanying documents is very general and appears to require that Seeney produce evidence that is material and relevant to the case. It does not say that it must be in conformity with his earlier statements.

(4 RT 1069.)

Because Seeney had invoked his Fifth Amendment privilege during the motion to exclude Seeney's testimony and statements and indicated that he would do the same if he were called as a witness at trial, the trial court, at the prosecution's request, declared Seeney unavailable. (3 RT 802-803; 6 RT 1418, 1511.) The trial court admitted Seeney's preliminary hearing testimony at the guilt phases of both the first trial and the retrial.[73] (8 RT 1957-1991; 14 RT 3729-3763.)

C. Controlling Legal Principles

"[T]he federal and California courts have consistently recognized that the 'admission at trial of improperly obtained statements which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial.'" (*People v. Douglas*, *supra*, 50 Cal.3d at pp. 499-500; see

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[73]Over a year after he testified at the preliminary hearing, Seeney recanted his preliminary hearing testimony and his other statements inculpating appellant. (3 RT 837-841; 11 CT 3240-3266.) Finding it inadmissible hearsay, the trial court barred all evidence of Seeney's recantation. (17 RT 4401-4402, 4490-4498.) In another claim of error, appellant asserts that the exclusion of the recantation was erroneous and unconstitutional. (See *post*, Argument IV.)

also *People v. Partida* (2005) 37 Cal.4th 428, 435 [the error in admitting the evidence had the additional legal consequence of violating due process].)

This Court set the parameters for this claim in *People v. Badgett* (1995) 10 Cal.4th 330, 345-363. Although a defendant cannot seek exclusion of trial testimony of a third party on the sole ground that it was the fruit of the witness's coerced extrajudicial statement (*Id.* at p. 353), the defendant nevertheless has standing to object to the allegedly coerced testimony of a witness if the earlier coercion has affected the reliability of the witness's trial testimony. (*Id.* at p. 348.)

This Court "employ[s] the terms 'coerced' and 'involuntary' confessions interchangeably to refer to confessions obtained by physical or psychological coercion, by promises of leniency or benefit, or when the 'totality of circumstances' indicate the confession was not a product of the defendant's 'free and rational choice.'" (*People v. Cahill* (1993) 5 Cal.4th 478, 482, fn. 1; see, generally, 1 LaFave & Israel, Criminal Procedure (1984) § 6.2, pp. 439-451; 1 Witkin, Cal.Evidence (3d ed. 1986) The Hearsay Rule, §§ 614-623, pp. 588-604 [involuntary confessions].) Thus, "[a] confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by exertion of improper influence." (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

A statement is involuntary if it did not result from an exercise of rational intellect and a free will. "It is not the product of a rational intellect and a free will if the [speaker's] will to resist confessing is overborne. [Citations.] A [witness's] will can be overborne by pressures engendered by law enforcement officers[.]" (*In re Cameron* (1968) 68 Cal.2d 487, 498.) It is immaterial whether the police pursued a proper purpose in eliciting the statement — "[t]he only issue is whether the accused's abilities to reason or comprehend or resist were in fact so disabled that he was

incapable of free or rational choice. . . . To determine this issue, the 'totality of the circumstances' [citations] surrounding the interrogation must be considered." (*Ibid.*; see also *People v. Thompson* (1990) 50 Cal.3d 134, 166 ["In determining whether or not an accused's will was overborne, 'an examination must be made of all the surrounding circumstances — both the characteristics of the accused and the details of the examination'"], quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.)

This Court has explained the difference between a voluntary statement and coerced statement, as follows:

> 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 reward. . . .' [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303.) However, 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, the confession is involuntary and inadmissible as a matter of law. (*People v. Brommel* (1961) 56 Cal.2d 629, 632.) Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not, however, make a subsequent confession involuntary. [Citation]

(*People v. Boyde* (1988) 46 Cal.3d 212, 238, aff'd sub nom. *Boyde v. California* (1990) 494 U.S. 370.)

As the trial court herein recognized, appellant had standing to assert that *his own* due process rights were violated through the admission of unreliable testimony at his trial:

> Defendant correctly observes that the federal and California courts have consistently recognized that the 'admission at trial of [an] improperly obtained statement which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial.' [Citations] But unlike those

> situations in which a defendant challenges his *own* prior voluntary statements [citations], when a defendant seeks to exclude the allegedly involuntary testimony of a witness or codefendant, the *defendant* bears the burden of proving that the admitted statements were involuntarily obtained [citation]. . . . [¶][¶] Because the exclusion is based on the idea that coerced testimony is inherently unreliable, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence *actually admitted* was coerced.

(*People v. Douglas*, *supra*, 50 Cal.3d at pp. 499-500[74] [emphasis in original].)

Appellant is entitled to this Court's de novo review of his claims:

> ". . . the entire record should be examined to determine whether [defendant was] actually deprived of due process because of the allegedly coerced testimony of the third party. [¶] In *Douglas* [citation], we . . . offered no deference, however, to the trial court's decision to admit the testimony, but instead examined the entire record, and most particularly the record of the witness's trial testimony, to determine whether, in our view, 'admission of [the third party's] testimony deprived defendant of a fair trial.' [Citation.]"

(*People v. Badgett*, *supra*, 10 Cal.4th at p. 350; see also *People v. Benson* (1990) 52 Cal.3d 754, 779.)

This Court has further acknowledged that "[t]he federal standard of review also seems to require the reviewing court to examine the record and make an independent determination whether admission of coerced testimony of a third party deprived the defendant of a fair trial." (*People v.*

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[74]See also *People v. Badgett*, *supra*, 10 Cal.4th at pp. 343-344 ["Thus, only when the evidence presented *at trial* is subject to coercion are defendant's due process rights implicated and the exclusionary rule we analyzed in *Douglas* applied. When a defendant seeks to exclude evidence on this ground, the defendant must allege that the trial testimony is coerced [citation], and that its admission will deprive him of a fair trial"]

Badgett. supra, 10 Cal.4th at pp. 350-351, citing *Wilcox v. Ford* (11th Cir. 1987) 813 F.2d 1140, 1148, fn. 15.)

D. Sylvester Seeney's Out-Of-Court Statements Should Have Been Suppressed

Four factors enabled the interrogators to break Sylvester Seeney's will to resist: (1) Sylvester Seeney was only eighteen years old when he was interrogated; (2) Lieutenant Hale and Sergeant Ertel threatened Seeney with the prospect of decades of incarceration; (3) Detective Elvert promised leniency regarding Seeney's probation violation if Seeney changed his story; and (4) Detective Elvert told Seeney how to change his story. The totality of the circumstances of Seeney's interrogations shows that Seeney's statements were not voluntary, but instead were the product of psychological coercion.

1. Sylvester Seeney Was Eighteen Years Old

At the time of the interrogations, Seeney was only eighteen years old. A suspect's youth is a significant factor in determining whether, under the totality of the circumstances, a suspect's statements to police were involuntary. (See, e.g., *J.D.B. v. North Carolina* (2011) ___ U.S. ___, 131 S.Ct. 2394, 2408; *Gallegos v. Colorado* (1947) 370 U.S. 49, 53-55.) An eighteen-year-old suspect is more susceptible to succumbing to psychological pressure than a forty-year-old career criminal. (See *Haley v. Ohio* (1947) 332 U.S. 596, 599-600 [explaining enhanced impact of interrogation methods on juvenile].)

2. Sylvester Seeney Changed His Story After His Interrogators Threatened Him with the Prospect of Serving a Long Prison Term

Lieutenant Hale and Sergeant Ertel employed tactics that were similar to those condemned by this Court in *People v. Brommel*, *supra*, 56 Cal.2d 629, 630-634. In both cases, the witnesses' first responses to their

interrogators presented a completely different set of facts than those given after the police used threats and lies. Mr. Brommel initially denied striking his dead infant daughter; Sylvester Seeney denied knowledge of the crimes against the taxicab drivers. Then, a second police official used the threat of punishment to terrify the subjects into adopting the police's version of the facts.

The following statement by the interrogator in *Brommel* carried the same level of psychological coercion as the threats made to Seeney:

> "'You either take it the hard way or you take it the easy way. [¶] Now the hard way is that I am going to get up and walk out of this room and put you before a jury . . . and I am going to bring in a number of [witnesses] and we are going to put them on the witness stand and swear them in to tell the truth, and they are going to tell everything they know about you, . . . and then the judge is going to pass sentence on you, and before you walk up to that judge to find out what is going to happen to you, he is going to want to know your ability to tell the truth. [¶] We have a little paper down here that wants to know how your ability is to tell the truth . . . if we just wrote one word across there, Liar, that would – you can go up before that judge and you can ask him for all the breaks in the world, and he is not going to believe you because when a man tells a lie, then even the truth becomes a lie because he is branded as a liar. [¶] Now if you want to meet the judge that way, if you want to meet your maker that way, well, brother, that is up to you."

(*People v. Brommel*, *supra*, 56 Cal.2d at p. 633; emphasis added.)

This Court characterized the *Brommel* police officer's statement as both a threat and an implied promise:

> The latter part of this statement was both a threat, that unless defendant told the officers what they wanted and were insisting that he tell them they would write 'Liar' on the statement and that defendant could then expect no leniency from the court; and an implied promise, that if defendant told the officers the story that they were insisting that he tell them

> they would not write 'Liar' on the document and defendant might expect a 'break' from the court.

(*People v. Brommel*, *supra*, 56 Cal.2d at pp. 633-634.)

Lieutenant Hale and Sergeant Ertel employed similarly coercive tactics. Although they did not tell Seeney that a judge would be the vehicle for retribution, they impressed upon Seeney that he had to tell them about the crimes against the taxicab drivers. The clear message they gave Seeney was that he had two options: He could give the police a statement and remain a free man, or he would be found an accessory to murder and be imprisoned for twenty years. For example, Lieutenant Hale told Seeney:

> California can make it happen [i.e., convict and imprison you for your role in the murders] without you even talking to them. So that's why I'm giving you the opportunity to tell us straight out what you know about it and what part of it you did and what part of it you didn't do. That's the only thing that's going to save your butt.

(11 CT 3235.)

Moreover, Hale and Ertel suggested that Seeney would face more serious charges if appellant implicated him in the crimes. (11 CT 3238-3239.)

In *People v. McClary*, this Court reversed a first degree murder conviction after finding that the sixteen-year-old defendant's admissions to the police were coerced and, thus, involuntary. Relying upon, inter alia, *People v. Brommel*, *supra*, 56 Cal.2d at pp. 632-635, and *People v. Johnson* (1969) 70 Cal.2d 469, 478-479, the Court considered the totality of the circumstances — including but not limited to the defendant's age, that the police repeatedly called her a liar during her first interrogation, and that "there were implications for leniency" made during the second interrogation. The Court found "it fair to conclude from the record that the threats of punishment and the promises of leniency echoed in the continuum

between the two conversations to a degree which renders her statements in the second interview involuntary and inadmissible." (*People v. McClary* (1977) 20 Cal.3d 218, 229.)

Similarly, in the instant case, the "questioning was far more than a simple exhortation to tell the truth." (*People v. Azure* (1986) 178 Cal.App.3d 591, 602; see also *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409, quoting *People v. Howard* (1988) 44 Cal.3d 375, 398 ["'[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary'"].) Lieutenant Hale and Sergeant Ertel threatened Seeney with decades of incarceration if he did not cooperate.

Moreover, Detective Elvert's repeated references during his interrogations, to allegations that Seeney had had sex with a twelve-year-old girl, enhanced the psychological pressure placed upon Seeney during those interrogations. Although Detective Elvert did not make specific threats of imprisonment, he told Seeney that other detectives would investigate the alleged statutory rape, "unless you want to get it all behind ya right now" (12 CT 3477), which added an additional element of coercion.

Seeney received these threats, which he unsurprisingly admitted had frightened him, while he was being interrogated in Ohio. (1 Supp. CT 241-243.) He received promises of leniency after he was extradited to California. The threats, coupled with promises of leniency, induced Seeney to incriminate appellant.

3. Sylvester Seeney Did Not Change His Story Until Detective Elvert Promised Assistance with His Probation Officer

In appellant's case, as in *Brommel*, the law enforcement officers' direct threats and implied promises of leniency are distinct, yet interrelated. Lieutenant Hale and Sergeant Ertel showed Seeney the stick. Detective Elvert offered the carrot.

Just as the *Brommel* detective impliedly promised the suspect the trial court would be more lenient if he confessed, Sergeant Elvert repeatedly told Seeney that he would speak to Seeney's probation officer on his behalf if Seeney gave them information about appellant's criminal conduct. At times, Sergeant Elvert's promises were limited to telling the probation officer that Seeney had cooperated with the police. But Sergeant Elvert twice said that Seeney could avoid sanctions for violating his probation. The first was the following exchange that occurred early in Detective Elbert's first interrogation of Seeney:

> SEENEY: So what's going to happen to me?
>
> ELVERT: If everything you're telling me is the truth, you got that violation of probation, leaving the state. It's pretty easily explained away, isn't it? But if I keep — if I go out digging, and I find out that you're lying and not telling the truth, then, yeah, you'll have more problems.

(3 RT 827.)

Promises of leniency with respect to the probation violation were significant in this case. The probation violation was the lone reason Seeney was incarcerated from the time he was apprehended in Ohio until after he testified at the preliminary hearing. (1 CT 134-135.) Thus, at the time of these interrogations, Seeney's freedom depended on not being incarcerated for leaving the state in violation of his probation. For these reasons, Detective Elvert gave Seeney promises of leniency that were contingent upon his implication of appellant.

As this Court has observed:

> The cases in this court are clear from the earliest time that any promise made by an officer or person in authority, express or clearly implied, or leniency or advantage for the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law. [Citations.] It is now settled that the same test must be applied to all incriminating statements whether they be confessions in the strict sense or only admissions. [Citation.]

(*People v. Brommel*, *supra*, 56 Cal.2d at p. 632.)

Similarly, in *In re Shawn D.* (1993) 20 Cal.App.4th 200, the Sixth District Court of Appeal found that assurances of leniency produced an inadmissible statement because:

> [T]he police repeatedly suggested that [Shawn D.] would be treated more leniently if he confessed. Such promises plainly render a confession inadmissible. [Citations omitted.] At the very beginning of the interrogation [police officer] Gordon said that if [Shawn D.] told the truth his honesty would be noted in Gordon's police report but if [he] lied, the deception would also be documented. Telling [Shawn D.] that his honesty would be recorded in the police report obviously implied that [Shawn D.] would be treated more favorably if he told the truth. If [his] honesty was irrelevant, why would the police tell [him] that it would be included in the police report? Any reasonable person, upon hearing the officer's statements, would conclude that he or she would benefit from having his or her honesty noted by the police. (*Id.* at p. 214.)

Seeney inevitably reached an analogous conclusion: If he implicated appellant, he would not be penalized for violating his probation. Fortunately for Seeney, Detective Elvert told him how to implicate appellant.

4. Sylvester Seeney Did Not Change His Story Until Detective Elvert Told Him What to Say

Not only did Detective Elvert induce Seeney to implicate appellant by offers of leniency, but he also gave Seeney a script of what to say:

ELVERT: *You know what's going to happen when you tell us the truth?*

SEENEY: What's going to happen?

ELVERT: *You're going to see your brother with a gun.*

SEENEY: So, I mean, what am I going to get out of this?

ELVERT: Right now you're just held on a probation violation. We're still investigating to determine what happened.

(3 RT 810-811, emphasis added.)

Shortly thereafter, Seeney stated that he saw appellant in possession of a .44 Magnum revolver. (3 RT 813.)

Thus, Elvert's interrogation of Seeney was very similar to the interrogation condemned by the Court of Appeal in *People v. Lee:*

> [T]he interrogation of [the witness] was not designed to produce the truth as [the witness] knew it but to produce evidence to support a version of events the police had already decided upon. In this respect, the police crossed the line between legitimate interrogation and the use of threats to establish a predetermined set of facts. The trial court erred in not excluding [the witness's] statements.

(*People v. Lee* (2002) 95 Cal.App.4th 772, 786, citing *People v. McClary*, *supra*, 20 Cal.3d at p. 229.)

In the instant case, the combination of threats and promises plus the clear implication of what Seeney needed to say to avoid the threatened consequences and receive the benefit of the promises, rendered Seeney's statements coerced. "It is this type of questioning that is an anathema to our system of criminal justice and cannot be tolerated. [Seeney] was deprived of his free choice to admit, deny or refuse to answer [the] questions. [Citation.] [The statement] was not the product of a rational intellect and free will."

(*People v. Azure*, *supra*, 178 Cal.App.3d at p. 602.) Therefore, Seeney's statements were involuntary and thus inadmissible.

5. The Trial Court Erred When It Ruled That Law Enforcement Officers Did Not Coerce Seeney

For the reasons explained above, this Court, when reviewing the questions de novo, should hold that the trial court committed error when it concluded that neither Seeney's statements nor his preliminary hearing testimony were coerced. To the extent that the court's rulings relied on factual findings, those findings lacked support in the record.

The trial court's conclusion that Lieutenant Hale and Sergeant Ertel, the interrogators in Ohio, merely encouraged Seeney to tell the truth ignores the obvious implications of the interrogators' remarks. They made a series of statements to Seeney that presented Seeney with the choice of cooperating with the police or serving a long prison sentence:

- "[Y]ou ain't far away from joining your brother."

(11 CT 3214.)

- You can only help yourself here. You can join the rest of your family in prison.

(11 CT 3221.)

- [Law enforcement officers] already think you're, you're deep in it. Your picture, let's put it this way, your picture ain't no surprise to me. Your face is not the first time I've seen it. So you need to help yourself or not.

(11 CT 3232.)

- [W]hen someone says they saw you two together and that you might have did something together, and even give your name, then that don't sound real good, from an eyewitness. So, whether you believe it or not, you're in it. And if you want

out of it, or any chance of getting out of it, now is your chance. Because once we turn the tape machine off and you tell us you're done, then not only are we done, but trust me, I think you're done. Your [sic] Deep Six, you're out of here. You could look for extradition, the boys from California and away you go. You won't drive back in a truck. You'll probably go on an airplane, in handcuffs. And you're awful young to be going to prison.

(11 CT 3233.)

- All I'm doing is giving you the opportunity to tell us your side or you're going to have to suffer with what's already known and the things that have already been said and they're going to piece it together and they're going to use it. And you're going to go down.

(11 CT 3235.)

- You're going to see, you ain't going to get out. Right now, you might be, you might come out at a decent age, 38, twenty years, but if your brother isn't as tight as you think, if he tries to save himself from getting shocked a little bit, then you're cooked. You better think about that.

(11 CT 3238.)

Clearly Ertel and Hale were doing a great deal more than simply encouraging Seeney to tell the truth. In actuality, what they were doing was placing inordinate pressure on Seeney, in a custodial setting, to incriminate his brother.

This Court has recognized that threatening a suspect with a longer sentence if he does not cooperate with his interrogators is coercive. In *People v. Neal* (2003) 31 Cal.4th 63, 78-85, this Court held that a suspect's confession was involuntary because it was the product of threats and promises similar to those made to Seeney and because the interrogator disregarded the suspect's invocation of his right to counsel. This Court

detailed the pressures placed upon the suspect, Kenneth Ray Neal:

> Prior to terminating the first interview, Detective Martin went beyond his deliberate violation of *Miranda* in order to make both a promise and a threat to defendant, each of which undermined the voluntariness of defendant's initiation of the second interview and his two subsequent confessions: "I mean this is your one chance. I am the bus driver in [a] Greyhound bus and you are the passenger back there. I mean this—make believe that I am driving the bus and you want to get off the bus. It's going to be up to the bus driver, me, you know to let you off that bus. You know closer to home or I can take you all the way to Timbuktu. Now I am the one you need to tell hey I want to get off this bus." If you "try and cooperate," "I can make it as best as I can for you. But believe me, if you don't try and cooperate . . . , the system is going to stick it to you as hard as they can . . . , they are going to just hit you as hard as they can," that is, "[c]harge you with a heavier [sic] charge as they can, you know first degree murder or whatever."

(*Id.* at p. 81.) This Court then explained why the threats and pressures were coercive:

> The third circumstance that additionally weighs heavily against the voluntariness of defendant's initiation of the second interview, and against the voluntariness of his two subsequent confessions as well, arises from Detective Martin's promise and threat to defendant at the first interview. Promises and threats traditionally have been recognized as corrosive of voluntariness. [Citations.] Here we have both a promise and a threat. Each was made by Martin long after he should have brought the first interview to an end upon defendant's repeated invocation of both his right to remain silent and right to counsel. Specifically, Martin threatened defendant, in Martin's Greyhound bus metaphor, to drop defendant off closer to Timbuktu than to home if he did not cooperate. [Fn. omitted.] Martin also promised defendant, if he did cooperate, to make it as good for him as he could. Both the promise and the threat had the effect plainly intended by Martin.

(*Id.* at p. 84-85.)

Seeney received a combination of threats and promises analogous to those received by the defendant in *Neal*. Seeney was told by his interrogators that he had a choice of cooperating with the police, in which case Detective Elvert would vouch for him to Seeney's probation officer, or, as Lieutenant Hale and Sergeant Ertel threatened, spend decades in prison for the crimes against the taxicab drivers. (Cf. Welsh S. White, *What Is an Involuntary Confession Now?* (1998) 50 Rutgers L. Rev. 2001, 2052 ["[C]ases suggest that interrogation tactics that threaten the suspect with harsh punishments if she does not confess or offer express or implied promises of significant sentencing advantages if she does may exert such unfair pressure on the suspect as to render the resulting confession involuntary. Empirical data indicating that interrogation tactics of this type are likely to produce false or untrustworthy confessions provide a sufficient basis for reviving and strengthening this principle."].) Because Seeney was being jailed for a probation violation, Detective Elvert's offer to tell the probation officer that Seeney cooperated with the Sheriff's Department hinted that Seeney might be freed from jail if he implicated appellant. (Cf. False Confessions, The Innocence Project, http:// www.innocenceproject.org/understand/False-Confessions.php (last visited May 28, 2013 ["Children and adults both are often convinced that they can 'go home' as soon as they admit guilt"].) Furthermore, Seeney, like the defendant in *People v. Neal*, *supra*, 31 Cal.4th at p. 69, was eighteen years old and thus more susceptible than an older person to succumbing to police pressures.

Similarly, as explained above (see *ante*, at pp. 158-159), this Court in *People v. McClary*, *supra*, 20 Cal.3d at pp. 229-230, found the combination of threats and promises given to a defendant over the course of two interrogations rendered her statement involuntary and, thus, unreliable. Like Seeney, the interrogators told defendant in *McClary* she would be charged with first degree murder if she did not change her story, and they strongly implied that changing her story would result in a lesser criminal sanction.

In a scenario even closer to the case at bar, the Court of Appeal in *People v. Lee*, *supra*, 95 Cal.App.4th at pp. 782-789, held that the trial court committed reversible error when it failed to suppress a witness's coerced statement identifying the defendant. In *Lee*, the witness was presented with the same choice the interrogators in Ohio gave Seeney: The detective suggested to the witness that the only way he could avoid being prosecuted for first degree murder was to tell the detective that the defendant had perpetrated the murder. (*Id.* at pp. 783-785.) Like Seeney, the witness in *Lee* implicated the defendant after being subjected to the threat of being convicted of murder if he did not implicate the defendant, and the implied promise that he could avoid being charged with murder if he did.

The trial court's conclusion that Seeney's interrogators merely encouraged him to tell the truth is thus unsupported by the facts and the governing law. However, that was not the only error the court committed in admitting evidence of Seeney's statements to the police.

The trial judge's finding that none of the interrogators put words in Seeney's mouth, and that Seeney merely gave information from his personal knowledge, was also contradicted by the record. When Detective Elvert told Seeney, "You're going to see your brother with a gun," he was telling Seeney to say that he saw appellant with a gun, which is precisely

what Seeney then said. (3 RT 810-814.) Given the context in which Seeney made that statement, it is clear that he made it under pressure to incriminate appellant. There was no evidentiary support for the trial court's finding that Seeney had actually seen appellant holding a gun, or that he was stating anything other than what Elvert wanted him to say.

Furthermore, the fact that the interrogators never directly accused Seeney of committing the murders did not make Seeney's statements uncoerced. Lieutenant Hale and Sergeant Ertel, without subtlety, told appellant that he could serve decades in prison for the offenses against the taxicab drivers. It was the prospect of lengthy incarceration — not whether the Ohio State Troopers believed that Seeney was a principal, an accessory, or an innocent person at risk of being wrongly convicted for the offenses — that frightened Seeney. Accordingly, the interrogators refraining from explicitly stating that they believed Seeney committed the murders did little to abate the coercive atmosphere that enveloped the interrogation.

The trial court also erred when it found that Elvert did not suggest Seeney would escape prosecution for statutory rape by informing on appellant. By simply mentioning the possibility that he could be charged with statutory rape, Detective Elvert permitted, if not encouraged, Seeney to draw that inference. He told Seeney that other detectives would investigate the alleged statutory rape, "unless you want to get it all behind ya right now." (12 CT 3477.)

For all of the foregoing reasons, the trial court erred when it determined that Seeney's statements were not the product of police coercion, and allowed them to be introduced at trial. Because Seeney's statements were coerced, and therefore unreliable, the admission of those statements denied appellant his due process right to a fair trial and a reliable determination of guilt. (See *People v. Badgett*, *supra*, 10 Cal.4th at pp. 346-

347 [explaining coerced statements are unreliable and their admission at trial violates the defendant's due process rights.]; *Clanton v. Cooper* (10th Cir.1997) 129 F.3d 1147, 1158 [same].)

E. Sylvester Seeney's Preliminary Hearing Testimony Should Have Been Excluded Because It Was Rendered Unreliable by the Prior Coercion as Well as the Coercion Implicit in His Immunity Agreement

A defendant may assert a violation of his or her own right to due process of the law and a fair trial based upon third-party witness coercion, if the defendant can establish that trial testimony was coerced or rendered unreliable by prior coercion and that the admission of this evidence would deprive the defendant of a fair trial. (*People v. Williams* (2010) 49 Cal.4th 405, 452-453.) This Court also reviews a coerced-testimony claim de novo. (*People v. Boyer* (2006) 38 Cal.4th 412, 444.)

At the preliminary hearing, Seeney testified pursuant to an immunity agreement that spelled out the substance of his anticipated testimony, which was what he had told his interrogators under intense psychological pressure. (12 CT 3579-3584.) Although the agreement did not expressly require Seeney's testimony to be consistent with what the agreement stated was "anticipated," it was nevertheless implicit that Seeney's immunity from prosecution for residential burglaries he had committed was dependent upon his testifying accordingly. However, when called as a witness at the subsequent hearing on appellant's motion to exclude his testimony, Seeney asserted his Fifth Amendment privilege against self-incrimination when asked whether his preliminary hearing testimony had been truthful. (3 RT 801.) Under these circumstances, the only reasonable inference to be drawn is that Seeney's preliminary hearing testimony incriminating appellant was not only rendered unreliable by prior coercion, but it was also rendered

unreliable by the implicit pressure place on Seeney to testify consistently with his "anticipated" testimony. Consequently, the trial court erred when it concluded that Seeney did not believe his immunity was contingent on having "to testify in conformity with his statements to the police in order to obtain immunity." (4 RT 1068.)

F. The Erroneous Admission of Seeney's Preliminary Hearing Testimony Deprived Appellant of a Fair Trial and Reliable Guilt Determination

Admission of Seeney's coerced, unreliable preliminary hearing testimony deprived appellant of due process and violated his right to a fair trial and his right to a reliable determination of guilt. (See *Dickerson v. United States* (2000) 530 U.S. 428, 435, fn. 1 ["our cases have long interpreted the Due Process . . . Clause[] to require that a suspect be accorded a fair trial free from coerced testimony"]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case].) The extreme pressure law enforcement authorities placed on Seeney to incriminate appellant created a constitutionally impermissible risk that Seeney's testimony was not true. Because Seeney's testimony formed a critical component of the prosecution's guilt-phase case, the admission of Seeney's testimony rendered the trial unfair and the guilt verdict unreliable.

G. Appellant Was Prejudiced By The Trial Court's Failure To Suppress Sylvester Seeney's Statements And Testimony

Because the admission of Seeney's coerced trial testimony and out-of-court statements violated appellant's rights to due process, a fair trial and a reliable determination of guilt (*People v. Benson*, *supra*, 52 Cal.3d at p. 778; *People v. Douglas*, *supra*, 50 Cal.3d at p. 500), the error is of federal constitutional dimension, and this Court must determine whether

respondent can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lee*, *supra*, 95 Cal.App.4th at p. 789 [applying *Chapman* standard after finding police coerced witness].)

Sylvester Seeney was the prosecution's most important witness in this case. No physical evidence implicated appellant for any of the offenses. James Richards's eyewitness identification of appellant was fundamentally flawed and unreliable. (See *ante*, at pp. 29-110.) Most of the circumstantial evidence against appellant could also have implicated Seeney or the McKinney brothers. The location of the Richards and Dominguez incidents in Bloomington was familiar to Seeney as well as to appellant. (14 RT 3729; 21 RT 5674-5681.) The place in San Bernardino where Richards picked up his fare was one block from the hotel in which appellant and Seeney's mother lived. (14 RT 3644.) Appellant's possession of Andres Dominguez's cellular phone several hours after the incident, suggested that appellant knew the perpetrators, but did not prove that he, rather than Seeney and/or the McKinney brothers, was the actual perpetrator. If Seeney or the McKinney brothers had killed Dominguez and stolen his cell phone, one of them could easily have given it to appellant. Evidence that appellant had an injured leg, which would have suggested that he was the person whose leg got dragged by the getaway car after the Henderson incident, was inconsistent, dubious, and slow to emerge[75]. As a result, evidence of

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[75]Three witnesses who lived near the location where Victor Henderson had been robbed and killed saw the assailant get dragged and apparently injure his leg when the driver of the getaway car attempted to escape too quickly. (15 RT 3982-3985, 16 RT 4034-4038, 4055-4060.) As noted in the statement of facts (see *ante*, at p. 14), every witness who testified that appellant had injured his leg did not mention any injury when

(continued...)

appellant admitting to having committed the robberies and homicides of the taxicab drivers was essential to the prosecution's guilt-phase case.

Seeney's testimony provided the key evidence of appellant's admissions. There were only two witnesses who testified to hearing appellant's alleged admissions: Sylvester Seeney and his girlfriend, Phyllis Woodruff. If Seeney's statements and testimony were excluded, the only evidence of appellant's admissions would have come from Woodruff, who had a motive to lie to protect her boyfriend. Furthermore, the admissions Woodruff alledgedly heard pertained only to the robbery and attempted murder of James Richards, not to either of the homicides. Thus, the most damning evidence admitted against appellant — his alleged admissions to committing the two capital crimes — would have been excluded if the trial court had suppressed Seeney's statements.

Moreover, the importance of Seeney's testimony to the prosecution is apparent from the guilt-phase closing arguments. After noting that there was no videotaped confession in this case, the prosecutor asserted that appellant's alleged admissions to Seeney and Woodruff were a substitute for such a confession. (18 RT 4850-4851.) He also argued that Seeney's testimony corroborated Woodruff. (18 RT 4862.) Defense counsel noted that most of the inculpatory facts the prosecutor cited in his closing argument came from the testimony of Seeney and Woodruff, both of whom had a motive to lie, and defense counsel pointed out that the prosecutor's case was thin without their testimony. (18 RT 4892-4893.)

Furthermore, "'in a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should

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[75](...continued)
they first spoke to law enforcement officers regarding these incidents. (16 RT 4164; 18 RT 4752.)

be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Here, the jury deadlocked at the first trial. That demonstrates that this was a close case of guilt. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1234.) In addition, the retrial jury did not return guilt-phase verdicts until eight days after it retired for deliberations. (9 CT 2495-2497, 2584-2586.) Lengthy deliberations indicate that a case is close. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 [determining ten-hour deliberations showed closeness of case]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations]; see generally, *In re Martin* (1987) 44 Cal.3d 1, 51 [collecting cases].) Moreover, the jury requested a readback of Seeney's preliminary hearing testimony (9 CT 2544), which indicated both the closeness of the case and the significance of Seeney's testimony. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [close case]; *People v. Avila* (2005) 131 Cal.App.4th 163, 171 [importance of testimony].) Likewise, the jury requested a readback of Woodruff's testimony (9 CT 2503), which suggested that the jury deliberated at length whether Seeney and Woodruff's allegations were truthful.

Without a doubt, the trial court's erroneous admission of Sylvester Seeney's coerced, and therefore unreliable, out-of-court statements and preliminary hearing testimony was extremely prejudicial and deprived appellant of a fair trial and a reliable determination of guilt. Because respondent cannot show that the error was harmless beyond a reasonable doubt (see *Chapman v. California, supra*, 386 U.S., at p. 24), reversal of appellant's guilt and penalty verdicts is required.

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IV.

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT ERRONEOUSLY EXCLUDED EVIDENCE OF SYLVESTER SEENEY'S RECANTATION OF HIS INCRIMINATING PRELIMINARY HEARING TESTIMONY, WHICH WAS ADMITTED AT TRIAL DUE TO SEENEY'S UNAVAILABILITY

Sylvester Seeney, appellant's half brother, provided the only testimony that appellant admitted to shooting the two taxicab drivers. Seeney and his girlfriend, Phyllis Woodruff, were also the only witnesses who testified to hearing defendant admit to committing the robbery and attempted murder of a third taxicab driver several weeks before the homicides. This testimony comprised the linchpin of the prosecution's case against appellant.

Prior to the first trial, the court denied appellant's motion to exclude Seeney's statements and preliminary hearing testimony for being coerced and unreliable. In addition, Seeney recanted all of his statements and testimony inculpating appellant. In the recantation, Seeney stated that appellant did not admit to committing any crimes against taxicab drivers and never showed Seeney and Woodruff a taxicab that appellant had allegedly stolen.

Appellant sought to admit the out-of-court recantation under the prior-inconsistent-statement and statement-against-penal-interest hearsay exceptions. The trial court, ruling that the recantation was inadmissible hearsay, excluded the evidence. Appellant then sought to introduce the recantation for impeachment purposes only. The trial court denied that as well. Excluding the evidence for all purposes was error that denied appellant his rights to present a defense, confront the key witness against

him, receive due process of law, and have a reliable guilt and capital-sentencing determination.

A. Facts and Procedural History

After arresting appellant and Seeney at a traffic stop in Ohio, law enforcement officers began to interrogate Seeney. Initially, Seeney said that he did not know who perpetrated the crimes against the three taxicab drivers; however, law enforcement officers from Ohio and California placed tremendous psychological pressure on Seeney, and several hours after he returned to California, Seeney implicated appellant for all three incidents against the taxicab drivers in Bloomington and Pomona. At the preliminary hearing, Seeney testified that on January 7, 2000, appellant told him and Phyllis Woodruff, Seeney's girlfriend, that appellant had robbed and attempted to kill James Richards. Seeney also testified that appellant showed them the taxicab he had stolen from Richards and driven to Victorville. Furthermore, Seeney testified that appellant twice told him he killed two taxicab drivers on February 21, 2000.[76] (14 RT 3734-3741; see *ante*, at 149-150.)

On December 10, 2001, during an interview with defense counsel Joseph Canty and defense investigator Ronald Forbush conducted at a California Youth Authority facility in Stockton, Sylvester Seeney recanted his preliminary hearing testimony. (3 RT 839; 1 Supp. CT 241-258.) Seeney explained that he was frightened when he was arrested and interrogated in Ohio. (1 Supp. CT 241-243.) Seeney said that his second set of

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[76]Appellant recapitulates Seeney's interrogations, statements to the police, and preliminary hearing testimony in significantly greater detail in his appellate claim asserting that the trial court erroneously denied appellant's motion to suppress Seeney's statements and testimony. See *ante*, Argument III.

interrogators were kinder than the first, but the pressure they put on him to tell them what they wanted to hear also scared him. (1 Supp. CT 243-244.) Seeney explained that he believed that law enforcement officers could carry out the threats of lengthy imprisonment if he did not provide evidence against appellant. (1 Supp. CT 245.) Seeney said that he was nervous and scared when the prosecutor offered not to prosecute him for the residential burglaries he had committed in exchange for Seeney's testimony against appellant. (1 Supp. CT 248.)

Seeney explained that his fear led him to incriminate appellant. (1 Supp. CT 243.) He explained that he told his interrogators that he knew what they had already told him they knew. (1 Supp. CT 249-250.) Seeney told Canty and Forbush he did not see appellant or anybody else with a .44 magnum, or any other high-caliber weapon. He said the only gun he saw was a .25-caliber gun possessed by either Brad or Cory McKinney. (1 Supp. CT 254-255.) Lastly, Seeney said that appellant did not tell him that he had used a gun and killed or robbed any taxicab drivers. (1 Supp. CT 256.)

Appellant called Seeney as a witness in conjunction with his motion to suppress Seeney's statements and testimony. At that hearing, Seeney repeatedly invoked his privilege against self-incrimination. (3 RT 798-805.) Defense counsel asked Seeney whether his preliminary hearing testimony had been truthful. In response, Seeney invoked his Fifth Amendment privilege. Seeney's counsel then indicated that Seeney would invoke his privilege against self-incrimination for any question regarding his preliminary hearing testimony. (3 RT 801.)

Because Seeney announced his intention to invoke his privilege against self incrimination if called as a witness at trial, the trial court declared Seeney unavailable. (3 RT 802; 6 RT 1511.) The prosecution introduced Seeney's preliminary hearing testimony at the guilt phases of

both the first trial and the retrial. (8 RT 1957-1991; 14 RT 3729-3763.)

At the retrial, defense counsel sought to introduce Seeney's audiotaped statements made during the December 10, 2001 interview conducted in the Youth Authority facility. (17 RT 4399-4401, 4482; 8 CT 2197.) The prosecutor objected to the evidence on hearsay grounds. (17 RT 4400.) In an email to the court and opposing counsel, defense counsel argued that two hearsay exceptions provided for the admission of Seeney's statement. He asserted it was admissible as a declaration against interest under Evidence Code section 1230, because Seeney's recantation was an admission that he had committed perjury when he testified at the preliminary hearing. Counsel also contended that the recantation was a statement inconsistent with Seeney's preliminary hearing testimony and should be admissible under Evidence Code section 1235. Counsel conceded that Seeney's unavailability made it impossible for appellant to comply with Evidence Code section 770's procedural requirement that the witness be given an opportunity to explain or deny the inconsistency, but counsel averred that the procedural requirement should be nullified in this case under section 770's interests-of-justice exemption.[77] (8 CT 2202-2203.)

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[77] Section 770 provides:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action.

(continued...)

In open court, defense counsel again argued that the interests of justice required admission of Seeney's out-of-court recantation:

> [W]e are talking about very significant testimony here in which this witness implicates the defendant by saying that the defendant admitted the murders to him and that he saw him in possession of weapons and so on.
>
> The notion that this person could at a later time admit that much of what he said was not true, knowing that what he said was under oath, he was subjecting himself potentially to a perjury prosecution, it seems to me that interest of justice does require that the jury know that the statement was made. Obviously, both counsel can put their spin on it in terms of is it believable or reliable or not, but it appears to me to meet the threshold requirements of at least 1230, the declaration against interest, and I believe the interest of justice under 1235 and 770.
>
> If this were just some collateral witness that didn't mean much, you know, I could see that maybe the court would feel it is not appropriate, but this — he is one of two of the most significant witnesses in the case and he hasn't even appeared in front of the jury who can evaluate his credibility in person and all we have is this preliminary hearing transcript. It seems to me they at least need to know that this person at a later time said that those things were not true.

(17 RT 4487.) Defense counsel explained how he would have impeached Seeney if he had not been declared unavailable:

> Your Honor, in most cases where defense investigators go out and interview witnesses and if they get an inconsistent statement, that statement is, in fact, offered at the trial if the witness is present and testifies at the trial. Here we don't have the ability to have that witness present to testify and I am trying to simply do the same thing that I would do in any

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[77](...continued)

(Evid. Code, § 770.)

other case where the witness actually appeared.

(17 RT 4489-4490.) The prosecutor contended that the recantation should not be admitted under Evidence Code sections 1230 or 1235 because the statement was unreliable. (17 RT 4488-4489.)

The trial court ruled that neither hearsay exception was applicable to Sylvester Seeney's out-of-court recantation of his statements and testimony. With respect to the statement-against-interest hearsay exception, the trial court concluded that Seeney's remarks were not, on their face, against Seeney's penal interest, and that Seeney did not subjectively believe that his statements amounted to an admission of perjury. (17 RT 4491-4492, 4496.) The trial court also ruled that the prior-inconsistent-statement hearsay exception did not apply. In addition to concluding that Evidence Code section 770's interests-of-justice exemption was inapplicable to this case, the trial court declined to admit the recantation under Evidence Code section 1235, on the grounds that the recantation did not precede the testimony and that it was not trustworthy. (17 RT 4490-4491.) The trial court explained:

> [T]he problem the court has is that these are statements that are being offered for the truth of the matter stated and they can only — therefore, they are hearsay unless they can come in because they are out of court statements and so they can only come in if they are, come within an exception, and the only exception that I deem is still possibly available is Evidence Code 1230 and that has certain requirements that I just have a hard time seeing in this case whether or not Mr. Seeney or whether a reasonable person in Mr. Seeney's position under these circumstances realized that he was subjecting himself to either criminal or civil liability or social disgrace or whatever the other factors are that that section deals with that says that a person wouldn't make that statement if it wasn't true.

(17 RT 4496.) This ruling spurred defense counsel to seek to introduce the

evidence solely for impeachment, not for the truth of the matter asserted:

> MR. CANTY: Let's assume that I do not offer them for the truth of the matter asserted, that is I will not argue or claim that because of what Mr. Seeney said to Forbush and me that therefore these statements by the defendant were not made. But I would simply offer it as inconsistent statements, which at least impeach the reliability of what he said when he testified in court, which is a different purpose and traditionally —
>
> THE COURT: We are back to 770.
>
> MR. CANTY: But traditionally before the rules were changed to allow inconsistent statements or declarations against interest to be used as substantive evidence of the truth of what they say, they were always traditionally admissible for the purpose of impeaching the testimony to at least show that somebody said something different at a different time and it seems to me that what we are dealing with, then, is the witness's state of mind at the time that he gave the testimony before the preliminary hearing — I mean at the preliminary hearing.
>
> What he is saying in these statements to Mr. Forbush and me is that when he made the statements to the police and when he testified at the preliminary hearing, he was acting under duress; that he felt that he had to say those things because of the things that have been said to him by the police. That goes to his state of mind at the time that he gave the testimony.
>
> And so under that exception as well I believe it would be admissible and again, I would not offer it for the purpose of showing the truth of what he said to us, but rather to show that he said something different and for whatever effect that has on the reliability of his testimony at the preliminary hearing. And I would not object to an instruction which set out that principle to the jury.
>
> THE COURT: You know, I see some inherent problems that Mr. Williams doesn't have an opportunity to cross examine Mr. Seeney on these statements or this state of mind.

MR. CANTY: That is always true with against interest.

THE COURT: But I am finding this doesn't come within that section.

MR. CANTY: I will submit it.

THE COURT: Okay.

I am still not persuaded that it is admissible and my ruling is I would sustain Mr. Williams's objection to that evidence coming in.

(17 RT 4497-4498.) Accordingly, the trial court refused to admit the recantation only for impeachment purposes.

B. The Trial Court Erred by Excluding Seeney's Recantation

The trial court abused its discretion by finding that neither hearsay exception applied. The court further erred by excluding the recantation for the nonhearsay purpose of impeaching Seenry's credibility.

1. Seeney's Recantation Was Admissible As a Declaration Against Penal Interest

Seeney's recantation was a statement against his penal interest. "The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 462, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 607; see also, Evid. Code, § 1230.) Appellant can make that showing.

The first prong of the three-part test has been indisputably met. The trial court declared Sylvester Seeney unavailable. (6 RT 1511.)

Seeney's recantation was also squarely against his penal interest. At the preliminary hearing, Seeney received transactional immunity for his participation in residential burglaries in which guns, including the weapon

used to kill Dominguez and Henderson, were stolen. By recanting his preliminary hearing testimony, Seeney subjected himself to criminal culpability in two ways.

First, he admitted to committing perjury in a capital case, which could by itself subject him to the death penalty. Penal Code section 128 provides: "Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4."

Second, in his statements to the police and his preliminary hearing testimony, Seeney gave details of the crimes that would only have been known to the assailant. By recanting his preliminary hearing testimony and other statements inculpating appellant, Seeney increased the likelihood that he, a potential alternative perpetrator, would be prosecuted for the crimes against the three taxicab drivers.

The trial court's determination that a reasonable person in Seeney's situation would not have realized that recanting his preliminary hearing testimony was against his penal interest, is absurd. In his recantation, Seeney admitted to having lied under oath. That lying under oath constitutes perjury, which is a crime, is hardly esoteric. Furthermore, Seeney was told by the Ohio State Troopers who arrested him that he would go to prison if he did not cooperate; i.e., incriminate appellant. Clearly, Seeney had to have known that recanting his testimony incriminating appellant could come at a steep penal cost.

Seeney's recantation was sufficiently reliable to be admitted into evidence because he was well aware that he faced severe consequences if he withdrew his cooperation with the prosecution of appellant. Although Seeney might have been trying to help his brother avoid a murder

conviction and death sentence, the risk that by recanting his testimony he would lose his freedom, dwarfed his incentive for assisting his brother. Between the threats he received possibly coming to fruition, his knowledge of details that could easily come from having himself committed the crimes, and the prosecution for perjury that he was inviting, "a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

2. Seeney's Recantation Was Admissible to Impeach His Preliminary Hearing Testimony

a. The Evidence Was Admissible Under Evidence Code section 1202

The second hearsay exception through which appellant sought to introduce the recantation was for purposes of impeachment as an inconsistent statement. The trial court ruled that Seeney's recantation was not admissible as a prior inconsistent statement under Evidence Code section 1235, because he was not going to testify at trial and would therefore not be given the opportunity to explain or deny his recantation.

Nevertheless, Seeney's recantation was inconsistent with his prior testimony and statements to the police. The recantation cast grave doubt on the veracity of Seeney's preliminary hearing testimony that was admitted in both trials. For this reason, the recantation could not have been more relevant to impeach the credibility of Seeney's testimony. Under the circumstances, the trial court should have admitted the recantation evidence under Evidence Code section 1202, which provides as follows:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such

> inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

(Evid. Code, § 1202.)

Evidence Code section 1202 deems Seeney, who did not testify at trial but whose prior testimony was admitted into evidence, to be a hearsay declarant. (*People v. Blacksher* (2011) 52 Cal.4th 769, 806-808 [holding Evidence Code section 1202 provides for the admission of evidence to impeach a nontestifying witness's preliminary hearing testimony].) Accordingly, Seeney's recantation was admissible for impeachment purposes under Evidence Code section 1202 although Seeney would not have the opportunity to explain or deny the inconsistency.

b. Appellant Preserved This Claim for Appeal

Although defense counsel did not explicitly cite section 1202, his argument clearly invoked the substance of that provision, and thereby adequately preserved his claim of error for appeal. Finding the claim forfeited because defense counsel did not say "1202" would be a hypertechnical application of Evidence Code section 354. (See *People v. Partida* (2005) 37 Cal.4th 428, 434 [explaining that contemporaneous-objection "requirement must be interpreted reasonably, not formalistically"].) That section of the Evidence Code provides that an erroneous exclusion of evidence is preserved for appeal if "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, §354, subd. (a).)

Appellant's request to introduce the evidence for impeachment

purposes met those requirements. Prior to the first trial, appellant presented the court with a transcript of Seeney's recantation. (3 RT 840-841.) After losing his bid to introduce the evidence for the truth of the matter asserted as a declaration against penal interest, defense counsel moved to admit the evidence for the purpose of impeachment. (17 RT 4497-4498.) Furthermore, defense counsel articulated the relevance of the credibility of the prosecution's most important witness. (17 RT 4495-4496.)

Defense counsel's argument for admitting the evidence for impeachment purposes drew upon Evidence Code section 1202's common-law origins. He accurately noted that, at common law, inconsistent statements were admissible for impeachment only. (17 RT 4497.) In addition, at common law, Seeney's recantation would have been admissible impeachment evidence. The seminal case of *People v. Collup* (1946) 27 Cal.2d 829 held, in the precise procedural situation presented in this case, that a preliminary hearing witness's subsequent out-of-court statement inconsistent with her preliminary hearing testimony, which was admitted in lieu of her live testimony because she was unavailable, was admissible to impeach her prior testimony. (*Id.* at pp. 834-839.) Evidence Code section 1202 extended the reach of *Collup* to cases in which the inconsistent statement preceded prior testimony and in which the hearsay declaration was not prior testimony. (See Evid. Code § 1202, Cal.L.Rev.Comm. com.) Accordingly, when defense counsel cited the common-law rule for the admissibility of out-of-court statements for impeachment, counsel implicitly referenced Evidence Code section 1202.[78]

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[78]Evidence Code sections 1202 and 1235 share common-law origins. Evidence Code section 1235 applies when the person being impeached is a witness at trial and permits the inconsistent statement to be used to prove

(continued...)

For these reasons, appellant did "alert the court to the exception relied upon and [met] the burden of laying the proper foundation." (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.) Accordingly, appellant has preserved for appeal the Evidence Code section 1202 issue.

c. The Trial Court Abused Its Discretion By Not Admitting Evidence of Seeney's Recantation to Impeach Seeney's Preliminary Hearing Testimony, Which Was Introduced at Trial

Seeney's out-of-court inconsistent statements comprised precisely the type of evidence that Evidence Code section 1202 makes admissible for impeachment of a nontestifying witness's prior testimony or hearsay remarks. The proffered evidence was patently admissible, and the trial court committed reversible error by excluding it.

The plain text of Evidence Code section 1202 demonstrates that the hearsay rule is no bar to the admission of Seeney's recantation for purposes of impeachment. (See *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1004 ["the statute's plain language permits the credibility of any hearsay declarant to be attacked by the introduction of an inconsistent statement made by the declarant."]) The first sentence of the evidentiary rule reads:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.

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[78](...continued)
the truth of the matter asserted. Evidence Code section 1202, in contrast, applies when the person being impeached does not testify at trial, and the inconsistent statement is admissible only to impeach the nontestifying hearsay declarant. (See Evid. Code, §§ 1202, 1235, and Law Rev. Comm'n cmts.)

(Evid. Code, § 1202.)[79] Accordingly, under this provision, the fact that Seeney would not be given an opportunity to explain or deny the inconsistency was no bar to admission of his recantation for impeachment purposes. Furthermore, the final sentence of the rule provides that a person who does not testify at trial but whose prior testimony is admitted into evidence is deemed a hearsay declarant:

> For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

(*Ibid.*)

Although Seeney's prior testimony occurred at a preliminary hearing, rather than a deposition, for the purposes of impeaching prior testimony admitted at trial, there is no functional difference between the two. Furthermore, Evidence Code section 1202 has long applied to evidence impeaching an absent witness's preliminary hearing testimony. (See *People v. Blacksher*, *supra*, 52 Cal.4th at pp. 806-808; *People v. Marquez* (1979) 88 Cal.App.3d 993, 998; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 989-990.)

The Law Revision Commission comment to Evidence Code section 1202 further demonstrates that Seeney's recantation was admissible to impeach his preliminary hearing testimony:

> Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to explain or deny the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and

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[79]The unabridged text of Evidence Code section 1202 is reproduced *ante*, at pp. 183-184.

> his right to impeach. *Cf.* People v. Lawrence, 21 Cal. 368, 372 (1863).

(Evid. Code, § 1202, Cal.L.Rev.Comm. com.)

Although appellant had the opportunity to cross-examine Seeney at the preliminary hearing, appellant did not have the chance to question Seeney in court about his recantation, which took place after the preliminary hearing. As the Law Revision Commission comment notes, the purpose of this Evidence Code section is to ensure that parties are not disadvantaged with impeaching a witness because he is unavailable at trial and his prior testimony is admitted at trial. "The purpose of section 1202 is to assure fairness to the party against whom hearsay evidence is admitted without an opportunity for cross-examination." (*People v. Corella* (2004) 122 Cal.App.4th 461, 470, 18 Cal.Rptr.3d 770, quoted in *People v. Curl* (2009) 46 Cal.4th 339, 361.) By admitting Seeney's preliminary hearing testimony, but barring appellant from impeaching that testimony with Seeney's recantation, the trial court disadvantaged appellant in a matter that Evidence Code section 1202 was designed to prevent. That was error.

It is well-settled that out-of-court statements are admissible under Evidence Code section 1202 to impeach prior testimony and other forms of hearsay. "A hearsay declarant is subject to the same credibility standards as if 'the declarant had been a witness at the hearing.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1022, quoting Evid. Code, §1202.) As explained by the Court of Appeal, shortly after the adoption of the Evidence Code:

> Ordinarily, the witness to be impeached by his own inconsistent extrajudicial statement is one who has testified in court, but a hearsay declarant may also be impeached in the same manner, which simply means that where a witness in court testifies to admissible extrajudicial statements of a third party declarant, the prior or subsequent inconsistent statements of the declarant may be received when offered in

> evidence for purposes of impeachment. (*People v. Collup*, 27 Cal.2d 829, 836, 167 P.2d 714; *People v. Lawrence*, 21 Cal. 368, 371-372; Evid.Code, § 1202.) The purpose of allowing extrajudicial inconsistent statements is to be fair to the party against whom the hearsay was received inasmuch as he was denied the opportunity of cross-examination; thus, such party should at least be allowed to impeach the declarant by admitting the declarant's own statements which are inconsistent with the declaration received in evidence. (*People v. Lawrence*, *supra*, 21 Cal. 368, 371-372.) The foregoing rule applies where the hearsay testimony is properly admitted under some exception to the hearsay rule. Consequently, it appears that the trial court committed prejudicial error in receiving the inadmissible hearsay testimony of [a nontestifying witness] and then rejecting the admissible impeaching evidence.

(*Am-Cal Inv. Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 542.)

More recently, the Court of Appeal succinctly stated why out-of-court inconsistent statements are probative:

> The theory of relevance for impeaching a witness or declarant with an inconsistent statement is that the hearsay and the inconsistent statement cannot both be true, that one must be wrong, and that, therefore, the person has "some undefined capacity to err; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality."

(*People v. Baldwin*, *supra*, 189 Cal.App.4th at p. 1004, quoting 3A Wigmore, Evidence (Chadbourn ed.1970) § 1017, p. 993.) In *Baldwin*, the Court of Appeal held that the trial court erred by excluding the defendant's out-of-court statements that were inconsistent with his jailhouse admissions introduced by the prosecution. (189 Cal.App.4th at pp. 1002-1005.) The appellate court determined that Evidence Code section 1202 provides liberal admission of out-of-court inconsistent statements and quoted the Law Revision Commission comment that a hearsay declarant may "'be impeached by inconsistent statements in all cases.'" (*Id.* at p. 1004.)

An inconsistent out-of-court statement is admissible for impeachment purposes irrespective of whether it is deemed trustworthy or reliable. In *People v. Corella*, *supra*, 122 Cal.App.4th at pp. 470-472, the Court of Appeal reversed a conviction because the trial court had erroneously excluded, as "untrustworthy," the in-court recantation by the complaining witness, which had been stricken from the preliminary hearing record. The trial court had previously admitted the witness's 911 tape incriminating the defendant. Notably, the Court of Appeal explained: "[T]here was no basis for excluding [the witness's] statement because it was untrustworthy. Unlike some exceptions to the hearsay rule, section 1202 does not require the trial court to consider trustworthiness as a condition of admissibility." (*Id.* at p. 472.)

The trial court in the instant case applied incorrect legal standards, and thereby abused its discretion in barring the introduction of Seeney's inconsistent statements to impeach his preliminary hearing testimony. The court's three bases for excluding the recantation were inapplicable to evidence admitted only for impeachment under Evidence Code section 1202.

The court excluded the evidence because the prosecution could not cross-examine Seeney, an unavailable witness. (17 RT 4498.) However, Evidence Code section 1202 permits the introduction of the out-of-court statements of nontestifying hearsay declarants. (Evid. Code § 1202.)

The second reason the court gave for excluding the evidence was that Seeney made the inconsistent statement *after* he testified. (17 RT 4490-4491.) But Evidence Code section 1202 allows admission of both prior *and* subsequent inconsistent statements. (See *Am-Cal Inv. Co. v. Sharlyn Estates, Inc.*, *supra*, 255 Cal.App.2d at p. 542.)

The court also excluded the recantation because it was not

trustworthy. (17 RT 4490.) However, as discussed above, "[u]nlike some exceptions to the hearsay rule, section 1202 does not require the trial court to consider trustworthiness as a condition of admissibility." (*People v. Corella*, *supra*, 122 Cal.App.4th at p. 472.) In any event, evidence admitted to impeach someone's credibility is not hearsay. (See *People v. Brooks* (1979) 88 Cal.App.3d 180, 187.)

The Court of Appeal has also rejected the argument that inconsistent out-of-court statements should be excluded because the jury may misuse impeachment evidence for hearsay purposes. The Court of Appeal explained:

> Further, we understand that the defendant may well hope that the jury will consider the inconsistent statements for their truth even though they are not admitted for that purpose. But such an unexpressed hope does not dispel the relevance of the inconsistent statement for the independent, non-hearsay purpose of casting doubt on the defendant's credibility as the declarant of incriminating party admissions used by the prosecution. Further, as one court observed, "section 1202 embodies the legislative judgment that the jury is able to distinguish between considering hearsay for truth and for impeachment."

(*People v. Baldwin*, *supra*, 189 Cal.App.4th at p. 1005, quoting *People v. Corella*, *supra*, 122 Cal.App.4th at p. 471; see also *People v. Osorio* (2008) 165 Cal.App.4th, 603, 618 [rejecting argument that jury would necessarily have used impeachment-only evidence improperly for hearsay purpose and presuming jury followed its instructions].) Notably, in the present case, defense counsel suggested to the trial court that it admit the evidence with a limiting instruction informing the jury that Seeney's inconsistent statements could be used only for impeachment and not for the truth of the matter asserted. (17 RT 4498.)

In sum, the trial court abused its discretion by excluding Seeney's

recantation for all purposes. In addition to violating state law, the trial court's exclusion of the evidence violated appellant's constitutional rights to present a defense, to due process of law, and to a reliable guilt determination.

C. The Trial Court Violated Appellant's Right to Present a Complete Defense by Excluding Seeney's Recantation

The exclusion of Seeney's recantation violated appellant's right to present a complete defense that the Sixth and Fourteenth Amendments guarantee. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324; *Green v. Georgia*, *supra*, 442 U.S. at p. 97.) Both the compulsory process clause and the due process clause imbued appellant with the right to present a complete defense. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324.) Fundamental fairness demands "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta*, 467 U.S. at p. 485.)

The exclusion of defense evidence violates "an accused's right to present a defense [if it is] 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (*United States v. Scheffer* (1998) 523 U.S. 303, 308, quoting *Rock v. Arkansas*, *supra*, 483 U.S. at p. 56.) The centrality of evidence to the defense is the key variable for determining whether the right to present a defense requires the admission of exculpatory defense evidence. (See *Rock v. Arkansas*, *supra*, 483 U.S. at p. 57; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Chambers v. Mississippi*, *supra*, 419 U.S. at p. 302; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 317-318.)

Seeney's recantation was critical to appellant's defense. Undermining the credibility of Sylvester Seeney's preliminary hearing testimony was a crucial component of appellant's guilt-phase defense

because the admissions appellant allegedly made to Seeney and Seeney's girlfriend, Phyllis Woodruff, were the linchpin of the prosecution's case against appellant. In those admissions, appellant purportedly stated that he had committed all of the offenses against the taxicab drivers. Appellant's guilt-phase defense depended on being able to convince the jury that Seeney and Woodruff had fabricated those admissions.

As explained above, because Seeney testified to these alleged admissions at the preliminary hearing, that testimony was admitted at trial due to Seeney's unavailability. By far, the strongest impeachment evidence appellant could have presented was Seeney's subsequent recantation of his testimony. Not only did Seeney recant his testimony that appellant had admitted to committing the crimes, but he also explained why he had testified falsely. Accordingly, Seeney's recantation was exculpatory and central to appellant's defense. (See *People v. Stevenson*, *supra*, 79 Cal.App.3d at p. 989 ["Here we have a key hearsay declarant's statements being admitted against defendant. The right to impeach such declarant is vital for defendant's defense."].)

Furthermore, the United States Supreme Court has explicitly held that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 419 U.S. at p. 302; *Green v. Georgia*, *supra*, 442 U.S. at p. 97.) After defense counsel asked the trial court to admit the recantation for impeachment purposes only, respondent lacked an overriding interest in excluding the out-of-court statement. Moreover, admitting Seeney's preliminary hearing testimony while excluding important evidence impeaching that testimony impeded, rather than enhanced, the adversarial process. Accordingly, the trial court, by applying the hearsay bar to evidence not offered for a hearsay purpose violated appellant's constitutional right to present a complete defense.

D. The Exclusion of the Recantation Violated Appellant's Truth-in-Evidence Rights

The truth-in-evidence provision of the California Constitution commands that "relevant evidence shall not be excluded in any criminal proceeding." (Calif. Const., art I, § 28, subdivision (f)(2).) Although the enactment of the truth-in-evidence provision of Proposition 8 in 1982 did not abrogate evidentiary bars on hearsay (see, e.g., *People v. Wheeler* (1992) 4 Cal.4th 284, 293), as explained above, Seeney's recantation was admissible under Evidence Code section 1202. Accordingly, the trial court's exclusion of Seeney's recantation violated appellant's state constitutional right to the admission of indisputably relevant evidence.

E. The Exclusion of the Recantation Also Violated Appellant's Rights to a Fair Trial and a Reliable Guilt and Penalty Determination

The due process clause of the Fourteenth Amendment guaranteed appellant the right to a fair trial. (See, e.g., *Adamson v. California* (1947) 332 U.S. 46, 53.) The United States Supreme Court and this Court have recognized that violating a defendant's right to present a complete defense prevents the defendant from receiving a constitutionally guaranteed fair trial. (See *Chambers v. Mississippi*, *supra*, 419 U.S. at pp. 302-303; *People v. Zapien* (1993) 4 Cal.4th 929, 1002-1003.) Thus, for the reasons elucidated in the prior subsection, the exclusion of Seeney's recantation denied appellant his due process right to receive a fair trial.

Moreover, excluding the evidence violated appellant's right to reliable guilt and penalty determinations guaranteed by the cruel and unusual punishment clause of the Eighth Amendment. (*United States v. Cronic* (1984) 466 U.S. 648, 656 [without opportunity to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to

produce just and reliable results]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [explaining that qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [Eighth Amendment mandates invalidation of rules that diminish reliability of guilt determination in capital case].) The admission of Seeney's preliminary hearing testimony and exclusion of Seeney's recantation of that testimony artificially inflated the apparent credibility of Seeney's testimony. Given the centrality of Seeney's testimony to the case against appellant, the exclusion of the recantation prevented the jury from reaching a reliable guilt and sentencing determination.

F. The Exclusion of Seeney's Recantation Was Prejudicial and Requires This Court to Vacate Appellant's Convictions and Death Sentence

In Argument III (see *ante*, at pp. 140-173), in which appellant argued that the admission of Seeney's preliminary hearing testimony violated appellant's right to a fair trial, and in the previous subsection of this argument (see *ante*, at pp. 192-193), appellant articulated the centrality of Seeney's preliminary hearing testimony to the prosecution's case. Argument III also explained how the admission of Seeney's preliminary hearing testimony prejudiced appellant. (See *ante*, at pp. 170-173.) The exclusion of Seeney's recantation for all purposes was prejudicial for similar reasons.

If it had been admitted at trial, Seeney's recantation would have undercut the credibility of his preliminary hearing testimony. In his recantation, Seeney admitted that his testimony incriminating appellant was false. In his preliminary hearing testimony, Seeney's key accusation was that appellant admitted to committing all three of the charged offenses. In

his recantation, Seeney said that appellant never made any admissions and that Seeney testified falsely because he feared he would be convicted of the crimes against the taxicab drivers if he did not implicate appellant and agree to testify against him. Accordingly, the recantation undermined, or at the very least cast tremendous doubt on the veracity of, Seeney's testimony incriminating appellant. For example, Seeney's most vivid testimony was his allegation that appellant showed Seeney and his girlfriend, Phyllis Woodruff, the taxicab he had allegedly stolen. However, if appellant never made any admissions to Seeney, then Seeney was lying when he testified that appellant showed them the taxicab he stole.

Moreover, the fact that Phyllis Woodruff's trial testimony was consistent with Sylvester Seeney's testimony would not have subverted Seeney's recantation. Woodruff was Seeney's girlfriend and partner in committing the residential burglaries that netted the murder weapon. (14 RT 3638, 3654-3656.) In the ten days between the homicides and Seeney's arrest, Seeney and Woodruff had more than enough time to concoct a story that would implicate appellant and exonerate Seeney.[80]

Indeed, defense counsel argued that Seeney and Woodruff fabricated their story. In his retrial guilt-phase closing argument, defense counsel noted that Seeney and Woodruff had the opportunity to collaborate on creating a story that exculpated Seeney:

> Now, we know that Seeney and Phyllis had a phone conversation and that occurred while Mr. Seeney was still in Ohio before he was brought back to California. We have evidence from Phyllis that she talked to him on the phone and she also told you she visited him in the county jail.

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[80]The robbery-murders were committed on February 21, 2000, and Ohio State Troopers arrested appellant and Seeney on March 3, 2000. (14 RT 3577; 15 RT 3961-3964.)

(18 RT 4895.) He further noted that Woodruff had the motive to lie to benefit Seeney and herself:

> [M]oving onto Miss Woodruff, she, of course, would have every motive to protect her boyfriend and fellow burglar. Keep in mind that she, like Mr. Seeney, admitted committing substantial residential burglaries.

(19 RT 4902.) Accordingly, Seeney's recantation, if admitted at trial, would have impeached his entire story, not just his testimony, and would also have undercut Woodruff's testimony.

The jury in this case was instructed that if it harbored doubts about the credibility of Seeney's preliminary hearing testimony, it could give it little or no weight. (18 RT 4791-4792; 5 CT 1430-1431; 11 CT 3003; see also, CALJIC No. 2.20.) Without Seeney's testimony, the prosecution's case against appellant was far from strong.

Appellant's alleged admissions, to which only Seeney and Woodruff testified, thus comprised the most important evidence in the prosecution's case against appellant. (See *ante*, at pp. 105-107, 170-173.) More broadly, the corroboration of the circumstantial evidence of appellant's alleged guilt came from the testimony of Seeney and Woodruff. (18 RT 4292-4293.) As defense counsel argued in his retrial guilt-phase summation, the prosecution's case against appellant unravels if a factfinder concludes that Seeney and Woodruff's testimony is not credible:

> Now, I would like to suggest again as I did when I began to talk about Mr. Seeney and Ms. Woodruff that you evaluate their testimony, consider all the things that I have talked about, and if you think there is a question as to their credibility, I think it would be a good exercise to just take everything they say away from the case and see what you have got left.
>
> One of things you won't have is anything that connects Mr. Wilson to the January 7th robbery of Mr. Richards other

> than Mr. Richards' identification itself [which was unreliable].[81]
>
> And, of course, you will have no evidence that Mr. Wilson admitted to the murders as Seeney and Woodruff claim or the evidence about the switching of jackets and all of that.

(18 RT 4305-4306.)

Furthermore, this was a close case. The jury hung on all counts at the first trial. At the retrial, the jury received the case more than one week before it returned guilt-phase verdicts. Additionally, the jury requested readbacks of Woodruff and Seeney's testimony during the guilt-phase deliberations. (See *ante*, at p. 173.)

Because Seeney's preliminary hearing testimony and the allegations he made against appellant in that testimony formed the crux of the prosecution's case, the State cannot prove beyond a reasonable doubt that the violation of appellant's constitutional rights resulting from the trial court's erroneous exclusion of Seeney's recantation was harmless. (See *Chapman v. California* , *supra*, 386 U.S. at p. 24.) However, even if this Court finds that the error did not reach constitutional proportions, appellant is entitled to reversal of his conviction and death sentence under *People v. Watson*, *supra*, 54 Cal.2d at p. 836, because it is reasonably probable that the jury would not have convicted appellant, found felony-murder and multiple-murder special circumstances, or reached a death verdict if the trial court had not improperly barred Seeney's recantation. (See *People v. Watson*, *supra*, 54 Cal.2d at p. 836.)

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[81]Appellant asserts that Richards's identification was unreliable and should have been suppressed in Argument I, *infra*.

V.

THE TRIAL COURT ERRONEOUSLY ADMITTED SYLVESTER SEENEY'S HEARSAY STATEMENT TO HENRY WOODRUFF AND THEREBY VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL

During the afternoon of February 20, 2000, several hours before the incidents against Andres Dominguez and Victor Henderson, appellant went to see Sylvester Seeney at Phyllis Woodruff's home in Hesperia, which is located south of Victorville in the High Desert. Phyllis's father, Henry Woodruff, was hosting a barbecue. Henry Woodruff testified that Seeney told him he did not want to go with appellant down the hill because appellant was doing wrong and Seeney did not want to violate his probation.[82] Woodruff further testified that he relayed Seeney's statement to appellant. (14 RT 3629-3630.)

Prior to Henry Woodruff's testimony at the retrial, appellant moved, on hearsay grounds, to preclude the prosecutor from eliciting testimony regarding Seeney's alleged statement. Defense counsel argued that its admission would be unfair to appellant because he would have no opportunity to cross-examine Seeney regarding the statement, because he had been declared an unavailable witness due to his invocation of his Fifth Amendment privilege against self-incrimination. (14 RT 3622, 3625.)

The prosecutor countered that the evidence was being offered not for its truth, but as an "operative fact that [Seeney] was attempting to comply with his probation." (14 RT 3623.) Defense counsel responded that if it was not being offered for its truth, it was not relevant. (*Ibid.*) The trial court denied the defense motion, and ruled as follows:

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[82]To people in High Desert cities like Victorville and Hesperia, going down the hill meant traveling through the Cajon Pass toward the San Bernardino Valley. (7 RT 1718.)

> Well, it sounds like these — this was a statement made at or around the time of the crimes, a statement by the witness as to what his intentions were. And as I understand, even assuming that it's hearsay, under the then-existing state of mind exception, I think the witness has to be unavailable, and they would go to prove his conduct in accordance with that state of mind. I'll allow it to come in under that exception.

(14 RT 3625.)

Henry Woodruff thereafter testified as follows:

> The younger brother [Seeney] told me that he didn't want to go down the hill with the older brother [appellant] because the older brother was doing wrong, and that he [Seeney] was on probation, and he would violate his probation if he went down the hill. So I told him he could stay. So when the older brother came to get him, I told him what the younger brother had said, so he agreed to leave the younger brother there.

(14 RT 3630.)

In his guilt phase closing argument, the prosecutor, under the guise of explaining the elements of aiding and abetting, stated as follows:

> So we have to prove, if we're using the aiding and abetting theory, we have to prove that the person who's helping knew what was going on; the robbery for example. [¶] Now for example, Sylvester Seeney, we know that he gives the jacket to Javance at the — at the barbeque, but — and we know he had knowledge, *because remember he tells Mr. Woodruff, I don't want to go down the hill with Javance because he's doing wrongdoing, or words to that effect. Well, so he knows that Javance is up to these robberies.*

(18 RT 4833, emphasis added.)

Sylvester Seeney's state of mind was not relevant to any issue in dispute, and therefore was inadmissible under the state-of mind exception to the hearsay rule, set forth in Evidence Code section 1251. The prosecutor's introduction of the evidence purportedly to prove Seeney's state of mind was merely a subterfuge; the prosecutor's true purpose in seeking admission

of Seeney's statement was to prove that appellant had planned to rob and murder taxicab drivers. In other words, he was introducing the evidence for the truth of the matter asserted. Finally, Seeney's statement should have been excluded under Evidence Code section 1252, because it was inherently untrustworthy. The trial court therefore abused its discretion, and violated appellant's right to a fair trial under the due process clause of the Fourteenth Amendment, when it allowed the prosecutor to elicit Seeney's hearsay statement through the testimony of Henry Woodruff.

A. Sylvester Seeney's State of Mind Was Irrelevant to Any Issue in Dispute, and the Only Relevance His Statement Had Was To Prove That Seeney Had Knowledge of a Plan by Appellant To Commit Robberies

Evidence Code section 1251 provides that evidence of a statement of the declarant's state of mind at a time prior to the statement is not made inadmissible by the hearsay rule if (1) the declarant is unavailable as a witness; and (2) the evidence is not offered to prove any fact other than such state of mind. Of course, the declarant's state of mind must also be relevant to a disputed issue: .

> [A]n out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted. . . . The trial court must also find that the nonhearsay purpose is relevant to the issue in dispute

(*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.)

In the instant case, Sylvester Seeney's state of mind — i.e., that he was afraid his probation would be violated if he went down the hill with appellant — was not relevant to any issue in dispute, other than to prove his knowledge of appellant's plan to commit robberies, and Seeney's statement to Woodruff would tend to show such knowledge only if it were admitted for its truth. As this Court recently held in *People v. Lopez* (2013) 56

Cal.4th 1028, admitting an out-of-court statement under the state-of-mind exception to the hearsay rule, whose only relevance is to prove the truth of the matter asserted, is error. In that case, the trial court erroneously admitted the preliminary hearing testimony of an unavailable witness under the state-of-mind exception, in which he recounted a statement made by the defendant's brother (a codefendant) to the witness on the night of the crime, for the asserted purpose of showing that the codefendant's act of shooting the victim was unplanned and unpremeditated. This Court held that it was error for the trial court to have admitted the statement because: (1) it was as consistent with an impulsive action as planned one; and (2) "such evidence would tend to show premeditation only if it were admitted for its truth." (*Id.* at p. 1061.)

The prosecutor's discussion of Seeney's statement in his closing argument, quoted above, reveals he intended to introduce it to show that appellant was planning to rob and murder taxicab drivers, and Seeney knew about it. He expressly argued that Seeney's statement to Henry Woodruff about not wanting to go down the hill established that Seeney "knows that Javance is up to these robberies." (18 RT 4833.) Although Seeney was not being prosecuted for aiding and abetting the murders, the prosecutor was able to conceal his true purpose for discussing Seeney's statement by arguing that Seeney and his girlfriend, Phyllis Woodruff, were aiders and abettors. Because Seeney's statement was really offered to prove a fact other than Seeney's state of mind, it should have been excluded. (Evid. Code, § 1251, subd. (b); see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1324-1325 [statement proffered under Evidence Code section 1251 to establish declarant's state of mind properly excluded where it was clear statement was proffered not only to prove declarant's state of mind but also to suggest a factual basis for that state of mind].)

B. Seeney's Statement Was Made under Circumstances That Indicated Its Lack of Trustworthiness

Even if Seeney's statement to Henry Woodruff had a relevant, non-hearsay purpose and was admissible under Evidence Code section 1251, it should still have been excluded under Evidence Code section 1252, because it was made under circumstances that indicated its lack of trustworthiness.

Evidence Code section 1252 provides that:

> Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a "broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception." (*People v. Edwards* (1991) 54 Cal.3d 787, 819-820.) Circumstances indicate trustworthiness when the declarant's statements "are 'made at a time when there was no motive to deceive.'" (*People v. Hamilton* (1961) 55 Cal.2d 881, 895, quoting 6 Wigmore, Evidence (3rd ed. 1940), § 1730, p. 94.) A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. (*People v. Edwards*, *supra*, at p. 820.)

Sylvester Seeney had a motive to deceive when he spoke to Henry Woodruff. Seeney was Henry Woodruff's daughter's boyfriend and was living at the Woodruffs' home for a week at that time because Seeney and appellant had moved out of the apartment they shared. (14 RT 3628.) These circumstances gave Seeney several significant reasons to deceive Henry Woodruff and create a false impression that he was staying out of trouble, and "trying to clean his life up." (14 RT 3635.)

First, Seeney would not have wanted Henry Woodruff to know the truth about his criminal activities, because if Woodruff had known that

Seeney was still committing crimes, he would likely have prevented Seeney from dating his daughter. Second, Seeney needed a short-term place to live and therefore had to remain in Woodruff's good graces so he could sleep on Woodruff's sofa until he found permanent housing[83]. Third, Seeney could easily have been trying to deceive Woodruff to deflect any suspicion that he was planning to rob and murder taxicab drivers.

Finally, Seeney undermined the veracity of his own hearsay remark long before the judge ever ruled on its admissibility. At the preliminary hearing, Seeney testified that on February 20, 2000, appellant did not ask him to come with him down the hill or otherwise commit crimes together. (1 CT 119.) This testimony further indicated that Seeney's hearsay statement to Henry Woodruff was made to put himself in a good light with his girlfriend's father and avoid appearing suspicious. (See *People v. Edwards, supra*, 54 Cal.3d at p. 820 [statements offered to prove defendant's state-of-mind excluded as untrustworthy because defendant had motive to deceive and seek to exonerate himself].)

Given the self-serving, exculpatory nature of Seeney's statement, and the obvious reasons giving him a motive to deceive, Seeney's statement was clearly untrustworthy and should have been excluded for that reason, even if otherwise admissible. The court therefore abused its discretion when it admitted Seeney's hearsay remarks into evidence.

C. Appellant Was Deprived of His Constitutional Right to a Fair Trial by the Erroneous Admission of Seeney's Hearsay Statement.

The admission of Seeney's hearsay statement deprived appellant of

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[83]On cross-examination, Woodruff testified that he did not know that Seeney had been committing residential burglaries, and that had he known, Seeney "wouldn't have been at the house." (14 RT 3634-3635.)

his right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment. Although a state court's erroneous application of evidentiary rules ordinarily does not violate the federal Constitution, state-law evidentiary errors that render a trial fundamentally unfair violate the due process clause. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13.) The erroneous admission of Seeney's hearsay statement rendered appellant's trial fundamentally unfair for several reasons.

As defense counsel argued (14 RT 3625), the admission of Seeney's out-of-court statement to Henry Woodruff unfairly allowed the prosecution to introduce incriminating, self-serving, self-exculpatory hearsay by a witness who invoked his Fifth Amendment privilege against self-incrimination, and therefore could not be cross-examined. In addition to the statement being self-serving, there was, as discussed above, a substantial basis to believe it was utterly untrustworthy. Admission of this untrustworthy evidence thus unfairly bolstered Seeney's incriminating preliminary hearing testimony without affording appellant an opportunity to impeach it.

It was particularly unfair to admit the hearsay under these circumstances, given the Seeney's importance to the prosecution's case. As defense counsel suggested in his closing argument, the prosecution had no case against appellant without Seeney and Phyllis Woodruff's testimony:

> Exclude all of the evidence that [Sylvester Seeney and Phyllis Woodruff] gave you and see what is left. See how many of these facts that Mr. Williams says corroborates and intercorroborates and so on, how many of those facts he has given you are really still going to be there without their testimony.

(18 RT 4892-4893.) It was also especially unfair for the jury to hear Seeney's self-serving statement without ever having had the opportunity to

assess Seeney's credibility as a witness by actually watching and hearing him testify[84].

Accordingly, given the unique circumstances presented in this case, the trial court's erroneous admission of Seeney's hearsay statement rendered appellant's trial fundamentally unfair, and thus violated his right to due process of law.

D. The Error Was Prejudicial

As discussed above and elsewhere in this brief, if Sylvester Seeney had not incriminated appellant in his statements to law enforcement and in his preliminary hearing testimony, it is unlikely that the prosecution would have obtained a conviction in this case. Hence, the prosecution sought to introduce Seeney's hearsay statement to Henry Woodruff because it bolstered Seeney's incriminating preliminary hearing testimony, without the risk of being impeached by cross-examination, because Seeney had invoked his privilege against self-incrimination and the trial court thereby declared unavailable. Moreover, because Seeney was declared unavailable, the jury had limited means by which to assess his credibility, and thus any evidence introduced that tended to corroborate Seeney's prior testimony would have to have influenced the jury's verdict. Under the circumstances, respondent cannot prove that the erroneous admission of Seeney's hearsay statement to Henry Woodruff did not influence the jury's guilt determination, and was therefore harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279

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[84]The unfairness of the trial was enhanced by the erroneous admission of Sylvester Seeney's coerced statements to law enforcement officers and preliminary hearing testimony (see *ante*, Argument III), and by the trial court's erroneous exclusion of his recantation (see *ante*, Argument IV).

[harmless error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error"].)

Significantly, Henry Woodruff was not called as a witness in the first trial, in which the jury hung, with one juror voting for acquittal on Counts One, Two and Three, and three jurors voting for acquittal on Counts Four, Five, Six and Seven. (11 RT 2838-2839.) Accordingly, in that trial, the jury did not hear Seeney's hearsay statement. However, the retrial jury, having heard the incriminating statement, voted unanimously for guilt, which indicates that all the jurors believed him. Because the only significant difference between the evidence related to Seeney presented in the first trial and that presented in the second trial was Seeney's hearsay statement to Woodruff, it is clear that the hearsay had a major impact on the retrial jury's credibility determination and its guilt verdict. Under the circumstances, even if this Court finds no federal constitutional error, reversal is still required, because there is a reasonable probability that the outcome of the trial would have been different had the hearsay statement been excluded. (*People v. Watson*, *supra*, 54 Cal.2d at p. 836.)

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VI.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY ADMITTING STATEMENTS TO POLICE OFFICERS THAT HE GAVE AFTER HIS INTERROGATORS WILLFULLY DISREGARDED HIS INVOCATION OF HIS RIGHT TO SILENCE

Miranda v. Arizona (1966) 384 U.S. 436 established what are now universally familiar procedural safeguards designed to protect suspects from coercion during custodial interrogations. To ensure that statements made in that setting are a product of a person's free will and to protect the Fifth Amendment right against self-incrimination, warnings must be given before questioning begins; once warnings are given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474.) Further, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Michigan v. Mosley* (1975) 423 U.S. 96, 104, fn. omitted.)

Although the dictates of the *Miranda* decision are clear, this Court and lower California courts have repeatedly been confronted with evidence of questioning "outside *Miranda*," where interrogating officers deliberately ignore a suspect's invocation of his rights, often with the admitted purpose of obtaining statements that they suspect will be excluded from the prosecution's case-in-chief under *Miranda*, but that they know will nevertheless be admissible to impeach the defendant's trial testimony pursuant to *Harris v. New York* (1971) 401 U.S. 222, 225-226. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1213; see also, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 816; *People v. DePriest* (2007) 42 Cal.4th 1, 29-31;

People v. Demetrulias (2006) 39 Cal.4th 1, 29-30; *People v. Neal* (2003) 31 Cal.4th 63, 80-81; *People v. Bradford* (1997) 14 Cal.4th 1005, 1042; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628; *People v. Montano* (1991) 226 Cal.App.3d 914, 932.) This Court has repeatedly stated that "[such] misconduct . . . is 'unethical' and must be 'strongly disapproved.'" (*People v. Neal*, *supra*, 31 Cal.4th at p. 81, citations omitted; see also, e.g., *People v. Jablonski*, *supra*, 37 Cal.4th at p. 816; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1042.) It has observed that "[t]his type of police misconduct is not only nonproductive, . . . but can be counterproductive because in the appropriate case it would compel us to reverse a conviction." (*People v. Jablonski*, *supra*, at p. 816.)

Appellant was interrogated twice in this case. The first interrogation, which followed his arrest in Ohio, was conducted by Detective Scott Franks and Sergeant Robert Dean of the San Bernardino County Sheriff's Department and Detective Allen Maxwell of the Pomona Police Department (hereinafter referred to as the "Ohio interrogation"), and the second interrogation, the next day, upon his return to San Bernardino, was conducted by Detective Jay Hagen of the San Bernardino County Sheriff's Department (hereinafter referred to as the "San Bernardino interrogation.") In both of appellant's interrogations, he repeatedly asserted his right to silence. Each time, the interrogators continued as if appellant had said nothing at all.

Appellant's case presents not only a blatant infringement of appellant's right to remain silent, but yet another example of deliberate questioning outside *Miranda*, a police practice that strikes at the very core of the *Miranda* decision's purpose and one that the United States Supreme Court has recognized is a "growing trend." (*Missouri v. Seibert* (2004) 542

U.S. 600, 610, fn. 2.) Although the trial court correctly suppressed statements made by appellant, following his invocation of his right to remain silent, during the Ohio interrogation, the trial court's admission into evidence of appellant's statements made during the San Bernardino interrogation violated his rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. Reversal is required.

A. Facts and Procedural History

Ohio State Trooper Charles Noel arrested appellant near Cincinnati on March 3, 2000. (3 RT 759.) As he read appellant his *Miranda* rights, appellant simultaneously recited them. He concluded that appellant knew the *Miranda* warnings. (3 RT 768-769.)

On March 5, 2000, Detectives Franks and Maxwell interrogated appellant in Hamilton, Ohio. (4 RT 981.) After being given his *Miranda* warnings, appellant initially agreed to speak to the detectives. (4 RT 982; 12 CT 3363.) But appellant changed his mind shortly thereafter.

As revealed by a video recording, appellant repeatedly asserted his right to silence during the Ohio interrogation. After Detective Franks told appellant that the police had a witness against him, appellant said, "I can't answer no more questions then, man." (12 CT 3398.) Detective Franks recognized that appellant was invoking his right to silence (4 RT 989); nevertheless, Detective Franks continued the interrogation:

FRANKS: Well, see — see, just hold on a sec. You pull, you know —

WILSON: You're blowing air up my ass, man.

FRANKS: Not, you pull questions from me and then when I tell you something, you're not going to answer anything any more?

WILSON: All right. Come on.

FRANKS: What kind of fair is that?

WILSON: Come on. Let's play the game. Come on. I'm listening. (12 CT 3398-3399.)

A moment later, Sergeant Robert Dean entered the interrogation room. (12 CT 3399.) Not long thereafter, appellant made new assertions of his right to silence:

WILSON: No, there's nothing else to discuss. We just going to take it to the courts.

FRANKS: Think about it.

WILSON: I mean, come on, man. Everything I say will and can be used against me in a court of law.

FRANKS: Well, of course. You know that.

WILSON: You think I'm going to continue to discuss with you? Shit I wouldn't be discussing —

FRANKS: What's there to discuss when you're not going to — when you dance around anyhow? Well, right.

WILSON: I mean, come on, man. You play a game with me, I'm going to play right back.

FRANKS: I know you are. So what I'm saying though is so what's the problem with us talking if we're going to dance with each other?

WILSON: Yeah, right.

FRANKS: So we could talk, right?

WILSON: Yeah.

FRANKS: So no problem. When we land, we'll go get some chow. We'll go to In and Out and get

> some chow, sit down and have some dinner and sit around and jaw-jack for a while.

(12 CT 3402-3403.)

After that, the interrogation substantively continued. (12 CT 3403.) Minutes later, the interrogators disregarded two more assertions by appellant of his right to silence. (12 CT 3407.) The detectives finally stopped interrogating appellant after he invoked his right to silence six additional times. (12 CT 3408-3410.)

On March 6, 2000, appellant flew back to California on a San Bernardino County Sheriff's Department jet. At the hearing on appellant's motion to suppress his statements, Detective Hagen testified that while the airplane made a refueling stop in Albuquerque, appellant told Detective Hagen that he wished to speak to the detective in confidence, and was concerned about the consequences to his family if he were to speak to the detective. (4 RT 872.) Detective Hagen testified that he told appellant that the brief stop in Albuquerque was not the time or place for a discussion, and said that they should speak after they returned to California. Appellant assented. (4 RT 873.)

Between one and two hours later, after the jet landed and appellant had been transported to the San Bernardino Sheriff's Department Central Station, Detective Hagen began interrogating appellant. (4 RT 874.) Detective Hagen testified that he had not been told that appellant had invoked his right to silence in the prior interrogation. (4 RT 878.) Hagen did not reissue the *Miranda* warnings during the San Bernardino interrogation (4 RT 875; 11 CT 3268); however, appellant invoked his right to silence anew. Partway through the interrogation, he said, "I'm going to have to request my right to remain silent." (11 CT 3285.) Detective Hagen thereafter continued the interrogation as if appellant had not said anything,

and never clarified whether appellant was invoking his *Miranda* rights. (11 CT 3285-3286.)

A short while later, appellant's invocations of his right to remain silent became increasingly adamant:

HAGEN: . . . Your brother is going to jail for probation violation. Sure.

WILSON: Uh-huh.

HAGEN: That's what he's being held for right now and when we charge his fucking ass for accessory to a murder, he'll be tried and he'll be fucking convicted of that and that will be on top of that. All right? Do you have any clue what I'm telling you?

WILSON: No, I —

HAGEN: Are you following what I'm telling you?

WILSON: (Unintelligible.)

HAGEN: Okay. That's his choice. That's his choice.

WILSON: Uh-huh.

HAGEN: But he's doing it for you.

WILSON: He's doing it for me. I suppose the girl[85] is doing it for me too, right?

HAGEN: No, the girl gave it up.

WILSON: Oh, she gave it — I suppose the mother and daddy gave it all up too?

HAGEN: Yeah, that's right.

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[85]Appellant is referring to Seeney's girlfriend, Phyllis Woodruff.

WILSON: Well, call them into court then.

HAGEN: Dude, they'll be there.

WILSON: Got them on tape?

HAGEN: I don't have them on tape.

WILSON: Do you have them on tape, yes or no?

HAGEN: Javance —

WILSON: Do you, yes or no?

HAGEN: I invoke my right to remain silent.

WILSON: Excuse me?

HAGEN: I invoke my right to remain silent.

WILSON: I request my right to remain silent too then.

HAGEN: Okay. Because you're here to fucking bleed us for information on the case. That's the only reason you want to talk to us. That's the only fucking bullshit you're playing. You think I'm going to play that game. You already tried to play those guys.

WILSON: Oh, man.

HAGEN: All you want to do is find out what we got. Well, buddy, we got enough to do you.

WILSON: If you have enough to do me, why are we sitting here talking? If you have enough to hang my ass and send me to prison why are we sitting up here talking?

HAGEN: Because there's always an explanation.

WILSON: Fucking explanation? There's supposed to be a dead man. What is the explanation for killing a human being?

HAGEN: There's —

WILSON: There is no explanation. Whether or not a man use it if I shoot this man right now, I don't give a fuck what my explanation is. My ass is grass.

HAGEN: Okay. Why don't we get back to that conversation we're having out there on tarmac out there?

WILSON: I'm not discussing it any no further until I talk to the DA, man.

HAGEN: The DA ain't going to talk to you.

WILSON: Like — fuck he ain't.

HAGEN: He ain't going to talk to you.

WILSON: Well, fuck it then.

HAGEN: Okay. All right. That's no problem. That's no problem.

WILSON: I ain't going to discuss it further. I mean, I was trying to be cooperative with you. Man, I'm just concerned about my people there.

HAGEN: I tell you what, your partner is going to be in jail within the next few days and when he tells us everything that he wants to tell us and lay it all on you because the first guy to the table usually gets the best consideration when it comes to the DA. After we get him, what you got to say really doesn't make any difference because you go your opportunity to tell us right now. Okay? The reason you're not telling us is because

you're in over your head and you're not playing a game with a couple fucking little traffic cops or a couple of little fuck guys —

WILSON: I'm sorry to see — I'm not trying to put you down, man, but it seems I am.

HAGEN: Okay. Well —

WILSON: The same little shit you're playing with me is the same shit I heard ten years ago when I first did that other shit.

HAGEN: All right. Killed people ten years ago, are you?

WILSON: Huh?

HAGEN: Are you killing people —

WILSON: I just got out of prison for killing somebody, man.

HAGEN: You killing multiple people like you did the other night?

WILSON: So now — oh, now I did it.

HAGEN: No doubt you did it.

WILSON: First I'm accused.

HAGEN: No, dude —

WILSON: If you have no doubt, we don't need to talk no more, sir.

HAGEN: You're right. You're right.

WILSON: Right?

HAGEN: We don't.

WILSON: Just put me back in my room and —

HAGEN: Okay. Sounds good. Sounds good.

WILSON: Sorry I couldn't work out no better, chief.

HAGEN: You say you wanted to cooperate. I know there's somebody else involved.

WILSON: Am I going to be able to get a cigarette from you?

HAGEN: Yeah. You thought I was going to say no, huh? You don't think I'll give you one? I told you whether you talk to me or not that has nothing to do with whether I give you a cigarette. Okay.

WILSON: Right now?

HAGEN: Yeah.

(11 CT 3289-12 CT 3293.)

Although Detective Hagen, by his own admission, believed appellant no longer wanted to talk (16 RT 4239, 4242-4244; see *post*, at pp. 221-222), as the above excerpt shows, he continued interrogating appellant for quite some time, until appellant requested a cigarette. (16 RT 4239; 12 CT 3291-3293.)

Detective Hagen and Sergeant Hector Rodriguez took appellant outside for a cigarette break. (16 RT 4239.) Detective Hagen gave appellant a cigarette, and they both smoked. (16 RT 4239, 4258.) The discussion held during the cigarette break, which lasted for no more than eight minutes, was not tape recorded. (16 RT 4242, 4259.) Neither officer took notes on this outdoor discussion, despite having been specifically trained to document conversations held after a suspect invokes his right to silence. (16 RT 4246, 4264.) During the cigarette break, appellant expressed concern for his

family's safety. (16 RT 4240, 4259.) Appellant also asked questions while he and Detective Hagen smoked. When appellant and Detective Hagen finished smoking their cigarettes, Detective Hagen asked if they were done talking or if there was more for them to talk about. Appellant said that they should talk some more. (16 RT 4241.) Rather than taking appellant back to his cell, the detectives took him back into the room in which they had been interrogating him, and resumed the interrogation.

Detective Hagen testified that at the time of the interrogations, deputies in the San Bernardino County Sheriff's Department were trained to continue interrogating a suspect after the suspect invoked his or her right to silence, in order to obtain impeachment evidence. As Detective Hagen testified, it was department policy to continue interrogating suspects after they have invoked their right to remain silent. (4 RT 891.)

Appellant did not confess to committing any of the crimes during either interrogation. He did, however, make three damaging admissions. First, he admitted to using Andres Dominguez's cell phone hours after the robbery and homicide in Bloomington.[86] (12 CT 3333, 3392-3397.) Second, appellant admitted that he sometimes possessed a pistol.[87] (12 CT 3307-3310.) Third, when talking about the robbery and attempted murder of James Richards, appellant said "click, click, click," which implied that he may have been the perpetrator of that crime and pulled the trigger on the

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[86]Appellant first made this admission during the portion of the Ohio interrogation that preceded his invocations of his right to silence. (12 CT 3394.) After taking a cigarette break during the San Bernardino interrogation, appellant again admitted using the phone. (12 CT 3333.)

[87]Appellant made this admission after he returned from the cigarette break during the San Bernardino interrogation. (12 CT 3307.)

gun that jammed.[88] (12 CT 3327.)

One month prior to the commencement of jury selection for the first trial, appellant moved to suppress his statements to the police. In the motion, appellant asserted that the interrogators, pursuant to a department policy of training detectives to interrogate suspects "outside *Miranda*," in order to obtain impeachment evidence, continued to interrogate appellant long after he had repeatedly invoked his right to silence during both interrogations. He further argued that his statements were involuntary. (3 CT 593-613.)

In its written response, the prosecution disputed that appellant had invoked his right to silence, contended that any assertions of his right to silence were quickly followed by appellant's initiation of further conversation regarding the case with the police officers, and that appellant's statements were voluntary. The prosecution theorized that appellant sought to have a dialogue with the detectives in order to learn what evidence the police had accumulated against him. (3 CT 825-852.)

While in the midst of jury selection at the first trial, the trial court held an evidentiary hearing on the motion to suppress. After the hearing, the court granted the motion in part and denied the motion in part. The trial court agreed with appellant that he invoked his right to silence several times during the Ohio interrogation. The court explained:

> And it's noteworthy that if there was any equivocation that could be attributed to the defendant's statements, that appears to be overcome by Detective Franks's testimony at the hearing on this motion that he believed the defendant was invoking his right to remain silent at that time. If he held such a belief, then he clearly should have ended the interview. However, whether through frustration or otherwise, he chose

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[88]This admission also came after the cigarette break. (12 CT 3327.)

> to continue. And from that point on, any statements made by the defendant would have been obtained in violation of his Fifth Amendment privilege.

(4 RT 1071.)

The trial court suppressed evidence from that interrogation from the moment appellant first said that he would not answer additional questions. (4 RT 1071, 1079.) The initial portion of the interrogation was received into evidence at the retrial. (18 RT 4782; 19 RT 4996, 5101.) In that portion of the Ohio interrogation, most of the conversation concerned appellant's background. (12 CT 3362-3398.) Substantively, they discussed appellant driving a rental car at the time Andres Dominguez and Victor Henderson were killed. In that conversation, appellant acknowledged making a telephone call from a cellular phone, which a detective said had belonged to one of the deceased taxicab drivers. (12 RT 3392-3397.)

The trial court admitted evidence from the San Bernardino interrogation in its entirety. (4 CT 1071.) The court found that appellant reinitiated the conversation with Detective Hagen in Albuquerque, during the refueling stop on the trip between Ohio and California. (4 RT 1072, 1078.) The court, citing *People v. Matson* (1990) 50 Cal.3d 826, determined that the interrogating officers did not have to re-advise appellant of his *Miranda* rights. (4 RT 1078.) As a result, the trial court declined to suppress the beginning of the San Bernardino interrogation.

Furthermore, the trial court concluded that appellant never seriously asserted his *Miranda* rights during the San Bernardino interrogation. The court explained that appellant's remarks throughout the interrogation indicated his "willingness to keep talking, attempting to learn about the evidence the sheriff had against him, and the sometimes lighthearted nature of the interview. It belies his claim that he seriously invoked his Fifth

Amendment privilege. . . ." (4 RT 1077.)

The court further found that appellant "was well aware of his rights and the consequences of making incriminating statements." (4 RT 1073.) The court concluded that the interrogators did not resort to trickery or coercion and "did not lead him to believe that he could get leniency or a deal from the district attorney if he talked." (4 RT 1074.) For these reasons, the court ruled the San Bernardino interrogation admissible in its entirety.

While preparing for the retrial, defense counsel discovered that in the middle of the San Bernardino interrogation, appellant and Detective Hagen had an unrecorded conversation outside the interrogation room during the cigarette break. (16 RT 4218.) Defense counsel sought to exclude appellant's statements from that point forward in the interrogation. (16 RT 4273.) Counsel argued that when Detective Hagen asked appellant if he wanted to talk further, this constituted a police reinitiation of the interrogation. Counsel further argued that if appellant had reinitiated the interrogation, Detective Hagen and Sergeant Rodriguez would have contemporaneously documented it. (16 RT 4272-4273.)

The trial court held a hearing to reconsider, in light of this information, whether part of the San Bernardino interrogation should be suppressed. (16 RT 4238-4370.) Detective Hagen testified that when the interrogation appeared to be over, he gave appellant a cigarette, and while they were smoking, appellant expressed concern for his family and brother, and probed the detectives regarding the evidence that they had accumulated. (16 RT 4238-4240.) Sergeant Rodriguez testified similarly. (16 RT 4258.) While cross-examining Detective Hagen, defense counsel established that Detective Hagen believed that appellant had invoked his right to silence:

> Q: Detective Hagen, you were more or less at the time that this interview was shut down and everybody left the room

and you began talking about a cigarette, it was your understanding, am I correct, that Mr. Wilson had invoked his right to remain silent?

[Objection overruled.]

A: I think his — I think he said something about taking him to his cell. Something like that.

Q : Well, why is it that you took him out of the room?

A: I believe it was because he wanted to go back to his cell, or he made a statement something to that effect.

(16 RT 4242-4243.) After quoting the portion of the interrogation that preceded the cigarette break, counsel continued:

Q: And then we have the discussion about the cigarette?

A: Yes, sir.

Q: And you tell him whether he talks to you has nothing to do with whether you're going to give him a cigarette?

A: That's correct.

Q: And it was your understanding at that point that he didn't want to talk to you anymore?

A: Yes.

(16 RT 4244.)

On cross-examination, defense counsel also sought to impeach the detectives' testimony that appellant had reinitiated the conversation during the cigarette break, by establishing that neither of them had documented any reinitiation, although they had been trained to do so whenever a suspect reinitiates a conversation with his interrogators. (16 RT 4245-4246, 4260-

4261.)

After holding an evidentiary hearing on the unrecorded portion of the interrogation, the trial court ruled that Detective Hagen appeared to believe that appellant had invoked his right to silence. (16 RT 4280.) The trial court nevertheless concluded that appellant reinitiated the conversation with the police and declined to suppress any portion of the San Bernardino interrogation. (16 RT 4281.) The court explained:

> It's unfortunate, I agree, that neither of the detectives documented this reinitiation conversation any better than they did. Apparently there is no tape recording of it or no report made of it, and there is nothing when they did go back into the room which would memorialize the conversation that occurred in the hallway or the parking lot area, but I have no reason to disbelieve Detective Hagen or Detective Rodriguez that what occurred, and I think based on that evidence, and again the totality of the circumstances leading up to that point, it would appear that Mr. Wilson in fact did reinitiate the interview, and therefore the continuation was proper.

(16 RT 4280-4281.)

The recorded portions of the San Bernardino interrogation were played for the jury during the guilt phase of the retrial. (16 RT 4318-4320.)

During his guilt-phase closing argument, the prosecutor spoke at length about the admissions appellant made during that interrogation. Initially, the prosecutor mentioned appellant's use of Dominguez's cellular phone: "The fact is, was that cell phone in Wilson's hands? Absolutely. And, in fact, Mr. Wilson admits as much." (18 RT 4853.) The prosecutor later spoke in great detail about the San Bernardino interrogation:

> [T]he second interview. You have all heard it, you will have a chance to listen to it again as I have suggested. You know, I want to just run down a couple things that caught my mind and this will only take a few moments and then I am essentially done.

What is interesting is just again it has that vagueness. He will never say anything throughout the interview that can be immediately or readily confirmed or verified by the detectives. Everything there has a haziness to it. That is not your imagination, it is a haziness that is consistent with somebody who is not being candid. And certainly let's say he did have this fear of this guy retaliating against his family. That would be all the more motivation to tell the police, "Look, I am going to tell you what is going on but I want you to go get the guy," and he wouldn't just like pretend to give a name. The police would obviously want a full description that they can verify as to the events surrounding that evening. Wilson is playing this game like "Oh, you have his name, you got it from me." You know, it is ridiculous.

But what is interesting also throughout the interview is Mr. Wilson's certainty as to what the detectives don't have and we know the first interview the detectives give him some insight as to what they might have or what they might not have. Hagen tells him up front, "I am not going to tell you what we have at this point." The next day, the additional development.

What is interesting is Wilson's certainty that they don't have a weapon, "You don't have prints, you don't have this, you don't have that," and I think that — well, in particular his certainty that Sylvester Seeney wasn't there and wasn't involved. Well, folks, if he wasn't involved, if he wasn't there, how would he know that Sylvester wasn't involved?

Again, a very ominous statement. The detective tells Mr. Wilson the Woodruffs gave it up. "You got them on tape?" "Yeah."

We know what the significance of a tape recording is, isn't it? If I don't have a witness on tape, we have an attorney like Mr. Canty who is saying oh, we don't know what the witnesses really said because we don't have them on tape, especially if a witness has changed their testimony. But once they are on tape, it is almost like testifying because they are pretty well locked in and we have seen that happen several

times and Wilson in the interview, "You got them on tape, yes or no? Yes or no, do you got them on tape?" That is on page 17.

He kind of contemplates the profitability of robbing cabbies, "It is not enough money because things are so expensive nowadays."

Page 27, it is interesting when Detective Rodriguez broaches the issue of "Have you had a gun, you know, we got some information that you may have had a gun." Wilson just seems stunned and you can see him, it takes him about a page and a half before he finally commits himself to an answer and then he tries to disassociate himself from small guns or from big guns and will only concede to having carried small guns and disassociates himself from the big guns. But his whole reaction to that is very telling.

His reference to the robbery victim as click, click, click and the amusement about that is I think very interesting as well.

His description of being heated when he goes down the hill, heated meaning, of course, that he was carrying a firearm that corroborates Phyllis; that is a big part of what Phyllis has told us in this case.

Also on page 52 he is describing how he only carries small guns, you know, denying ever carrying any big guns, but he talks about, he kind of inadvertently says, he is describing firing a gun and he goes bam, the type of bam that is consistent with a big gun, not a small gun. And he doesn't like to carry it, draws too much attention, too hard to get rid of. Interesting.

He won't say where he gets his guns because he has now admitted to carrying only small guns and the detectives want to know "Where do you get your guns?", or whatever, and we know he gets them from burglaries. All right. But he says he borrows them from people. They belong to friends who own them legitimately and, in fact, if he ever gets busted

with one of the guns, he knows his friends won't get in trouble but he will, he is the one that will go to jail for the gun, not his friend. Well, if that is the case, why doesn't he give their names? There would be every inducement that I borrowed Bob's gun or John's gun lawfully possessed by John or Bob but no, he doesn't do that. That is because he is lying.

Then on page 56, another ominous statement, he gets big shit, referring to guns, "If I am going to do something big." Well, we know that Wilson in doing these robberies was intending on and planned and envisioned doing something big. He tells Phyllis that he gave the .22 to Brad McKinney because it was too small. Not because it was not firing or jamming and wasn't a very reliable handgun, but because it was too small and he is envisioning the .44 looking at it and it will blow a big hole in someone, which it in fact did to two different people. That statement in the interview certainly corroborates Phyllis.

And again, the reference to the tennis shoe. His amusement with that is very, very apparent and he thinks it is quite funny that the detectives are asking him about it.

(18 RT 4941-4945.)

The prosecutor also contended that appellant was vague during the interrogation and asserted that the vagueness was an indication that appellant was not being candid.

Wilson through both interviews is extremely vague as to any kind of points that the detectives might be able to follow-up on, something that would give them a foothold that they could verify, information that is verifiable and you get very little to zero of that. To the extent you get it, it is as to points that don't really matter but as to where he was, you know, that type of thing.

For example, in the second interview, and I use this just as a brief illustration, he talks about having borrowed the guns from people who owned them legitimately and yet he won't tell the detectives who he borrows the guns from, these guns he had possession of, and that theme continues

> throughout the whole interview and it is clearly a sign that Mr. Wilson is not being candid.

(18 RT 4870- 4871.)

B. The Officers Violated *Miranda* Each Time They Persisted in Interrogating Appellant after He Had Invoked His Right to Remain Silent

The facts of this case establish a *Miranda* violation. During the interrogation in Ohio, appellant's repeated invocations of his right to silence fell upon deaf ears. The trial court properly suppressed the first interrogation from appellant's first assertion of his right to silence. The trial court, however, should have excluded the San Bernardino interrogation as well. The trial court's failure to do so infringed appellant's Fifth and Fourteenth Amendment rights.

It is axiomatic that a criminal suspect in custody has a Fifth Amendment right to remain silent, and one of the most important safeguards of that right is the right to cut off questioning. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474.) After a suspect has been advised of his *Miranda* rights,

> [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

(*Id.* at pp. 473-474.)

The United States Supreme Court recently reaffirmed that where a suspect makes a "simple, unambiguous statement[]" that he wants to remain silent or does not want to talk with the police, he invokes his right to remain

silent and the """right to cut off questioning."""" (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 130 S. Ct. 2250, 2260, citations omitted.) Where an officer is faced with such an unequivocal and unambiguous invocation of the right to remain silent, "further interrogation must cease." (*Id.* at pp. 2263-2264.)

This Court has long held that "'no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent.'" (*People v. Randall* (1970) 1 Cal.3d 948, 955.) A suspect seeking to invoke his right to silence need not "provide any statement more explicit or more technically-worded than 'I have nothing to say'" (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 865), or "I plead the Fifth" (*Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 787 (en banc), cert. denied 129 S. Ct. 344). The inquiry into whether a defendant has invoked *Miranda* rights is an objective one, which asks what "a reasonable officer in light of the circumstances would have understood." (*Davis v. United States* (1994) 512 U.S. 452, 458-459.) On review, this Court reviews independently the trial court's determination of whether the defendant invoked his *Miranda* rights. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.)

During both interrogations, the detectives recognized that appellant had invoked his right to silence. Each time, the interrogations continued.

Early in the Ohio interrogation, appellant first invoked his right to silence when he said: "I can't answer no more questions then, man." (12 CT 3398.) Consequently, the detectives were constitutionally compelled to "'scrupulously honor'" appellant's right to cut off questioning regarding the robberies and homicides. (*Michigan v. Mosley, supra*, 423 U.S. at p. 104, quoting *Miranda v. Arizona*, *supra,* 384 U.S. at p. 479.) But they did not honor his right to remain silent at all. Accordingly, the trial court correctly

suppressed the evidence from that interrogation.

When interrogating officers scrupulously honor a suspect's right to silence by letting time pass before reinterrogating him, the detectives may reinitiate the next round of questioning. (See *Michigan v. Mosley*, *supra*, 423 U.S. at pp. 105-106.) But when the interrogating officers intentionally infringe the suspect's right to remain silent, the police should not be able to reinitiate contact with the suspect to interrogate him further, which is the law governing resumptions of interrogations following an invocation of the right to counsel. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [barring police from reinitiating interrogations after suspect invokes right to counsel].) Barring the police from reinitiating contact with a suspect is necessary to deter law enforcement officers from deliberately disregarding the dictates of *Miranda*. The United States Supreme Court recognized the need to deter intentional *Miranda* violations in *Missouri v. Seibert* (2004) 542 U.S. 600. In a rare employment of the fruit-of-the-poisonous tree doctrine for a *Miranda* violation, the plurality opinion criticized "a police strategy adapted to undermine the *Miranda* warnings." (*Id.* at p. 616.) The plurality explained: "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* [*v. United States* (2000) 530 U.S. 428] held Congress could not do by statute." (*Seibert*, *supra*, at p. 617.) In a concurring opinion, Justice Kennedy, who opted not to provide a fifth vote for the plurality opinion, was no more forgiving of the interrogation tactic: "The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect." (*Id.* at p. 621 [conc. opn. by Kennedy, J.].) For these reasons, law enforcement officers who interrogate suspects outside *Miranda* should not be able to elicit admissible statements by

reinitiating the conversation with the suspect.

In the typical custodial interrogation setting, in which the suspect is brought from his holding cell or jail cell into the interrogation room for further interrogation, the law enforcement officers, not the suspect, have reinitiated contact. (See *People v. Gamache* (2010) 48 Cal.4th 347, 386-387.) Thus, if the police violate a suspect's right to silence, the police cannot bring the suspect back into the interrogation room on another day in the hope that the suspect is the first to speak in the intimate setting and thereby render admissible the ensuing interrogation, because law enforcement officers had initiated that encounter.

In this case, however, the trial court found in an analogous scenario that appellant had reinitiated contact during the airplane trip from Ohio to California. That was error.

The conditions of the trip on the San Bernardino Sheriff's private jet were analogous to an interrogation room. Appellant was in a small enclosed space with his interrogators. Appellant's mere proximity to the detectives over an extended period of time provided inherent pressure for appellant to talk. It was the law enforcement officers who brought appellant to the airplane. Although appellant seemed to be aware of his *Miranda* rights, the *Miranda* violation that occurred during the first interrogation gave appellant no reason to believe that the detectives would honor any assertion of his *Miranda* rights in a subsequent interrogation. For these reasons, appellant's request to Detective Hagen in Albuquerque to speak confidentially with him was not a silver bullet that rendered the subsequent interrogation compliant with *Miranda*.

Although it was appellant who approached Detective Hagen, the inherently coercive atmosphere prevented appellant from truly reinitiating the conversation with his interrogators. Because appellant was in close

quarters with his interrogators, the pressure on him to talk was palpable. Appellant talking to Detective Hagen on the tarmac was akin to a suspect making a substantive comment to an interrogator who had kept the suspect in an interrogation room for several hours following the suspect's invocation of the right to silence. Appellant speaking to Detective Hagen on the tarmac rather than in the airplane did not alter the inherently coercive dynamic of the trip between Ohio and California: It would be ludicrous to suggest that appellant was free to wander about the airport while the jet was refueling.

Even if this Court concludes that appellant reinitiated the conversation with the police during the refueling stop in Albuquerque, the trial court erred when it determined that appellant's subsequent assertion of his right to silence in San Bernardino, before the cigarette break, was nullified by appellant's reinitiation of the conversation during the break. As the trial court found, Detective Hagen recognized that appellant asserted his right to silence during the San Bernardino interrogation when he said that he would not answer more questions. (16 RT 4280.) The trial court erred, however, in finding that appellant had reinitiated the conversation after that.

Detective Hagen's initial response to appellant's assertion of his rights constituted another violation of appellant's *Miranda* rights. After a suspect has invoked his *Miranda* rights, the interrogating officer may not say something to the suspect that is reasonably likely to elicit response. (See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301-302.) Detective Hagen made such a statement when he told appellant that he had "no doubt [appellant] did it." (16 RT 4343; 12 CT 3293.) It is difficult to conceive of another comment Detective Hagen could have made that would be more likely to elicit a response from a suspect. A law enforcement officer opining that a suspect is guilty is the axiomatic remark that courts deem reasonably

likely to elicit a response from a suspect. (See *Commonwealth v. Larkin* (Mass. 1999) 708 N.E.2d 674, 678, fn. 4.)

Moreover, after Detective Hagen purportedly agreed to appellant's request to be taken back to his cell, Detective Hagen made another comment that was reasonably likely to elicit a response: "You say you wanted to cooperate. I know there's somebody else involved." (12 CT 3293.) Anything appellant said a few minutes later during the cigarette break was tainted by Detective Hagen's response-inducing remarks and could not be deemed a reinitiation by *appellant* of the interrogation. (See *People v. Boyer* (1989) 48 Cal.3d 247, 274-275 [holding police reinitiated conversation with suspect when suspect speaks following police remarks that are reasonably likely to elicit a response].)

By remarking that he had no doubt appellant committed the crimes and that he knew there was somebody else involved, Detective Hagen failed to scrupulously honor appellant's right to cut off questioning. (See *Michigan v. Mosley*, *supra*, 423 U.S. at p. 104.) Accordingly, appellant speaking to the detectives during the cigarette break did not constitute a reinitiation of the conversation because the interrogation never truly ended.

However, if this Court finds that the interrogators honored appellant's assertion of the right to silence by taking the cigarette break, the trial court's denial of appellant's motion to suppress was erroneous nonetheless. As explained above, Detective Hagen's comments were reasonably likely to elicit a response from appellant. Thus, when appellant spoke during the cigarette break, it was Detective Hagen — not appellant — who had reinitiated the conversation. (See *People v. Boyer*, *supra*, 48 Cal.3d at pp. 274-275.)

One of the main purposes of *Miranda* is to protect a suspect's right to silence by giving him the opportunity to cut off questioning and thereby

prevent police from badgering him into making incriminating statements against his will. (See, e.g., *Miranda v. Arizona*, *supra*, 384 U.S. at p. 474 ["Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked"].) Such badgering is precisely what happened here. Appellant's statements were taken in violation of his *Miranda* rights under the Fifth and Fourteenth Amendments, and the use of his statements against him at trial was unconstitutional.

C. The Unconstitutional Admission of Appellant's Statement Was Prejudicial

The erroneous failure to suppress a defendant's confession or admission is reversible error unless the prosecution can show that the admission of the defendant's statement is harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *Chapman v. California* (1967) 386 U.S. 18, 23; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) The question for resolution is "not whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the court must look to "the basis on which the jury *actually rested* its verdict. [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

As explained above (see, *ante*, at pp. 223-226), the prosecution

argued that appellant made admissions during the second interrogation that demonstrated his guilt. Appellant admitted using Andres Dominguez's cellular phone after that incident. Appellant also admitted that he possessed small guns around the time of these incidents. Lastly, appellant said "click, click, click" with respect to the Richards robbery, suggesting that appellant knew the gun jammed, and therefore was the perpetrator of that crime.

However, without appellant's damaging admissions, the evidence that appellant – rather than Seeney and/or the McKinney brothers — committed the crimes in this case was not overwhelming, as reflected by the fact that the first trial resulted in a hung jury. (See Bateman, *Blast It All: Allen Charges and the Dangers of Playing with Dynamite* (2010) 32 U. Haw. L. Rev. 323, 340 [citing research demonstrating that close cases create most hung juries].) Therefore, the erroneous admission of appellant's statements cannot be deemed harmless under the overwhelming-evidence test adopted by the United States Supreme Court in *Harrington v. California* (1969) 395 U.S. 250, 254 [evidence of defendant's guilt so overwhelming that unconstitutional admission of co-defendant's incriminating statement was harmless].

There was no physical evidence tying appellant to the robbery and attempted murder of James Richards, or to the robbery and murders of Andres Dominguez and Victor Henderson. The evidence against appellant with respect to the robbery and attempted murder of James Richards consisted of: (1) Richards's identification of appellant, which appellant established was tainted by suggestive police procedures and therefore unreliable (see *ante*, Argument I); (2) the incriminating testimony of Sylvester Seeney and Phyllis Woodruff, both of whom were given transactional immunity and had motives to lie (see *ante*, at pp. 16-20-105-107); and (3) the close proximity of where Richards was robbed to the

home of appellant and Seeney's aunt and uncle's home (16 RT 4157), and of where Richards's taxicab was parked to appellant and Seeney's apartment (16 RT 4151), circumstantial evidence that pointed as much to Seeney as it did to appellant. (14 RT 3729, 3737.) Furthermore, a stolen gun that had a tendency to jam was seized from the apartment of Brad and Cory McKinney, close friends of Seeney's, which provided additional circumstantial evidence of third-party culpability. (14 RT 3642; 15 RT 3997-4001.)

The evidence against appellant with regard to the robbery and murders of Andres Dominguez and Victor Henderson also pointed to third-party culpability. Andres Dominguez was robbed and murdered on the same street in Bloomington as the robbery and attempted murder of Richards, approximately a half mile from appellant and Seeney's aunt and uncle's home. (16 RT 4157.) Again, this was circumstantial evidence that tended to incriminate Seeney as much as it did appellant. It could also have pointed to Cory McKinney, who was a close friend and associate of Sylvester Seeney. As defense counsel asserted in his guilt-phase closing argument:

> [Y]ou received evidence about this residence on Mindanao out in Bloomington which apparently had been a family home of the Wilsons and you were told it is not far from the crime scene of the Dominguez murder and also the place where Mr. Richards was robbed. *Of course, again, that would have been the family home of Mr. Seeney as well and it, we know the McKinneys were good friends of Mr. Seeney.*

(18 RT 4902, emphasis added.)

Although appellant used Dominguez's phone several hours after Dominguez's murder, the phone was also used by Cory McKinney. (16 RT 4180; 16 RT 4209.) Moreover, the phone was on the seat beside McKinney in the rental car the morning after the murder, and McKinney took the phone with him when he got out of the car. (17 RT 4601.)

In addition, the man who was seen trying to climb into the getaway car after the Victor Henderson shooting was called "Trey" by the getaway driver (16 RT 4039, 4055), which was Cory McKinney's nickname. The man wore a puffy white jacket, which according to witnesses, extended to the man's lower thighs. (15 RT 3989; 16 RT 4034-4038, 4055-4060.) The white jacket appellant borrowed from Seeney was waist length. (17 RT 4340; 18 RT 4872.)

Witnesses also reported that the fleeing assailant appeared to injure his leg as he attempted to get into the getaway car. (15 RT 3984-3985; 16 RT 4039-4040.) However, the evidence as to whether appellant had an injured leg was conflicting (14 RT 3586-3588, 3706, 3725-3727; 16 RT 4164, 4192; 17 RT 4587-4588; 18 RT 4752), and there was also evidence that Cory McKinney had an injured leg. (16 RT 4208; 17 RT 4591, 4601.) Finally, a shoe found 150 feet from where "Trey" was seen struggling to get into the getaway car was size 10½, which was Cory McKinney's size, and also Sylvester Seeney's size. (17 RT 4587.) Appellant wears a size 12. (18 RT 4919.)

Because the evidence establishing that appellant, rather than Sylvester Seeney and/or Cory McKinney, committed the crimes charged in this case was far from overwhelming, respondent cannot prove beyond a reasonable doubt that the jury's guilty verdict was "surely unattributable to" the admission of the incriminating statements appellant made during the San Bernardino interrogation. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) This is especially true in light of the tremendous persuasive impact that confessions and admission have on juries. As the late Justice Potter Stewart observed in his dissenting opinion in *Bruton v. United States*:

> [T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against

> him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

(*Bruton v. United States* (1968) 391 U.S. 123, 139-140.) Accordingly, appellant's conviction and death sentence should be reversed.

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VII.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR NEW TRIAL WITHOUT DETERMINING WHETHER APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS FUNDAMENTAL RIGHT TO TESTIFY

A. Introduction

After the jury returned a death verdict, but before appellant was sentenced, he told the probation officer preparing the presentence probation report that he had asked his attorney to let him testify in his own behalf, but his attorney advised against it and refused to allow it. (Probation Report, p. 2; 22 RT 5999-6000.) When defense counsel received the probation officer's report containing this information, he requested that the court appoint counsel to investigate appellant's claim and, if appropriate, file a motion for new trial on appellant's behalf. (22 RT 6000.)

The trial court appointed attorney Grover Porter to represent appellant regarding this issue. (22 RT 6008.) Porter filed a motion for new trial on August 5, 2003 (11 CT 3150-3158), and the District Attorney filed an opposition on August 12, 2003. (11 CT 3159-3165.) The court heard and denied the motion on August 27, 2003. (22 RT 6034-6041.)

The essence of appellant's claim, as set forth in his sworn declaration attached to his new-trial motion, was that his attorney prevented him from testifying and that appellant was not aware until *after* the trial that he had the absolute right to testify, even over his attorney's objections. (11 CT 3156-3157.)

At the hearing on the motion, the prosecutor called appellant's trial counsel, Joseph Canty, as a witness. Canty testified that he had recommended to appellant that he not testify, but that he never told appellant in "emphatic, conclusive terms that he was not going to testify in

the case." (22 RT 6036-6037.) However, in his testimony Canty did not dispute, or even address, appellant's claim that he was not aware of his absolute right to testify, even over Canty's objections.

The prosecutor argued, and the trial court agreed, that Canty did not prevent appellant from testifying, and that it was untimely for appellant to have waited until the time of sentencing to raise the claim. (22 RT 6038-6040.) At this point, Porter argued that appellant was not even aware of his constitutional right to testify until he was interviewed by the probation officer for purposes of sentencing. (22 RT 6041-6042.) However, the trial court believed it unnecessary to determine whether Canty had ever advised appellant of his right to testify, and denied the motion based on its finding that Canty had not refused to let appellant testify:

> Even assuming that's true, I still don't see and don't find that Mr. Canty denied him his right to testify, and that's my finding.

(22 RT 6041.)

The trial court erroneously failed to determine whether or not appellant knew he could insist on testifying over his attorney's objection. Even assuming his attorney never told him he could *not* testify, and appellant merely misinterpreted counsel's strong opposition as preclusion, unless appellant was aware that the decision whether to testify was his alone, he did not voluntarily relinquish his right to do so. If appellant was unaware of his constitutional right to testify, as his undisputed declaration stated, then his relinquishment of that right was neither knowing nor intelligent, and he was entitled to a new trial.

B. The Right to Testify Is a Fundamental Constitutional Right, and the Decision Whether to Testify Belongs to the Defendant

A criminal defendant has a constitutional right, under the due

process clause of the Fourteenth Amendment, and the compulsory process clause of the Sixth Amendment, to testify in his own behalf. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-52; *People v. Allen* (2008) 44 Cal.4th 843, 860.) The Supreme Court in *Rock* described the right to testify in one's own behalf in defense to a criminal charge as a *"fundamental constitutional right*" (483 U.S. at p. 53, fn. 10, emphasis added), "one of the rights that 'are essential to due process of law in a fair adversary process.'" (*Id.* at p. 51, quoting *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15.) The Court further declared that:

> Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the [Sixth] Amendment,". . . is an accused's right to present his own version of events in his own words."

(*Id.* at p. 52, internal citation omitted.)

The right to testify guarantees the right to ultimately choose whether or not to testify. (*Jones v. Barnes* (1983) 463 U.S. 745, 751; *United States v. Teague* (11th Cir. 1992) 953 F.2d 1525, 1532.) Because the decision whether to testify belongs to the defendant, if the defendant insists on testifying, over his attorney's objections, he cannot be deprived of that opportunity. (*People v. Allen, supra*, 44 Cal.4th at p. 860; *People v. Robles* (1970) 2 Cal.3d 205, at pp. 214-215.)

C. If Trial Counsel Failed to Advise Appellant of His Right to Testify Against Counsel's Advice, Then Appellant Did Not Effectively Waive His Right to Testify

Although this Court has held that a trial court need neither advise a criminal defendant of his or her right to testify, nor obtain an on-the-record waiver of that right, unless a conflict with counsel comes to its attention (*People v. Enraca* (2012) 53 Cal.4th 735, 762), it has recognized that

"[w]hen a defendant undergoes a jury trial any competent defense counsel will inform him of his right . . . to testify or not to testify." (*People v. Murphy* (1972) 8 Cal.3d 349, 366; *People v. Cox* (1991) 53 Cal.3d 618, 670.)

As explained by the en banc Court of Appeals for the 11th Circuit, if defense counsel does *not* inform the defendant of his constitutional right to choose whether to testify, the defendant cannot validly waive that right:

> Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst* 304 U.S. 458, 464 [parallel citations omitted] (1938) (emphasis added.)

(*United States v. Teague* (11th Cir. 1992) 953 F.2d 1525, 1533; see also *United States v. Pennycooke* (3rd Cir.1995) 65 F.3d 9, 13 [defense counsel has duty to advise defendant of right to testify to ensure any waiver is knowing and intelligent]; *People v. Naranjo* (Colo. 1992) 840 P.2d 319, 324 [if defense counsel never informed defendant of right to testify, counsel neglected vital professional responsibility of ensuring that defendant's right to testify is protected and any waiver is knowing and voluntary].)

Accordingly, if a defendant tells the trial court that he did not learn of his fundamental constitutional right to testify until *after* his conviction, the trial court cannot assume that defense counsel properly advised him of that right and that the defendant knowingly and intelligently waived it.

In this case, despite appellant's undisputed assertion that he did not find out about his right to testify over his attorney's objection until after trial, the trial court found that appellant's right to testify had not been

violated, without making any determination as to whether trial counsel ever explained to appellant that the choice whether to testify was his alone. It is apparent from the trial court's ruling, quoted above, that the court did not understand it was necessary to resolve that issue before deciding whether appellant had been deprived of his right to testify.

Regardless of whether defense counsel told appellant he would not allow him to testify, if counsel never informed appellant that he had the right to disregard counsel's advice and testify, there was "no intentional abandonment or relinquishment of a *known* right or privilege" by appellant and, thus, no effective waiver of his right to testify. (*United States v. Teague*, *supra*, 953 F.2d at p. 1533; see also *Deluca v. Lord* (S.D.N.Y. 1994) 858 F.Supp. 1330, 1356 ["Clearly, a defendant who is unaware that [he] has the right to assert [his] desire to testify over [his] attorney's wishes cannot be deemed to have waived [his] right knowingly and voluntarily].) Under these circumstances, appellant's constitutional right to testify would have been violated.

D. Reversal Is Required Because The Trial Court Abused Its Discretion in Denying Appellant's Motion for New Trial

A trial court's decision whether or not to grant a motion for new trial is reviewed for abuse of discretion, and such an abuse of discretion occurs if the trial court based its decision on impermissible factors or an incorrect legal standard. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) As noted above, the trial court in the instant case had before it appellant's undisputed assertion that he had not been advised, and therefore was unaware, of his right to testify over the objection of his attorney. As the cases discussed above make clear, it was thus incumbent upon the court to make a determination as to whether appellant had knowingly and voluntarily waived that right. However, the trial court erroneously ruled that even

assuming appellant did not assert his right to testify because he was unaware of its existence, his right to testify was not violated. The trial court therefore abused its discretion in denying appellant's motion for new trial.

Accordingly, the judgment should be reversed and the case remanded to the trial court for a further hearing on appellant's motion for new trial to determine whether appellant knowingly and voluntarily waived his right to testify. (*People v. Braxton* (2004) 34 Cal.4th 798, 820 [if record insufficient to permit a reviewing court to determine as a matter of law whether motion for a new trial was meritorious, reviewing court may remand the case for a hearing on motion];[89] see also *People v Knoller*. *supra*, 41 Cal.4th at p. 159 [where court applied incorrect legal standards in ruling on motion for new trial, judgment reversed and case remanded for reconsideration of motion]; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1148-1149 [reversing judgment and remanding for hearing on new trial motion alleging incompetent representation, where trial court failed to make necessary inquiries].) If, upon remand, the trial court determines that appellant did not knowingly and intelligently waive his right to testify, or if it determines that a fair hearing on this issue is no longer feasible, then appellant must be granted a new trial. (*People v. Braxton*, *supra*, 34 Cal.4th at p. 820 [holding defendant must receive new trial, if after remand trial court determines either that new trial motion is meritorious or that a fair

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[89]In *People v. Braxton*, this Court affirmed the Court of Appeal's holding that the trial court had erroneously refused to hear the defendant's oral new trial motion alleging juror misconduct. (*Id.* at p. 807, fn. 2.) Although the trial court in the present case held a hearing on appellant's new trial motion, it erroneously failed to make the factual determination necessary to the resolution of appellant's claim of entitlement to a new trial. Therefore, as was the case in *Braxton*, the record herein is insufficient to permit this Court to determine as a matter of law whether appellant's motion for new trial is meritorious.

hearing on motion is no longer feasible].)

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VIII.

THE TRIAL COURT VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO RECEIVE A SPEEDY TRIAL

A. Facts and Procedural History

On October 17, 2001, over nineteen months after his arrest, appellant first asserted his right to a speedy trial in response to being asked to agree to a January 14, 2002 trial date. Appellant said he would waive time for only thirty additional days. At this time, appellant's time waiver extended only thirty days from October 24, 2001. Based on the waiver already in effect and the ten-day buffer provided by law, the trial court set a trial date of December 3, 2001. Defense counsel said he would not be ready for trial before March 2002, and the court invited defense counsel to file a motion seeking a continuance. (2 RT 360-364.)

On November 8, 2001, defense counsel Joseph Canty, who was a deputy for the San Bernardino Public Defender Office, moved to continue the trial date from December 3, 2001, to March 4, 2002. In the motion, defense counsel stated that when he was assigned appellant's case, he represented two other capital defendants. Canty explained that the trial in one those cases lasted from February to May 2001. He wrote that he had been preparing for his previously assigned capital case, because that case was older and on track to be tried first, and because he had not anticipated that appellant would demand a speedy trial. Canty articulated that he needed time to prepare appellant's case further so that he could represent appellant competently and effectively. For those reasons, Canty requested that the trial court set a March 4, 2002 trial date, at which time *in limine* motions could be litigated, and summon a jury for March 11, 2002. (2 CT 492-493.)

At the oral argument on the motion, which was held on November 8,

2001, Canty explained that he needed to do further investigation and preparation of appellant's case, and could not complete those necessary tasks by December 3, 2001. (2 RT 437.) The prosecutor did not object to the continuance. (2 RT 438.) The trial court, noting the complexities of a capital case, ruled that Canty had shown just cause for a continuance because he was in trial or preparing for other death penalty cases. The court stated that a death sentence in another case had been reversed the previous day because the defense attorney had not adequately prepared for trial. The court told Canty that it expected him to devote his full efforts to preparing for trial in this case. (2 RT 438-439.)

Appellant addressed the court and stated that counsel could not waive his right to a speedy trial on his behalf. Appellant recited the text of the Sixth Amendment and asserted that the eighteen months that had elapsed since Canty began representing him provided counsel with sufficient time to prepare for appellant's trial. Appellant therefore urged the trial court to deny the continuance. (2 RT 441-442.)

The trial court explained that defense counsel had been involved in other capital cases and needed a reasonable time to prepare for appellant's trial. The court added that it believed that giving counsel adequate time to prepare served appellant's best interests. The court stated that counsel would now devote his full efforts to preparing appellant's case. (2 RT 442-443.)

Unhappy that the court granted the continuance, appellant requested a *Marsden*[90] hearing. (2 RT 443.) One week later, on the date for which the court had scheduled the hearing, appellant stated that he no longer wished to make a *Marsden* motion. Nevertheless, appellant continued to decline to

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[90]*People v. Marsden* (1970) 2 Cal.3d 118.

waive his right to a speedy trial. (2 RT 446-447.)

B. Appellant's Rights to a Speedy Trial Were Violated

1. Appellant's Case Should Have Been Dismissed under Penal Code Section 1382, Subdivision (a), Because the Delay Was Attributable to the Fault or Neglect of the State and Was Therefore Unjustified

"An unexcused delay beyond the time fixed in section 1382 of the Penal Code without the defendant's consent entitles the defendant to a dismissal." (*People v. Martinez* (2002) 22 Cal.4th 750, 766, quoting *People v. Godlewski* (1943) 22 Cal.2d 677, 682.) Penal Code section 1382, subdivision (a), provides that absent a showing of good cause, a defendant accused of a felony is entitled to a dismissal of the charges against him if he is not brought to trial within 60 days of the arraignment.

Following the preliminary hearing, the court on August 31, 2000, held appellant to answer to stand trial in Superior Court. (1 CT 271-274.) The court scheduled the arraignment for September 13, 2000. On that day, appellant waived formal arraignment and waived his speedy trial rights through sixty days after October 22, 2000. (2 RT 77.) Appellant subsequently made six additional speedy trial waivers. (2 RT 282, 298, 302, 347, 349, 354.) In his final waiver, appellant waived time to thirty days after October 24, 2001, which required appellant's trial to begin by December 3, 2001. (2 RT 354, 364.) While awaiting defense counsel's motion for a continuance, the court set December 3, 2001 as the trial date. (2 RT 364.)

Accordingly, appellant was entitled to dismissal of the charges under Penal Code section 1382, unless good cause for the delay was established. The record definitively demonstrates that the trial court found good cause entirely because defense counsel's other case responsibilities prevented him from being able to investigate and prepare appellant's case adequately by

December 3, 2001. An attorney's work for *other clients* cannot form a valid basis for overriding *appellant's* speedy trial rights.

In *People v. Johnson* (1980) 26 Cal.3d 557, 567, this Court held that counsel's request to postpone trial beyond the statutory period, if based solely upon defense counsel's obligations in other cases, cannot stand unless it is supported by the express or implied consent of the client. This Court criticized the precedents that assumed that court congestion or excessive public defender caseloads necessarily constitute good cause to deny dismissal on speedy trial grounds. (*Id.* at pp. 570-71.) This Court explained:

> In 1901 this court in *In re Begerow* (1901) 133 Cal. 349, 355, stated that the purpose of the state constitutional protection of the right to a speedy trial is "to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers." "[T]he state or its officers," we must observe, includes not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants; "oppression" or "neglect" may include the failure to provide the facilities and personnel needed to implement the right to speedy trial.
>
> A defendant's right to a speedy trial may be denied simply by the failure of the state to provide enough courtrooms or judges to enable defendant to come to trial within the statutory period. The right may also be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel. "[U]nreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn."

(*Id.* at p. 571, quoting *Barker v. Wingo* (1972) 407 U.S. 514, 538 (conc. opn. by White, J).) This Court added:

> The state cannot reasonably provide against all contingencies

> which may create a calendar conflict for public defenders and compel postponement of some of their cases. On the other hand, routine assignment of heavy caseloads to understaffed offices, when such practice foreseeably will result in the delay of trials beyond the 60-day period without defendant's consent, can and must be avoided. A defendant deserves not only capable counsel, but counsel who, barring exceptional circumstances, can defend him without infringing upon his right to a speedy trial. Thus the state cannot rely upon the obligations which an appointed counsel owes to other clients to excuse its denial of a speedy trial to the instant defendant.

(*People v. Johnson*, *supra*, 26 Cal.3d at p. 572). This Court in *Johnson* therefore held that counsel's obligations to other clients did not constitute good cause for granting a continuance over the defendant's objection. (*Id.* at p. 573.)

More recently this Court examined *Johnson* in *People v. Sutton* (2010) 48 Cal.4th 533. In *Sutton*, this Court delineated the scope of *Johnson*. This Court explained:

> [T]he focus of the court's concern in *Johnson* with respect to the good-cause issue involved the impropriety of justifying a delay in trial upon appointed counsel's inability or unavailability to try the case when it is the state that realistically bears responsibility for counsel's unavailability because of its chronic failure to provide a number of public defenders or appointed counsel sufficient to enable indigent defendants to come to trial within the prescribed statutory period.

(*Sutton*, at p. 553.) This Court accordingly concluded good cause for a continuance existed because defense counsel's trial for another client unexpectedly did not end by the trial date, which was scheduled for the last day in which he could receive a speedy trial. (*Id.* at p. 556.)

Thus, defense counsel's obligations to his other clients can create good cause for a continuance that overrides a defendant's speedy trial rights when the delay is not the product of systemic flaws in the criminal justice

system. As this Court noted in *Sutton*, the state is responsible for the delay only when it has been caused by a failure to provide enough attorneys to permit indigents to get tried within the sixty-day speedy-trial period. (*People v. Sutton*, *supra*, 48 Cal.4th at p. 553.) That was the case here.

The state could not have brought appellant to trial prior to the expiration of his time waiver. Although twenty months had elapsed since defense counsel had been assigned appellant's case, he still needed three more months to prepare for appellant's trial, despite his intention to devote all of his work time to appellant's case. Defense counsel did not have a second attorney assist him in representing appellant.[91] Because the trial court premised its finding of good cause for a continuance on defense counsel's need for ninety days to prepare for appellant's trial, the trial court's ruling implied that defense counsel could not adequately prepare for trial in sixty days, and that the San Bernardino County Public Defender's office lacked sufficient personnel to expedite the trial preparation and bring appellant's case to trial within the period required by state law.

Moreover, Canty was assigned to two other capital cases when he received the assignment to represent appellant. Although this Court has stated that the size of a defense attorney's caseload does not demonstrate a systemic flaw in an indigent-defense system where plea agreements are regularly reached on the eve of trial (see *People v. Suttton*, *supra*, 48 Cal.4th at p. 553), plea bargains are reached far less often in capital cases than in run-of-the-mill criminal cases. (See Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations on the Administration of

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[91]On two days in which Canty anticipated that he would have to testify, Deputy Public Defender Michael Knish also appeared in court. (16 RT 4093; 17 RT 4577.) Knish also appeared for Canty on the day the court conducted hardship voir dire at the first trial. (3 RT 537-538, 624, 713.)

the Death Penalty in California (June 30, 2008), pp. 80-81 [noting five percent of LWOP judgments were obtained via plea agreement and presuming that many of those LWOP pleas had been capital cases].) Consequently, Canty's capital caseload is pertinent evidence of the San Bernardino County criminal justice system's systemic inability to provide speedy trials to capital defendants.

Furthermore, this case is quite different from *Sutton*. In *Sutton*, the delay was neither anticipated nor inevitable. Instead, the delay was caused by the defense attorney's trial in another case taking longer than expected. In this case, by contrast, when appellant invoked his speedy trial rights, there was no chance that appellant could receive a speedy trial within the period prescribed by law. Thus, as distinguished from *Sutton*, the failure to try appellant's case within the statutory period was attributable to the state. Accordingly, there was no good cause for which to grant the continuance over appellant's objection. Without "good cause" for the delay, the court had no choice but to dismiss the case. (*People v. Wilson* (1963) 60 Cal.2d 139, 151 [Penal Code section 1382, subdivision (a), is mandatory].) Its failure to do so was error.

2. Appellant's State Constitutional Right to a Speedy Trial Was Violated When His Trial Was Continued Beyond the 60-day Period, over His Objection, without Good Cause

The right to a speedy trial is guaranteed under article I, section 15, clause 1 of the California Constitution, and is one of the fundamental rights possessed by a defendant in a criminal action. (See Pen. Code, § 686(1) ; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88.) In *Sykes*, this Court explained:

> In our view [Penal Code] section 1382 constitutes a legislative endorsement of dismissal as the proper judicial sanction for violation

> of the constitutional guarantee of a speedy trial and as a legislative determination that a trial delayed more than 60 days is prima facie in violation of the defendant's constitutional right. The legislature "by necessary inference had said that a trial delayed more than 60 days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision." [Citation omitted.].

(*Id.* at p. 89; see also *People v. Martinez*, supra, 22 Cal.4th at p. 766 [constitutional speedy trial right is construed and implemented by Penal Code section 1382].)

Accordingly, appellant was deprived of his fundamental right to a speedy trial under the California Constitution when the trial court continued his trial beyond the statutory period over his objection, without good cause.

C. Appellant Was Prejudiced by the Trial Court's Erroneous Denial of His Motion to Dismiss for Violation of His State Statutory and Constitutional Speedy Trial Rights

Although a defendant seeking pretrial review of post-indictment or post-information delay is not required to affirmatively show that he has been prejudiced by a violation of his right to a speedy trial under Penal Code section 1382, subdivision (a), and art. I, section 15, clause 1 of the California Constitution, this Court has held that upon appellate review, following conviction, a defendant who seeks to predicate reversal of his conviction upon denial of his right to a speedy trial must show that the delay caused prejudice. The appellate court must "weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself." (*People v. Wilson*, *supra*, 60 Cal.2d at p. 151; accord *People v. Johnson*, *supra* , 26 Cal.3d at p.575.)

The delay in bringing appellant to trial was prejudicial. As the United States Supreme Court explained, the right to a speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to

trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." (*United States v. Ewell* (1966) 383 U.S. 116, 120.) Appellant had been incarcerated for nearly two years, and awaiting trial while his life hung in the balance inevitably produced great anxiety. Although the prosecution in this case could have refiled the charges had they been dismissed under Penal Code section 1382, dismissing and refiling the charges would neither have impacted appellant's incarceration nor ameliorated appellant's anxiety.

D. Appellant Is Also Entitled to Reversal Because His Right to a Speedy Trial under the Sixth and Fourteenth Amendments to the United States Constitution Was Violated

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." The right to a speedy trial is a fundamental right secured by the Sixth Amendment and is made applicable to the states by the Fourteenth Amendment. *Klopfer v. North Carolina* (1966) 386 U.S. 312, 323.) The right attaches either when a defendant is charged by "a formal indictment or information" or when the defendant is subjected to "the actual restraints imposed by arrest and holding to answer a criminal charge." (*People v. Martinez*, *supra*, 22 Cal.4th at p 761, quoting *United States v. Marion* (1971) 404 U.S. 307, 320.)

In *Barker v. Wingo*, the United States Supreme Court enunciated the test to be employed by a court in deciding whether to dismiss a criminal action for violation of the speedy trial clause. The Court stated:

> The approach we accept is a balancing test in which the conduct of both the prosecution and the defense are weighed. A balancing test compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some

> of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant.

(*Barker v. Wingo*, *supra*, 407 U.S. at p. 530.)[92]

In *Barker*, the Supreme Court defined delay that would trigger a speedy trial claim, as "some delay which is presumptively prejudicial," and stated that the "length of the delay that will provoke such an inquiry is necessarily dependent on the peculiar circumstances of the case." (*Barker v. Wingo, supra,* 407 U.S. at pp. 530-531.) The Court noted that "[t]o take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." (*Id.* at p. 531.) The Court also noted, with apparent approval, a First Circuit opinion in which the court had found "a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony." (*Id.* at p. 531, fn. 31.) In *Doggett v. United States* (1992) 506 U.S. 647, 652, fn. 1, the Supreme Court observed that "[d]epending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." As discussed above, under California law in effect at the time of appellant's trial, a delay of more than 60 days from the filing of the indictment or information, without good cause shown, entitles the defendant to dismissal of the charges. (*People v.*

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[92]In *Doggett v. United States* (1992) 506 U.S. 647, 651, the Court described the test enunciated in *Barker* as "four separate enquiries: whether the delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as a result of that delay."

Martinez, *supra*, 22 Cal.4th at p. 766; *People v. Wilson*, *supra*, 60 Cal.2d at p. 160.)

In this case, appellant first sought dismissal of his case for violation of his speedy trial rights on October 17, 2001, approximately 19 months after his arrest and detention and 13 months after he had initially been held to answer. By the time the trial court ruled on defense counsel's motion for a continuance, appellant had been in custody for over 20 months. Under the circumstances, appellant was subjected to inordinate delay sufficient to trigger the speedy trial analysis set forth in *Barker*, *supra*.

In weighing the "reason for the delay," the Supreme Court instructed that:

> different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

(*Barker v. Wingo*, *supra*, 407 U.S. at p. 531.) Although there was no deliberate attempt to delay the trial in the instant case, the delay was caused by a systemic inability to provide appellant with a trial within the period prescribed by Penal Code section 1382.

Regarding the third factor, *Barker* declared that "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." (*Id.* at pp. 531-532.) In this case, appellant unambiguously asserted his speedy trial rights. (2 RT 362-363, 441-442.)

Finally, for the reasons set forth in the prior subsection, the delay

was prejudicial. Reversal of appellant's conviction and death sentence is therefore required.

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IX.

GUILT-PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

At the guilt phase of the retrial, the trial court instructed the jury with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (18 RT 4787-4788, 4793-4794, 4796, 4810-4811.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship* (1970) 397 U.S. 358, 364), and thereby deprived appellant of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, 15-16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) By relieving the prosecution of its burden to present the full measure of proof at the guilt phase, they also violated the fundamental requirement of reliability in a capital case. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because these instructions violated the federal Constitution in a manner that can never be harmless, the judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims

for federal review, if necessary.[93]

A. The Instruction on Circumstantial Evidence — CALJIC No. 2.01 — Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given CALJIC No. 2.01, addressing the relationship between the reasonable doubt requirement and circumstantial evidence. (18 RT 4787-4788.) This instruction advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (18 RT 4788.) The instruction thus informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty — even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17).[94]

First, the instruction compelled the jury to find appellant guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance

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[93]In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly rejected challenges to standard guilt phase instructions will also be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents those claims here.

[94]Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

of reasonableness: The jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than that constitutionally mandated.

Second, the circumstantial evidence instruction required the jury to draw an inculpatory inference when the inference appeared "reasonable." The instructions thus created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even if explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the instruction given here, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless appellant produced a reasonable interpretation of that evidence pointing to his innocence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instruction, the

jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave three other standard instructions at the guilt phase that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.2 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony), and 2.27 (sufficiency of testimony of one witness). (18 RT 4793-4794.) Another guilt-phase instruction, CALJIC No. 8.20 (deliberate and premeditated murder), further violated appellant's constitutional rights. (18 RT 4810-4811.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny — that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt — is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22, regarding the weighing of conflicting testimony, specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard."

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and

deliberation, misled the jury regarding the prosecution's burden of proof at the guilt phase. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt at the Guilt and Penalty Phases

At the guilt phase, the trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(46 RT 5241; 22 CT 5294.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby

lessening the prosecution's burden of proof. However, due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive pertaining to the issues in this case. The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It did not tell the jury that the same evidence could establish a mental state in which appellant did not premeditate, deliberate,

or harbor malice. (Cf. *People v. Martinez* (1984) 157 Cal.App.3d 660, 669.) The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It thereby put a thumb on the scales in preference for the prosecution's view of the evidence and for the imposition of the death penalty.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection, and a reliable determination of guilt and penalty. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *In re Winship, supra,* 397 U.S. at p. 364.)

D. This Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, (1991) 53 Cal.3d 334 at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (see *Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"].)

Furthermore, nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

E. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is

required unless the prosecution can show the error was harmless beyond a reasonable doubt. (See *Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings of guilt and the appropriate penalty are undermined. The dilution of the reasonable-doubt requirement by the instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana* (1990) 498 U.S.39, 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the judgment must be reversed in its entirety.

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X.

CALIFORNIA'S DEATH-PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Many features of California's capital-sentencing scheme violate both the United States Constitution and international law. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.[95]

A. Penal Code Section 190.2 Is Impermissibly Broad

Between the guilt and penalty phases, appellant moved to bar the death penalty for the State's failure to comply with the Eighth Amendment's narrowing requirements. Appellant submitted a detailed

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[95]These claims of error are cognizable on appeal under Penal Code section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here.

declaration from Steven Shatz in support of the motion. (9 CT 2665-10 CT 2724.) The trial court denied the motion. (19 RT 5031.) In doing so, the trial court erred.

To meet constitutional muster, a death-penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant, Penal Code section 190.2 contained 31 special circumstances. (9 CT 2687.)

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Burney* (2009) 47 Cal.4th 203, 268.) This Court should reconsider these rulings and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 22 RT 5911 [CALJIC

No. 8.85(a)].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." (See *Tuilaepa v. California* (1994) 512 U.S. 967, 986-988 (dis. opn. by Blackmun, J.) [noting California prosecutors' extensive, contradictory use of factor (a)].) As a result, California's capital-sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges this Court to reconsider this holding.

C. The Death-Penalty Statute and Accompanying Jury Instructions Fail to Set Forth The Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1998) 16 Cal.4th 1223, 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (22 RT 5911-5914 [CALJIC Nos. 8.85 and 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and, (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (22 RT 5913-5914 [CALJIC No. 8.88].) Because these additional findings were required

before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable-doubt standard on California's penalty-phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death-penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty-phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by the due process clause and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt that the factual bases for its decision are true, and that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.)

Appellant requests that this Court reconsider its holding. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, this Court can have no confidence in either the strength or the reliability of the ultimate verdict. Accordingly, the judgment must be set aside.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (22 RT 5011-5914), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on

the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death-penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."

(*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (22 RT 5913-5914 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (See *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury that the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them that they may return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (22 RT 5913-5914.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender; i.e., it must be

appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (See, e.g., *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an

instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death-penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

D. Failing To Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (see *People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.)

Appellant urges this Court to reconsider its decisions on the necessity of written findings. Written findings in this case would have allowed this Court to determine if the death verdict was the result of improper aggravating factors. If this Court is to affirm the judgment in this case, it must find that these errors were harmless. This Court cannot and should not do so without written findings allowing meaningful review of the basis for the penalty determination.

E. The Instructions to the Jury On Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (22 RT 5912-5912), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital-sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death-penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection

clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (see *People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

H. Intercounty Disparities in Capital Charging Practices Violates the Equal Protection Clause

Prior to the commencement of the penalty phase, appellant moved to dismiss the information on equal protection grounds. Appellant, citing *Bush v. Gore* (2000) 531 U.S. 98, asserted that different counties having different standards for seeking a death sentence violated his Fourteenth Amendment Rights. (9 CT 2601-2606.) The trial court denied the motion. (19 RT 5031.) That was erroneous.

Appellant acknowledges that this Court has rejected this subclaim (see, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 589); however, he asks this Court to reconsider its ruling.

I. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving

standards of decency (*Trop v. Dulles* (1958) 356 U.S. 86, 101)." (See *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, as well as decisions of the United States Supreme Court citing international law in prohibiting the imposition of capital punishment under various circumstances (see *Roper v. Simmons* (2005) 543 U.S. 551, 554 [prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," citing the Brief for European Union as Amicus Curiae]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [noting that "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' [Citation.]"]), appellant urges this Court to reconsider its previous decisions.

Even if the death penalty as a whole does not violate international law, appellant submits that his trial violated specific provisions applicable to his trial. These rights include the right to an impartial tribunal, which demands that each of the decision-makers, including the jury, be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].) It also encompasses standards that require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process

and the smooth functioning of the criminal justice system." (*Guidelines on the Role of Prosecutors*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally, international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision of national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 6(1) of the European Convention; Article XXVI of the American Declaration; and, Article 8 of the American Convention.)

Here, among other violations, appellant's right to a fair trial was violated by the trial court's rulings. The trial court denied appellant's motion to suppress James Richards's unreliable and suggestive identification of appellant. (See Argument I, *ante*.) Also, the trial court erroneously barred appellant from eliciting evidence of Detective Franks's dishonesty and penchant for lying to his supervisors that suggested he disregarded Sergeant Robert Dean's order not to show Richards one of the two photo arrays that had appellant's picture. (See Argument II, *ante*.) Moreover, the trial court denied appellant's motion to suppress Sylvester Seeney's coerced statements and testimony that inculpated appellant. (See Argument III, *ante*.) Then, despite admitting Seeney's testimony and remarks, the court excluded Seeney's recantation of his testimony and statements. (See Argument IV, *ante*.) Appellant submits that the individual and combined effect of each claim raised in this case (see Argument XI, *post*, if fully set forth herein) violated his right to a fair trial under international standards, and therefore this Court should reverse the judgment in this case.

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XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court should find that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt- and penalty-phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [addressing claim that cumulative errors so infected "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The Ninth Circuit Court of Appeals has pointed out that, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the

defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) That observation is applicable to this case, given not only the sheer number of substantial errors, but the way in which those errors operated *synergistically* to deny appellant his state and federal constitutional rights. (See Arguments I through X, *ante*, each of which is hereby incorporated by reference as if fully set forth herein.)

The trial court's erroneous rulings in the guilt phase worked in combination to deprive appellant of a fair trial. First, the court improperly admitted James Richards's unreliable eyewitness identification of appellant (Argument I), and then compounded that error by preventing appellant from effectively establishing that Richards's identification had been tainted by Detective Franks's use of suggestive tactics (Argument II). Second, the trial court improperly admitted Sylvester Seeney's incriminating preliminary hearing testimony, which had been obtained through coercion (Argument III), and then compounded the error by excluding Seeney's subsequent recantation of that testimony (Argument IV). The court further compounded the error by improperly admitting Seeney's incriminating hearsay. (Argument V.) Together, these errors allowed the prosecution to build its case against appellant upon unreliable evidence, and then unfairly prevented the defense from effectively contesting its reliability. The trial court exacerbated the unfairness by improperly admitting statements by appellant obtained in violation of his privilege against self-incrimination. (Argument VI.)

As appellant has argued, any of the errors at the guilt phase, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp.

278-282; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Taken separately or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination of guilt. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, and 17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting convictions and death sentence a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's convictions, therefore, must be reversed. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error].)

The fundamentally flawed verdicts further contributed to an unreliable determination of penalty by the jury. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black* (1992) 503 U.S. 222, 230-232;

Beck v. Alabama, *supra*, 447 U.S. at p. 638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) The errors that combined to taint the guilt phase spilled over into the penalty phase. The evidence admitted at the guilt phase got incorporated into the penalty-phase weighing process, mostly through factor (a). (See Pen. Code, § 190.3, subd. (a).)

The case in aggravation presented at the penalty phase was not so overwhelming compared to the evidence in mitigation that the death penalty was a foregone conclusion. Appellant presented evidence that his schizophrenic mother abused drugs while she was pregnant with him and egregiously neglected appellant after he was born. Appellant's family was displaced often due to his mother's inability to pay the rent. But appellant's many childhood homes shared one key characteristic: Domestic violence was rampant, and appellant was often the target of abuse. Appellant had ADHD and other learning disabilities, and a neuropsychiatrist determined that appellant had damage to the frontal lobe of his brain. Appellant's father was a heavy drinker who would often be incarcerated, and appellant's older brother was a gang member and criminal who unduly influenced appellant. When appellant was incarcerated in CYA custody, he did not receive adequate rehabilitative services and lived in an environment that steered him toward more criminal conduct. (See *ante*, at pp. 22-28.).

It is far more difficult to show harmlessness under *Chapman v. California*, *supra*, at the penalty phase than at the guilt phase. When a jury makes a guilt determination, it must mechanistically determine whether the prosecution has proven every element of a crime. The jury's penalty phase determination is quite different; the jury has discretion to make a subjective

moral judgment.

> [T]he nature of the penalty phase necessarily endows a jury with greater discretion than does the guilt phase. Guilt phase jurors are expected to make findings of fact and apply the law to the facts without injecting their personal feelings or sense of justice. [Footnote.] Penalty phase jurors, by contrast, are expected to bring their own values into play. . . . Since the jury cannot be instructed regarding the proper expression of these values, the death penalty decision necessarily involves subjective and discretionary elements not present when a jury decides the question of guilt.

(Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases — A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 52-53; accord, Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing* (1987) 54 U. Chi. L.Rev. 740, 755 ["[T]he statutory definitions of aggravating circumstances act as only a partial constraint on the decision of the sentencer in a capital case: the sentencer may find some aggravating circumstances and yet still choose not to impose a death sentence. In noncapital cases or in the guilt phase of a capital case, on the other hand, the tribunal's choice is constrained as soon as it finds that the statutorily defined elements of a crime are present"].) Harmless-error analysis at the penalty phase must take this distinction into account. (See *Satterwhite v. Texas* (1988) 486 U.S. 239, 258 ["the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"]; *State v. Kleypas* (Kan. 2001) 40 P.3d 139, 271-273 [recognizing how harmless-error analysis differs at penalty phase]; Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied* (1993) 28 Ga. L.Rev. 125, 150 ["The individual choices jurors make about the existence of mitigating circumstances coupled with the unique weighing of factors creates a

proceeding fundamentally different from a guilt trial. [¶] An analysis of harmless error in the penalty phase should be refined to take into account the unique characteristics of the decision"].)

Accordingly, the prejudicial effect of the foregoing errors, singly and in combination, were reasonably likely to have a continued prejudicial effect upon the jury's consideration of the evidence presented at penalty, as well as upon the jury's ultimate decision to return a sentence of death.

Reversal of the death judgment is mandated here because it cannot be shown that the errors occurring at the guilt phase had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, the special-circumstance findings, and the death sentence.

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CONCLUSION

For all of the foregoing reasons, appellant asks this Court to reverse his convictions and set aside his sentence of death.

Dated: September 3, 2013

Respectfully submitted,

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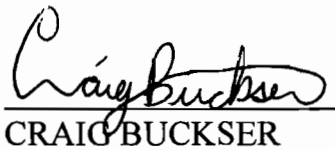
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Craig Buckser, am the Deputy State Public Defender assigned to represent appellant Javance Wilson in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 82,125 words in length excluding the tables and this certificate.

DATED: September 3, 2013



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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Javance Wilson**
Case Number: **Supreme Court No. Crim. S118775**
Superior Court No. FVA 12968

I, Saundra Alvarez, declare that I am over 18 years of age, a citizen of the United States, and not a party to the within cause; my business address is 770 L Street, Suite 1000, Sacramento, California, 95814. On this day I served a true copy of the attached

APPELLANT'S OPENING BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on September 3, 2013, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 3, 2013, at Sacramento, California.

Saundra Alvarez