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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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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DEATH PENALTY

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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

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in Appellant's Opening Brief, does not constitute a concession, abandonment, or waiver of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3). It merely reflects appellant's view that the issue has been adequately presented.

Before replying to respondent's arguments, appellant must point out a significant factual error in respondent's statement of facts. Respondent wrote: "Wilson's fingerprints were discovered inside [Andres] Dominguez's cab." (RB 7, citing 15 RT 4001-4002.) The record shows otherwise. Randolph Beasley, a forensic specialist with the San Bernardino County Sheriff's Department, testified that none of the latent fingerprints found in either Andrew Dominguez's and Victor Henderson's taxicabs matched appellant's fingerprints. (15 RT 3997, 4002.) Indeed, no physical evidence tied appellant to any crime scene in this case.

I

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

Appellant maintains that the trial court erred by allowing the prosecution to present evidence about James Richards's out-of-court and in-court identifications of appellant as the man who had robbed and tried to shoot him on the night of January 7, 2000. (AOB 29-109.) More specifically, appellant argues that: (1) the procedures employed to obtain Richards's identifications of appellant were unduly suggestive and unnecessarily so (AOB 36-72); (2) the prosecution failed to meet its burden to prove that Richards's identifications were based on a reliable memory of the night of the crime, rather than the product of subsequent suggestion by the police and the prosecutor (AOB 72-82); and (3) the trial court applied the wrong test in determining the admissibility of the identification evidence, the erroneous admission of which cannot be deemed harmless beyond a reasonable doubt (AOB 46-47, 82-86, 103-113).

Appellant also requests that this Court update the legal test that California courts use to determine the admissibility of eyewitness identification evidence. (AOB 86-103.) This is necessary because the current test for admissibility is premised on inaccurate assumptions about memory formation and retention, and fails to take into account nearly 40 years of scientific research and development that have altered our understanding about how the brain functions. Updating how state judges perform their gatekeeping role in considering threshold questions regarding the admissibility of this highly persuasive yet unreliable evidence will bring California's practice into alignment with the overwhelming scientific

consensus on best practices when dealing with eyewitness identification evidence.

Respondent argues that the identification procedures used in this case were not unduly suggestive (RB 18-35); that, in any event, Richards's identification of appellant was reliable under the totality of the circumstances (RB 35-39); and that any error in the admission of this evidence was harmless beyond a reasonable doubt (RB 39-41). Respondent further contends — without acknowledging, much less addressing, the current scientific consensus on key issues related to the reliability of eyewitness identification — that this Court need not revise the standard for the admissibility of this type of evidence. (RB 24.)

For the reasons discussed below, and in Appellant's Opening Brief, each of respondent's positions lacks merit.

A. The Eyewitness Identification Evidence Failed to Meet the Required Threshold Showing of "Constitutional Reliability," and Was Erroneously Presented to Appellant's Jury.

Prior to his first trial, appellant moved to exclude Richards's identification on both federal constitutional and state-law grounds. (3 CT 705-824.) The prosecutor opposed the motion (4CT 1065-1077), and the trial court conducted an evidentiary hearing (4 RT 904-1045). At that hearing, appellant presented the testimony of Dr. Kathy Pezdek, an expert on eyewitness identification procedures and memory formation and recall. (4 RT 905-945.) Appellant also called the Deputy District Attorney who had handled the case at the preliminary hearing. Both parties also called law enforcement officers who described the out-of-court identification procedures used during the investigation. The prosecution did not present expert testimony.

The trial court denied appellant's motion. It found no due process violation. In making that ruling, the court concluded that appellant had failed to make "a sufficient showing that [Richards's] identification is worthless, and therefore should be excluded. So I would deny the motion." (4 RT 1082.)[1]

Concerning appellate review, appellant and respondent agree that this Court defers to the trial court's findings of historical fact and determinations of witness credibility, but it independently reviews the record of the evidentiary hearing to determine whether the identification evidence at issue was admissible, notwithstanding a challenge to the evidence on due process grounds. (See AOB 46; RB 22.) The parties also agree that issues of admissibility have been historically resolved by state and federal court judges under the United States Supreme Court's two-part *Manson*[2] test.

More specifically, in *People v. Gordon* (1990) 50 Cal.3d 1223, 1242, this Court explained that, under *Manson*, the eyewitness identification evidence must meet a threshold showing of "constitutional reliability" before it can be presented to the jury. Such reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessarily so; and if it was, (2) whether the identification itself was

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[1]Prior to the start of the retrial, the court indicated that its rulings on motions from the first trial would remain in effect for the second trial. (14 RT 3559-3560.)

[2]*Manson v. Brathwaite* [hereinafter "*Manson*"] (1977) 432 U.S. 98, formally adopting the analysis of *Neil v. Biggers* [hereinafter *Biggers*] (1972) 409 U.S. 188; see *People v. Cunningham* (2001) 25 Cal.4th 926, 989.

nevertheless reliable under the totality of the circumstances. (*Ibid.*, citing *Manson, supra,* 432 U.S. at pp. 104-107.)

1. The Identification Procedures Were Unduly Suggestive, and Unnecessarily So

Turning to the first prong of the *Manson* test, appellant has demonstrated that the evidence offered at the evidentiary hearing showed that the procedures used to obtain Richards's identification of appellant were unduly suggestive, and unnecessarily so. Respondent disagrees, arguing in essence that there was nothing suggestive about the procedures used in this case. It is wrong.

The suggestive procedures at issue include the following: (1) the photo array was not administered using known best practices (double-blind, sequential photo displays), but instead was administered using a non-blind, simultaneous photo array, a technique scientifically proven to result in misidentifications; (2) the administrator of the non-blind photo array either intentionally or inadvertently gave Richards cues as to appellant's picture before Richards identified appellant, and then used techniques that reinforced Richards's selection of appellant, thereby tainting subsequent identifications; (3) law enforcement reused the same photograph of appellant in successive photo arrays, a technique known to adversely affect the accuracy of an identification; (4) the administrator of the photo array improperly gave Richards post-lineup feedback, which falsely inflated the witness's confidence in the identification when he testified; (5) after Richards expressed doubt that he would be able to identify the perpetrator if he were in the courtroom, the prosecutor further tainted the identification by immediately showing appellant's photo to Richards; and (6) both six-pack

photo arrays were put together in a manner that caused appellant's photo to "stand out."

First, appellant presented uncontroverted expert testimony that use of non-blind identification procedures causes "experimenter expectancy effect," which can skew the results of a lineup. (AOB 48-54.) Study after study shows that non-blind procedures risk tainting the identification in this way. (See AOB pp. 30, 49 fn. 26, 51 fn. 27.) Such non-blind procedures were used in this case: The investigating officer — Detective Scott Franks — administered the six-pack photo array to Richards even though he knew appellant's identity and was tasked with building a case against him. (10 RT 2471; 16 RT 4202.)

In addition to the non-blind administration of the photo array, Detective Franks also failed to use a sequential procedure. (AOB 53-55.) Again, uncontradicted expert testimony established that eyewitnesses are less likely to misidentify innocent suspects when photos are presented to the witness sequentially, rather than simultaneously in a single photo array. That is because a sequential display requires the subject to make an absolute choice about each photograph, while a simultaneous array results in a comparative choice. In other words, the simultaneous array results in a relative judgment, in essence asking the question: "Of these six individuals, which is the closest match?" (4 RT 914.)

Respondent does not contest the fact that the identification procedures used in this case were non-blind and simultaneous. It also does not claim that it was at all necessary for Franks, rather than an officer unfamiliar with appellant, to administer a simultaneous photo array to Richards. Nor does respondent take issue with the fact that these procedures are more likely to result in administrator bias and produce errors. Instead,

respondent contends that while sequential double-blind procedures may be "preferable methods for administering a pretrial lineup," no "legal authority" requires their use. (RB 28.) This argument misses the point.

In the application of the first step of the *Manson* test, the issue is not whether double-blind sequential identification procedures were legally mandated, even if they should be. Rather, the issue is whether appellant met his burden of "demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham, supra,* 25 Cal.4th at p. 989.) As to that question, appellant proved that the procedures used in this case were known at the time to skew the results of the lineup and any subsequent in-court identification, and were more likely to result in errors. Respondent does not attempt to explain why or how procedures that are scientifically known to produce skewed results and an increase in errors can be viewed as anything but "unreliable." On this evidence alone appellant has met his burden under *Manson*'s first prong.

Second, appellant did not simply present evidence that the procedures employed were methodologically prone to result in unacceptable rates of error. Rather, appellant has shown that Detective Franks administered the non-blind photo array in a manner that was actually suggestive. (AOB 50-54.) Respondent disagrees, and in doing so it makes the stunning assertion that there is "simply no evidence, and nothing to suggest" that Detective Franks "even remotely" gave Richards a clue as to which photo was that of appellant. (RB 29.) Even a cursory review of the testimony at the evidentiary hearing puts the lie to respondent's claim.

Eyewitness identification expert Dr. Pezdek reviewed the tape recording and transcript of the photo array (see Exhibit 221), and concluded that Detective Franks had made several unnecessary and suggestive

statements that indicated appellant's photo, and created an unwarranted certainty in Richards's choice. For example, Detective Franks was the first person to mention appellant's photo in the array: When Richards moved his finger over the photo array, the detective asked, "What are you pointing to, number five?" (12 CT 3550.) An administrator, without knowledge that the suspect was in fact in position number five, may not have made the mistake of narrowing Richards's choices to a single number. And even a non-blind administrator, like Detective Franks, should have simply asked Richards to explain what he was doing, in a neutral manner. But instead, Detective Franks cued Richards by first asking a question ("what are you pointing to?") and then supplying a possible answer ("number five?"). Only after Detective Franks mentioned "number five" a *second* time, did Richards finally identify appellant's photograph in the fifth position.

While these facts alone rebut respondent's claim that Franks gave no cues to Richards, there is more. After Richards selected appellant's photo, Franks instructed Richards to circle appellant's picture with a pen, a procedure that Dr. Pezdek described as an "unusual" one. Dr. Pezdek explained that this procedure greatly increased the chances that Richards would later identify the person he circled in subsequent lineups and at trial. Thus, there is ample evidence proving that Detective Franks administered the photo array in an unnecessarily suggestive manner.

Third, strong evidence establishes that law enforcement showed Richards three photo arrays; that appellant's DMV photo was used in the second and third arrays; that only appellant's photo appeared in both the second and third arrays; and that only after appellant's photo was reused in the third and final array did Richards claim, not surprisingly, that appellant's picture "just jumped right out" at him, leading to the

identification. (See AOB 56-64.) Uncontested expert testimony at the evidentiary hearing established that use of the same photograph in successive photo arrays adversely affects the accuracy of an identification. And this Court has warned against using this technique. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 124.)

Respondent does not disagree that reuse of a subject's photograph can lead to mistaken identifications. Instead, respondent claims that this procedure was not legally prohibited, and maintains that in any event, Detective Franks showed Richards only two, not three, photo arrays, and only one of those two arrays (the third one) contained appellant's picture. (RB 25-29.) As to this later point, respondent argues that it is "pure speculation and belied by the record" to suggest that Richards saw three photo arrays, two of which contained appellant's picture. (RB 25.) Not so: Richards himself repeatedly testified that he had been shown *three* photo arrays. (1 CT 189; 7 RT 1662.)

Respondent is correct that Detective Franks and his supervisor, Sergeant Robert Dean, testified *at trial* that while three photo arrays were made, two of which contained appellant's photo, Richards was shown only two of them.[3] But a year and a half earlier, when he testified at the preliminary examination, Richards categorically testified that he had been shown *three* photo arrays between February 27 and March 20, 2000. Richards recalled that he had selected appellant's photograph only once,

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[3]Sergeant Dean testified that he told Detective Franks not to administer one of the two photo arrays containing appellant's photo. But Sergeant Dean was not present during any of the photo arrays, and did not claim independent knowledge as to what Detective Franks actually did or did not do in the field.

during the third and final photo array. Moreover, prior to trial, the prosecution conceded that there had been three photo arrays, even though law enforcement had not disclosed the third photo array to the defense.[4]

Much later, the third photo array was discovered. That discovery corroborated Richards's earlier testimony that he had been shown three photo arrays. Only *after* the discovery of the third photo array did law enforcement acknowledge the existence of the third array, but then claimed that Richards had not seen it. Nevertheless, even at trial, Richards remained steadfast about seeing *at least* three 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.)

On Richards's testimony alone, this Court must reject respondent's "pure speculation" argument. Moreover, this Court should accept as true what Richards said from the very beginning: He was shown three photo arrays and picked out appellant's photo only after seeing the first two arrays. This means Richards saw appellant's picture in two consecutive photo arrays.

Respondent contends that even if Richards saw appellant's photo in two consecutive photo arrays, Detective Franks's use of this procedure is simply a factor to be considered in determining whether the pretrial lineup

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[4]It bears noting that when the prosecutor examined Dr. Pezdek at the evidentiary hearing, he posed a hypothetical in which a witness is shown *three* photo arrays, and no one is selected in the first two, but someone is selected in the third. The only factual basis for such a specific hypothetical is that Richards was shown three photo arrays.

procedures were suggestive. (RB 28.) Appellant agrees, but respondent is mistaken to the extent it goes on to argue that this was solely a jury issue. Rather, the issue here is one of admissibility, and for the detailed reasons discussed by Dr. Pezdek at the evidentiary hearing, and for those addressed by this Court in *People v. Yeoman, supra,* 31 Cal.4th at p. 124, this third factor weighs heavily in favor of a finding that appellant has met his burden under the first prong of the *Manson* test.

Fourth, appellant has proven that Detective Franks tainted Richards's memory when he told Richards that he had correctly identified appellant in the final photo array. This improper post-lineup feedback — given only after Richards *failed* to identify appellant at a live lineup — inflated Richards's confidence in his identification of appellant and irreparably marred any subsequent identification attempt. (AOB 64-68.)

Respondent does not try to argue that it was proper for Detective Franks to tell Richards that he had correctly identified appellant at the final photo array. (RB 31-33.) Rather, respondent strangely focuses on Richards's lay opinion at *trial* as to whether he had been given cues to pick appellant's photograph, and Richards's own explanation as to why he failed to make any identification at the live lineup. However neither of these points address the issue to be resolved, to wit, whether Detective Franks's post-lineup feedback tainted Richards's memory and subsequent ability to independently identify the perpetrator. The answer to that question is "yes," and this fact further supports appellant's position that he has met the first prong of the *Manson* test.

Fifth, and perhaps most egregiously, the record shows that Deputy District Attorney Kent Williams tainted Richards's memory, and likely caused Richards to identify appellant at the preliminary examination by

showing appellant's picture to Richards just prior to Richards being called to testify and identify the perpetrator. (AOB 68-69.) Respondent sees no problem with this pre-trial identification procedure, arguing that it was acceptable for the prosecutor to simply "'refresh [Richards's] recollection'" as to the prior identification. Respondent also argues there is no authority prohibiting this particular practice. (RB 33-34.)

As to the later point, respondent is wrong. In his Opening Brief, appellant pointed respondent and this Court to *People v. Contreras* (1993) 17 Cal.App.4th 813. In that case, the appellate court stated:

> Although the trial court did not make an express finding on whether the pretrial photographic procedures were suggestive, it is clear from the record that they were. After Lopez had failed to identify appellant from the photo array, the deputy district attorney showed him a single photo of Contreras two days before the preliminary hearing and asked if Lopez could identify him as his assailant. Lopez had been told there were two individuals in custody and knew Casares was one of them-he knew the police wanted Lopez to identify the other. The picture was a clear photo of appellant. The procedure could only suggest to Lopez that the police believed Contreras to be the other assailant.

(*People v. Contreras*, *supra*, 17 Cal.App.4th at p. 820.) This is precisely what happened here. Although the *Contreras* court went on to find no due process violation occurred under the totality of the circumstances of that case, the appellate court's finding that the suggestive nature of this procedure alone satisfied the first prong of the *Manson* test.

Moreover, respondent's argument that the prosecutor was merely refreshing Richards's recollection of the events related to the identification procedure borders on the disingenuous. When he showed appellant's photo to Richards, the prosecutor was not merely trying to verify that the array he had in his file was the same document that Richards had been shown. Nor

was what happened here equivalent to refreshing a witness's recollection about a prior statement or event. What happened here is that the prosecutor tampered with Richards's memory.

Just prior to being called at the preliminary hearing, Richards told the prosecutor that he doubted he would be able to identify the perpetrator, even if he were present in court. To address Richards's uncertainty, the prosecutor showed Richards the final photo array, in which only appellant's photo was circled. This was the same photo array about which Detective Franks gave Richards post-identification feedback by telling him that he had correctly identified the perpetrator in the photo array. Not surprisingly, Richards then pointed out appellant at the preliminary hearing.

That the prosecutor's pre-trial actions were unduly and unnecessarily suggestive — in that they were aimed at aiding Richards in making an in-court identification — cannot be reasonably disputed. Indeed, Dr. Pezdek's detailed testimony about the fragility of memories, and how memories and recollections leading to identifications are malleable and subject to even unintentional manipulation, was undisputed at the evidentiary hearing. (See 4 RT 905-945.) Showing appellant's photo to Richards immediately after the witness expressed doubt as to his recollection of the face of the man who robbed him did nothing more than cement the image of appellant's photo in Richards's memory.

The sixth and final set of facts that shows appellant has met the first prong of the *Manson* test is that each of the six-pack photo arrays that contained appellant's picture and were shown to Richards were constructed in a manner that caused appellant's photo to "stand out" in comparison to the "filler" photos, so much so as to suggest that Richards should select him. (AOB 69-72; see actual color Exhibit 147 and Exhibit 16.) Respondent

agrees that the second photo array, Exhibit 147, was unduly suggestive, but again claims that Richards did not view it. As for the third photo array, Exhibit 16, respondent argues it was not too suggestive because the photos making up that array showed similarly aged African-American men with similar hair, and set against similar backgrounds. (RB 34-35)

As set out in more detail above and in Appellant's Opening Brief, Richards was in fact shown Exhibit 147, which respondent concedes was unduly suggestive. As for the suggestiveness of Exhibit 16, respondent is simply incorrect. While Exhibit 16 is certainly less suggestive than Exhibit 147, any honest comparison of the color photos in Exhibit 16 leads to the conclusion that appellant's photo showed him to be the lightest-complected individual in the array. This fact is key because Richards told the police that the man who robbed him was a "light complected" black male. That fact alone made appellant's photo more likely to be selected. But then coupled with the fact that Richards saw the suggestive second photo array — and only appellant's photo repeated in both arrays — there can be no doubt that the procedures used to obtain an identification were unduly and unnecessarily suggestive.

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. (*Manson, supra,* 432 U.S. at p. 114; *People v. Ratliff,* (1986) 41 Cal.3d 675, 689.)

2. Richards's In-Court Identification Was Not Independent of the Suggestive Pre-Trial Identification Procedures

Appellant maintains that the State has further failed to show by clear and convincing evidence that, under the totality of the circumstances,

Richards's identification was nevertheless reliable standing on its own. (AOB 72-82.) That is, neither the prosecutor below nor respondent on appeal has shown that the identification had reliability *independent* of the suggestive procedures. (See *United States v. Wade* (1967) 388 U.S. 218, 240.)

Respondent disagrees. It argues that, even if the pretrial procedures were suggestive, Richards's identification of appellant was nevertheless reliable in light of the five factors commonly used in assessing the overall reliability. (RB 35-39.) Turning to the first factor, Richards's opportunity to view the robber during the crime, respondent argues that Richards had ample opportunity to view the perpetrator while the perpetrator rode in Richards's taxicab and stopped for gasoline. (RB 37.) But respondent conflates the fact that Richards *spoke* with his assailant for nearly half an hour, with Richards's opportunity to *view* the individual who was sitting in the back of Richards's unlit taxicab at night.

The record shows that Richards's opportunity to view the assailant was limited by a variety of conditions. First, notwithstanding Richards's testimony that he picked up his assailant in the daylight, there is no dispute that it was completely dark at 8:00 p.m. that January night when Richards picked up his fare. Second, although Richards and the robber were in the same vehicle for about 30 minutes, Richards was in the front seat driving and looking forward, while the assailant was in the back seat in the dark. Third, when Richards asked for his fare and turned to his passenger, the assailant pointed a gun at Richards; at that point, as Dr. Pezdek pointed out, the gun became the focus of Richards's attention. And finally, when the two got out of his taxicab in the dark, unlit, rural area, Richards ran away from

his assailant and was in no position to observe or pay attention to the perpetrator's face.

Indeed, Richards's sincere belief that Ray Bradford, a man he subsequently met, was the perpetrator, corroborates the fact that Richards lacked the opportunity to view the assailant's face. Richards's identification of Bradford as the perpetrator was later proved false.

Respondent next contends that Richards's degree of attention during the offense was high and not impaired. (RB 36.) But respondent again wrongly equates the attention Richards paid to the conversation he had with his assailant, with the visual attention necessary to correctly identify the perpetrator. As noted, Richards's attention was fully engaged in the driving of his taxicab. He was facing forward, looking at the road and away from his passenger. Under these circumstances, it is unreasonable to argue that Richards's attention was not impaired for purposes of making an accurate identification of the assailant.

Similarly unworthy of credit is respondent's argument that Richards's initial identification accurately described appellant. (RB 36-37.) In fact, Richards's initial account described an older man, and the other points of description — that the suspect was a black male, about six feet tall, and about 220 pounds — were general and described countless other black men. But more importantly, Richards's stated description did *not* match Ray Bradford, the 5'9" man with whom Richards lived for a month, and who Richards believed was the man who robbed him.[5]

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[5]Notably, respondent does not contest appellant's position that this case involves the additional problem associated with cross-racial identification. This problem is particularly indicated here because the only real physical similarity between appellant and Bradford's is their race.

Turning to the fourth factor — the witness's degree of certainty — respondent argues that Richards expressed a high degree of certainty at trial when he claimed he was "[v]ery certain" of his identification of appellant. (RB 37.) However, this argument ignores the fact that Richards's claim of certainty occurred only after Richards had believed that Ray Bradford was the robber; only after Detective Franks had indicated appellant's picture during the third lineup; only after Detective Franks had Richards circle appellant's picture; only after Detective Franks reassured Richards that while he failed to pick appellant at a live lineup, he had correctly identified him earlier; and only after Richards had expressed uncertainty about his memory and ability to identify the robber to the prosecutor, who then, prior to the preliminary examination, showed Richards the photo array in which he had circled appellant's picture. Indeed, Richards's identification of appellant at the retrial was tainted by, rather than independent from, unduly suggestive identification procedures.

In addition, respondent does not address the fact that this particular factor — the witness's self-assessed level of certainty in an identification — is now widely understood to be a poor one in assessing the accuracy of an identification. (AOB 77-80.) This modern understanding is based in scientific studies that uniformly show that while witness certainty is the single most powerful determinant of whether jurors will believe that the eyewitness made an accurate identification,[6] there is a statistically weak

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(AOB 76-77.)

[6]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*

correlation between witness certainty and the accuracy of an identification.[7] Accordingly, Richards's stated certainty at trial should be viewed for what it is: a poor indicator that appellant was in fact the man who robbed him.[8]

Finally, respondent argues that the nearly two months that passed between the crime and Richards's identification of appellant's photo in the photo array, and the nearly nine months that passed between the crime and Richards's first in-court identification, was "reasonable, particularly in an investigation of this nature." (RB 37-38.) Respondent misses the point.

The question concerning the passage of time and its impact on memory has nothing to do with reasonableness or the length and nature of the investigation. Rather, this factor focuses on the loss of memory over time. Not surprisingly, respondent ignores appellant's evidence that even a brief interval between an incident and an attempt to make an identification is significant. (AOB 81-82.) This occurs because memory is fragile and subject to what is scientifically known as "memory decay." This decay

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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.

[7]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.

[8]This incongruity between the jury's perception and the scientific evidence regarding the accuracy of identifications is a major reason that judges must be gatekeepers for unreliable identifications. (See *State v. Lawson* (Or. 2012) 291 P.3d 673, 695.)

begins almost immediately, and the majority of memory decay happens during the first 24 hours, with accuracy dropping to 80 percent just about two hours after the incident. After a 24-hour period, memory drops to 70 percent, and to 50 percent after just 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; see also Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies* (1986) 100 Psychol. Bulletin 140 [meta-analysis also finding an association between longer retention intervals and fewer correct identifications].)

At the evidentiary hearing, there was no dispute that passage of time results in memory decay, and that fact weighs against a finding that Richards's identification of appellant was reliable notwithstanding the suggestive identification procedures. Indeed, 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 and, thus, unreliable and inadmissible.

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

Appellant has argued that the trial court failed in its constitutionally required gatekeeping role, which was to screen, limit, and/or exclude eyewitness identification testimony that is extremely persuasive to a jury, but highly susceptible to error. (AOB 82-86.) Specifically, the trial court

applied the wrong legal test while considering the evidence offered at the evidentiary hearing and ruling on appellant's motion to exclude evidence of Richards's identification. The error occurred when trial court concluded that the pretrial procedures were not so "*impermissibly suggestive as to violate due process.*" (4 RT 1081.) As appellant explained in his Opening Brief (AOB 81), the question was not whether the *procedures* violated due process, but whether admission of state-tainted unreliable evidence would violate appellant's right to due process. Answering that question required an initial determination as to whether the procedures were needlessly suggestive, and if so, 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.)

Respondent does not attempt to justify or explain the trial court's actual ruling. Rather, respondent seems to argue that the court met its obligation by finding — under *Manson*'s first prong — that the procedures were not "impermissibly suggestive," thereby making it unnecessary to reach any conclusion under the second prong, that is, whether Richards formed an independent memory notwithstanding the pre-trial identification procedures. (RB 22-23.) Again, respondent's argument misses the point.

The problem here is that the trial court never ruled, under prong one of the *Manson* test, whether appellant had met his burden of presenting substantial evidence that the pre-trial procedures were unnecessarily suggestive. Rather, the court considered only whether the *procedures themselves violated due process*. This was not an issue to be resolved under *Manson*. And while appellant agrees with respondent that the trial court never properly ruled on the second prong of the *Manson* test (whether the

prosecution presented clear and convincing evidence that Richards's in-court identification would be reliable under the totality of the circumstances notwithstanding the pre-trial identification procedures), the fact is that the trial court's ruling shows that it required appellant to prove that the procedures employed violated due process, and that was not appellant's burden.

Moreover, respondent ignores the fact that when the trial court actually seemed to consider the second prong of *Manson*, it again failed to apply the proper legal standard. The trial court concluded that there had not been a "sufficient showing that this identification is worthless, and therefore should be excluded." (4 RT 1082.) Of course this was wrong because *appellant's* only burden was to show that the pre-trial procedure were suggestive, and it was never appellant's burden to show that Richards's testimony was "worthless." After appellant made the required showing under prong one of the *Manson* test, the burden shifted to the prosecution 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.

For the reasons already discussed, the prosecution failed to meet that burden, and by applying the wrong standard, the trial court failed to hold it to its burden. In so doing, the trial court came to the wrong conclusion. Appellant is confident that this Court will not make the same errors made below, and will reach the only reasonable conclusion on the facts: that the pretrial identification procedures were unduly and unnecessarily suggestive, and that Richards did not form a reliable independent memory of the events at issue.

C. This Court Should Modify California's Approach in Considering Evidentiary Challenges to Eyewitness Identification Evidence Because the Current Approach Is Premised on Scientifically Inaccurate Views of Human Memory Formation and Retention

As discussed in Appellant's Opening Brief, the *Manson* test — the federal test used to determine whether an in-court identification should be limited or excluded on due process grounds — no longer comports with present-day scientific understanding of memory formation and retention. (AOB 83-103.) Because California trial and appellate courts uniformly use the federal due process test to resolve motions to exclude tainted eyewitness identification evidence that are made in whole or in part *under state law*, appellant has urged this Court to adopt a reliability test that rejects the false assumptions of *Manson* and accurately reflects current scientific knowledge concerning this highly unreliable type of evidence.

Respondent does not disagree with the fact that key elements of the 40-year-old *Manson* test are based on scientifically flawed assumptions. Nor does respondent suggest that this Court cannot craft an appropriate state-law test to correct the federal test's flaws.[9] Rather, respondent argues only that (1) appellant forfeited this argument on appeal by failing to raise the specific challenge below, and (2) that the second prong of the *Manson*

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[9]Respondent states that "there is no basis for California to "reconsider" the standard outlined by the United States Supreme Court in [*Manson*] and [*Biggers*]." (RB 24.) Appellant has not suggested that this Court has the authority or ability to alter the *federal* due process test; that responsibility lies solely with the United States Supreme Court. This Court can, however, "reconsider" whether state courts should use the flawed federal test in ruling on an objection to tainted eyewitness testimony under state law.

test sufficiently addresses appellant's concerns. (RB 23-24.) Respondent is wrong on both counts.

First, respondent ignores the fact that appellant moved to exclude Richards in-court identification on *both* federal due process and state-law grounds. (3 CT 715.) At that point, the trial court did what this Court has required trial courts to do under these circumstances: It conducted an Evidence Code section 402 evidentiary hearing, and attempted (albeit unsuccessfully) to apply the out-dated federal due process test to resolve the issue. Indeed, the dissonance in the trial court's analysis is palpable in that the court could not square the uncontradicted scientific evidence provided by Dr. Pezdek at the evidentiary hearing with the *Manson* test, which provided no framework for fully considering the expert testimony. (4 RT 1080-1081 [noting that the preferable identification procedures, not used in this case, "may become the norm down the road"].) But absent the additional guidance appellant has requested from this Court, it is not surprising that the trial court never required, under state law, the prosecution to come forward with proof by a preponderance of the evidence that Richards's memory was untainted and that any subsequent trial testimony was sufficiently reliable to be admissible.

Second, respondent claims that the *Manson*'s test sufficiently addresses the ultimate question of whether an eyewitness's testimony is reliable, even after law enforcement has used unduly suggestive techniques in obtaining an identification. In respondent's view, it is enough that the federal test requires "'reliability under the totality of the circumstances.'" (RB 24, citing *People v. Cunningham, supra,* 25 Cal.4th at p. 989, *Manson,* and *Biggers.*) Respondent is wrong.

Most significantly, respondent does not address the many flaws in the first prong of the two-part *Manson* test. The first prong focuses exclusively on unnecessary suggestions by state actors, known as "system variables." But there is wide consensus among the scientific community that "estimator variables," which are the many factors attendant to the witness himself and the circumstances under which the memory was formed, are equally important in the assessment of an identification's reliability . (AOB 90-92, discussing http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF.)

Here, the trial court attempted to follow the *Manson* test, and in so doing, never considered estimator variables. Instead, it followed this Court's precedent and focused its ruling entirely on the system variables. Such an analysis is incongruent with the current scientific understanding of the reliability of memory formation and retention.

Respondent is correct that the second prong of the *Manson* test looks at reliability under the totality of the circumstances. But respondent ignores the numerous known flaws with that prong as well, particularly that *Manson* and this Court's precedent require trial courts to look at inappropriate factors in assessing overall reliability. Under *Manson* and its progeny, courts (and juries) are told to consider the eyewitness's certainty in the identification, even though it is widely accepted in the scientific community that a witness's certainty is not closely correlated to accuracy. In fact, it is now known that at least three of the five factors articulated in *Manson's* reliability analysis are themselves unreliable because they are *strengthened* by the very suggestive conduct that resulted in a prong-two analysis. That is, the more suggestive the police procedures, the greater the

chance that the eyewitness will be confident in his identification, claim to have paid better attention during the incident, and will report better physical viewing conditions. (*State v. Lawson* (Or. 2012) 291 P.2d 673, 687.)

For these reasons, and for those ignored by respondent but set out fully in Appellant's Opening Brief, appellant requests that this Court use this opportunity to address the serious flaws in the *Manson* test. The New Jersey Supreme Court and the Oregon Supreme Court have acknowledged these shortcomings and used their states' respective evidence codes to refine the standards for admitting identifications in order to ensure that unreliable identification evidence does not get admitted into their trial courts. (See *State v. Henderson* (N.J. 2011) 27 A.3d 872; *State v. Lawson*, *supra*, 291 P.3d 673.) This Court should do the same in this case. (Cf. *Sargon Enterprises Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 769-773 [interpreting Evidence Code sections 801 and 802 to require trial courts to play gatekeeping role for the admission of expert testimony in order to ensure exclusion of unreliable evidence].) This is an appropriate case in which to update California's evidentiary rules to comport with developing scientific knowledge of how eyewitness memory works and how the identification process can shape it. Defense counsel litigated the issue at the trial court. Furthermore, as discussed above (see *ante*, at pp. 7-8, 11), this case contains several examples of how failing to use double-blind identifications and sequential lineups can impact an eyewitness's selection of a subject in a photo array and his or her confidence in the accuracy of that selection.

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D. The Jury's Consideration of Richards's Unreliable Identification of Appellant Violated Appellant's Eighth Amendment Right to Reliable Guilt and Penalty Determinations

Appellant maintains that the erroneous admission of Richards's tainted identification of appellant undermined the reliability of the jury's guilt and penalty verdicts with respect to the capital offenses, and violated appellant's Eighth and Fourteenth Amendment rights. (AOB 103-105.) Respondent does not address this argument.

E. The Erroneous Admission of Richards's Identification of Appellant Was Prejudicial

Appellant has explained in detail how he was prejudiced at his capital trial by the trial court's erroneous admission of Richards's tainted and unreliable identification of appellant as the man who robbed him. (ABO 103-113.) Not surprisingly, respondent argues there was "overwhelming evidence" of appellant's guilt (RB 39), ignoring the fact that appellant's first trial ended in a mistrial on the same evidence; that eyewitness identification evidence — like that given by Richards against appellant — is among the most damning kind of evidence; and that by the time Richards testified at appellant's second trial, Richards had become absolutely certain that appellant was the man who had robbed and attempted to shoot him, and he told the jury just that (15 RT 3906).

In support of its argument, respondent points to the testimony of Sylvester Seeney and Phyllis Woodruff. (RB 39-41.) It is true that Seeney claimed that appellant told him he had robbed a taxicab driver, and had showed Seeney the stolen taxicab.[10] (14 RT 3736-3738.) But what

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[10] Prior to the first trial, Seeney recanted his testimony. (1 Supp. CT 241-258.)

respondent fails to mention is that Seeney was an alleged alternative perpetrator with a strong motive to lie and blame appellant for his own conduct. Seeney implicated appellant only after being threatened with incarceration, 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.)

Respondent also correctly points out that Woodruff claimed that appellant admitted robbing Richards, showed her the taxicab he had stolen, and that she had seen appellant possess the gun believed to be the murder weapon. (14 RT 3653-3656.) But again, respondent neglects to mention that Woodruff was Seeney's girlfriend who had participated in residential burglaries with Seeney. Nor does respondent mention in his argument that Woodruff received 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 had a motive to lie to protect her boyfriend from prosecution for those offenses.

Respondent also claims that appellant admitted the crimes to his wife, Melody Mansfield. (RB 39-40.) As written, respondent's argument strongly implies that Mansfield testified that appellant admitted the taxicab-driver killings: "As stated, Wilson also admitted his role in the crimes to both Melody Mansfield and Sylvester Seeney. Specifically, when Mansfield asked Wilson whether he killed the cab drivers, Wilson admitted he was the one who committed them." (RB 40, citing 14 RT 3734-3738.) But Melody Mansfield did *not* testify in this case. And what respondent fails to mention is that it was Seeney — the alternative suspect, who testified under a grant of immunity, and who had a motive to lie — who testified to appellant's purported conversation with Mansfield.

Respondent also attempts to make much ado about the testimony of Charles Whitley and Joe Diaz. (RB 40.) It argues that circumstantial evidence connects appellant to the Richards robbery, in that appellant allegedly sold Whitley a rifle that was stolen from Diaz's home during the same home burglary in which the gun used to rob Richards was stolen. This is an accurate, but incomplete, account of the evidence. A fair review of this circumstantial evidence leads to the inescapable conclusion that the stolen gun evidence as strongly implicates Seeney, who engaged in several home burglaries during which guns were stolen, as it does appellant in the robbery of Richards. More importantly, however, respondent neglects to mention that appellant lived with Seeney. Both had access to the rifle, but that the handgun used to rob Richards was found at the home of Seeney's friends, Cory and Brad McKinney. (15 RT 3998-4001; 16 RT 4192.) Both were suspects in the Richards robbery and the shootings, and a considerable amount of evidence was offered at trial to show that the McKinneys had committed crimes against taxicab drivers.

There can be no question that this was a close case. There was no direct or physical evidence linking appellant to any of the crimes;[11] the prosecution's key witnesses were themselves suspects (Seeney and Woodruff) who testified under grants of immunity; and even during the retrial, the lead detective on the case admitted that Brad McKinney was an alternative suspect in the case (16 RT 4199). On this evidence, it is not surprising that appellant's first jury hung, and his retrial jury deliberated for several days before reaching guilt-phase verdicts.

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[11]As noted in the introduction to this brief (see *ante*, at p. 1), appellant's fingerprints were *not* found in Andres Dominguez's taxicab. (15 RT 4002.) Respondent's statement to the contrary was in error.

Richards's eyewitness identification of appellant was crucial to the prosecution's case, and respondent has not met its heavy burden to show that its erroneous admission was harmless beyond a reasonable doubt. (See *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].) Accordingly, appellant's conviction for the robbery, carjacking and attempted murder of James Richards must be reversed. Additionally, as a result of the prejudicial impact of the 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.

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II

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

A. Introduction

In his Opening Brief, appellant demonstrated that the trial court improperly excluded evidence of misconduct by Detective Scott Franks, who administered the photo array in which James Richard identified appellant. As discussed in the previous claim of error (see *ante*, Argument I), the prosecution built its case against appellant in large part on James Richards's identification. Evidence suggests, however, that Detective Franks showed Richards two photo arrays that included the same photograph of appellant (Exhibits 16 and 147), which would have undermined the reliability of the identification.[12] In out-of-court statements to his superior officer and at trial, Detective Franks denied that allegation. Accordingly, Detective Franks's character for honesty was highly probative toward assessing whether he had improperly shown both photo arrays to James Richards and then falsely denied doing so.

At the first trial, appellant elicited evidence regarding two instances of Detective Franks committing misconduct that revealed the detective's

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[12]Defense expert witness Dr. Kathy Pezdek testified that repeating a photograph in different photo arrays has a "powerful effect" on whether the witness identifies the person depicted in multiple photo arrays. She cited a study showing that a witness is likely to identify an innocent person with a repeated photo as he or she would select the actual perpetrator if a subsequent photo array included both a repeated photo and a photograph of the suspect. (18 RT 4670.)

dishonesty. In the first incident, Detective Franks, to support a friend in a custody dispute, pretended to be a Colton detective to gain access to and photograph a home he had no right to enter, and later lied to a bona fide Colton detective by claiming that he entered the house on official business. In the second incident, Detective Franks lied to his superiors in order to avoid being disciplined for violating department policy by holding a second job, which caused him to arrive late to a crime scene. Both of these instances of misconduct occurred between one and two years after Detective Franks investigated this case. (12 RT 3067.) Prior to the retrial, the trial court granted the prosecution's motion to exclude evidence of these incidents.

In his Opening Brief, appellant demonstrated that the trial court erred, that the evidence was highly probative and neither prejudicial, time-consuming, nor confusing, and that the exclusion of the evidence violated his confrontation-clause rights, as well as his rights to present a defense and to due process, a fair trial, and reliable guilt and penalty determinations.

In its brief, respondent contends that the trial court acted within its discretion by excluding the misconduct evidence. Respondent asserts the trial court has broad discretion to exclude collateral evidence of misconduct. Respondent further argues that the misconduct evidence had minimal probative value, because the evidence could not prove definitively that Detective Franks had shown the extra photo array (Exhibit 147) to James Richards, because the evidence was cumulative, and because the defense theory that Detective Franks showed James Richards two photo arrays was speculative. Respondent also contends that the exclusion of the evidence did not violate appellant's constitutional rights or create reversible error.

For the reasons discussed in Appellant's Opening Brief and below, this Court should reject respondent's assertions and conclude that the exclusion of the misconduct evidence constituted state-law error, violated appellant's federal constitutional rights, and requires this Court to vacate the judgment.

B. The Trial Court Abused Its Discretion by Excluding the Misconduct Evidence

1. There Was No Valid Basis for Excluding the Evidence

In its brief, respondent improperly suggests that the trial court has discretion to exclude this impeachment evidence merely because it is collateral. In support of this proposition, respondent quotes *People v. Price,* in which this Court upheld the exclusion of impeachment evidence. (RB 44, citing *People v. Price* (1991) 1 Cal.4th 324, 412.) However, *Price* is inapposite to the present case because it concerned the admissibility of prior inconsistent statements. The present case concerns instead misconduct-involving-moral-turpitude evidence, which comprises an entirely separate category of impeachment evidence. (See *Price*, at p. 412.)

A trial court may not exclude moral turpitude evidence merely because it is collateral. In fact, that designation is meaningless here because all evidence of a witness's acts involving moral turpitude offered for the sole purpose of impeaching him or her is by definition collateral. The trial court has discretion to exclude such collateral evidence pertaining to a witness's credibility only under limited circumstances. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 ["This exercise of discretion necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature."].) Those circumstances occur when the proffered

evidence unfairly surprises the opposing party, fails to show the witness's moral turpitude, creates unnecessary collateral factual disputes, entails undue time, confuses the factfinder, or is unduly prejudicial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297.) Not one of the legitimate rationales for excluding this evidence exist in this case.

Contrary to respondent's assertion, there was no unfair surprise. Respondent argues that appellant surprised the prosecution by presenting the misconduct evidence. (RB 46.) That is not true. The defense discovered the misconduct evidence via a *Pitchess*[13] motion. (4 RT 866.) The court told the prosecutor that he would receive the same documents pertaining to Detective Franks's misconduct that the San Bernardino Sheriff's Department was sending defense counsel. (4 RT 869.) In any case, respondent surely was not surprised by the evidence when it sought to exclude it at the retrial.

Furthermore, the misconduct evidence was not time-consuming. The trial court recognized that the defense did not take undue time to elicit the evidence at the first trial. Indeed, Detective Franks himself was the only witness who testified about the misconduct, and the entire testimony about the misconduct spanned only four pages in the reporter's transcript. (10 RT 2467-2470.) In its brevity on the matter of Detective Franks's misconduct, this case stands in direct contrast to *People v. Lucas* (2014) 60 Cal.4th 153, 242, in which this Court upheld the exclusion of collateral evidence of police officers' misconduct that would have taken weeks to present.

Respondent, however, argues that the presentation of evidence of Detective Franks's misconduct would have been more time-consuming at

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[13]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

the retrial because the prosecution would have presented character evidence on rebuttal. But the record fails to support respondent's contention. The prosecution declined the opportunity to find and present character witnesses at the first trial even though it was alerted to Detective Franks's misconduct well before the first trial. Therefore, there is no basis upon which to infer that the misconduct evidence would have been time-consuming at the retrial if the trial court had not excluded it.

Likewise, admitting the evidence at the first trial did not set off a protracted extraneous dispute over the factual details of Detective Franks's conduct involving moral turpitude. Respondent argues that the trial court utilized its discretion to prevent a "nitpicking war" at the retrial. (RB 45-46.) But respondent does not identify any actual or potential disputes over minutiae regarding the evidence of Detective Franks's dishonesty. There was no disagreement over the facts pertaining to the two instances of misconduct. Specifically, there was no mini-trial regarding whether Detective Franks falsely claimed to be a detective with the Colton Police Department in order to gain entry into a private home or whether he lied to a Colton detective about his reason for getting into the home. Similarly, the prosecution did not contest whether Detective Franks arrived late when on call because he improperly held a second job or whether he fabricated an excuse for his tardiness to deceive his supervisors

Moreover, the misconduct evidence was neither misleading nor confusing. Neither the trial court nor respondent has explained how the misconduct evidence could have misled or confused the jury. By categorizing the evidence as misleading or confusing without explaining why or how the evidence purportedly had those problematic characteristics, respondent has failed to articulate a proper basis for excluding relevant

impeachment evidence. The purpose of the evidence was clear: The misconduct evidence demonstrated Detective Franks's dishonesty, which suggested that Detective Franks had not told the truth when he denied showing Exhibit 147 to Richards. The misconduct evidence had no more potential to mislead or confuse the jury than any other collateral evidence concerning a witness's credibility.

Finally, nothing in the record, aside from the prosecutor's unsubstantiated assertions, suggests that the misconduct evidence evoked jurors' anti-law-enforcement bias. Respondent argues that the defense calling Detective Franks and "attempting to paint him as an untrustworthy law enforcement officer . . . is the type of evidence that would tend to inflame the jury and prejudice it against law enforcement in general." (RB 47) But neither the prosecutor at trial nor respondent's appellate counsel has identified anything to suggest that the jury was, or could have been, inflamed in this case. In his Opening Brief, appellant argued that defense counsel did not assert, hint, or imply that Detective Franks's misconduct had any bearing on the credibility of any other law enforcement officer. Respondent has not answered or rebutted that argument at trial or on appeal. Respondent's failure to substantiate its claim that the evidence educed jurors' anti-law-enforcement bias demonstrates that the misconduct evidence's risk of prejudice did not substantially outweigh the evidence's probative value.

2. The Excluded Evidence Was Highly Probative

A central theme in respondent's argument has been that the misconduct evidence was minimally probative because the prosecution did not call Detective Franks as a witness in its case-in-chief. (6 CT 1676; 12 RT 3066-3068; RB 46-48.) This is not correct. Although Detective Franks

did not testify at the prosecution's case-in-chief, he had a critical role in the investigation of this case. He was the detective who interacted with James Richards throughout the identification process and was the only person who administered the photo array in which Richards identified appellant. (15 RT 3869; 17 RT 4444.)

Detective Franks's critical role in the investigation was highlighted at the preliminary hearing, at which the prosecutor called him as a witness and designated him the investigating officer. (1 CT 75, 242-251.) However, after the defense received discovery of Detective Franks's misconduct in response to its pretrial *Pitchess* motion, the prosecutor made a decision not to call Franks as a trial witness, presumably because he knew that Franks's testimony would be subject to impeachment, and would, in turn, undermine the reliability of the eyewitness identification, which was the heart of the prosecution's case. Thus, Franks's testimony was not included in the prosecution's case-in-chief because the prosecution perceived him to be a liability, not because his role in the case was peripheral.

Because Detective Franks played a critical role in the investigation, his credibility was highly material, notwithstanding the fact that his testimony came in during the defense case, . Whether Detective Franks truthfully told Sergeant Dean that he did not show Richards Exhibit 147 was an essential issue for appellant's defense. The question of his credibility was central to appellant's argument that Detective Franks, despite his denials, showed Exhibit 147 to James Richards.

Respondent argues that the misconduct evidence was cumulative because appellant had further evidence pertaining to Detective Franks's credibility. (RB 51-52.) The additional evidence demonstrated that at the preliminary hearing, Franks had testified inaccurately with respect to his

own conduct during Richards's identification of appellant. During the preliminary hearing, Detective Franks testified that during the administration of the photo array in which Richards selected appellant, he told Richards to take his time in looking over Exhibit 16. However, a tape recording revealed that he had not said that but instead had given Richards cues regarding appellant's photo. (1 CT 248; Exhibit 221.) At the preliminary hearing, Detective Franks also denied that Richards said after the live lineup that the perpetrator was not present; another tape recording refuted that testimony. (10 RT 2453-2455, 2463-2364; 17 RT 4453-4456, 4459-4473; 1 CT 250; Exhibit 222.)

These inaccuracies in Detective Franks's preliminary hearing testimony comprised the only evidence that the defense was permitted to present at the retrial suggesting that Detective Franks was dishonest. However, without the misconduct evidence, the impeachment of Detective Franks could not convincingly demonstrate that the detective was a dishonest person. The misconduct evidence showed Detective Franks's pattern of deliberate falsehoods. Without the misconduct evidence, the inaccuracies in Detective Franks's preliminary hearing testimony could be explained away as honest misrecollections rather than lies.

In fact, that is what happened. At the first trial, in which the defense impeached Detective Franks with both the misconduct evidence and preliminary hearing testimony, the prosecutor conceded that Detective Franks had exhibited dishonest professional conduct in several instances but argued that there was no indication that he had acted improperly while he sought Richards's identification of appellant. (11 RT 2701.) At the retrial, at which the trial court barred the misconduct evidence, the prosecutor argued that Detective Franks's untrue preliminary hearing testimony was a

mere misrecollection rather than an indication of Franks's dishonest character. (18 RT 4923-4925.)

The misconduct evidence presented unambiguous proof of Detective Franks's dishonesty. That evidence also placed Detective Franks's inaccurate and self-serving preliminary hearing testimony in the context of the detective's dishonest character. When considered in conjunction with the misconduct evidence rather than in isolation, the inaccuracies in Detective Franks's preliminary hearing were far more likely to be perceived as intentional fabrications. By barring the misconduct evidence and thereby leaving the retrial jury unaware of the detective's pattern of prevarications, the trial court diminished the significance of Detective Franks's preliminary hearing testimony.

Respondent nevertheless argues that even if the misconduct evidence was not cumulative, it had little probative value because it would not have definitively established that Detective Franks had lied in this case. That argument is unconvincing. The threshold for admitting collateral evidence pertaining to a witness's credibility is not so stringent. Indeed, collateral evidence of someone's credibility can never definitively prove that a person lied in a particular instance. Even the most damaging collateral evidence of a witness's dishonesty — a witness's perjury convictions — cannot definitively demonstrate that a witness has testifyied falsely at a particular moment. Rather, the purpose of such collateral evidence is that it strongly suggests that a witness's testimony is not credible.

This Court has recognized that evidence of a person's bad conduct has probative value if it can, by reasonable inference, establish a material fact. (See *People v. Haston* (1968) 69 Cal.2d 233, 247.) This Court has never required an inference to be inevitable for proffered evidence to

withstand a challenge under Evidence Code section 352. In this case, Detective Franks's misconduct demonstrated his dishonesty, from which a factfinder could reasonably infer that Detective Franks lied when he denied showing Exhibit 147 to James Richards. That was sufficient.

Respondent also argues that the misconduct evidence lacked probative value due to a dearth of evidence supporting the defense theory that Detective Franks had shown Richards Exhibit 147. (RB 50-51.) In support of this contention, respondent correctly states that when defense counsel cross examined Richards at the retrial, Richards did not agree that he had been shown three photo arrays. (RB 51.) What respondent neglects to mention is that Richards also did not state that he definitely had been shown only two photo arrays. In fact, at the preliminary hearing, which took place seven months after the robbery, Richards testified that he had been shown three photo arrays. (1 CT 191.) At the first trial, which occurred twenty months after the preliminary hearing, Richards testified that he thought, but was not sure, that he had been shown three photo arrays. (6 RT 1632-1633.) At the retrial, which occurred nearly three years after the robbery, Richards testified that he did not recall whether Exhibit 16 was the second or third photo array he had been shown. (15 RT 3887.) When Richards's testimony that he had been, or may have been, shown three photo arrays is conjoined with the evidence that Exhibit 147 was one of three photo arrays prepared in this case, it was indeed reasonable to infer that Detective Franks had shown Exhibit 147 to Richards.

Respondent attempts to buttress his argument that the defense theory was speculative by noting that Sergeant Dean testified that Exhibit 147 had not been shown to Richards. (RB 50.) Sergeant Dean had ordered that Exhibit 147 not be used because he concluded that the photo array was

unduly suggestive. However, Sergeant Dean was not a percipient witness to the administration of the photo arrays. (8 RT 2130-2131.) Due to his lack of first-hand knowledge of what had transpired when Richards identified appellant in a photo array, Sergeant Dean's testimony could not prove that Detective Franks refrained from showing Exhibit 147 to Richards. As Sergeant Dean himself conceded at the first trial, Detective Franks could have administered Exhibit 147 without the sergeant's knowledge. (8 RT 2130.)

In any event, Sergeant Dean's testimony about Exhibit 147 was entirely consistent with the defense's theory that Detective Franks disregarded Sergeant Dean's order not to use Exhibit 147, showed that photo array to Richards, and lied to Sergeant Dean about flouting the sergeant's order. Likewise, the lack of documentation of the administration of Exhibit 147, and Detective Franks's consistent testimony that he did not show Exhibit 147 to Richards, do not conflict with the defense's theory that Detective Franks administered that photo array surreptitiously.

Whether Detective Franks showed Exhibit 147 to Richards was a significant factual dispute at both trials. But when the trial court barred the misconduct evidence at the retrial, the trial court increased the likelihood that the jury would resolve the factual dispute in the prosecution's favor at the retrial. The defense theory appeared less plausible to a factfinder who was not privy to the detective's pattern of prevarication. To a factfinder who was aware of Detective Franks's penchant for lying, it was reasonable to infer that Detective Franks had administered Exhibit 147 and subsequently denied doing so.

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

Respondent contends that appellant forfeited the constitutional issues because he did not raise them at trial. (RB 47.) However, this court has recognized that there is a subset of constitutional claims to which the contemporaneous-objection requirement does not apply. In *People v. Partida* (2005) 37 Cal.4th 428, 435-438, this Court explained that on appeal a defendant may raise constitutional claims that assert that an erroneous legal ruling had the additional consequences of violating his constitutional rights despite not making an objection on those constitutional grounds at trial, provided that the appellate claim pertaining to the underlying error has been preserved for appeal.

The present case meets each of those requirements. Appellant has unmistakably preserved his state-law claim that the trial court erroneously excluded the misconduct evidence under Evidence Code section 352. Respondent does not dispute this. Furthermore, as will be discussed below, the exclusion of the evidence had the additional consequence of violating appellant's constitutional rights.

Respondent contends that because the prosecution did not call Detective Franks as a witness, the exclusion of the misconduct evidence does not implicate appellant's confrontation-clause rights. But the confrontation clause has not been construed that narrowly.

In his Opening Brief, appellant articulated that Detective Franks's status as a defense witness was immaterial with respect to appellant's confrontation claim. (AOB 136-137.) Appellant quoted the United States Supreme Court's unequivocal rejection of respondent's argument:

> 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, quoted in AOB 136-137.) Respondent makes no attempt to rebut this argument or explain why *Chambers* does not control this case. Rather, respondent categorically argues that the confrontation claim fails because Detective Franks was a defense witness. (RB 48.) In so doing, respondent premises its argument on the same narrow definition of "against" that the United States Supreme Court rejected in *Chambers*.

Respondent further argues that the trial court may place reasonable limits on cross examination, "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant." (RB 48.) However, the cross-examination at issue did not implicate any legitimate concerns to justify such limitation, and respondent offers no explanation of how exclusion of the misconduct evidence fell within the ambit of acceptable limitations on cross-examination.

Respondent nevertheless asserts that the trial court did not violate appellant's constitutional rights when it prevented appellant from cross-examining Detective Franks regarding his prior misconduct (RB 49), but the cases respondent cites in support of this contention in fact support appellant's claim that his rights were violated. In *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624, this Court held that limits on cross-examination are permissible "unless a reasonable jury might have received a

significantly different impression of the witness's credibility had the excluded cross-examination been permitted." In *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386, the Court of Appeal held that limits were proper "[a]s long as the cross-examiner had the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it." In this case, the jury at the retrial could not accurately appraise Detective Franks's credibility because the trial court barred the defense from eliciting the misconduct evidence.

The excluded evidence was qualitatively different from the other impeachment evidence, and its exclusion gave the jury a materially different impression of Detective Franks. It was the misconduct evidence that unambiguously showed instances of Detective Franks's tendency to lie when he found it advantageous. Although the defense demonstrated that Franks gave incorrect testimony at the preliminary hearing regarding what he had said to James Richards, that evidence by itself showed an untrue statement that could be attributed to either falsehood or misrecollection, and failed to demonstrate definitively that Franks was a dishonest person.

A comparison of the prosecutor's guilt-phase closing arguments from the two trials demonstrates how exclusion of evidence establishing Detective Franks's dishonesty unfairly thwarted the defense's ability to impeach his credibility. At the first trial, in which the evidence was admitted, the prosecutor had to acknowledge that Franks had lied in the past, but argued that this did not prove that he was lying when he claimed he never showed James Richards the other photo array containing appellant's photo. (11 RT 2701.) However, at the retrial, in which the evidence was excluded, the prosecutor, rather than recognizing Detective

Franks's dishonesty as he had in the first trial, argued that discrepancies between Franks's preliminary hearing testimony regarding whether he had given Richards cues in the identification process and what tape recordings demonstrated that Detective Franks had actually said to Richards were nothing more than honest misrecollections. (18 RT 4923-4925.)

The exclusion of the misconduct evidence similarly impacted the defense's arguments regarding Detective Franks's dishonest character. At the first trial, defense counsel asserted that Detective Franks tended to lie when it was advantageous to do so: "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.) Defense counsel further argued that Detective Franks's dishonesty, in conjunction with law enforcement's belief that appellant was the perpetrator and police officers' ability to manipulate identification procedures suggested that Detective Franks did show Exhibit 147 to Richards. (11 RT 2763-2764.)

The United States Supreme Court has explained that, absent a valid basis, state-court evidentiary rulings may not insulate the prosecution's case from adversarial testing:

> [The state may not exclude defense evidence] when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

(*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691, quoting *United States v. Cronic* (1984) 466 U.S. 648, 656.) As discussed above (see *ante*, at pp. 32-35), the bona fide bases for excluding the misconduct evidence did not exist

in this case. Thus, the exclusion of the misconduct evidence violated appellant's constitutional rights.

D. The Exclusion of the Evidence Was Prejudicial

The exclusion of the misconduct evidence and the resulting violations of appellant's constitutional rights compel this Court to vacate the judgment. The erroneous exclusion of the evidence cannot be deemed harmless.

Respondent argues that the evidence of appellant's guilt was overwhelming and thus any error regarding the exclusion of evidence was harmless. (RB 50.) However, the fact that the first trial resulted in a hung jury, and the second jury deliberated for a week before reaching a verdict belies respondent's claim. Respondent does not attempt to explain why, if there was indisputable proof of appellant's guilt, the prosecution was unable to obtain a unanimous verdict of guilt in the first trial, and why the jury in the retrial deliberated for a full week before returning a guilty verdict. It is readily apparent that neither jury found the evidence to be overwhelming.

In fact, the excluded evidence was critical to the defense.[14] Respondent argues that the excluded evidence mattered little because the defense was able to show that Franks had testified falsely at the preliminary hearing. (RB 51-52.) However, as discussed above and in Appellant's Opening Brief, without being able to show that Detective Franks had a history of dishonesty in connection with his job, appellant was not able to defend against the prosecution's claim that inaccuracies in Franks's

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[14]In his motion seeking to exclude the misconduct evidence, the prosecutor attributed the hung jury to the admission of this evidence. (6 CT 1676-1677.)

preliminary hearing testimony were due to faulty memory rather than deliberate prevarication. (See *ante*, at pp. 43-44.)

James Richards's identification of appellant was the linchpin of the prosecution's case. The jury had to decide whether that identification was reliable and accurate. Detective Franks's conduct in connection with the identification was therefore directly relevant to those issues. The jury had to decide whether Richards's identification was tainted by suggestive statements and actions by Detective Franks that the detective denied had taken place. The jury's assessment of Detective Franks's credibility was thus at the heart of that determination. The fundamental difference between the first trial, which resulted in a hung jury, and the retrial, which resulted in a verdict of guilt, was that the jury in the first trial heard evidence that Franks had a history of professional misconduct and prevarication aimed at hiding that misconduct from his superiors, and the jury in the retrial did not. Given the closeness of the case and the significance of the excluded evidence, respondent cannot show that the exclusion of the evidence and concomitant violation of appellant's constitutional rights were harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Thus, this Court must vacate appellant's convictions and sentence.

If this Court does not conclude that the exclusion of the misconduct evidence violated appellant's federal constitutional rights, the evidentiary error nevertheless requires reversal under state law. There is more than a reasonable probability that the difference in outcome between the first trial and the retrial was attributable to the exclusion of the misconduct evidence. Accordingly, appellant has met his burden of demonstrating that the state-law error was prejudicial and requires reversal of his conviction and death

sentence. (See *People v. Watson*, (1956) 46 Cal.2d 818, 836 *supra*, 46 Cal.2d at p. 836.)

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III

THE 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

In his Opening Brief, appellant argued that, contrary to the trial court's finding, law enforcement officers coerced Sylvester Seeney during interrogations, in which he implicated appellant. (AOB 156-168.) Appellant further argued that Seeney's preliminary hearing testimony, which he gave pursuant to a immunity agreement, was coerced. (AOB 169-170.) Appellant asserted that because the statements and testimony were coerced, they were unreliable, and that their erroneous admission deprived appellant of his right to a fair trial. (AOB 170.)

In its brief, respondent addresses only part of appellant's argument. Respondent does not discuss appellant's claim that Seeney's statements to police should have been suppressed. Respondent contends only that Seeney's preliminary hearing testimony was not coerced, either by the police who interrogated him or by the immunity agreement. (RB 56-62.) Respondent alternatively argues that any error in admitting Seeney's preliminary hearing testimony was harmless. (RB 62-63.) As demonstrated in Appellant's Opening Brief and below, respondent's arguments are not supported either by the record or by pertinent precedent.

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B. The Statements Seeney Made to Law Enforcement Officers During the Interrogations in Ohio and California Were Coerced

Appellant has asserted that Seeney's out-of-court statements incriminating appellant should have been suppressed because the interrogators procured them by employing coercive tactics, including threats and promises, that rendered the statements unreliable. (AOB 156-169.)

Although respondent does not directly address this argument, respondent contends that Seeney's preliminary hearing testimony was not the product of police coercion: "[L]aw enforcement officers consistently urged [Seeney] to simply tell the truth." (RB 59.) A comprehensive evaluation of the interrogations of Seeney reveals otherwise.[15] Under the guise of engaging in casual conversation, the interrogators calibrated their remarks to frighten Seeney into implicating appellant in the crimes against the taxicab drivers. By making a combination of threats and promises to Seeney, the interrogators crossed the line from permissible interrogation tactics into coercion. (See *People v. Ray* (1996) 13 Cal.4th 313, 340 [noting this Court has found statements to have been coerced when law enforcement officers "promise leniency in exchange for the suspect's cooperation, and extract incriminating information as a direct result of such express or implied threats and promises"].)

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[15]In its brief, respondent discusses Seeney's immunity agreement before his interrogations. In this Reply Brief, appellant rebuts respondent's arguments regarding the interrogations before addressing the immunity agreement. The organization of appellant's argument in this brief parallels the organization of this claim in Appellant's Opening Brief.

1. A Summary of the Interrogators' Statements

The Ohio interrogators, Lieutenant Kelly Hale and Sergeant James Ertel of the Ohio State Highway Patrol, coerced Seeney by threatening him with decades of incarceration for the crimes committed against the taxicab drivers and implying that he could avoid that punishment only by cooperating with the police and implicating appellant for those offenses. As detailed in Appellant's Opening Brief (AOB 142-147), the Ohio detectives made the following statements to Seeney:

- "You can join the rest of your family in prison." (11 CT 3221.)
- "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." (11 CT 3237.)
- "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." (11 CT 3238.)
- "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.)
- "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.)

After law enforcement authorities extradited Seeney to California, Detective Chris Elvert of the San Bernardino Sheriff's Department offered Seeney inducements in exchange for his cooperation. These inducements pertained to the probation violation for which he had been arrested.

Detective Elvert told Seeney that he would talk to Seeney's probation officer about whether Seeney has been truthful during the interrogation. (3 RT 810.) He then suggested that his report to Seeney's probation officer would determine the sanction Seeney would receive for violating his probation. He also told Seeney what would constitute a truthful statement. In addition, Detective Elvert reminded Seeney that he faced potential prosecution for having sex with a minor. (3 RT 810-811, 12 CT 3477, 3480.)

- "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." (8 RT 827.)
- "You know what's going to happen when you tell us the truth? . . . You're going to see your brother with a gun." (3 RT 810.)
- "I'll talk to [the probation officer] tomorrow. She's waiting to hear from us." (12 CT 3460.)
- "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.)

2. The Interrogators Used Threats and Inducements to Extract Statements From Seeney That Incriminated Appellant

Although respondent contends that the interrogators' remarks quoted above merely constituted permissible exhortations to Seeney to tell the truth (RB 59), in actuality, they were nothing less than a series of threats designed to induce Seeney to incriminate appellant out of fear. These were undeniably coercive tactics.

To determine whether a statement is voluntary or coerced, courts employ the voluntariness test. That test asks if the statement was the

product of free will. (See *Culombe v. Connecticut* (1961) 367 U.S. 568, 602 [holding confession was voluntary if it was "the product of an essentially free and unconstrained choice by its maker"].) When a law enforcement officer makes threats or promises during an interrogation, the governing law presumes that the officer's conduct has overborne the will of the person being interrogated:

> To be voluntary, a confession must be the product of a rational intellect and a free will. Consequently, a confession must not be extracted by *any sort of threat or violence*, nor obtained by any direct or implied promises, however slight, *nor by the exertion of any improper influence.* [Citation.]
>
> A confession coerced by psychological pressure is involuntary. Law enforcement conduct which renders a confession involuntary does not consist only of expressed threats so direct as to bludgeon the defendant into failure of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear a rational intellect and a free will. [Citation.]

(*People v. Denney* (1984) 152 Cal.App.3d 530, 543 [original italics].) Accordingly, the procurement of a statement made as a result of express or implied threats or promises renders the statement coerced:

> A statement is involuntary (e.g., *Malloy v. Hogan* (1964) 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653) when, among other circumstances, it "was 'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight. . . .'"

(*People v. Neal* (2003) 31 Cal.4th 63, 79, quoting *Hutto v. Ross* (1976) 429 U.S. 28, 30; accord, *People v. Linton* (2013) 56 Cal.4th 1146, 1176 ["'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of

improper influence.'"], quoting *People v. McWhorter* (2009) 47 Cal.4th 318, 347.)

To determine whether a statement made to the police is coerced, appellate courts use a totality-of-the-circumstances test: The "evaluation 'permits—indeed, it mandates—inquiry into all the circumstances,' including 'evaluation of [defendant's] age, experience, education, background, and intelligence'" (*People v. Neal, supra*, 31 Cal.4th at p. 84, quoting *Fare v. Michael C.* (1979) 442 U.S. 707, 725.) Accordingly, courts must consider both the interrogator's conduct and the interrogation subject's characteristics when evaluating whether a statement was coerced.

It is well-accepted that young people are susceptible to the pressures that interrogation tactics create.

> The law enforcement community generally agrees that children are developmentally different from adults in terms of their comprehension abilities, willingness to yield to authority, and psychosocial immaturity. . . . When the youth in question is a suspect or witness rather than a victim, however, law enforcement authorities frequently disregard this advice. Police interrogators often question such children using the same leading and manipulative tactics that would be used on any adult suspect. [Footnote.] The result is that statements taken from children and adolescents under aggressive police interrogation are systematically unreliable.

(Tepfer et al., *Arresting Development: Convictions of Innocent Youth* (2010) 62 Rutgers L. Rev. 887, 917.) Indeed, the United States Supreme Court has recognized that young people are particularly susceptible to interrogators' psychological ploys: "The pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' [Citations.] That risk is all the more troubling — and recent studies suggest, all the more acute — when

the subject of custodial interrogation is a juvenile." (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, __, 131 S.Ct. 2394, 2401, quoting *Corley v. United States* (2009) 556 U.S. 303, 321.) That is because young people have less capacity than adults to withstand the psychological ploys used in interrogations. (See *In re Elias V.* (2015) 237 Cal.App.4th 568, 587-589; Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation* (2007) 31 Law & Psychol. Rev. 53, 62-63.)

Although Seeney, who was 18 years old at the time (3 RT 787), was no longer a juvenile, he still lacked a mature adult's capacity for withstanding the pressures of interrogation. (See Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, *supra*, at p. 896 [defining youth to include 18 and 19 year olds because cognitive and psychosocial development continues throughout a person's teenage years]; cf. 2015 Cal. Legis. Serv. Ch. 471 (S.B. 261) (West) [extending availability of youth offender parole hearings to people who committed crimes when they were 18 through 22 years old].)[16] In his Opening Brief, appellant argued that

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[16]Senator Loni Hancock, the author of Senate Bill 261, explained that youthful-offender parole hearings should be made available to people who committed crimes as young adults because cognitive development continues for several years after people turn 18 years old:

> Recent scientific evidence on adolescent and young adult development and neuroscience shows that certain areas of the brain — particularly those affecting judgment and decision-making — do not fully develop until the early - to mid-20s. Various studies by researchers from Stanford University (2009), University of Alberta (2011), and the National Institute of Mental Health (2011) all confirm that the process of brain development continues well beyond age 18.

Seeney's youth constituted a substantial factor in the calculus for whether he had been coerced. (AOB 156.) In its brief, respondent does not address Seeney's age.

In addition to considering Seeney's youth, when evaluating the voluntariness of Seeney's statement, this Court should be cognizant of the structure and process of custodial interrogations. Professor Richard Leo, a leading scholar on interrogations, has emphasized that interrogations must be understood in this light: "It is important to see modern interrogation as a structured, cumulative, and goal-directed process with a distinct logic of persuasion to induce compliance and confession." (Leo, *Police Interrogation and American Justice* [hereinafter, "*Police Interrogation and American Justice*"] (2008) 133.)

Because interrogations are cumulative, goal-directed endeavors, courts must consider that the individual remarks combine to influence the person being interrogated. An interrogator's comment that appears to be an offhand remark or benign statement in isolation may nevertheless be coercive. As other commentators have also explained, interrogations are tightly controlled, well-planned interactions: "While to the undiscerning eye interrogation seems to be a conversation, in fact it is a carefully orchestrated interaction which provides an ideal forum for suspect manipulation." (Alvarez, *Taking Back* Miranda*: How* Seibert *and* Patane *Can Keep "Question First" and "Outside* Miranda*" Interrogation Tactics in Check* (2005) 54 Cath. U. L. Rev. 1195 [internal quotations omitted]; accord Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in*

(Senate Rules Com., Off. of Seb. Floor Analyses, 3rd reading analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) as amended June 1, 2015, p. 3.)

Evaluating Juveniles' Waiver of Miranda (2003) 48 Vill. L. Rev. 629, 632-633 ["Police learn to manipulate situations to obtain confessions. Police manuals teach officers to create an atmosphere of control by orchestrating the interview down to the dress of the interrogator."])

Furthermore, as illustrated by the following quote from the leading training manual on interrogation techniques used by law enforcement agencies, detectives are explicitly trained to accuse a reluctant witness of committing the crime to frighten him into implicating the targeted suspect:

> *Whenever a witness or other prospective informant refuses to cooperate because he is deliberately protecting the offender's interests or because he is antisocial or antipolice, the investigator should seek to break the bond of loyalty between the subject and the offender or accuse him of the offense and proceed to interrogate him as though he were actually considered to be the offender.* . . . A witness or other prospective informant, thus faced with a false accusation, may be motivated to abandon his efforts to protect the offender or to maintain his antisocial or antipolice attitudes.

(Inbau et al., *Criminal Interrogation & Confessions* (4th ed. 2001) 409 [italics in original].)[17]

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[17]The quoted material comes from the book explicating the "Reid Method." Since Fred E. Inbau and John E. Reid published the first edition of *Criminal Confessions and Interrogations* in 1962, their book has been the "leading law enforcement treatise on custodial interrogation." (*In re Elias V.* (2015) 237 Cal.App.4th 568, 579; see also, Thomas, *Fred Inbau, 89, Criminologist Who Perfected Interrogation*, N.Y. Times, (May 28, 1998) p. B9 [calling *Criminal Confessions and Interrogations* "the undisputed bible of police interrogation since its initial publication in 1962"].) Approximately two-thirds of law enforcement executives in the United States have received interrogation training in the "Reid Method." (*Ibid.*) In California, law enforcement officers receive mandatory training on "Reid Method" techniques from the Commission on Peace Officer Standards and Training. (*Id.* at p. 579, fn. 7.)

Telling the subject of an interrogation that cooperating with the police provides the only possible escape from severe penal consequences is also a coercive interrogation technique that can result in a false confession or the false incrimination of another person:

> A convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable.

(*In re Elias V.* (2015) 237 Cal.App.4th 568, 583.) Nevertheless, this interrogation technique is nearly universal:

> At the root of virtually every interrogation is the message, communicated implicitly or explicitly, that the suspect stands to receive intangible or tangible benefits and avoid harms in exchange for an admission — ideally a full confession — to some version of the offense.

(*Police Interrogation and American Justice*, *supra*, at p. 133.)

Law enforcement officers typically need not be explicit in order to communicate threats and inducements to the person they are interrogating:

> [S]uch inducements may be either explicit or implicit. However, as long as the suspect understands the detective to communicate such consequences, he may base his rational analysis of the relative costs and benefits of confession on these anticipations.

(Davis & O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in Handbook of Forensic Psychology (2003) 914.)

Although Seeney was not law enforcement's target, and his interrogators did not accuse him of being the primary perpetrator, the detectives interrogated him as if he were a suspect in order to convince him

to cooperate, and told Seeney he was culpable for the crimes that they were investigating. In doing so, the interrogators placed inordinate psychological pressure on him. The interrogators told Seeney that the cost of not cooperating would be a lengthy prison sentence. That was not, as respondent characterizes it (RB 59), an encouragement to Seeney to tell the truth. It was a threat of punishment that was not mitigated by the absence of an explicit charge: Sergeant Ertel and Lieutenant Hale told Seeney that his choices were saying nothing and "going down" or cooperating and "saving [his] butt." (11 CT 3235.) Notably, the appellate record in this case provides evidence of the interrogation techniques' impact. At the preliminary hearing, Seeney testified that Lieutenant Hale and Sergeant Ertel's threats had frightened him. (14 RT 3749.)

Another barely veiled threat came when Detective Elvert warned Seeney that he could be prosecuted for statutory rape. Detective Elvert said that he knew Seeney had sex with a 12-year-old girl named Desiree and said that he could be prosecuted for it. (12 CT 3477, 3840.) This remark about a potential statutory rape charge constituted another implied threat. Although Elvert said he would have to discuss that matter with other detectives, Detective Elvert's reference to it gave Seeney another indication of the law enforcement authorities' power over him.

Although, as respondent points out, this Court has held that "[t]here is nothing improper in confronting a suspect with the predicament he or she is in" (*People v. Daniels* (1991) 52 Cal.3d 815, 863, quoted at RB 59), the interrogators did more than that here. Detective Elvert was not interrogating Seeney about his sexual activity with Desiree. Moreover, Detective Elvert's mention of the statutory rape must be read in conjunction with the threats made by the Ohio interrogators discussed above and Detective Elvert's

inducements discussed below. When the statutory-rape remarks are considered as part of the goal-oriented process of interrogation, it is reasonable to infer that Detective Elvert's remarks about the statutory rape communicated to Seeney that failing to cooperate with the police would have negative penal consequences.

In addition, Detective Elvert made an implied promise of leniency. Seeney was being held in jail on a probation violation. When Detective Elvert told Seeney that the probation violation could be easily explained away, he implied that Seeney could be released from jail if he cooperated. This inducement was substantial: Multiple studies of false confessions have shown that the inference that one could go home after cooperating provides a powerful incentive. (See Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations* (2010) 34 Law & Hum. Behav. 3, 9; Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness* (2011) 17 Psychol. Pub. Pol'y & L. 394, 396.) Again, threats and promises are coercive regardless of whether they are explicit or implied. (*People v. Linton, supra*, 56 Cal.4th at p. 1176; *Brady v. United States* (1970) 397 U.S. 742, 754, quoting *Bram v. United States* (1897) 168 U.S. 532, 542-543.) Although Detective Elvert did not specifically state that Seeney would soon get released if he cooperated with the police and implicated appellant, he insinuated that Seeney would be spared severe consequences for leaving the state in violation of his probation if he cooperated. That veiled promise went well beyond "discussing any 'advantage' or other consequence that will 'naturally accrue' in the event that the accused speaks truthfully about the crime." (*People v. Ray, supra*, 13 Cal.4th at p. 340, quoted at RB 59.)

The threats and promises the interrogators gave Seeney belie respondent's contention that the law enforcement officers merely "consistently urged [Seeney] to simply tell the truth." (RB 59.) Seeney's statements were coerced and should have been suppressed.

3. The Tactics Employed by Seeney's Interrogators Have Been Deemed Coercive by This Court and Others

Respondent cites *People v. Jimenez* (1978) 21 Cal.3d 595, *People v. Daniels* (1991) 52 Cal.3d 815, and *People v. Ray* (1996) 13 Cal.4th 313 to support its argument that the strategy employed by his interrogators to elicit incriminatory statements from Seeney was not coercive. (RB 58-59.) However, respondent cites those cases only for general legal principles and does not cite any case in which a court found statements to police given under similar circumstances to be voluntary. Indeed, pertinent caselaw does not support respondent's position.

Repondent quotes *Jimenez* to assert that "'mere advice or exhortation by the police that it would be better for the accused to tell the truth' does not render a subsequent statement voluntary." (RB 58, quoting *People v. Jimenez, supra*, 21 Cal.3d at p. 611.) However in *Jimenez,* this Court concluded that the defendant's confessions were coerced because the interrogators procured them with promises of leniency. (*Jimenez*, at pp. 610-614.) The Court held that even if it were to assume that the defendant had not been given express promises of leniency, the sergeant's remarks that the defendant might get the death penalty but the codefendant probably would not "carried with them the clear implication" that if he cooperated with the police, the defendant might receive lenient treatment from the judge or jury. (*Id.* at p. 613.) There were similar implications in the instant case. Like the sergeant in *Jimenez*, Detective Elvert did not promise a

concrete legal outcome if Seeney cooperated, but did suggest to Seeney that his probation officer would treat him leniently if he cooperated with the police. Accordingly, *Jimenez* provides precedential support for appellant's assertion that the interrogators in this case went beyond merely advising him to tell the truth and obtained his statements by making improper threats and promises.

Respondent cites *People v. Daniels*, *supra*, 52 Cal.3d at pp. 862-863, for the proposition that offering not to prosecute a witness in exchange for his cooperation does not, by itself, render a confession involuntary. (RB 59.) However, the facts in *Daniels* contained none of the additional indicia of coercion present in this case. This Court explained: "More is needed to show that testimony is the inadmissible product of coercion, but nothing more has been presented on the record here." (*Id.* at p. 863.) *Daniels* did not mention which interrogation tactics were used or whether the witnesses were vulnerable to the pressure interrogation. Rather, *Daniels* compared the offer to refrain from prosecuting the witnesses to a plea agreement or an immunity agreement given to a witness in exchange for testimony and concluded that the germination of a plea or immunity agreement during an interrogation does not render subsequent trial testimony involuntary per se. (*Id.* at pp. 862-863.)

Unlike in *Daniels*, the record in this case contains myriad examples of coercion. Law enforcement officers placed intense psychological pressure on Seeney. The Ohio detectives threatened him with prison time and told him he needed to cooperate soon in order to avoid lengthy incarceration. (11 CT 3221, 3225-3228.) In California, Detective Elvert provided further inducements to convince Seeney to cooperate. (8 RT 827; 12 CT 3460.) Detective Elvert also told Seeney what he had to say in order

to cooperate. (3 RT 810-811.) Moreover, due to his youth, Seeney was particularly susceptible to manipulation by the interrogating detectives. On these facts, appellant met his burden of showing that Seeney had been coerced. The defendant in *Daniels* did not present analogous facts and was unable to meet his burden. (See *People v. Daniels*, *supra*, 52 Cal.3d at 863.)

Respondent also cites *People v. Ray*, *supra*, 13 Cal.4th at p. 340 for the proposition that it is not coercive for the police to discuss consequences that would naturally accrue if the suspect speaks truthfully about the crime. (RB 59.) However, that case is also distinguishable from the present one in material respects. In *Ray*, this Court held that law enforcement officers had not placed the defendant under duress. Additionally, in *Ray* the defendant indicated a willingness to confess in order to prevent someone else from being wrongly charged. Further, in *Ray*, the defendant himself raised the possibility that he could receive a death sentence; thus, unlike the instant case, the law enforcement officers did not threaten Ray with any penalty as the cost of not cooperating with them. Moreover, the law enforcement officers in *Ray* did not suggest that the "defendant could avoid serious punishment by cooperating with police" (*id.* at p. 341), as they did with Seeney in the present case.

In contrast to *Ray*, the Ohio detectives told Seeney that cooperating with police as soon as possible was his only path for avoiding a decades-long prison sentence. Seeney was not willing to implicate appellant until he had received both threats and an inducement. Unlike in *Ray*, nothing in the record in this case suggests that Seeney was motivated by anything besides self-preservation when he cooperated with police and implicated appellant. Finally, unlike *Ray,* who was in his thirties at the time of his interrogation (*People v. Ray*, *supra*, 13 Cal.4th at p. 352 [noting Ray was 33 years old at

time of trial]), Seeney was only 18 years old. In short, *Ray* is inapposite because, unlike this case, *Ray* contains no indication that the interrogators induced a confession with psychological pressure.

Indeed, respondent has not cited a single case with facts that parallel those of the instant case, in which this Court — or any other court — has upheld the defendant's confession or witness statement as voluntary. In contrast, in his Opening Brief, appellant noted similarity between the facts of his case and those of two cases in which appellate courts found coercion: *People v. Lee* (2002) 95 Cal.App.4th 772 and *People v. Neal, supra*, 31 Cal.4th 63. Respondent fails to meaningfully distinguish this case from *Lee* and does not even address *Neal.*

In *People v. Lee, supra,* the Court of Appeal found that the admission of the witness's statements to police violated the defendant's due process rights because the interrogator "in essence told" the witness that he would be prosecuted for first degree murder if he did not identify the defendant as the shooter. Appellant relied upon *Lee* to establish that the coercion of Seeney was similar to the coercion of the key witness in that case. (AOB 167.) Respondent contends that *Lee* is inapposite because in this case, Seeney was not told that he would be prosecuted for murder if he did not implicate appellant. (RB 61.) Respondent's argument in incorrect for two reasons.

First, the police officer in *Lee* did not expressly tell the witness that he had to implicate the defendant in order to avoid prosecution for first degree murder. Rather, that message was merely implied, albeit strongly. In *Lee*, the detective told the witness: "So right now there's no question in my mind either you are the one that pulled that trigger or Midnight and you pulled that trigger. Okay. What I am going to tell you now, before this thing

gets too far out of hand, work with me or work against me. That's where you are, where you are. Now, that's the reality of it." (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 784.) In this case, as in *Lee*, Seeney's options of implicating appellant or facing prosecution for the offenses were implied rather than explicit. (See *ante*, at pp. 56-58.)

Second, even if we assume for argument's sake that the interrogator in *Lee* was more frank than the law enforcement officers in this case, that difference is immaterial. To reiterate, threats and promises are improper whether they are express or implied. The interrogators intended Seeney to perceive their remarks as threats and promises. They manifestly employed a strategy to convince Seeney that cooperating with the detectives was his best available option. (See Holgraves, *The Oxford Handbook of Language and Social Psychology* (2014) 452 ["The implied threats and promises have proven very effective in convincing suspects that confession is in their best interests."].)

They also followed an interrogation strategy to keep their threats and promises vague, in order to maximize the likelihood that Seeney's statements would be deemed voluntary and thus admissible:

> Interrogation training manuals and seminars offer very specific guidance concerning the exact wording and phrasing that will best promote crucial misperceptions in the suspect, while not stating these messages in legally impermissible explicit form.

(Davis & Leo, "Interrogation Through Pragmatic Implication: Sticking to the Letter of the Law While Violating its Intent," in Solan & Tiersma (eds.), *The Oxford Handbook on Language and Law* (2012) 355; see also, *Police Interrogation and American Justice*, *supra*, at p. 157 ["the most common promise-threat dynamic in American interrogation is more subtle and

indirect: while detectives seek to communicate that the suspect will be treated more leniently if he confesses, they also want to be able to plausibly deny that they issued any promises or threats"].)

The key to assessing whether implied threats or promises could have coerced a confession is whether the interrogators successfully communicated their inducements to the person being interrogated. This Court has expressed on multiple occasions that a statement is involuntary if a person being interrogated makes it because he has been led to believe that he would receive leniency for it:

> "[I]f . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. . . ."

(*People v. Holloway* (2004) 33 Cal.4th 96, 115 [ellipses in original], quoting *People v. Jimenez*, *supra*, 21 Cal.3d at pp. 611-612.) For this reason, an interrogator's strategic vagueness when communicating incentives to a subject does not render the resulting statement voluntary. Rather, if a subject perceives that the interrogator has implied inducements, a court must find that the interrogator has made inducements. There should be no gray area in which an interrogator can imply threats or promises that are understood by the subject to be inducements but are considered by a court to be permissible. (See *People v. Hill* (1967) 66 Cal.2d 536, 549 [explaining statement is coerced if defendant understands he might reasonably expect leniency, even when "promise of such benefit" is "implied from equivocal language not otherwise made clear"].)

In this case, the law enforcement officers clearly got their message across to Seeney. Lieutenant Hale and Sergeant Ertel told Seeney that he was "going down," unless he spoke to them, in which case he could save himself. (11 CT 3235.) Detective Elvert told Seeney that if he told "the truth," he would "see [appellant] with a gun." (3 RT 810.) Taken together, the implication was clear: He needed to cooperate with the police to avoid culpability for the crimes and escape a severe sanction for violating his probation, and he would have to implicate his brother in order to be deemed cooperative. The fact that Seeney implicated appellant shortly after Detective Elvert told him what to say demonstrates that Seeney did receive the message as the detectives had intended to deliver it. Furthermore, Seeney testified at the preliminary hearing that Lieutenant Hale and Sergeant Ertel told him that he would be found an accessory to murder and imprisoned accordingly if he did not quickly cooperate with them. (14 RT 3748.) Because Seeney understood that inculpating appellant was his path for avoiding punishment for the crimes against the taxicab drivers, the fact that the law enforcement officers could have articulated the inducements more explicitly did not render Seeney's statements voluntary. The inducements were understood all the same:

> Generally, like promises of leniency, threats of more serious legal consequences are conveyed indirectly and by implication. Nevertheless, they are understood just as clearly as if explicitly stated.

(Davis, *Selling Confession: The Interrogator, the Con Man, and Their Weapons of Influence* [hereinafter "*Selling Confession*"] (Winter/Spring 2008) Wisconsin Defender, at 14.) Because the choice the interrogated witnesses faced were communicated effectively in both *People v. Lee*, *supra*, and this case, *Lee* is apposite to this case.

Respondent also contends that *Lee* is distinguishable from this case, because in this case the police did not seek to obtain from Seeney a statement that was consistent with what the police deemed had happened. That is not so.

To support its contention, respondent argues that Seeney's statements came from his personal knowledge and, therefore, interrogators did not seek to obtain a statement that conformed to their theory of the case:

> As the court noted, Seeney's statements were a product of his own personal knowledge and provided great detail that eventually led officers to locate the murder weapon. There is nothing in the record that demonstrates the officers questioned Seeney only "to establish a predetermined set of facts" as was the case in Lee.

(RB 61-62, quoting *People v. Lee*, *supra*, 95 Cal.App.4th at p. 786.) Respondent's conclusion fails to flow from its premise. Respondent assumes Seeney could have acquired personal knowledge of the incidents only if appellant had provided those facts to Seeney. That assumption is inaccurate. Seeney could have obtained personal knowledge of the crimes against the taxicab drivers if he had committed them himself. Similarly, Seeney's good friends, Brad and Cory McKinney, could have perpetrated those offenses and told Seeney about them. Appellant, Seeney, and the McKinney brothers comprised the entire pool of potential perpetrators. Because none of them were strangers to Seeney, there was no need for the interrogators, as the trial court phrased it, to put words in Seeney's mouth. The only accusation for which Seeney needed coaching was naming appellant as the assailant.

Contrary to respondent's claim, the record does indicate that the interrogators sought and ultimately acquired Seeney's cooperation to

support their theory of the case. The detectives believed that appellant had committed the crimes. Phyllis Woodruff told Detective Chris Elvert that she and Seeney had seen appellant hold a large-caliber gun that was believed to be the murder weapon. (3 RT 811.) Detective Elvert then sought a statement from Seeney that was consistent with Woodruff's statement :

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.

(3 RT 810.)

These remarks show that Detective Elvert expected to hear a predetermined fact, and imply that if Seeney had said that he had never seen appellant with a high-caliber weapon, Detective Elvert would not have believed that Seeney had told him the truth. Similarly, the detective's remarks suggest that if Seeney had said Brad or Cory McKinney, rather than appellant, claimed responsibility for the crimes, Detective Elvert would not have found Seeney to be truthful.

Indeed, Detective Elvert recognized that both he and Seeney understood that Detective Elvert would be the person who determined whether Seeney had been truthful to him. (3 RT 827-828.) At the suppression hearing, Detective Elvert acknowledged that during the interrogation he was "the decider of truth." (3 RT 828.)

Even if this Court concludes that the interrogators in this case did not seek to have Seeney provide a statement that conformed to a predetermined set of facts, Seeney's statements were nevertheless coerced because they were induced by a combination of threats and promises. (See *People v. Holloway*, *supra*, 33 Cal.4th at p. 115 [explaining that a statement made in

consideration of an expectation of leniency is involuntary irrespective of whether the statement is true].)

In his Opening Brief, appellant drew parallels between the threats and promises made to Seeney and those made to the defendant in *People v. Neal, supra.* 31 Cal.4th 63. (AOB 164-166.) In *Neal,* this Court found that an interrogator made a threat and promise when he warned the defendant that the criminal justice system would treat him harshly if he declined to cooperate with the police, but suggested the defendant could avoid that fate if he cooperated. (*Id.*, at p. 73.) Although *Neal* is binding precedent, respondent does not attempt to explain how the threats and promises made to Seeney in this case differed from those made to the defendant in *Neal.* In any event, for the reasons articulated in Appellant's Opening Brief (AOB 164-166), the inducements in this case cannot be distinguished from those in *Neal.*

Because the inducements in this case matched the inducements given to the defendant in *Neal,* this Court's determination in *Neal* that Detective Martin made promises and threats compels the conclusion that the law enforcement officers in this case made promises and threats to Seeney. Because Seeney made his statements in response to promises and threats, his statements were coerced and, and should have been suppressed on the grounds that they were unreliable.

C. Seeney's Preliminary Hearing Testimony Was Also the Product of Coercion and Therefore Unreliable, and Should Have Been Excluded

In his Opening Brief, appellant asserted that Seeney's preliminary hearing testimony was unreliable for two reasons: the coercion from the interrogations tainted the testimony and because Seeney's immunity agreement was implicitly coercive. (AOB 169-170.) Respondent contends

that Seeney's testimony was not rendered unreliable by prior coercion because the interrogators never coerced Seeney. (RB 58-62.) Respondent also argues that the immunity agreement was not coercive because it did not explicitly compel Seeney to testify consistently with his statements regardless of their truth. (RB 57-58.) Neither of these arguments withstands scrutiny.

First of all, the coercion from the interrogations had not dissipated. As demonstrated in Appellant's Opening Brief and above, the interrogators employed coercive tactics that induced Seeney to incriminate appellant. The preliminary hearing was held less than six months after the interrogations, and Seeney was incarcerated during the entire time between the interrogations and preliminary hearing. (1 CT 136-137; compare *People v. Williams* (2010) 49 Cal.4th 405, 454 [concluding coercion arising from interrogation did not taint witness's trial testimony because she testified at trial three years after the interrogation and had been released from custody shortly after the interrogation].)

The agreement that provided Seeney with transactional immunity for residential burglaries in exchange for his preliminary hearing testimony compounded the coercion. Although, as respondent accurately notes, the mere fact that Seeney testified under a grant of immunity does not, by itself, establish that his testimony was coerced (RB 57, citing *People v. Badgett* (1995) 10 Cal.4th 330, 354-355), under the facts of this case, the immunity agreement was coercive.

When Seeney was on the witness stand at the preliminary hearing, the prosecutor lodged the immunity-agreement documents with the court. (1 CT 112.) Three two-page documents related to Seeney's immunity agreement. (12 CT 3579-3584.)

The first was the prosecution's Petition and Request for an Order Requiring Witness To Answer Questions and Produce Evidence under Section 1324 of the Penal Code of California. In addition to requesting that the court order Seeney to answer questions that he would ordinarily be entitled to refuse to answer by asserting his privilege against self-incrimination, the prosecution summarized Seeney's anticipated testimony. The anticipated testimony echoed the salient statements Seeney gave to the detectives during his interrogations and included Seeney's representation that appellant twice admitted killing the taxicab drivers:

> The petitioner believes this witness 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 cabby robbery, whereat the victim would have been executed but for defendant's pistol jamming. Defendant described this event to the witness.

(12 CT 3579-3580.)

The next document was titled Waiver of Issuance of Order to Show Cause and Hearing under Section 1324 of the Penal Code of California. (12 CT 3581-3582.) This document encapsulated the immunity agreement. According to the agreement, Seeney:

> hereby consents to the issuance of an order by this court, forthwith, ***compelling the undersigned to answer such questions and produce such evidence in [this case], as may be material, competent, and relevant to the case***, and an order by this court that upon compliance therewith the

> undersigned shall not be prosecuted or subjected to penalty or forfeiture for, or on account of, any question, fact, or thing related to said residential burglaries, which in accordance with said order, the undersigned was required to answer or produce.

(12 CT 3582, emphasis added.) During the preliminary hearing, the prosecutor indicated that the entire immunity agreement was contained within these documents; that is, he averred there were no side agreements regarding Seeney's immunity that were not reduced to writing. (1 CT 114.)

The third document was the court's Order Requiring Witness To Answer Questions under Section 1324 of the Penal Code of California. The judge signed this order on August 25, 2000, the day Seeney testified at the preliminary hearing. (12 CT 3583-3584.) The order required Seeney to testify in exchange for immunity:

> IT IS HEREBY ORDERED that said SYLVESTER ARMAND SEENEY ***shall answer questions and produce such evidence in [this case], as may be material, competent, and relevant to the case*** and which otherwise, but for the provisions of Section 1324 of the Penal Code of California, the witness would be privileged to withhold on the ground that answering such questions and producing such evidence might be self-incriminating.
>
> After complying with this order, the above named witness shall not be prosecuted or subjected to penalty or forfeiture for or on account of any question, fact, or thing relating to the residential burglaries, which, in accordance with this order, the witness was required to answer or produce.

(12 CT 3583-3584, emphasis added.)

There are two general contours of the law regarding whether an immunity agreement by itself coerces a witness's testimony. First, an immunity agreement that requires only that a witness testify fully and

truthfully does not coerce the witness's testimony. Second, an agreement that conditions the witness's immunity on whether the testimony substantially conforms to a prior statement given to the police yields coerced and inadmissible testimony. (*People v. Allen* (1986) 42 Cal.3d 1222, 1252-1253.) Put another way:

> These principles are violated only when the agreement requires the witness to testify to prior statements "regardless of their truth," but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain.

(*People v. Homick* (2012) 55 Cal.4th 816, 863, quoted at RB 58.)

Respondent argues that the trial court correctly found that the immunity agreement contained general language that could be fairly interpreted as merely requiring Seeney to testify truthfully. (RB 58.) This argument must fail, because nothing in the immunity agreement required Seeney to testify truthfully.

By their terms, the immunity agreement and the court order enforcing the immunity agreement required Seeney to answer questions and provide evidence that was "material, competent, and relevant to the case." (12 CT 3582-3584.) This language made no reference to whether Seeney was obligated to tell the truth. The prosecutor stated in open court that there were no ancillary immunity agreements. (1 CT 114.) Accordingly, nothing in the immunity agreement informed Seeney that his receipt of immunity for the residential burglaries was conditioned on truthful testimony. In contrast, in recent cases in which this Court has found that an immunity agreement was not coercive, the agreement explicitly conditioned immunity on the witness testifying truthfully. (See *People v. Homick, supra*, 5 Cal.4th at p.

863; *People v. Williams*, *supra*, 49 Cal.4th at p. 454; *People v. Boyer* (2006) 38 Cal.4th 412, 456; *People v. Avila* (2006) 38 Cal.4th 491, 593.)

Because the Seeney's immunity agreement was silent with respect to whether he was required to testify truthfully, it is necessary to look to extrinsic evidence to determine whether Seeney understood that he was expected to testify truthfully. (See *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 40, fn. 8 ["Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous."]; *People v. C.S.A.* (2010) 181 Cal.App.4th 773, 779 [explaining immunity agreements are usually analyzed by contract law standards].) As explained above, this Court has explained that an immunity agreement is not coercive if truthful testimony forms part of the parties' mutual understanding of the immunity agreement. (See *People v. Homick*, *supra*, 55 Cal.4th at p. 863.) In *People v. Badgett*, *supra*, 10 Cal.4th at pp. 357-363, in which there had been multiple immunity agreements over the course of the proceedings that on their face placed differing obligations on the immunized witness with respect to her testimony, this Court looked beyond the four corners of the immunity agreement under which she testified to analyze what she believed the immunity agreement required of her trial testimony. Because the immunity agreement in this case was ambiguous regarding whether Seeney was required to testify truthfully, this Court should review the record to determine what Seeney believed was required of his testimony.

The record shows that Seeney, when he testified at the preliminary hearing, believed that he was obligated to testify consistently with his prior statements. In addition to the immunity agreement failing to specify an obligation to testify truthfully, there is no indication that Seeney was told

that he would hold up his end of the bargain so long as he testified truthfully. During his preliminary hearing testimony, Seeney was not asked what he believed the immunity agreement required him to do. (Compare *People v. Badgett, supra*, 10 Cal.4th at p. 361 [finding immunity agreement not coercive, in part because the witness testified that she understood her immunity was conditioned on her providing truthful testimony].) On the other hand, the circumstances surrounding his preliminary hearing testimony demonstrate that he believed he was obligated to inculpate appellant, as he had done during his interrogations, regardless of its truth. As discussed above, Seeney's interrogators placed inordinate pressure on him to implicate appellant, and Detective Elvert told Seeney that when he told the truth, he would see appellant holding the murder weapon. Seeney was 19 years old at the time of the preliminary hearing, and he testified at that proceeding that he was frightened by the interrogators' threats that he faced lengthy imprisonment if he did not cooperate with the police. (1 CT 143, 147.) The immunity documents filed with the court contained the prosecution's summary of how Seeney was expected to testify. Even assuming that the summary of anticipated testimony was a mere offer of proof, Seeney would have understood that he needed to testify in accord with the offer of proof to meet his obligation to provide "material, competent, and relevant" evidence.

Seeney's actions after the preliminary hearing further suggest that he believed that the immunity agreement required him to testify consistently with his statement inculpating appellant. Seeney recanted his preliminary hearing testimony and stated that appellant had not made the admissions to which Seeney had testified. (See Argument IV, *post.*) When he was called as a witness during a suppression hearing, Seeney invoked his Fifth

Amendment rights in response to a question asking if his preliminary hearing testimony had been truthful. If Seeney had understood that his immunity agreement required him to testify truthfully, regardless of its consistency with his prior statements, then Seeney would have had no basis for asserting his Fifth Amendment privilege when asked if his testimony had been true.

In sum, Seeney's preliminary hearing testimony was unreliable because of continued coercion from the interrogations as well as the terms of his immunity agreement, and the court's order. The admission of that prior testimony at appellant's retrial violated appellant's due process rights under the United States and California Constitutions. (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"].)

D. The Admission of Seeney's Coerced Statements and Prior Testimony Deprived Appellant of a Fair Trial and Requires Reversal of Appellant's Convictions and Death Sentence

Respondent contends that even if it was error not to suppress Seeney's statements and preliminary testimony, the error was harmless because Seeney's testimony and statements were cumulative of other incriminating evidence, namely the testimony of Seeney's girlfriend, Phyllis Woodruff. Respondent notes parallels between Seeney's statements and testimony and the testimony of Woodruff (RB 62-63), who testified that she heard appellant admit to robbing James Richards, and that she observed in appellant's possession the weapon believed to be the gun used to kill Andres Dominguez and Victor Henderson. (14 RT 3646-3647, 3652.) In support of its harmless-error argument, respondent asserts that Seeney's

statements and testimony were "largely duplicative of Phyllis Woodruff's testimony." (RB 62-63.).

Contrary to respondent's assertion, Phyllis Woodruff's testimony could not have filled the gaps in the prosecution's case if Seeney's statements and testimony had been excluded. The scope of Woodruff's testimony was limited. She testified that she heard appellant make admissions only with respect to the robbery of James Richards, which was not a capital crime. In contrast, Seeney was the only witness who claimed to have heard appellant's alleged admissions regarding the murders.

Furthermore, there were multiple reasons why the jury could have concluded that Woodruff was not a credible witness. As Seeney's girlfriend, she had a motive to testify falsely to protect Seeney or Seeney's friends. But that was not her only incentive. Like Seeney, Woodruff testified under transactional immunity with respect to her participation in the residential burglaries, including those during which the murder weapon was stolen. The jury could have determined that she testified consistently with the police's theory of the case in order to ensure that she would not be prosecuted for those burglaries.

Woodruff's testimony that she saw appellant in possession of the murder weapon at some unspecified time prior to the crimes against Andres Dominguez and Victor Henderson also did not render the admission of Seeney's statements and testimony harmless for two reasons. First, it failed to establish that appellant, rather than Seeney or the McKinney brothers, perpetrated the homicides. Thus, even if the jury found Woodruff's testimony credible, it did not dispel the very real possibility that the gun changed hands before the crimes and that another person committed the crimes against Dominguez and Henderson.

Furthermore, appellant's alleged admissions to Seeney regarding the murders — to which only Seeney testified — were much more directly incriminating than Woodruff's testimony.[18] Accordingly, Seeney's testimony was not cumulative of other evidence. Without that testimony the prosecution would not have had a case against appellant.

Respondent also contends the admission of Seeney's testimony and statements were harmless because appellant was free to argue that they were false or unreliable. (RB 62.) Respondent's conclusion does not follow its premise. Arguing that evidence is unreliable is no substitute for the exclusion of unreliable evidence, particularly when that disputed evidence concerns defendant's alleged admissions to committing the charged crimes. (Cf. *Jackson v. Denno* (1964) 378 U.S. 368, 388-389 [concluding that a jury cannot be expected to disregard a confession admitted into evidence even if the jury concludes that the confession is unreliable].) Respondent does not cite, and appellant's counsel could not find, any authority supporting the proposition that counsel's argument that erroneously admitted evidence should be given little weight can cure the error of admitting the evidence. The court received Seeney's statements and prior testimony into evidence, and the jury was entitled to rely on them in determining appellant's guilt.

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[18]In its brief, respondent takes inconsistent positions regarding the role of Seeney's testimony in the prosecution's case. For example, respondent accords great weight to appellant's purported admissions in the harmless-error section of the argument pertaining to James Richards's identification of appellant. (RB 40-41.) Likewise, when contending that the admission of appellant's statements from his interrogations was harmless error, respondent argues that other damaging evidence dwarfed appellant's statements. Respondent cited appellant's purported admissions to which Seeney testified as prime probative evidence that demonstrated appellant's guilt. (RB 98.)

Harmless-error analysis asks whether evidence that should have been excluded might have contributed to the verdict: As the United States Supreme Court observed, "the inquiry . . . [is] whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Respondent cannot meet its burden of showing that Seeney's statements and testimony inculpating appellant did not contribute to the verdicts merely because defense counsel argued that Seeney was not truthful. Besides, the jury did not have the opportunity to evaluate Seeney's credibility comprehensively, because the trial court excluded evidence of Seeney's recantation of his statements and prior testimony. (See *post*, Argument IV.)

For these reasons, the admission of Seeney's statements and testimony was prejudicial and deprived appellant of a fair trial. Accordingly, appellant's convictions and the death judgment should be vacated.

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IV

THE EXCLUSION OF SYLVESTER SEENEY'S RECANTATION OF HIS STATEMENTS AND PRELIMINARY HEARING TESTIMONY VIOLATED APPELLANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

A. Introduction

In his Opening Brief, appellant argued that the trial court abused its discretion and violated his constitutional rights when it excluded, on hearsay grounds, statements made by Sylvester Seeney to appellant's attorney and investigator, recanting prior incriminating statements he had made against appellant during his police interrogation and in his preliminary hearing testimony.[19] (AOB 181-198.) Appellant established that Seeney's recantation was admissible both under Evidence Code section 1230, as a statement against penal interest (AOB 181- 183), and under Evidence Code section 1202, which permits, for impeachment purposes, the introduction of a person's statements that are inconsistent with his or her hearsay declarations that were admitted into evidence. (AOB 183-192.)

Respondent contends that the recantation was not admissible for any evidentiary purpose. (RB 63-75.) Specifically, respondent argues that Seeney's recantation was not admissible as a statement against penal interest (RB 68-72); that the Section 1202 claim was forfeited; and that Section 1202 is substantively inapplicable. (RB 74-75.) Respondent also avers that any error was harmless. (RB 75-77.) For the reasons stated below

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[19] Seeney told appellant's attorney and investigator during a tape-recorded interview, that the detectives who interrogated him had frightened him. He admitted that despite what he told the detectives, he never actually saw appellant in possession of a high-caliber firearm, and that appellant never confessed to having committed the crimes. (1 Supp. CT 241-258.)

and in Appellant's Opening Brief, each of respondent's arguments is without merit and should be rejected.

B. The Recantation Was Admissible Under the Declaration-Against-Penal-Interest Hearsay Exception

The declaration-against-penal-interest hearsay exception applies if the declarant is unavailable at trial, the statement was against the declarant's penal interest when made, and it was sufficiently reliable or trustworthy to be admitted despite being hearsay. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108; see also, Evid. Code, § 1230.) As appellant established in his Opening Brief, the recantation meets all three of these requirements, and the trial court erred when it refused to admit the recantation under this hearsay exception.

Although Seeney was declared unavailable as a witness, respondent asserts that Seeney's recantation was not admissible under section 1230, because it was neither against his penal interest, nor reliable or trustworthy. Respondent's argument as to both these points is predicated upon faulty reasoning.

Respondent initially argues that most of Seeney's statement was not at all against his penal interest. (RB 70.) This contention does not undercut appellant's argument, because appellant's claim concerns the exclusion of the recantation, not the entire statement. (AOB 181-183.) Although defense counsel sought to introduce all of Seeney's statements (17 RT 4399-4401; 8 CT 2197), in his Opening Brief, appellant did not contend that the portion of the statement preceding the recantation was against his penal interest. (AOB 181-182.) Regardless of whether the first part of Seeney's statement was admissible under the statement-against-penal-interest hearsay exception, the trial court erred by excluding the entire statement. The

recantation was unquestionably against Seeney's penal interest, because the obvious implication of his recantation is that he committed perjury at the preliminary hearing. In addition, as the interrogators in Ohio had warned him, Seeney himself could be prosecuted for the crimes against the taxicab drivers if he did not inculpate appellant.

Respondent then asserts that the evidence was inadmissible under section 1230, because Seeney did not appear aware that the recantation was against his penal interest:

> First, as the trial court noted, there is no indication that Seeney was admitting he falsified prior sworn testimony. The transcript contains no mention of Seeney's prior testimony, whether that testimony was truthful, or whether Seeney was admitting to violating his prior oath by speaking with defense counsel and the defense investigator. (1 Supp. CT 241-258.) As the prosecutor argued below, "exposure to perjury" appears the "last thing on [Seeney's] mind."

(RB 70.)

However, the determination of whether a declaration was against someone's penal interest is not based on the declarant's subjective state of mind. "The test imposed is an objective one — would the statement subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true." (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678; *People v. Soto* (2011) 51 Cal.4th 229, 246 [noting, when discussing duress, that a reasonable-person standard is a "purely objective standard"].) Thus, Seeney's subjective awareness was irrelevant to the question of whether his recantation was a declaration against penal interest. The relevant question is whether a reasonable person in Seeney's position would have made the statement, subjecting himself to criminal culpability, only if it was true.

A reasonable person in Seeney's position would have known that his recantation would have subjected himself to criminal culpability. It was an implicit admission of perjury. The recantation also risked the nullification of Seeney's immunity agreement, subjecting him to prosecution for residential burglaries. Given his knowledge of the events and his participation in the burglary in which the murder weapon was stolen, Seeney further subjected himself to prosecution as an aider and abettor of the crimes against the taxicab drivers.

Respondent also contends that statements made to defense counsel and his investigator "lacked the requisite reliability and trustworthiness to warrant admission as a declaration against penal interest under Evidence Code section 1230," because of the circumstances under which it was made: "it was elicited privately by defense counsel and the defense investigator without any law enforcement present . . . while Seeney was incarcerated" and because Seeney agreed with the leading questions and assumptions suggested by defense counsel and the investigator. (RB 76.) These arguments are unconvincing.

The circumstances under which Seeney recanted his testimony did not render Seeney's statements unreliable. As argued in Argument III, *ante*, Seeney's statements to police and his preliminary hearing testimony that he recanted were themselves made under circumstances that tend to produce unreliable statements and testimony. There was little reason to give greater credence to the prior statements and testimony than the recantation. Indeed, the factors respondent cites to support its argument were all present in Seeney's interrogations. The interrogations were elicited by law enforcement officers while Seeney was incarcerated. The interrogators asked leading questions. The prosecutor asked Seeney many leading

questions during the preliminary hearing: On twelve occasions during Seeney's direct examination, defense counsel made leading-question objections. (1 CT 116-131.)

Moreover, Seeney's meeting with defense counsel and investigator lacked other pressures inherent in interrogations. Appellant's counsel and investigator had no power to arrest or prosecute Seeney for the crimes against the taxicab drivers. They could not promise to give Seeney's probation officer a good report or suggest that such a report would reduce or eliminate his sanction for violating his probation. In short, they had no power to make meaningful threats or promises to Seeney. Also, they did not accuse Seeney of lying until he provided them with evidence that they sought. Indeed, Seeney stated that the interrogators' threats frightened him. (14 RT 3749; 1 Supp. CT 241-243.) Accordingly, when juxtaposed against the environment in which Seeney made his original statements, the manner in which defense counsel and the defense investigator elicited Seeney's recantation did not render the recantation unreliable.

In addition to citing the circumstances under which Seeney recanted his testimony, respondent argues that the recantation was unreliable because Seeney loved appellant and presumably recanted his preliminary hearing testimony in order to improve appellant's chances of winning an acquittal in his upcoming trial. (RB 71-72.) Respondent's argument is flawed.

Respondent cites no support for its assertion that Seeney's recantation should be deemed unreliable and inadmissible because he loved appellant. The only factual evidence of witness bias to which respondent refers is Seeney's testimony that he loved his half-brother. (RB 71, citing 14 RT 3729.) Respondent cites no legal authority for the proposition that a

statement against penal interest is inadmissible merely because the statement could benefit a loved one.

More importantly, adopting respondent's argument would usurp the jury's function. A jury is well-suited to evaluate whether a witness's bias undermines his credibility:

> A fundamental premise of our criminal trial system is that "the jury is the lie detector." [Citation] Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."

(*United States v. Scheffer* (1998) 523 U.S. 303, 313, quoting *United States v. Barnard* (9th Cir. 1973) and *Aetna Life Ins. Co. v. Ward* (1891) 140 U.S. 76, 88; see also *United States v. Abel* (1984) 469 U.S. 45, 52 [explaining importance of evidence of a witness's bias in jury's evaluation of that witness's credibility].) The jury already had to judge Seeney's credibility, although he did not testify at trial. Excluding the recantation prevented the jury from fairly and fully evaluating it.

Furthermore, Seeney's statement to appellant's trial counsel and investigator provided a plausible explanation for why he was making a statement against his penal interest to them that differed from his statement to his interrogators. Seeney told them that the interrogators' threats frightened him and induced him to give a statement that falsely inculpated appellant. (1 Supp. CT 241-251.) Notably, this interview was not the first time Seeney had said that he had been fearful of the interrogators' threats; Seeney had testified regarding his fear during the preliminary hearing. (1 CT 143.) Accordingly, Seeney's articulation of his fear was not a post-hoc rationalization that he concocted during the interview with the defense

team. Because there was a bona fide basis for Seeney to change his story when talking to appellant's trial counsel and investigator, from which it would have been reasonable to conclude that Seeney's recantation was credible, the recantation should not have been excluded for lack of trustworthiness.

Lastly, respondent claims:

> Anytime an individual has provided testimony incriminating a loved one — a very common occurrence in criminal prosecutions — the defense could simply hire a defense investigator to inform the individual that all they have to do is recant any prior incriminating testimony and: (1) that person will not have to testify against their loved one because they can simply "plead the Fifth"; and (2) it will greatly assist their loved one's chances at trial. Such an outcome cannot be envisioned by the reliability requirement of Evidence Code section 1230.

(RB 72.)

Respondent overstates its case. Appellant does not seek a blanket rule that all recantations should be admissible as statements against penal interest. Nor does appellant suggest that a trial court can never exclude the recantation of a witness whose bias renders the recantation unreliable. Rather, appellant asserts that there was a sufficient basis for finding the recantation in this case credible and that, therefore, the recantation was sufficiently reliable to have been admissible under Evidence Code section 1230.

C. The Recantation Was Admissible as a Prior Inconsistent Statement Under Evidence Code Section 1202

In the Opening Brief, appellant argued that the recantation was admissible to impeach Seeney's prior statements to the police and his preliminary hearing testimony, as a prior inconsistent statement under

Evidence Code section 1202. Respondent contends that appellant's claim is not cognizable on appeal, because it was not preserved below, and that it fails on the merits, because section 1202 is inapplicable to impeach prior testimony. Respondent is incorrect as to both matters.

1. Appellant Has Preserved This Issue for Appeal

After defense counsel argued, unsuccessfully, that Seeney's recantation was admissible as a prior inconsistent statement under Evidence Code section 1235, he further argued that he nevertheless should be allowed to introduce it to impeach Seeney's preliminary hearing testimony. (17 RT 4497-4498.) In making this argument counsel did not specifically cite Evidence Code section 1202, which provides for admission of prior inconsistent statements for purposes of impeaching the credibility of the declarant, but instead referred to the common law origin of the rule codified in that section of the Evidence Code. The trial court rejected this argument on the grounds that because Seeney had been declared unavailable, he would have no opportunity to explain or deny the inconsistency. (17 RT 4498.)

Respondent contends that appellant is barred from challenging the trial court's ruling on appeal because defense counsel "never argued *in any fashion*" that the recantation should be admitted under ection 1202. (RB 74, emphasis added.) That is not so.

As appellant argued in his Opening Brief, he fulfilled the requirements set forth in Evidence Code section 354 to preserve this issue for appeal. (AOB 184.) That section 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).) (AOB 184.) There is no dispute that defense counsel provided the trial court with the substance of the evidence (1 Supp. CT 241-258 [transcript of Seeney's interview with appellant's attorney and investigator]), and trial counsel fully articulated its purpose and relevance. (17 RT 4495-4498.)[20] As appellant stated in his Opening Brief, only a hypertechnical application of Evidence Code section 354 could lead this Court to conclude that appellant forfeited his claim that the trial court erroneously excluded evidence of Seeney's recantation offered for purposes of impeachment. In order to

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[20] Defense counsel argued as follows:

> 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 . . . 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. . . . [A]gain, 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.

(17 RT 4497-4498.)

preserve his claim for appeal, appellant was required to do no more than assert the same theory of admissibility that he advanced in the trial court. (See *People v. Ervine* (2009) 47 Cal.4th 745, 779.) Clearly, appellant did that. (Compare *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1192 [defendant barred under Evidence Code section 354 from raising claim on appeal that evidence should have been admitted to impeach witness's credibility, where he argued different theory of admissibility in trial court].) Respondent's argument to the contrary is without merit.

2. The Failure to Admit the Recantation Under Evidence Code Section 1202 Was Error

Respondent also erroneously claims that Seeney's recantation was inadmissible under Evidence Code section 1202, because that provision is inapplicable to impeach "a witness who has previously testified." Respondent contends that Seeney falls into this category because he testified at the preliminary hearing. (RB 75.) However, respondent has misread section 1202, and fails to recognize that testimony given at a pretrial proceeding is hearsay when it is admitted at trial. (See Evid. Code, § 1200 ["'Hearsay evidence' is evidence of a statement that was made other than by a witness *while testifying at the hearing* and that is offered to prove the truth of the matter stated," emphasis added.].) Because the prosecution introduced Seeney's former testimony and Seeney did not testify at trial, he was a hearsay declarant at trial whose prior testimony was subject to impeachment under Evidence Code section 1202.

The Law Revision Comments concerning section 1202 specifically reference *People v. Collup* (1946) 27 Cal.2d 829, in which this Court held that the defendant was entitled to impeach an unavailable witness whose preliminary hearing testimony was read into the record by the prosecution,

with a subsequent inconsistent statement recanting her earlier testimony. This is precisely what appellant herein sought to do, but was barred from doing by the trial court, on the legally erroneous grounds that Seeney would have no opportunity to explain or deny the inconsistent statement. Section 1202 explicitly provides that an inconsistent statement offered for impeachment of a declarant, "is not inadmissible though he is not given and has not had an opportunity to explain or deny such inconsistent statement or other conduct." (Evid. Code, § 1202; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 806-808 [hearsay held admissible under Evidence Code section 1202 to impeach preliminary hearing testimony of unavailable witness].)

Respondent's reliance upon *People v. Williams* (1976) 16 Cal.3d 663, 668-669, in support of its argument is misplaced. That case addressed the inadmissibility of hearsay by an unavailable witness to prove the truth of the matter, under Evidence Code section 1235, *not* the admissibility hearsay to *impeach* an unavailable witness under section 1202. In fact, in *Williams*, this Court made a point of distinguishing a hearsay statement of a witness who testifies at trial under section 1235, from that of a hearsay declarant unavailable at trial, whose hearsay statement is offered as an inconsistent statement for impeachment purposes. (*Ibid.*)

As explained in *People v. Corella* (2004) 122 Cal.App.4th 461, 470, section 1202 requires the admission of statements that contradict hearsay declarations so that a jury may receive a balanced presentation of evidence, rather than one in which the prosecution elicits a hearsay statement that defense is barred from impeaching:

> Under section 1202, when a hearsay statement by a declarant who is not a witness is admitted into evidence by the prosecution, an inconsistent hearsay statement by the same person offered by the defense is admissible to attack the

> declarant's credibility. [Citation] Section 1202 creates "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" [Citation].

(*Ibid.*)

Respondent's argument that section 1202 does not apply to Seeney because he does not qualify as a hearsay declarant is therefore legally erroneous. Appellant was entitled to impeach Seeney's preliminary hearing testimony with subsequent inconsistent statements. The trial court clearly erred in excluding the evidence on the grounds that the prosecution would not have an opportunity to cross-examine Seeney. (17 RT 4498.) Because the trial court admitted Seeney's statements to police and prior testimony, but not his recantation, the trial court denied the jury the opportunity to fully and fairly assess Seeney's credibility. (See *People v. Corella, supra*, 122 Cal.App.4th at p. 470.)

D. The Exclusion of Seeney's Recantation Violated Appellant's Constitutional Rights

As appellant established in his Opening Brief (AOB 192-195), the exclusion of the recantation violated appellant's federal constitution right to present a defense, to a fair trial, and to reliable guilt and penalty determinations, as well as his right to present relevant evidence under the "truth in evidence" provision of the California Constitution.

Respondent asserts that the erroneous exclusion of defense evidence is merely an error of state law and not one "of constitutional dimension." (RB 75.) However, respondent ignores United States Supreme Court case law, as well as decisions of this Court that have held otherwise. (See, e.g., *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-327 [explaining United States Constitution places limits on states' latitude to develop evidentiary

rules and holding exclusion of third-party-culpability evidence under state law violated defendant's Sixth and Fourteenth Amendment rights to a meaningful opportunity to present a complete defense]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [holding state trial court's exclusion of evidence pertaining to circumstances surrounding defendant's confession violated his Sixth and Fourteenth Amendment rights to a meaningful opportunity to present a complete defense]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 [holding state trial court's bar on cross-examining prosecution witness regarding his alleged bias violated defendant's Sixth Amendment confrontation-clause rights]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [holding exclusion on hearsay grounds of evidence tending to show defendant had not participated in killing victim violated defendant's due process rights]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [holding application of state law barring defendant from impeaching his own witness violated defendant's Sixth Amendment confrontation-clause rights]; *People v. Partida* (2005) 37 Cal.4th 428, 439 [state-law evidentiary error violates due process if it renders trial fundamentally unfair].)

In his Opening Brief, appellant demonstrated that the exclusion of the recantation violated his Sixth and Fourteenth Amendment rights to a defense. Appellant explained that the exclusion of Seeney's recantation effectively eviscerated appellant's defense that Seeney had lied during the police interrogation, and at the subsequent preliminary hearing, about appellant having admitted to committing the murders. (AOB 92-93.) He further demonstrated that exclusion of this evidence deprived him of his Fourteenth Amendment right to a fair trial and his Eighth Amendment right to reliable guilt and penalty determinations, as well as his state

constitutional right to the admission of indisputably relevant evidence. (AOB 94-95.)

Other than arguing generally that any error in excluding the evidence was strictly one of "state law" (RB 76), respondent has neither disputed any of appellant's specific claims of infringement of his constitutional rights, nor offered any analysis of why the erroneous exclusion of Seeney's recantation does not rise to the level of constitutional error.

E. The Exclusion of Seeney's Recantation Was Prejudicial and Requires This Court to Vacate the Judgment

Respondent argues that any error was harmless because the recantation was patently unbelievable, the evidence against appellant was overwhelming, and Seeney's testimony was largely duplicative of Phyllis Woodruff's testimony. The record does not substantiate these contentions.

The exclusion of Seeney's recantation, under either section 1230 or 1202 of the Evidence Code, was highly prejudicial. The recantation directly undercut the testimony of the prosecution's most important witness, who provided the only evidence of appellant's purported admissions to the February 21, 2000 crimes against the taxicab drivers. Its exclusion thus severely and unfairly limited appellant's ability to subject that testimony to meaningful adversarial testing vital to his defense. It also left the jury without all the evidence it needed to make a reliable determination regarding Seeney's credibility.

Under analogous circumstances, the Court of Appeal recognized the unfairness attendant to the exclusion of a prime prosecution witness's statements that are inconsistent with his or her inculpatory testimony:

> [The defendant] had the right to present the words to the jury for its consideration of the truth of [the witness's] earlier words. [The witness] gave two versions of the events. By not

> admitting her preliminary hearing statement, the jury heard only the version proffered by the prosecution.

(*People v. Corella*, *supra*, 122 Cal.App.4th 461, 471.) Due to the importance of Seeney's testimony regarding appellant's purported admissions, the exclusion of Seeney's inconsistent statements regarding whether appellant made those alleged admissions was prejudicial. (See *Blackston v. Rapelje* (6th Cir. 2015) 780 F.3d 340, 355 ["[T]here was no physical evidence linking Blackston with the murder and, in such a situation, additional impeachment tending to tip the credibility balance cannot be brushed aside as cumulative."].)

Contrary to respondent's contention, the recantation was not patently unbelievable. Regarding appellant's alleged admissions, Seeney told two different stories: He told his interrogators and testified at the preliminary hearing that appellant twice admitted to him that he had killed the taxicab drivers, and he told appellant's trial counsel and investigator that appellant never made those admissions. (14 RT 3734-3741; 1 Supp. CT 141-158.) Respondent's contention that the latter was patently unbelievable because he made them in response to leading questions during a jailhouse interview with the defense team turns a blind eye to the pressures Seeney faced in the interrogation room to incriminate his brother. Seeney testified he was afraid of his interrogators and their threats and explained that he inculpated appellant in response to that fear. (1 CT 143; 1 Supp. CT 141-151.) A reasonable juror certainly could have concluded that the recantation was truthful and that Seeney's statements and prior testimony were not.

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Furthermore, the recantation undermined Seeney's credibility regardless of its veracity.[21] When a witness recants, it casts doubt on the truthfulness of anything the witness says: "On its face, recanted testimony demonstrates the unreliability of a witness." (*State v. Perry* (Mont. 1988) 758 P.2d 268, 275, overruled on other grounds in *State v. Clark* (Mont. 2005) 125 P.3d 236, 239; see also *United States v. Bednar* (8th Cir. 1985) 776 F.2d 236, 239 [observing that when a witness recants, "we know that he either lied then, is lying now, or that he lied both then and now"]; Cobb, *Gary Dotson As Victim: The Legal Response to Recanting Testimony* (1986) 35 Emory L.J. 969, 982 ["When a witness substantially recants his or her previous testimony, it is immediately apparent that on one occasion or the other, he or she told something other than the truth. An aura of suspicion is thereby cast on both statements of the witness."].) That witness's inconsistent statements undermine his or her credibility: "A witness's own inconsistent statements, including recantations of prior inculpatory testimony, undeniably bear on a witness's bias and credibility." (*Blackston v. Rapelje, supra*, 780 F.3d at p. 353, citing *United States v. Hale* (1975) 422 U.S. 171, 176; see also *Harris v. New York* (1971) 401 U.S. 222, 225 [recognizing impeachment value of witness's inconsistent statements].)

Despite respondent's characterization, the evidence of appellant's guilt was far from overwhelming. (See *ante*, at pp. 26, 45.) The first trial resulted in a hung jury on the issue of guilt, and the jury in the second trial did not return guilty verdicts until eight days after it retired for deliberations. This disproves respondent's assertion regarding the strength

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[21]If the recantation had been admitted under Evidence Code section 1202 but not Section 1230, the jury would not have been permitted to consider the recantation for the truth of the matter asserted.

of the evidence against appellant. The strength of the prosecution's case would have been further diluted with evidence of the recantation, which provided a bona fide basis to question the veracity of Seeney's testimony that appellant twice admitted to committing the homicides. Moreover, it bears repeating that no direct or physical evidence linked appellant to any of the crimes.[22]

As discussed in Argument III, Seeney's testimony was neither superfluous nor duplicative of Woodruff's testimony. (See *ante*, at pp. 75-77.) Seeney was the only witness who testified that appellant admitted to killing Andres Dominguez and Victor Henderson. Phyllis Woodruff's testimony that appellant admitted to her that he robbed James Richards and that she saw appellant possess the murder weapon an unspecified number of days before the homicides suggested that appellant was the perpetrator. But Seeney's testimony regarding appellant's admissions, if found credible, definitively proved that appellant was the assailant. Accordingly, Seeney provided the strongest evidence of appellant's guilt for the death-eligible offenses. Evidence conflicting with Seeney's prior testimony and undercutting his credibility would have significantly impacted appellant's trial.

For these reasons, respondent cannot demonstrate beyond a reasonable doubt that the error was harmless. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24) However, even if this Court agrees with respondent that the trial court's errors were strictly ones of state evidentiary law, it is reasonably probable appellant would not have been convicted if

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[22]To reiterate (see *ante*, at p. 1), appellant's fingerprints were not found in Andres Dominguez's taxicab. (15 RT 4002.)

the trial court had not erroneously excluded Seeney's recantation. Thus, appellant meets his burden of demonstrating prejudice for state-law evidentiary error. (See *People v. Watson*, *supra*, 54 Cal.2d at p. 836.)

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V

THE TRIAL COURT ERRONEOUSLY ADMITTED SYLVESTER SEENEY'S HEARSAY STATEMENT TO HENRY WOODRUFF AND THEREBY VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL

A. Introduction

In his Opening Brief, appellant argued that the statement by Sylvester Seeney to Henry Woodruff that Seeney did not want to go with appellant to San Bernardino Valley, because appellant was "doing wrong" and Seeney did not want to violate his probation, was inadmissible hearsay, and that its improper admission deprived appellant of a fair trial and constituted reversible error. (AOB 199-207.)

In its brief, respondent argues that the trial court properly admitted the evidence under Evidence Code section 1250, the hearsay exception for the declarant's then-existing state of mind. Respondent contends that Seeney's state of mind was relevant, because appellant alleged that Seeney was an alternative perpetrator. Respondent adds that appellant's assertion of untrustworthiness was speculative and went only to the evidence's weight, rather than admissibility. Respondent also claims that any error from admitting the evidence did not implicate appellant's constitutional rights and was harmless. (RB 77-84.) For the reasons stated below and in Appellant's Opening Brief, respondent's arguments lack merit and must be rejected.

B. The Statement Was Not Relevant for a Nonhearsay Purpose

Respondent acknowledges that Seeney's statement, to which Henry Woodruff testified, was hearsay, and that its admissibility required a relevant nonhearsay purpose. Respondent, however, argues that, under

Evidence Code section 1250(a)(1), appellant made Seeney's state of mind relevant by naming Seeney as an alleged alternative perpetrator. (RB 80-81.) Respondent also contends that Seeney's statement was admissible to prove or explain his acts or conduct, under Evidence Code section 1250(a)(2). These arguments misconstrue the relevance requirement.

Without question, Seeney's conduct was material in this case. By naming Seeney as an alleged alternative perpetrator, evidence tending to prove that Seeney did not commit the crimes also tended to prove appellant's guilt. But respondent's argument that Seeney's state of mind was relevant to show Seeney's conduct misses the point. Seeney's state of mind must be more than nominally relevant: It must be relevant for a nonhearsay purpose. Seeney's remarks to Henry Woodruff were inadmissible under Evidence Code section 1250 because Seeney's state of mind was relevant only for a hearsay purpose.

To be relevant for a nonhearsay purpose, remarks must prove something other than the truth of the matter asserted. (*People v. Davis* (2005) 36 Cal.4th 510, 535-536.) Respondent has not articulated a bona fide nonhearsay purpose for the evidence. Respondent claims that "Seeney's belief that Wilson was 'doing wrong' was not itself admitted for the truth, but rather was admitted circumstantially to prove Seeney's state of mind in not wanting to leave with *Wilson*." (RB 81.) But this contention lacks an explanation of how Seeney's state of mind proves any relevant fact for something other than the truth of Seeney's remarks.

Indeed, Seeney's state of mind is not admissible as an explanation of Seeney's conduct because its relevancy depends on the statement being true. Seeney's hearsay remarks would tend to prove that he did not

perpetrate the homicides only if it was true that he did not want to go down the hill from Hesperia to the San Bernardino Valley.

In *People v. Lopez* (2013) 56 Cal.4th 1028, this Court held that evidence revealing a declarant's state of mind was inadmissible under Evidence Code section 1250 if the state of mind was relevant only if true. In that case, the defendant's brother, Ricardo, shot and killed the victim while the defendant was incarcerated. (*Id.* at pp. 1039-1040.) The prosecution theorized that the defendant orchestrated the murder and was, therefore, an aider and abettor. (*Id.* at pp. 1068-1069.) The trial court admitted, under the state-of-mind hearsay exception, Ricardo's statement immediately following the shooting, that "it is for my *carnal,*" meaning "it is for my brother." (*Id.* at p. 1060.)

On appeal, the Attorney General asserted that Ricardo's state of mind was relevant to rebut a witness's testimony that the murder had not been planned or premeditated. This Court rejected that argument and held that the defendant had not placed Ricardo's state of mind at issue, and that the evidence would tend to show premeditation only if it were admitted for its truth — that Ricardo shot the victim on behalf of, or at the behest of, his brother. (*Id.* at p. 1061.) Like Ricardo's hearsay statement in *Lopez*, the only relevance of Seeney's remarks to Henry Woodruff was to prove the truth of the matter asserted. Seeney's statement was likewise inadmissible under the state-of-mind hearsay exception.

In addition to using Seeney's out-of-court remarks to prove their truth, respondent sought to prove Seeney's purported noncriminal conduct through his self-exonerating remarks. Seeney's explanation of his conduct — that he did not want to go with appellant because appellant was "doing wrong" and by going with appellant he would be violating his probation —

was a self-exculpatory statement that was offered as evidence that Seeney did not commit the crimes in order to rebut appellant's third-party-culpability defense. Respondent cites no authority for the proposition that a declarant's self-exonerating statement offered to prove his conduct is admissible under the state-of-mind hearsay exception because the statement also reveals his state of mind. More broadly, respondent cites no authority to support its proposition that an alleged alternative perpetrator's state of mind is relevant to rebut a third-party-culpability defense. Appellant's counsel is not aware of any authority that supports either proposition.

Accordingly, respondent's theory of relevancy is nothing more than a backdoor way of using Seeney's remarks to prove that appellant was committing crimes. In his Opening Brief, appellant asserted that the prosecutor's closing argument demonstrated that the true purpose of eliciting the evidence was to prove from Seeney's statement that appellant had been planning to rob and kill taxicab drivers. (AOB 202, quoting 18 RT 4833.) Respondent neglects to address this argument and fails to demonstrate that the prosecutor at trial actually used Seeney's statement to Henry Woodruff for a permissible purpose.

It was, of course, improper to use Seeney's hearsay remarks to prove appellant's conduct. It is axiomatic that evidence admitted under the state-of-mind hearsay exception cannot be used to prove an act committed by someone other than the declarant. (See *Shepard v. United States* (1933) 290 U.S. 96, 104.) Specifically, the state-of-mind hearsay exception cannot be used to prove a defendant's conduct. (See *People v. Noguera* (1992) 4 Cal.4th 599, 622.)

In addition, a declarant's state of mind is inadmissible under Evidence Code section 1250 if the fundamental question at issue is the

perpetrator's identity, as it was in this case. In *People v. Hernandez* (2003) 30 Cal.4th 835, this Court held that out-of-court statements were not admissible under the state-of-mind hearsay exception although the statement was relevant to prove that the defendant was the perpetrator, because the declarant's state of mind was relevant only for an impermissible hearsay purpose. (*Id.* at pp. 872-873.) In this case, Seeney's hearsay remarks were relevant only to show that appellant, rather than Seeney, perpetrated the offenses. Consequently, Seeney's statements to Henry Woodruff were not admissible under the state-of-mind hearsay exception.

C. Seeney's Hearsay Statement Was Untrustworthy

In his Opening Brief, appellant argued that even if Seeney's statement to Henry Woodruff had a relevant, non-hearsay purpose and was admissible under Evidence Code section 1251, it should nevertheless have been excluded under section 1252, because Seeney had motives to lie when he made the statement, thus rendering it untrustworthy.

Respondent argues that appellant's claim that Seeney had motives to lie is speculative because it is unsupported by "concrete evidence," and that such speculation does not render a statement untrustworthy, and thus inadmissible, under Evidence Code section 1252. (RB 82.) It is not clear what respondent means by "concrete evidence," but, in any event, under section 1252, a declarant's motive to deceive may be inferred from the circumstances in which the hearsay statement was made. (See *People v. Jurado* (2006) 38 Cal.4th 72, 130, citing *People v. Livaditis* (1992) 2 Cal.4th 759, 779-780, *People v. Edwards* (1991) 54 Cal.3d 787, 820, and *People v. Whitt* (1990) 51 Cal.3d 620, 642-643.)

The circumstances herein create a strong inference that Seeney had motives to lie to Henry Woodruff, and respondent's characterization of

appellant's evidence of untrustworthiness as evidence of a "general motive to lie to Henry Woodruff so he could remain in his 'good graces'" (RB 82, quoting AOB 204), is misleading. Seeney had readily apparent reasons to deceive Henry Woodruff, the father of Seeney's girlfriend, Phyllis Woodruff. After Seeney had moved out of the apartment he shared with appellant, Henry Woodruff provided him with a home in which to live. Seeney also had a specific reason to lie to Henry Woodruff in the hearsay statement: Seeney wanted him to believe, falsely, that Seeney was complying with the terms of his probation. Seeney could not risk having Henry Woodruff learn that Seeney had been committing residential burglaries as recently as five days earlier. To ensure he would not lose his girlfriend and his temporary home, Seeney especially needed to hide the fact that Phyllis Woodruff was the getaway driver for those burglaries. Accordingly, it was not speculative to conclude that Seeney had a motive to lie to Henry Woodruff when Seeney falsely stated that he did not want to risk violating his probation.

Respondent further maintains that appellant's claim that Seeney had a motive to lie did not go to the admissibility, but rather to the weight of the evidence. (RB 82.) However, it is well settled that a statement offered to prove the declarant's state of mind is inadmissible under Evidence Code section 1252 when circumstances reveal that a hearsay declarant had a motive to lie. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 821-822 [explaining that a statement should be excluded when circumstances indicate it was made by person with motive to deceive]; *People v. Edwards* (1991) 54 Cal.3d 787, 820, quoting *People v. Howard* (1988) 44 Cal.3d 375, 405.)

Respondent cites no authority supporting its proposition that evidence showing that a statement was made under circumstances suggesting a motive to deceive are pertinent to the statement's weight rather than its admissibility. *People v. Harris* (2013) 57 Cal.4th 804, the case respondent relies upon (RB 82), is inapposite. In *Harris,* the defense objected to the admission of letters written by the victim a week prior to her death, in which she described her feelings for her boyfriend. The letters were introduced for the purpose of establishing that the victim loved her boyfriend and would therefore not have consented to having sex with the defendant a week later. The defense argued that the letters were not a trustworthy representation of the victim's feelings on the night of the murder. This Court held that the letters were trustworthy because they were written in a natural manner and not under circumstances of suspicion, and that the fact that the victim's feelings possibly changed between when she wrote the letters and when she was murdered, went to the weight they should be given, not their admissibility. (*Id.* at p. 844.) In the instant case, by contrast, Seeney's statements *were* made under circumstances of suspicion, and therefore should have been excluded as untrustworthy.

D. The Admission of the Statement Deprived Appellant of a Fair Trial

Respondent argues that application of ordinary rules of evidence could not have infringed appellant's constitutional rights. This is not so. The United States Supreme Court has held that evidentiary rulings constitute due process violations when they deny a defendant a fair trial. (See *Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13; *Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Lisenba v. California* (1941) 314 U.S. 219, 228-229.)

Respondent argues that any error was harmless under both the *Watson* test and the *Chapman test* for several reasons. First, respondent argues that the hearsay statement impugned Seeney's credibility more than it bolstered it, because it was inconsistent with Seeney's preliminary hearing testimony that appellant had not asked him to leave the barbecue. (RB 83.) However, the prosecutor used the statement to buttress his case. In his closing argument, he argued that Seeney's statement to Henry Woodruff showed that appellant had told Seeney ahead of time that he intended to rob taxicab drivers. (18 RT 4833.) During closing arguments, defense counsel did not argue that Seeney's hearsay remarks were inconsistent with his statements to the police or testimony. Nor did defense counsel otherwise use the hearsay statement to argue that Seeney was not credible. In light of counsel's arguments, it seems unlikely that the jury concluded that Seeney's hearsay remarks detracted from his credibility. To the contrary, the fact that the retrial jury convicted appellant based in large part on Seeney's testimony incriminating appellant, it appears that the jury in fact found Seeney to be credible.

Second, respondent argues that the statement was fleeting and did more to disassociate Seeney from the crimes than associate Wilson with them. (RB 83.) However, the statement was prejudicial to appellant's third-party-culpability defense, due to its tendency to establish Seeney's innocence. Furthermore, the statement unquestionably incriminated appellant. It provided contemporaneous evidence suggesting that, several hours before the homicides, appellant planned to rob taxicab drivers, and corroborated Seeney's testimony that appellant had told him of his plan to rob taxicab drivers. Indeed, the prosecutor argued that the hearsay statements showed that appellant had told Seeney of his intent to commit

crimes against taxicab drivers. (18 RT 4833.) It also rebutted appellant's argument that Seeney fabricated the evidence against appellant in response to police coercion.

Third, respondent argues that any error in admitting the evidence was harmless because it was merely supplemental to other, "overwhelming evidence" of guilt. (RB 84.) However, under the *Chapman* test, respondent bears the burden of showing beyond a reasonable doubt that the erroneously admitted evidence in no way contributed to the verdict. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Respondent cannot meet that burden. Seeney's hearsay statement provided substantive, contemporaneous evidence that in the afternoon preceding the early-morning homicides, appellant planned to commit robberies. As explained above, the hearsay statement corroborated Seeney's testimony that incriminated appellant. Due to the centrality of Seeney's preliminary hearing testimony to the prosecution's case, respondent cannot show that the hearsay statement did not contribute to the verdict.

Furthermore, as appellant has argued previously, contrary to respondent's claim, the evidence was not overwhelming, and this was a close case. (See *ante*, at pp. 26, 45, 94-95.) Respondent's argument fails to consider the defense case that rebutted or cast doubt on the prosecution's evidence of appellant's purported guilt. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 331 [explaining harmless-error analysis must consider both prosecution and defense evidence].) James Richards, the lone witness who identified appellant, failed to identify appellant at a live lineup after he had selected appellant in a photo. (15 RT 3870.) Appellant elicited expert testimony opining that Richards's identification of appellant was unreliable, because it was produced by procedures known to result in false

identifications and tainted by cues from the police and prosecutor. (18 RT 4644-4703.) Sylvester Seeney testified under a grant of transactional immunity, and defense counsel argued that his testimony was not credible because he was an alleged alternative perpetrator who implicated appellant in response to his interrogators' intense psychological pressure. (18 RT 4893-4896; 12 CT 3579-3584.)

Accordingly, this Court should find under *Chapman*, that the State has failed to meet its burden of proving that the erroneous admission of Seeney's hearsay statement did not contribute to the guilt verdict and was therefore harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana, supra* 508 U.S. at p. 279; *Chapman v. California, supra*, 386 U.S. at p. 24.)

However, even if this Court concludes that the admission of Seeney's hearsay statement constituted only state-law error, it should nevertheless find reversible error under the *Watson* test. As explained above, Seeney's testimony was the linchpin of the prosecution's case and the hearsay remarks provided contemporaneous corroboration of his statements to police and preliminary hearing testimony. In addition, the addition of Henry Woodruff's testimony, of which Seeney's hearsay statement was a significant component, was one of two evidentiary differences between the first trial, in which the jury could not reach a verdict, and the retrial, in which the jury convicted appellant.[23] For these reasons, it was reasonably probable that appellant would not have been convicted at the retrial if the trial court had excluded Seeney's hearsay statement.

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[23]The other evidentiary difference was the exclusion of evidence of Detective Franks's misconduct at the retrial. (See Argument II, *ante*.)

VI

THE TRIAL COURT VIOLATED APPELLANT'S *MIRANDA* RIGHTS BY ADMITTING HIS STATEMENTS TO POLICE OFFICERS THAT HE GAVE AFTER HIS INTERROGATORS CONTINUED TO INTERROGATE HIM AFTER HE INVOKED HIS RIGHT TO REMAIN SILENT

A. Introduction

In his Opening Brief, appellant argued that the admission of his statements after the first invocation of his right to silence violated his *Miranda*[24] rights. (AOB 208-237.) Specifically, appellant challenged the trial court's conclusion that appellant reinitiated the interrogation before law enforcement officers began to question him in San Bernardino and again after appellant invoked his right to silence during the San Bernardino interrogation. (AOB 227-233.)

Respondent argues that the trial court properly admitted all of appellant's statements made during the San Bernardino interrogation. (RB 84-99.) Respondent asserts that the trial court did not admit any statement into evidence in violation of appellant's *Miranda* rights because appellant twice reinitiated the interrogation. Respondent contends that appellant reinitiated the interrogation when he spoke to Detective Hagen in Albuquerque. (RB 92-93.) Respondent also argues that appellant did not invoke his right to silence during the San Bernardino interrogation. (RB 94-96.) Respondent alternatively argues that even if appellant did invoke his right to silence, he reinitiated the interrogation by asking questions about the case during the cigarette break. (RB 96-98.) Respondent adds that if any evidence was erroneously admitted under *Miranda*, the error was harmless.

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

(RB 98-99.) For the reasons discussed in Appellant's Opening Brief and below, this Court should reject these arguments.

B. The Admission of Appellant's Statements Made during the March 6, 2000 Interrogation in San Bernardino Violated Appellant's Constitutional Rights

As discussed in his Opening Brief, appellant invoked his right to silence during the March 5, 2000 interrogation in Ohio, but law enforcement officers deliberately disregarded the invocation and continued to interrogate him "outside *Miranda*." (AOB 228-229.) This failure to scrupulously honor appellant's invocation of his right to silence barred further interrogations unless appellant reinitiated them. (AOB 229-230.) He did not.

Reinitiation requires that the suspect seek to discuss the investigation with law enforcement officers on his or her own initiative. Two conditions must be met. First, the suspect must show that he or she would like to discuss the investigation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045-1046 [holding suspect has not reinitiated an interrogation unless suspect has "evinced a willingness and a desire for a generalized discussion about the investigation"].) Second, the suspect's desire to be reinterrogated must be self-motivated: "[T]he impetus for discussion [must come] from the suspect himself." (*Van Hook v. Anderson* (6th Cir. 2007) 488 F.3d 411, 418.)

1. Appellant Did Not Reinitiate the Interrogation When He Approached Detective Hagen

Respondent argues that the trial court correctly found appellant to have reinitiated the interrogation during the fuel stop in Albuqurque, because he approached Detective Hagen and asked for a confidential conversation (RB 92-93.) Respondent is wrong.

Contrary to respondent's argument and the trial court's conclusion, reinitiation is not merely a question of who speaks first; rather, the court must consider the suspect's motivation for speaking: "The Supreme Court's Fifth Amendment cases clearly show that the word 'initiate' is a term of art in this context and does not mean 'who talks first.'" (*Sattayarak v. State* (Okla. Crim. App. 1994) 887 P.2d 1326, 1329; accord, *Haynes v. State* (Miss. 2006) 934 So.2d 983, 988.) Because the suspect, rather than the interrogators, must provide the impetus for discussion, the suspect's request to talk must be independent from law enforcement's words and actions. (See *United States v. Palega* (8th Cir. 2009) 556 F.3d 709, 716 [finding no *Miranda* violation because defendant independently reinitiated the interrogation]; cf. *People v. Stoesser* (N.Y. 1981) 421 N.E.2d 110, 111 ["There is no finding here, and indeed the record would not have supported one, that defendant's statements were spontaneous in the literal sense of that word as having been made without apparent external cause, i.e., self-generating. It is not sufficient that the statements were found to have been voluntary and not in response to express questioning by the police."].)

Appellant's request to speak with Detective Hagen did not constitute an independent reinitiation for two reasons. First, law enforcement officers ignored appellant's assertion of his right to silence during the Ohio interrogation, and appellant's request to speak to Detective Hagen cannot be separated from that police badgering.[25] The following facts show the relationship between the violation of appellant's *Miranda* rights and appellant's brief conversation with Detective Hagen in Albuquerque.

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[25]The United States Supreme Court has characterized improper questioning following a suspect's invocation of *Miranda* rights as "police badgering." (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1044.)

The Ohio interrogation, conducted by Detective Scott Franks, Investigator Allen Maxwell, and Sergeant Robert Dean (4 RT 981, 985, 989, 1029), took place the night before the cross-country trip. (4 RT 982.) Midway through that interrogation, appellant invoked his right to silence. (12 CT 3398; 4 RT 1071.) Instead of scrupulously honoring appellant's invocation, the interrogators repeatedly urged appellant to change his mind. (12 CT 3399-3410.) During this time, they temporarily received appellant's assent to be interrogated after they traveled to San Bernardino:

DEPUTY: [Y]ou said you'll go back with us tomorrow?

WILSON: Hell, yeah.

DEPUTY: And then we'll —

WILSON: Hell, yeah.

DEPUTY: We'll take you back and we'll take you through the system. If you want to — you know, tomorrow, we'll have a better idea at our office.

WILSON: Uh-Huh.

DEPUTY: If you want to sit down and talk a little more —

WILSON: No, there's nothing else to discuss. We just going to take it to the courts.

DEPUTY: Think about it.

WILSON: I mean, come on, man. Everything I say will and can be used against me in a court of law.

DEPUTY: Well, of course. You know that.

WILSON: You think I'm going to continue to discuss with you? Shit I wouldn't be discussing —

DEPUTY: What's there to discuss when you're not going to — when you dance around us anyhow? Well, right.

WILSON: I mean, come on, man. You play a game with me, I'm going to play right back.

DEPUTY: 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.

DEPUTY: So we could talk, right?

WILSON: Yeah.

(12 CT 3401-3402.) Before they concluded interrogating appellant "outside *Miranda,*" appellant again invoked his right to silence, and the interrogators expressed doubt that appellant would be able to continue to remain silent during the trip back to San Bernardino:

WILSON: Can we go back? I'm ready to retire. I'm ready to retire.

DEPUTY: Okay. All right.

WILSON: I'll see you all tomorrow, man, on that plane.

DEPUTY: Sit down, please.

WILSON: For what? The man just told me I can go.

DEPUTY: Sit down, please. You know we return tomorrow.

WILSON: Uh-huh.

DEPUTY: We're going to sit down and —

DEPUTY: I have one more question about that C-Note.[26]

WILSON: I'm not answering no more questions. I'm requesting my right to remain silent and I'm going to do just that until we get to court. You can ask me any questions in court.

DEPUTY: I bet you — I bet you dinner that you can't stay quiet. You're not the quiet type.

WILSON: I'll tell you what.

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[26]C-Note is Sylvester Seeney's friend Cory McKinney. (14 RT 3642.)

DEPUTY: You're not going to — it's going to be a long trip. (12 CT 3408-3409.) The last thing said during the interrogation was a law enforcement officer stating, "You'll be flying back with us, man." (12 CT 3410.) The three interrogators and Detective Hagen were the four law enforcement officers who flew with appellant and Seeney between Ohio and California. (4 RT 871-872.)

Several of these facts show that the violation of appellant's *Miranda* rights the night of March 5, 2000, and appellant's conversation with Detective Hagen during the refueling stop in Albuquerque were interrelated events. The cross-country trip occurred less than 24 hours after the unlawful questioning of appellant that followed his invocation of the right to silence. During the unlawful questioning, the officers sought and briefly obtained appellant's assent to be reinterrogated after they arrived in California. After appellant said he would not speak to them until they got to court, the offending interrogators challenged appellant's ability to remain silent during the lengthy trip. The three interrogators who had just violated appellant's *Miranda* rights flew with appellant back to California. Only one law enforcement officer who traveled on that airplane had not already violated appellant's constitutional rights. That was Detective Hagen, the officer appellant approached in Albuquerque.

Respondent appears to consider each step of the interrogation process to constitute independent events and does not consider whether the March 5 interrogation and *Miranda* violation in any way influenced or encouraged appellant's desire to speak with Detective Hagen the following day. Respondent's analysis improperly evaluates the independence of the purported reinitiation. The independent-reinitiation rule enunciated in *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 ensures that law

enforcement officers cannot capitalize on a *Miranda* violation by having that misconduct in any way induce a suspect to waive his or her *Miranda* rights:

> *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." [Citations.] The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures.

(*Minnick v. Mississippi* (1990) 498 U.S. 146, 150-151, quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 350.) In order to satisfy *Edwards*'s dictates and preclude *Miranda*-violation-induced waivers, courts must consider the entire interrogation process to be an interrelated set of events. Specifically, a purported post-violation reinitiation must be evaluated in the context of the *Miranda* violation that preceded it.

As stated above, law enforcement officers cannot supply the impetus for renewing the interrogation. A purported reinitiation would not be independent if it is in any way influenced by an interrogator's *Miranda* violation:

> Under *Edwards*, police badgering must be relevant to whether the suspect made a valid initiation (as well as a valid waiver) because the initiation requirement cannot serve its purpose if the police can satisfy it by badgering the suspect into reopening a new round of questioning. And dismissing badgering as irrelevant to initiation not only would defeat what the Supreme Court sought to accomplish in *Edwards*, it would turn the initiation requirement on its head. Instead of preventing the police from badgering suspects who have requested counsel, the initiation rule would incentivize them to do so.

(*Dorsey v. United States* (D.C. 2013) 60 A.3d 1171, 1194.) In this case, the purported reinitiation was not independent from the *Miranda* violation,

because of the temporal proximity of the *Miranda* violation to the airplane flight, the common identity of the law enforcement officers who interrogated and traveled with appellant, and the interrogators' post-invocation attempts to convince appellant to speak with them after the trip from Ohio to California, and their belittling appellant and his ability to remain silent after he again asserted his right to silence. Rather, the interrogators' actions and remarks the night before they left for California pressured appellant to speak to Detective Hagen.

Second, the cramped, coercive environment in which appellant was transported from Ohio to California prodded him toward requesting to speak to Detective Hagen. The San Bernardino County Sheriff's Department airplane on which he traveled was small: Eight people filled the plane. (1 CT 145.) They were appellant, Sylvester Seeney, two pilots, the three officers who interrogated appellant the night before, and Detective Hagen. (4 RT 982.) Appellant and Seeney were handcuffed and shackled. (1 CT 145.)

In *Miranda*, the United States Supreme Court recognized that the interrogation room is an inherently coercive setting. (See *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 456-458.) The intimidating atmosphere extends beyond the interrogation room:

> Regardless of his whereabouts in the police station house, the defendant remained in police custody, in a police-dominated atmosphere in which there are "inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."

(*Hartman v. State* (Ind. 2013) 988 N.E.2d 785, 789, quoting *Miranda v. Arizona*, *supra*, 384 U.S. at p. 467.)

Placing appellant on a small San Bernardino County Sheriff's Department plane was the functional equivalent of keeping appellant in the station house; it was a police-dominated atmosphere. Of course, the law enforcement officers, not appellant, initiated the close contact between appellant and the interrogators. The detectives who interrogated appellant the night before the flight were well-aware of the coerciveness of the flight when they told appellant that he would not be able to remain silent as they traveled back to California. Because appellant's attempt to talk to Detective Hagen was not independent from law enforcement's actions, he did not truly reinitiate the interrogation. Likewise, appellant's acknowledgment at the outset of the San Bernardino interrogation that he approached Detective Hagen with a desire to speak confidentially was immaterial because any purported reinitiation cannot be separated from the inherently coercive atmosphere in which he was held. Indeed, it would be inconsistent with *Miranda* and *Edwards* and their progeny to find a reinitiation where detectives disregard a suspect's assertion of the right to silence, continue to urge him to talk, mock his inability to remain silent as they continued to interrogate him unlawfully, and the suspect subsequently speaks while in an inherently coercive, police-dominated atmosphere. (See *Minnick v. Mississippi*, *supra*, 498 U.S. at pp. 150-151.) Although appellant argued in his Opening Brief that the purported reinitiation was not valid because he had not independently reinitiated the interrogation (AOB 230-231), respondent has not addressed this argument.

2. Appellant Invoked His Right to Silence Before the Cigarette Break

Respondent argues that appellant did not assert his right to silence during the interrogation in San Bernardino because appellant did not clearly

and unambiguously invoke his rights and instead sought to find out what evidence law enforcement had against him. (RB 96.) The record reveals otherwise.

The conversation between appellant and Detective Hagen showed a mutual understanding that a reasonable officer would have found to be an invocation.

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.

(11 CT 3289-12 CT 3293.)

In that discussion, appellant made clear that he was not going to answer additional questions, and Detective Hagen purportedly agreed to put appellant back in a jail cell and end the interrogation. This was an unambiguous invocation of his right to silence. Because Detective Hagen appeared to agree to end the interrogation, there was no need for appellant to assert his right to silence more emphatically.

The trial court, when reconsidering appellant's suppression motion prior to the retrial, found that appellant had invoked his right to silence. However, the court concluded that appellant then reinitiated the interrogation while smoking a cigarette outside with Detectives Hagen and Rodriguez, and therefore statements made by appellant during and after that cigarette break were admissible. (16 RT 4281.)[27]

3. Appellant Did Not Reinitiate the Interrogation During the Cigarette Break

Respondent argues that the trial court correctly found that appellant reinitiated the interrogation during the cigarette break because, during that break, appellant asked questions about the case and asked to return to the interrogation room. (RB 97-98.) As with the purported reinitiation in Albuquerque, appellant's questions regarding the investigation were not sufficient to establish reinitiation.

Appellant could not have reinitiated the interrogation in San Bernardino because the interrogation never truly ended. The interrogation

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[27]The trial court initially ruled prior to the first trial, that appellant had not invoked his right to silence during the San Bernardino interrogation. (4 RT 1077.) However, prior to the retrial, after defense counsel discovered that appellant and Detective Hagen held an unrecorded discussion during the cigarette break, and moved to exclude appellant's statements made subsequent to the cigarette break (16 RT 4128, 4272-4273), the trial court held a hearing, at which Detectives Hagen and Rodriguez testified, to reconsider whether to suppress appellant's statements made after the cigarette break. (16 RT 4237-4370.) The trial court again denied the suppression motion, but instead of finding that appellant had not invoked his *Miranda* rights, instead found that the post-cigarette break statements were admissible on the grounds that appellant had reinitiated the interrogation by asking questions during the cigarette break. Implicit in that ruling was a determination that appellant *had* invoked his right to remain silent prior to the cigarette break. (16 RT 4380-4381.)

continued through the cigarette break because Detective Hagen made remarks immediately before it that were reasonably likely to elicit a response. (See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [defining interrogation to include police officers' comments reasonably likely to elicit a response from a suspect].) As appellant was invoking his right to silence, Detective Hagen said "no doubt you did it." (12 CT 3293.) After the invocation, Detective Hagen said, "You said you wanted to cooperate. I know there's somebody else involved." (12 CT 3293.)

As several state supreme courts have held, when a detective follows the invocation of the right to silence with remarks reasonably likely to elicit a response, a suspect cannot be found to have reinitiated an interrogation because the interrogation did not cease. (*People v. Bradshaw* (Colo. 2007) 156 P.3d 452, 459; *State v. Koon* (La. 1997) 704 So.2d 756, 763; *Commonwealth v. Thomas* (Mass. 2014) 21 N.E.3d 901, 911-912; *State v. Munson* (Minn. 1999) 594 N.W.2d 128, 140.) The Louisiana Supreme Court observed that it is impossible to reinitiate an ongoing interrogation:

> In the interrogation context "initiation" means to "begin" or "set-going." In order for there to be a valid waiver, the suspect must have "started," not simply "continued," the interrogation; for, just as one cannot start an engine that is already running, a suspect cannot "initiate" an on-going interrogation.

(*State v. Abadie* (La. 1993) 612 So.2d 1, 6.)

Even if this Court determines that the interrogation ended when the cigarette break began, appellant nevertheless did not independently reinitiate the interrogation during the cigarette break. Appellant's attempt to restart the conversation during the cigarette break constituted a response to Detective Hagen's remarks that he knew appellant was guilty and another

person was involved in committing the crimes. The purported reinitiation came too close in space and time to the invocation in order to be deemed valid and independent. Appellant had never been removed from a coercive environment, and the interrogators remained with appellant while he smoked the cigarette. Detectives Hagen and Rodriguez testified that appellant spoke to them about the investigation throughout the eight-minute cigarette break. (16 RT 4240, 4258.) The purported reinitiation thus occurred immediately after the interrogation had purportedly ceased. (See *People v. Redgebol* (Colo. 2008) 184 P.3d 86, 99-100 ["The People cite no case law from this jurisdiction or any other where a court has held that a defendant invoked his right to an attorney, thus ending the questioning, and then reinitiated questioning in less than a minute. Previously, we have found that a defendant voluntarily waived his *Miranda* right when, after the defendant invoked his right to counsel, the police left and twenty minutes later — or more often, hours or even days later — the defendant reinitiated the conversation."].)

C. The Admission of the Interrogation Was Prejudicial

Respondent argues that even if the trial court had erroneously admitted appellant's statements, the error was harmless. Respondent principally relies on the fact that appellant did not make any major admissions during the interrogations. Respondent adds that other evidence admitted against appellant was much more damaging than appellant's remarks and demeanor during the interrogation. Respondent concludes that the verdict would have been identical without the admission of appellant's statements. (RB 98-99.) These arguments are unconvincing.

Appellant's statements during the interrogation were damaging to his defense. Although appellant did not admit that he robbed or killed any of

the taxicab drivers, the prosecution used appellant's statements and evasive behavior during the interrogation as evidence of his consciousness of guilt. Respondent recognizes that they comprised circumstantial evidence. (RB 98.) Respondent's characterization of them as minor circumstantial evidence conflicts with the prosecutor's use of them as a significant component of its case attempting to establish appellant's guilt. As quoted in Appellant's Opening Brief (AOB 233-234), the prosecutor argued at length that appellant's admissions and evasiveness demonstrated his guilt.[28] Accordingly, appellant's statements comprised a substantial portion of the prosecution's case.

By basing its argument on a comparison of the evidentiary weight of appellant's statement against the other prosecution evidence, respondent fails to consider the defense's case concerning the weaknesses in the prosecution's case. The United States Supreme Court has explained that harmless-error analysis cannot be accurately performed by looking at the prosecution's evidence without regard to defense evidence that rebuts it. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 331.) The "much more damaging" evidence to which respondent refers was unreliable. (See RB 98.)

The most damaging evidence was Seeney's preliminary hearing testimony in which he said that appellant admitted to him that he killed the taxicab drivers. Defense counsel argued that Seeney's testimony was not credible because he testified under immunity, was himself an alternative assailant, and only inculpated appellant to end police coercion. (18 RT

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[28]This portion of the prosecutor's guilt-phase closing argument is reproduced in Appellant's Opening Brief. (AOB 223-226., quoting 18 RT 4870-4981, 4941-4945.)

4893-4896.) Defense counsel likewise asserted that the testimony of Phyllis Woodruff, Seeney's girlfriend who claimed to have heard appellant's admissions to robbing James Richards and seen appellant possess what was believed to be the murder weapon less than a week before the homicides, was also impeached by the fact she received immunity and had a motive to lie to protect herself and Seeney. (18 RT 4902-4905.)

James Richards's identification of appellant as the perpetrator of the January 7, 2000 robbery and attempted murder was also rebutted. Richards could not identify appellant at a live lineup. (15 RT 3870.) The jury also heard testimony from appellant's expert witness, Dr. Kathy Pezdek, that Richards's identification of appellant was tainted and the product of unreliable procedures. (18 RT 4644-4703.)

All other evidence against appellant was far from definitive. No physical evidence established appellant's guilt or presence.[29]

On the other hand, the statements appellant made during his interrogation were uniquely probative in one respect: Appellant indisputably made them. This contrasts sharply from appellant's purported admissions to Seeney, for which the authenticity was in doubt.

To reach its conclusion that "had the trial court excluded this evidence, the result would have been identical" (RB 99), respondent answers the wrong question. As the United States Supreme Court has explained, harmless-error analysis considers whether the "verdict actually rendered in *this* trial was surely unattributable to the error," not whether the verdict "would surely have been rendered" without the error. (*Sullivan v.*

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[29]Contrary to respondent's assertion (RB 7), appellant's fingerprints were not found inside any taxicab. (See *ante*, at p. 1.)

Louisiana, *supra*, 508 U.S. at p. 279.) The emphasis upon which the prosecutor placed on the evidence from appellant's interrogations ensured that appellant's statements and demeanor during the interrogations factored into the jury's determination whether appellant was guilty of the charged offenses. It is widely accepted that juries perceive a defendant's confession to be the most powerful evidence of guilt. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 311 ["Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors. . . ."]; *People v. Parnham* (1963) ["Almost invariably, . . . a confession will constitute persuasive evidence of guilt."].) A defendant self-incriminating statement constitutes powerful evidence even when the defendant's statements do not constitute a full-blown confession. (See *People v. Faris* (1965) 63 Cal.2d 541, 545-546 [finding erroneous admission of defendant's statement to police prejudicial irrespective of whether it was a confession or an admission]; *Commonwealth v. Seng* (Mass. 2002) 766 N.E.2d 492, 501 [finding erroneous admission of defendant's statement to police prejudicial because prosecutor used it to undermine insanity defense]; *State v. Sellers* (Wash. Ct. App. 1985) 695 P.2d 1014, 1018 ["A defendant's admissions are the most probative and damaging evidence."].) Accordingly, this Court cannot conclude that the jury's guilt-phase verdict was "surely unattributable to the error." (*Sullivan*, at p. 279.)

As explained elsewhere in this brief, the evidence against appellant was not overwhelming, and this was a close case. (See *ante*, at p. 26, 45, 94-95, 105-106.) Therefore, respondent fails to carry its burden of proving harmlessness beyond a reasonable doubt.

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VII

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR NEW TRIAL WITHOUT DETERMINING WHETHER APPELLANT KNEW HE HAD A RIGHT TO TESTIFY AND INTENTIONALLY RELINQUISHED OR ABANDONED THAT RIGHT

A. Introduction

In his Opening Brief, appellant argued that the trial court abused its discretion in denying appellant's motion for new trial without determining whether appellant's trial counsel had advised him of his right to testify. (AOB 238-244.) Although appellant stated in a sworn declaration that he did not become aware until *after* the trial was over that he had an absolute right to testify, even over his attorney's objection, the court denied appellant's motion, stating that "[*e*]*ven 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, emphasis added.)

Respondent advances a number of arguments as to why the trial court's ruling was correct, and why appellant's claim should be rejected by this Court, none of which are responsive to appellant's argument that the trial court abused its discretion in denying the new trial motion without making a determination as to whether appellant's failure to assert his right to testify during the trial constituted an "intentional relinquishment or abandonment of a *known* right or privilege." (See *United States v. Teague* (11th Cir. 1992) 953 F.2d 1525, 1533 [defense counsel must advise defendant of fundamental right to choose whether or not to testify in order for waiver of right to be effective], quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, emphasis in original; *Lema v. United States* (1st Cir. 1993) 987

F.2d 48, 53 [defendant's waiver of right to testify, like waiver of other constitutional rights must be made voluntarily and knowingly]; *United States v. Leggett* (3rd Cir. 1998) 162 F.3d 237, 246 [if defendant waives right to testify, waiver must be knowing, voluntary and intelligent].) Like the trial court, respondent mistakenly assumes that having found not credible appellant's assertion that his attorney prohibited him from testifying, it was "unnecessary [for the trial court] to separately and expressly determine whether Wilson was subjectively aware of his right to testify before denying his new trial motion." (RB 104, fn. 4.)

B. Appellant's Claim That He Was Deprived of His Right to Testify Was Not Untimely

Respondent argues that appellant could not wait until after the trial had concluded to inform the trial court he wanted to testify, and demand a new trial on those grounds. Respondent contends the situation in the instant case is "nearly identical" to that in *People v. Guillen* (1974) 37 Cal.App.976, 984-985, in which the Court of Appeal held that the defendant's assertion of his right to testify following the rendering of the verdict was untimely. (RB 101.) However, *Guillen* is distinguishable from the instant case in a critical respect, and does not compel the conclusion that appellant's assertion of his right in this case was properly rejected as untimely. In contrast to the present case, there was no indication Guillen's attorney had failed to advise him of his fundamental right to testify against counsel's recommendation, and no claim that Guillen did not become aware that he possessed that right until after the trial was over.

In the present case, there is no dispute that appellant told his attorney during trial that he wanted to testify (22 RT 6037-6038), and, as noted above, appellant submitted a sworn statement in which he declared that he

was not informed of his right to testify against his attorney's advice until *after* the trial was over and he was being interviewed by a probation officer. (11 CT 3156-3157.) Given these facts, the court could not presume there had been a "knowing, voluntary and intelligent waiver" by appellant of his right to testify (*People v. Leggett, supra*, 167 F.3d at p. 246), and it was therefore improper for the court to conclude that appellant had forfeited his opportunity to invoke his right to testify by failing to inform the court during trial of his desire to do so.

Under the circumstances, it was incumbent upon the trial court to make a determination as to whether or not appellant had intentionally relinquished or abandoned a known right. (See *United States v. Teague, supra, supra* 953 F.2d at p. 1533.) It could not simply deny appellant's new trial motion on the grounds that his assertion of his right to testify was untimely. (See *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 ["'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'"].)

Citing this Court's opinion in *People v. Alcala* (1992) 4 Cal.4th 742, 805-806), respondent nevertheless asserts that "a trial judge 'may safely assume' that a represented criminal defendant who does not testify is 'merely exercising his Fifth Amendment privilege against self-incrimination and his abiding by his counsel's trial strategy.'" (RB 103.) However, when confronted with evidence that defense counsel failed to inform the defendant of his unqualified right to testify against counsel's advice, the trial judge cannot rest on such an assumption. As the First Circuit Court of Appeals declared in *Owens v. United States* (1st Cir. 2007) 483 F.3d 48, 58:

> Where counsel has failed to inform a defendant of his right to testify, we do not believe that a waiver of that right may be implied from defendant's silence at trial; "at trial, defendants generally must speak only through counsel, and absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver." [Citations omitted.]

Appellant's case is thus clearly distinguishable from *Alcala, supra,* in which the defendant claimed that he chose not to invoke his right to testify during the trial because he received bad advice from his attorney. (*Alcala, supra,* 4 Cal.4th at p. 805.) In the instant case, by contrast, appellant's claim is not that his attorney failed to give him enough information to make an informed choice as to whether or not to testify; instead, his claim is that his attorney failed to inform him that he even *had a choice* whether or not to testify against his attorney's advice. This is a critical distinction.

Respondent nevertheless suggests that because appellant had "never been shy about speaking or letting his requests be known," he deliberately waited until after the jury had returned an adverse verdict to "speak up." (RB 102.) However, the record supports the opposite conclusion. The fact that appellant personally addressed the court to assert other rights (such as his right to a speedy trial), but not his right to testify, indicates that he did not know he possessed that right.

C. The Trial Court Failed to Make a Finding as to Whether Appellant Was Adequately Informed by Defense Counsel of His Right to Testify

As appellant established in his Opening Brief, trial counsel had an affirmative duty to advise appellant that he had the right to choose whether or not to testify, and that counsel could not prevent appellant from doing so,

even if counsel believed it imprudent, or even harmful to appellant's case. (See *Florida v. Nixon* (2004) 543 U.S. 175, 187 [defendant has the ultimate authority to determine whether to testify in his or her own behalf, and an attorney must both consult with the defendant and obtain consent to the recommended course of action]; *People v. Carter* (2005) 36 Cal.4th 1114, 1198 ["the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel"].) Appellant could not be deemed to have waived that right in the absence of such advice. (See *United States v. Teague*, *supra*, 953 F.2d at p. 1533.)

If appellant was not adequately informed by his attorney that he possessed that right, then he was deprived of his Sixth Amendment right to effective assistance of counsel. (See *People v. Hendricks* (1987) 43 Cal.3d 584, 592 ["When a defendant undergoes a jury trial any competent defense counsel will inform him of his right to . . . testify or not to testify"]; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 546 [defendant's claim that he elected not to testify due to erroneous advice of counsel, constituted claim of ineffective assistance of counsel]; *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 defendant's right to testify protected and any waiver knowing and voluntary]; *United States v. Hung Thien Ly* (11th Cir. 2011) 646 F.3d 1307, 1314 ["a defendant represented at trial may vindicate his right to make a knowing and intelligent decision whether to testify through a claim

of ineffective assistance of counsel"].) This would be true despite the trial court's finding that counsel did not tell appellant he could not testify.[30]

Accordingly, the trial court's inquiry should have focused on what exactly trial counsel told appellant regarding his fundamental right to testify. Specifically, the court should have determined whether or not trial counsel informed appellant that the decision whether to testify was his alone, and could not be overridden by trial counsel. The court should not have simply denied appellant's motion for new trial on the grounds that appellant's assertion of his right to testify was untimely and that trial counsel did not prevent him from testifying.

Thus, contrary to respondent's claim, appellant is not requesting that "all criminal defendants be afforded a the ultimate trump card any time a jury reaches a verdict with which he or she disagrees." (RB 102.) He merely seeks enforcement of fundamental rights to which he is entitled under the Constitution. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 51-52 [right to testify]; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [right to effective assistance of counsel].)

D. The Trial Court Made No Adverse Credibility Finding With Respect to Appellant's Claim That He Was Unaware of His Right to Testify

Respondent claims that "the trial court did not find appellant's self-serving declaration credible." (RB 104, fn. 11.) Respondent is mistaken.

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[30] As indicated above, the trial court denied appellant's motion after finding that trial counsel did not tell appellant he could not testify. (22 RT 6041.) Appellant is not challenging that finding herein. However, the court's finding was not dispositive of the remaining issue before the court, which was whether or not appellant intentionally relinquished or abandoned a known right. (See *Johnson v. Zerbst, supra,* 304 U.S. at p. 464.)

What the trial court found not credible was appellant's claim that his attorney had told him he could not testify. (22 RT 6040.) The court made no adverse finding regarding the credibility of appellant's statement that he first became aware of his constitutional right to testify after the conclusion of the trial, while he was being interviewed by a probation officer for purposes of sentencing, and that had he been aware of this, he would have insisted on testifying. (See Declaration of Javance Wilson, 11 CT 3156-3157.) In response to appellant's argument that his claim should not be rejected as untimely because he was unaware of his right to testify against defense counsel's advice until after the trial was finished, the trial court stated, "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 court's ruling reflects not that it found appellant had been properly advised of his right to testify, but rather that the court found it unnecessary to make such a determination.

E. Appellant Is Not Seeking to Have This Court Adopt a Rule Requiring Trial Courts to Obtain an Affirmative Waiver From a Defendant Who Does Not Testify

Respondent asserts that appellant wants this Court to adopt a rule requiring trial courts to obtain an affirmative waiver from a defendant who does not testify. (RB 102.) It should be clear from Appellant's Opening Brief (AOB 240), and appellant's argument above, however, that this is a mischaracterization of appellant's claim. Appellant acknowledged in his Opening Brief that this Court has explicitly declined to adopt such a rule (*People v. Enraca* (2012) 53 Cal.4th 735, 762), and appellant is not asking the Court to reconsider its holding.

Instead, appellant's argument is that the trial court in this case, having been apprised of appellant's allegations that (1) his attorney failed to advise him of his right to testify; and (2) that he did not knowingly and voluntarily waive that right, was obligated to determine the truth of those allegations, and if it found them to be true, to grant appellant's motion for new trial. The court's failure to do so requires reversal of the judgment and remand to the Superior Court for further hearing to resolve these issues.

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VIII

THE TRIAL COURT VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL BY ERRONEOUSLY FINDING GOOD CAUSE TO DELAY THE TRIAL OVER APPELLANT'S OBJECTION

A. Introduction

Appellant argued in his Opening Brief that his case should have been dismissed for violation of his right to a speedy trial under both Penal Code section 1382, and the California and United States constitutions. Specifically, appellant argued that the trial court lacked good cause to continue the trial over his objection, and that he was prejudiced by the delay. (AOB 245-256.)

Respondent argues that appellant's claim is barred by virtue of the fact that he did not seek dismissal of his case in the trial court, and that even if his claim is deemed to have been preserved for appeal, it should be denied because the trial court had good cause to delay the trial over appellant's objection, and appellant suffered no prejudice from the delay. (RB 107-112.) For the reasons stated below, and in Appellant's Opening Brief, respondent's contentions should be rejected.

B. Under the Circumstances of This Case, This Court Should Not Find That Appellant Waived His Right to a Speedy Trial By Not Filing a Motion to Dismiss

Respondent contends that because appellant did not move for dismissal of his case after the trial court continued his trial over his objection, he cannot argue on appeal that the trial court abused its discretion by not dismissing his case. (RB 108.) Respondent relies on dictum in *People v. Wilson* (1963) 60 Cal.2d 139, 146, in which this Court stated that the right to a speedy trial will be deemed waived unless the defendant both

objects to the date set and thereafter files a timely motion to dismiss.[31] In that case, defense counsel objected to the continuance at issue on the grounds that it violated his client's speedy trial rights. (*Id.* at p. 145.) However, in a case such as the present one, in which the continuance is granted at *defense counsel's* request over the defendant's objection, the fact the defendant fails to subsequently file a motion to dismiss the case should not be treated as a waiver of his right to a speedy trial. To hold otherwise would effectively be to require the defendant to represent himself in order to preserve his claim for appeal, and thus deprive him of his Sixth Amendment right to counsel. Respondent has cited no authority to support such a position.

C. The Trial Court Did Not Have Good Cause to Grant a Continuance Over Appellant's Objection

Respondent maintains that there was no abuse of discretion on the part of the trial court for granting defense counsel's motion for a continuance of the trial date over appellant's objection, because (1) defense counsel needed more time to prepare for trial, thus the delay was for appellant's benefit; and (2) it was reasonable for counsel to have given priority to an older case that was expected to proceed to trial before appellant's case. (RB 109-110.)

As discussed in Appellant's Opening Brief, the jurisprudence of this Court makes clear that good cause does not exist to grant a public defender a continuance over his client's objection, if counsel's reason for requesting

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[31] There was no dispute as to whether appellant's speedy trial claim had been preserved for appeal. At issue in that case was whether in order to win his appeal, Wilson had to prove that he was prejudiced by the delay, and whether he had so proven. (*Id.* at pp. 149-154.)

more time to prepare for trial is that he was too busy representing other capital clients to get the necessary work done, and he does not have *Keenan* counsel assigned or appointed to assist him. As defense counsel stated in his continuance motion, he had two capital cases in addition to appellant's case. (2 CT 492-493.) The fact that he had to juggle his responsibilities to multiple capital clients, was clearly a function of the large number of indigent defendants charged with capital crimes and the dearth of lawyers to handle such complex, time-consuming cases. As the Court observed in *People v. Johnson* (1980) 26 Cal.3d 557, 567, a defendant's right to speedy trial may "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." (See also *People v. Sutton* (2010) 48 Cal.4th 533, 553 [state bears responsibility for counsel's unavailability by failing to provide enough public defenders or appointed counsel to enable indigent defendants to come to trial within the prescribed statutory period].)

Respondent insinuates that appellant is somehow to blame for defense counsel's lack of preparedness for trial, because he had waived time up until that point, but then changed his mind just before the December 2001 trial date.[32] (RB 109.) However, appellant had already been in custody for nearly 19 months when he objected to having to wait six more months for his trial to start. (1 CT 136; 2 RT 360, 363.) Not only was appellant's objection to a further continuance reasonable, but he was well within his rights to demand a speedy trial. It was the public defender, not appellant,

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[32] Appellant invoked his right to a speedy trial on October 17, 2001, stating that he would waive time for only 30 additional days. (2 RT 362.)

who chose to give priority to other cases, and it would be unreasonable and unfair to hold appellant responsible for that choice.

Accordingly, contrary to respondent's contention, the trial court abused its discretion when it found good cause to continue the trial over appellant's objection.

D. Appellant Suffered Prejudice as a Consequence of the Delay

Respondent argues that appellant suffered no prejudice from the delay of his trial, because the delay did not impact his ability to defend himself against the charges, and instead placed him in a better procedural posture, because his attorney was better prepared for trial. (RB 112.) However, this Court has recognized that in cases such as this one, where identity is at issue and the prosecution relies on eyewitness identification, delay is prejudicial because fading memories impair the defendant's ability to effectively cross-examine eyewitnesses. (See *People v. Hill* (1984) 37 Cal.3d. 491, 498.)

Moreover, the speedy trial right does not only protect the accused's ability to defend himself, but also protects him against "undue and oppressive incarceration prior to trial and anxiety and concern accompanying public accusation." (*United States v. Ewell* (1996) 383 U.S. 116, 120.) At the point appellant asserted his right to a speedy trial and refused to waive more time, he had been incarcerated in the county jail awaiting trial for nearly two years, while his life hung in the balance. It is axiomatic that he suffered tremendous anxiety under these circumstances. (AOB 253.)

Accordingly, respondent's contention that appellant suffered no prejudice is incorrect. Reversal is required.

IX

GUILT-PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

As explained in the Opening Brief (AOB 257-266), the circumstantial-evidence instructions violated appellant's right to be convicted only if the prosecution has proven every element of a crime beyond a reasonable doubt. Appellant acknowledges that this Court has repeatedly rejected this claim (see, e.g., , *People v. Contreras* (2013) 58 Cal.4th 123, 161-162), and he respectfully requests this Court to reconsider that holding.

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X

CALIFORNIA'S DEATH-PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

As explained in the Opening Brief (AOB 267-281), the capital-sentencing statute, as interpreted by this Court and applied at appellant's trial, violated appellant's constitutional rights and international law. Appellant acknowledges that this Court has repeatedly rejected this claim (see, e.g., *People v. McCurdy* (2014) 59 Cal.4th 1063, 1110-1112), and he respectfully requests this Court to reconsider that holding.

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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

As articulated in the Opening Brief (AOB 282-287), the cumulative effect of the errors at appellant's trial require this Court to vacate the judgment. Respondent contends that no errors impacted the outcome of the trial, alternatively asserts that all errors were harmless, and concludes that appellant received a fair trial. (RB 124-125.) Appellant does not agree. Appellant did not receive a fair trial at either the guilt phase or the penalty phase. Consequently, appellant's convictions and sentence must be vacated.

CONCLUSION

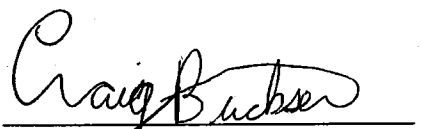
For all of the foregoing reasons, appellant asks this Court to reverse his convictions and set aside his sentence of death.

Dated: January 19, 2016

Respectfully submitted,

MARY K. McCOMB
State Public Defender

JESSICA K. McGUIRE
Assistant State Public Defender

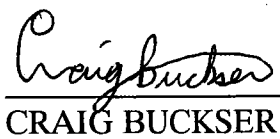


CRAIG BUCKSER
Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(1)

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 36,584 words in length excluding the tables and this certificate.

DATED: January 19, 2016



CRAIG BUCKSER
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Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People vs. Javance Wilson**
Case Numbers: **Supreme Court No. SS118775**
San Bernardino County Superior Court Case No. FVA 12968

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this case. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelop with the United States Postal Service with the postage fully prepaid;

/X/ **placing** the envelope for collection and mailing on the date and 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 prepaid.

The envelopes were addressed and mailed on **January 19, 2016**, as follows:

Donald W. Ostertag Office of the Attorney General P.O. Box 85266 San Diego, CA 92186	Javance Wilson, V-05878 CSP-SQ 4-EB-117 San Quentin, CA 94974
San Bernardino County Superior Court Attn: Appellate Division 8303 Haven Avenue Rancho Cucamonga, CA 91730	Kent Williams Office of the District Attorney 8303 Haven Avenue, 4th Floor Rancho Cucamonga, CA 91730
Office of the Public Defender 8303 N. Haven., 3rd Floor Rancho Cucamonga, CA 91730	California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 19, 2016, at Sacramento, California.

Marsha Gomez, Declarant