IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARCUS ADAMS, Defendant and Appellant.	No. S118045 Los Angeles County Superior Court NO. BA181702-01

APPELLANT'S REPLY BRIEF

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angeles

The Honorable Lance Ito, Judge

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DEATH PENALTY

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, Appellant addresses specific contentions made by Respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief ("AOB"). The decision to not address any particular argument, sub-argument or allegation made by Respondent, or to not reassert any particular point made in the AOB, does not constitute a concession, abandonment or waiver of the point made by Appellant. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) The decision only reflects Appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this Reply Brief are numbered to correspond to the argument numbers in the AOB.

I.

APPELLANT'S CONVICTIONS FOR MURDER MUST BE REVERSED BECAUSE THE PROSECUTION ELICITED "WITNESS INTIMIDATION" EVIDENCE AND ALLEGED THAT APPELLANT INTIMIDATED WITNESSES WITHOUT PRESENTING SUFFICIENT EVIDENCE THAT APPELLANT PERSONALLY ACTED TO INSTILL FEAR IN ANY WITNESS, OR DIRECTED OR AUTHORIZED OTHERS TO ATTEMPT TO INTIMIDATE ANY WITNESS

Appellant noted in his opening brief that the prosecution's allegation that appellant murdered three Rollin' 60's gang members, Dayland Hicks, Trevon Boyd, and Lamar Armstrong, on September 7, 1994, suffered from three major evidentiary hurdles: (1) no physical or ballistic evidence placed appellant at the scene of the murders; (2) both the alleged eyewitnesses against appellant, Lewis Dyer and Zenia Meeks, possessed criminal and gang-related backgrounds that raised serious questions about their credibility; and moreover, (3) both these witnesses had not only previously failed to identify

appellant as the shooter at live lineups – Dyer in 1995 (15 RT 2514) and Meeks in 1998 (16 RT 2774) -- but also had repeatedly told police and others that they *could not* identify the shooter.

Dyer told a defense investigator in the summer of 1995 that he had been inside the liquor store on the corner at the time of the shootings and that he did not see anything. He also told the investigator that the police had forced him to say things about appellant when he was questioned by the police a week after the shootings, and that he told the police that appellant was involved in the shootings then because family members of Dayland Hicks had pressured him to do so. (15 RT 2518-2520.) Zenia Meeks told the police when questioned after the shootings that she had been high and on her "psych" medications at the time of the shootings and that she could not identify anyone. (16 RT 2768-2770.)

The eyewitness identifications of appellant as the shooter made by Dyer and Meeks at trial constituted the primary evidence against appellant. The prosecutor therefore had the task of convincing the jurors that although Dyer and Meeks had both failed to identify appellant as the shooter in the past, their new identifications of appellant, made years later, were now to be believed. The prosecutor did succeed in convincing the jurors that these key witnesses were *now* telling the truth, but through improperly arguing that both Dyer and Meeks did not originally identify appellant because he had intimidated each of them into not identifying him. As appellant showed in the AOB, this argument constituted prejudicial misconduct because there was no evidence to support it.

A. The Prosecutor's "Witness Intimidation" Arguments

The prosecutor argued witness intimidation from the start to the end of appellant's trial. In his opening statement, the prosecutor told the jurors "a couple other themes that you will hear during the course of the testimony

. . . will include threats and intimidation and they will include fear. (¶) You will hear of witnesses having been threatened. You will hear of witnesses being afraid to tell the truth. And you will hear of the effect that that fear and intimidation has had on their past statements and in some instances even their identifications." (14 RT 2308.)

The prosecutor argued that the jurors should ignore the failures by his key witnesses to identify appellant, or otherwise incriminate him – because appellant had threatened and intimidated each of the witnesses. However, not only did the prosecution subsequently offer no evidence to support these allegations, the prosecutor misstated the facts that *would* later be put in evidence:

> Now, you probably may be wondering why this case has taken so long. This happened back in 1994. And this is where the theme of threats and intimidation comes in, ladies and gentlemen. (¶) Mr. Dyer was very reluctant to come to the police. It was only at the urging of the victim's family to do the right thing that he finally came forward and came to the police. He didn't want to get involved, like many people in these types of neighborhoods. (¶) And Mr. Dyer himself is a gang member. He didn't want to get involved. He didn't want to go to the police, but he did. . . . I am going to jump forward a little bit. And Mr. Dyer was asked to go to a lineup.
>
> And unfortunately for Mr. Dyer, at the time that the lineup occurred, he was in custody because he had violated his juvenile parole and he was going to go back to the Youth Authority. So he was in custody with the defendant. And at that time he was very afraid, because being in custody and attempting to testify against another inmate is very dangerous. People can get killed.
>
> And because of that fear and intimidation, *the intimidation occurred because he ran into the defendant on a couple of occasions. And in fact, the defendant at one point tried to tell him that he had a relative who was a deputy sheriff and that made Mr. Dyer even more afraid.*

> So when Mr. Dyer went to the lineup in 1995, he did not pick out the defendant because of this fear.

(14 RT 2316-2317; emphasis added.)

The prosecutor also told the jurors that when Dyer some years later spoke with investigators from Santa Barbara County, Dyer told them that "he had been threatened and he was very—and he explained to them why he refused to identify the defendant at the lineup, and also explained the threats and intimidation he felt." (14 RT 2318.)

In fact, Dyer testified that prior to the date of the lineup, he had not spoken to appellant, and Dyer did not testify that anyone else had spoken to him about identifying or not identifying appellant as the September 7, 1994 shooter. Dyer testified that his first – and only – contact with appellant at the jail occurred *after* the lineup had occurred. (15 RT 2515-2517.) The prosecutor therefore committed misconduct in telling the jurors that Dyer did not identify appellant at the jail lineup because he had been intimidated by appellant.

The prosecutor also told the jurors that Zenia Meeks "was also very afraid back in 1994 and 1995 and she in fact was also very reluctant to talk to the police . . . . She just did not want to have anything to do with the case." (14 RT 2318-2319.) According to the prosecutor, Meeks subsequently "changed her life completely around" (14 RT 2319), and she then "positively picked out the defendant" in a photographic lineup. She "also indicated that she was afraid to do it in the past because of several reasons." (*Ibid.*) The prosecutor then told the jurors:

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> Her family had been threatened back in 1994 and 1995. They had found out – someone had found out her address of her cousin and where her cousin lived and they received phone calls, and it was made quite clear to her that she not say anything when she went to court.

(14 RT 2320.)

However, the prosecutor subsequently offered no evidence that appellant had anything whatsoever to do with any phone calls made to the family of Zenia Meeks. At the police station after the shooting, Meeks did not identify the shooter. (16 RT 2769.) The prosecutor asked why, and Meeks responded, "Because I didn't want to get involved. I was scared for myself and my family." (*Ibid.*)

The prosecutor then crossed the line of fair questioning about the fear a resident of a gang-ridden neighborhood might possess about being involved in a police investigation. He asked, "Now, were you afraid of – were you afraid for your family from immediately after the shooting or did something else happen?' Meeks responded, "No. It wasn't immediately after the shooting. Something else happened. My family was contacted and the person said that they --" At this point, trial counsel objected to the answer, on hearsay grounds, and the trial court admonished the jurors that he was going to allow the question and answer "not because in fact what was stated by someone else was true, but how it affects this witness' willingness to testify in the case. That is the only relevance and that is the limited purpose for which I am going to allow this testimony." (16 RT 2770.)

Thereafter, the prosecutor asked, "So did something happen that you made you [sic] fear for your family?' Meeks responded, "Yes, it did. It was a phone call made to my family stating that I said I did not know anything and they know that I do know, but I said that I didn't know anything." (16 RT 2771.) Meeks explained that, "In other words, that *they* know how to get in

contact with me, like if I say anything." (Emphasis added.) The prosecutor asked, "So the message at that point was so far you haven't said anything, but they know where your family lives?' Meeks responded, "That's correct." The prosecutor asked, "So you took that to mean you better keep your mouth quiet?' Meeks responded, "That's correct." (*Ibid.*)

The prosecutor asked if Meeks remembered "when in the sequence that that call occurred?' Meeks responded she did not, but she then confirmed that the call occurred "later on" *after she had already talked to the police* and had "not told them anything." (*Ibid.*)

This testimony showed (1) that Meeks had already denied being able to identify the shooter before she allegedly received the threatening phone call or calls, (2) zero evidence was presented that appellant initiated, authorized or knew about the phone calls that Zenia Meeks testified she received, (3) and therefore the inadmissibility of this testimony went well beyond the hearsay problem initially identified by trial counsel. The admonishment the trial court gave heightened the unfair prejudice to appellant engendered by Meeks' testimony about the phone calls. The trial court specifically admonished the jurors that it was allowing the question and answer to show how the phone call affected "this witness' willingness to testify in the case." (16 RT 2770.) This was in fact the very reason this testimony needed to be excluded – it unfairly suggested that appellant was attempting to intimidate Zenia Meeks.

Following his initial allegations of witness intimidation in his opening statement, the prosecutor concluded his opening statement with yet another allegation that appellant intimidated the prosecutions' witnesses:

> And I ask you to pay very close attention to all the evidence and be mindful of the themes that I indicated to you will be presented during the course of this trial, and this is premeditated violence and planned violence, threats and intimidation and fear.

> Because, ladies and gentlemen, you will see some of that from the testimony – you may see witnesses that are very afraid to testify. You may see witnesses who may not even want to testify. But you have to understand that in the nature of these types of cases, this is going to be the recurring theme, and this is what we expect to present to you during the course of the trial.

(14 RT 2324-2325.)

The prosecutor's opening statement unfairly poisoned the jurors' minds in a manner that would prevent them from making a fair assessment at trial of whether Lewis Dyer or Zenia Meeks were credible witnesses. In addition, the prosecutor impermissibly vouched for his two key witnesses's credibility. He did not just state that Dyer and Meeks each claimed they had changed their lives, but asserted that they *had* done so, and so their testimony at trial recanting their prior statements that they could not identify the shooter should *now* be believed.

Most prejudicially, the prosecutor asserted – without supporting evidence – that appellant was personally involved in intimidating the two witnesses. For this reason, appellant was irretrievably prejudiced by these allegations, and must be granted a new guilt trial on the homicide convictions.

B. Unsubstantiated "Intimidation of Witnesses" Testimony Unfairly Prejudices A Defendant and the Unfairness Cannot Be Rectified

As appellant showed in the AOB, allegations of witness intimidation that are not substantiated prejudice a defendant in a manner that cannot be rectified except by reversal of a conviction. In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, the Court reversed the appellant's conviction of aiding a bank robbery, where the prosecutor elicited testimony from a participant in the bank robbery that he had received some threatening phone calls the night

before he testified. However, the witness did not know who made the calls. (*Id.* at p. 969.) Dudley argued the testimony about the phone calls violated his right to due process, because the threats came from an unidentified source and so were linked to Dudley only by "prejudicial innuendo." (*Ibid.*) The Court agreed, stating that testimony concerning threats to a witness, "when no connection is shown between the defendant and the threats, can amount to an 'evidential harpoon.'" (*Id.* at p. 970.)

The Court noted that *Keyser v. State* (1974) 312 N.E.2d 922, had stated, "[S]uch evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." (*Id.* at 924.) The Court also noted that in *Keyser* such testimony was held so prejudicial that even an instruction to disregard it "was not sufficient to expiate its effect." (854 F.2d at p. 970.)

The Court also cited *Cox v. State* (1981) 422 N.E.2d 357, in which a witness testified that he had received threats, but the prosecution presented no evidence that the defendant was responsible for – or even knew about – the threats. The Court in *Cox* held that the "threat" testimony should have been excluded, because such "threats tend to show guilty knowledge or an admission of guilt on the part of the defendant," and therefore "a proper foundation must be laid showing the threats were made either by the defendant, or with his or her knowledge or authorization . . . . Barring such a showing, the highly prejudicial nature of such testimony requires its exclusion." (854 F.2d at p. 970, quoting *Cox v. State*, 422 N.E.2d at p. 362.)

This Court has held similarly. In *People v. Weiss* (1958) 50 Cal.2d 527, the Court held that a defendant is unfairly prejudiced by unsubstantiated "threat and intimidation" evidence. In *Weiss*, the key witness in an illegal abortion prosecution testified that she received a telephone call from an

individual purporting to be the attorney for one of the defendants. (50 Cal.2d at p. 535.)

On appeal, the People argued this testimony was admissible to show that the witness had been impliedly intimidated by an agent of the defendants. This Court held to the contrary that admitting such testimony "based on a theory of an attempted suppression of evidence" was prejudicial error. (*Id.* at p. 537.) The Court stated that "evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence." (*Id.* at pp. 537-538.) Since no evidence of authorization by the defendant was offered, the trial court erred in admitting the "telephone incident" evidence. (*Id.* at p. 538.)

In *People v. Hannon* (1977) 19 Cal.3d 588, the Court reversed convictions for attempted robbery and assault with a deadly weapon, where the trial judge admitted unsubstantiated "threat" testimony and also gave a "consciousness of guilt" instruction based on that testimony. (*Id.* at p. 603.) This Court stated, "[A]n allegation that a defendant has attempted to suppress adverse evidence, if not entirely refuted, may . . . utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*Ibid.*) For this reason, the Court recognized, such allegations must be substantiated or they fundamentally impair the fairness of a trial.

In the instant case, the prosecutor in his opening statement "emasculated whatever doubt" the defense would have been able to establish regarding appellant's guilt for the triple murder, based on the multiple changing of stories offered by the alleged eyewitnesses.[1]

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[1] As appellant noted in the AOB, Judge Ito stated, outside the presence of the jury, that over time Lewis Dyer had wound up giving "five or six different versions of the events of September 7" (i.e., regarding the triple murder). (15 RT 2470.) Judge Ito also noted, again outside the presence of the jury, that Zenia Meeks similarly "has said different things to other people." (15 RT 2707.)

Moreover, appellant's right to due process was further violated by the trial judge instructing the jurors – as did the trial judge in *People v. Hannon* -- that if appellant tried to suppress evidence, such as by intimidating a witness, the jury could find this a circumstance "tending to show a consciousness of guilt." (21 RT 3552.) The evidence presented at trial did not support the giving of this instruction.

After the trial judge gave this witness intimidation premised consciousness of guilt instruction, the prosecutor once again stated erroneously to the jurors that Lewis Dyer had been "threatened and intimidated by the defendant in jail," and this was why Dyer had not identified appellant at the live lineup in the jail. (21 RT 3575-3576.)

As stated previously, Lewis Dyer testified that he had no contact with appellant before he failed to identify him in the live lineup in 1995. Therefore, Dyer's failure to identify appellant as the September 7, 1994 shooter was not due to any action by appellant, or due to any act directed or authorized by appellant. All that could have been argued was that Dyer was immersed in the gang culture in 1994 and 1995 that did not support cooperating with the police about any matter. But this would hardly prove that Dyer *could* have identified appellant at the live lineup in 1995, or that he "lied" when a defense investigator interviewed him later in a Youth Authority facility and he said that he had been *inside* the liquor store at the time of the shootings. (15 RT 2518.)

Appellant has a federal and state due process right to a fair trial. (*People v. Williams* (1997) 16 Cal.4th 635, 653.) Because the prosecutor failed to substantiate during the trial that appellant engaged in, directed or authorized any instance of intimidation against any prosecution witness, the prosecutor's

assertions that appellant threatened and intimidated witnesses egregiously violated appellant's state and federal due process rights to a fair trial.

C. The Unsubstantiated "Intimidation" Testimony of Lewis Dyer Requires Reversal of Appellant's Murder Convictions

The violation of appellant's constitutional right to due process requires reversal unless the error beyond a reasonable doubt did not contribute in any way to appellant's murder convictions. (*Chapman v. California* (1967) 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705.) The evidence against appellant was hardly overwhelming, and in fact rested primarily on the credibility of Lewis Dyer. In this regard, Dyer testified that he did not talk to the police the day of the triple murder because he did not want to be "involved." He was a gang member, living a "wild lifestyle." (15 RT 2505.) He was a member of the Crips, the same street gang that the three murder victims belonged to. The rivalry between the Crips and appellant's street gang, the Bloods, was intense. Loyalties to the gang ran strong. So Dyer was necessarily an enemy of appellant, and therefore also necessarily a biased witness against appellant, making his testimony inherently unreliable.

Further, Dyer's testimony that appellant shot the three Rollin' 60's gang members contradicted his own prior statements made in 1994 and 1995, as well as his failure to identify appellant as the shooter when he viewed the live lineup in 1995. On September 15, 1994, Dyer told the police that he had not told relatives of Dayland Hicks who the shooter was, that he did not know who did the shooting or what happened, and that he was not standing next to the car at the time the shootings occurred. He stated that he had been inside the liquor store when the shootings occurred. He also told Dayland Hicks' relatives that he was not afraid of anyone. He indicated that after the murders, he was primarily concerned that people might think he was involved in the murders. (15 RT 2593-2598.)

As noted previously, Dyer also admitted that he also told a defense investigator in the summer of 1995 that he was inside the liquor store at the time of the shooting and that he did not see anything. (15 RT 2518.) He further admitted that he told the investigator that the police had forced him to say things and that Hicks' family members had pressured him to identify appellant when he did so at the police station earlier. (15 RT 2518-2519,)

Obviously, Lewis Dyer needed some help to be found credible, but the prosecutor enhanced Dyer's credibility through improper means when he asserted that appellant intimidated Dyer into failing to identify appellant as the shooter at the live lineup in 1995, so the jurors should believe Dyer's later identification of appellant as the shooter.

D. The Unsubstantiated "Intimidation" Testimony of Zenia Meeks Requires Reversal of Appellant's Murder Convictions

Similarly, the jurors had good reasons to not accept anything Zenia Meeks testified to. At the outset of her testimony, she admitted that in September 1994 she was abusing drugs, including on the morning of the shooting, and that she had been convicted "quite a few times" (as the prosecutor put it) for theft offenses as a result of her drug problems. (16 RT 2754.) She also admitted using aliases, and to smoking crack cocaine and PCP, which in turn led to her using Haldol and Cogentin. (16 RT 2755.)

Meeks specifically acknowledged that she had smoked some "sherm" (PCP) at 2:00 a.m. the morning of the shooting. (16 RT 2793.) Meeks at trial maintained that she had not been "high" at the time of the shootings, but confirmed that she had testified otherwise at the preliminary hearing in this case in 1999. At the preliminary hearing, she testified that she had been high on PCP, crack, her psychiatric meds, and alcohol on the day of the shooting.

Meeks also admitted that when she was at the police station on September 7, 1994, she had then also told the police that she was under the

influence of drugs at the time of the shootings. (16 RT 2793-2794.) Meeks' account of the shootings also did not match Dyer's account in several ways. (16 RT 2789-2792.) At trial, Meeks testified that she was right in the middle of the shootings as they were going on, standing next to the front hood of the car. (16 RT 2759.) She testified, "I was amazed I didn't get shot." (16 RT 2763.) Rightly so. If she really had been standing next to the front hood, it was amazing she also did not get shot.

Meeks contradicted Dyer's testimony that the shooter started shooting right into the car, and that he did not shoot first at Dyer. (16 RT 2804.) She also contradicted Dyer's testimony that the shooter said something to him and gestured at him. (16 RT 2807.) Meeks claimed at trial, for the first time, that she paid attention to the man who walked up and started shooting. She admitted that in her 1994 statement to the police she said she could not remember how the shooter looked, and that she was *not* paying attention to him. (16 RT 2794-2795.)

Meeks also testified that she sometimes heard voices, and that she took Haldol for this. She testified that she had had psychiatric hospitalizations for her mental condition prior to 1994. She testified that she began stealing in 1990 to support both her drug habit and her "spending" habit. Meeks testified that she had been sent to prison for selling drugs. (16 RT 2796-2798.)

Thus the jurors could easily have dismissed Meeks' new claim made for the first time at trial that she was in "close range" at the time of the shooting, and that the shooter looked her in the face and she looked at him in the face. (16 RT 2769.) The trial court erred in allowing the prosecutor to question Meeks about the phone calls to her family, and in allowing Meeks' follow up testimony about the fear caused by the phone calls, for the same reasons the "threat" phone calls in *Dudley v. Duckworth* were inadmissible and testimony about them so prejudicially tainted the defendant's right to a fair trial that the

error required reversal of Dudley's conviction. What the *Dudley* Court stated applies equally in appellant's case: "The admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from 'evidential harpoons.' We find the error amounts to a violation of the petitioner's fourteenth amendment right." (854 F.2d at p. 972.)

The admission of "threat testimony" in appellant's case that the prosecutor failed to substantiate as coming from, being directed by, or being authorized by appellant, constituted prejudicial error requiring this Court to reverse appellant's three first-degree murder convictions. The Court must in turn reverse appellant's death verdict.

E. Improper Testimony about Special Precautions Taken to Protect Kipchoge Johnson and Christopher Fennelle

Trial counsel objected to testimony by Detective William Smith that special precautions had been taken to protect prosecution witnesses Kipchoge Johnson and Christopher Fennelle during the trial. (18 RT 3214.) Fennelle himself testified he was not concerned about his safety because of testifying. (18 RT 3204-3205.) The trial court erred in admitting Detective Smith's testimony, and the prosecutor violated appellant's due process right to a fair trial by alleging that appellant had engaged in and was continuing to engage in a campaign of witness intimidation that included trying to intimidate Kipchoge Johnson and Christopher Fennelle. As with regard to Lewis Dyer and Zenia Meeks, the prosecution offered no evidence demonstrating that appellant had personally attempted to intimidate either Johnson or Fennelle as witnesses, or that appellant had personally directed or authorized others to attempt to intimidate either of these two witnesses.

People v. Williams, *supra*, stands in contrast to appellant's case. As appellant described more fully in the AOB, *Williams* was also a prosecution of a "Blood" gang member for killing a "Crip" gang member, and extensive

evidence was offered that the defendant attempted to intimidate a key witness. This Court found that the prosecution had sufficiently demonstrated the defendant's involvement in the intimidation of the witness. But absent such evidence, it is improper to allow the prosecution to "explain away" a witness's prior inconsistent statements as the product of prior intimidation.

The reason "fear of retaliation" testimony must not be admitted to explain prior inconsistent statements made by the witness -- absent substantive supporting evidence – is clear. If a prosecutor can present "fear of retaliation" testimony without also being required to show that the defendant was involved in creating that fear, "intimidation of the witness" would become the all-purpose "explanation" used to prop up wobbly prosecution witnesses who have made prior inconsistent statements and/or provided inconsistent testimony. Being allowed to explain away such inconsistencies through "fear of retaliation" testimony is doubly prejudicial when not supported by substantive evidence because such testimony serves not only to explain away contrary statements or testimony, it also strongly suggests a consciousness of guilt on the part of the defendant. Just as it was so used in appellant's trial.

Respondent argues that appellant's claims above are forfeited because appellant failed to object at trial to the prosecutor's arguments, the intimidation testimony, or the witness precaution testimony. (Respondent's Brief, pp. 55-56.) Regarding the testimony by Detective Smith that special precautions had been taken to protect Kipchoge Johnson and Christopher Fennelle during the trial, counsel did object to the admission of that testimony. (18 RT 3214.)

Regarding the prosecutor's statements that witnesses had been intimidated by appellant, this is the kind of improper argument that it would have been futile for trial counsel to object to. (*People v. McDermott* (2002)

28 Cal.4th 946, 1001.) In *Dudley v. Duckworth, supra,* 854 F.2d at p. 970, the Court stated "such evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant" (quoting *Keyser v. State, supra,* 312 N.E.2d at p. 924). The Court noted that the court in *Keyser* found such testimony so prejudicial that even an instruction to disregard it "was not sufficient to expiate its effect." (854 F.2d at p. 970.)

In *State v. Monday* (Wash. 2011) 257 P.3d 551, a man was fatally shot after a confrontation in a downtown Seattle park, and a street musician by chance caught the confrontation on a video camera. However, many other witnesses were reluctant to cooperate with police or gave inconsistent responses to investigators. (*Id.* at pp. 552-553.) At trial, witness credibility was "particularly at issue because many of the State's witnesses were not enthusiastic proponents of the State's case." (*Id.* at p. 553.) The prosecutor during his closing argument spoke at length about "the code" that prevented "black folk" from testifying against "black folk." (*Id.* at p. 555.)

Monday was convicted of first degree murder and appealed on numerous grounds, including that the prosecutor committed misconduct in telling the jurors that the African-American witnesses who did not advance the prosecution's case did so because of the "code" against "snitching" against other African-Americans. The Washington Supreme Court granted review on this limited issue. (*Ibid.*) The State argued that the defendant had failed to preserve the issue of misconduct by objection, but the Court reversed. (*Id.* at p. 556; 558.) The Court found the prosecutor's misconduct "tainted nearly every lay witness's testimony." (*Id.* at p. 558.) Similarly, in appellant's case, the prosecutor's misconduct cannot be disregarded.

Regarding appellant's claim that there was insufficient evidence to support the giving of the consciousness of guilt instruction, claims of instructional error are reviewable on appeal to the extent they implicate a defendant's substantial rights, even absent objection to the instruction at trial. (*People v. Famalaro* (2011), 52 Cal.4th 1, 35; *People v. Prieto* (2003), 30 Cal.4th 226, 247.) The giving of the consciousness of guilt instruction, in the circumstances of appellant's murder trial, where the credibility of witnesses was central to the finding of guilt or innocence, clearly implicated appellant's substantial rights. Therefore, appellant did not forfeit his right to challenge on appeal the giving of the consciousness of guilt instruction.

For all the above reasons, this Court must reverse appellant's convictions for murder, and in turn, reverse appellant's sentence of death.

II.

THE PROSECUTOR COMMITTED MISCONDUCT IN THE PENALTY PHASE BY ARGUING THAT APPELLANT'S MITIGATING EVIDENCE OF CHILDHOOD ABUSE BY HIS GRANDMOTHER WAS UNRELIABLE BECAUSE HIS SISTERS DID NOT TESTIFY TO THIS, WHERE THE PROSECUTOR KNEW THEY HAD CONFIRMED THIS ABUSE IN THE STARKEST TERMS

The prosecutor committed misconduct when he argued, regarding mitigating evidence presented by Beverly Parks that appellant was severely mistreated and abused by his maternal grandmother, Amy Parks (32 RT 5773-5783), that Beverly Parks' testimony was suspect and unreliable, because neither of appellant's sisters (Nakei Powell and Larhonda Biggles) testified that "the grandmother mistreated the defendant." (35 RT 6233.)

The prosecutor, however, knew that both of appellant's sisters had in fact verified the existence of such abuse. On August 13, 2002, trial counsel

had provided in discovery the reports of interviews of appellant's youngest sister, Nakei Powell, and appellant's older sister, Larhonda Biggles, conducted on June 9, 2000, in which both sisters confirmed that appellant's grandmother, Amy Parks, severely mistreated them and appellant as children.[2]

According to Nakei Powell, Amy Parks was a very violent person "who would beat them [Nakei, Larhonda and appellant] and cuss at them every chance she got." Nakei felt that their grandmother "hated them" and "took every opportunity to let them know how she felt." (13 CT 3477J.) When Larhonda was seven years old, Amy Parks accused her of sleeping with her grandfather. (*Ibid.*)

Their grandmother "would beat them for the slights [sic] thing that they did." Amy would make them go the backyard, get a switch from a tree, take it to her, and then she would beat them with it. (*Ibid.*) Nakei also described many physical fights between their mother, Pearl Thomas, and their grandmother. Nakei said that all of the physical violence and verbal violence was witnessed by all of the children in the house, including appellant. (13 CT 3477J.)

According to Larhonda Biggles, their grandmother was "a very violent person" who stabbed her own daughter, Linda, because she thought Linda was sleeping with Amy Parks' husband (Linda' own father). Their grandmother would "stalk" them. When the children were sitting at the dining table, she would "come after them with a large butcher knife." Their grandmother routinely chased them "from room to room with the knife, turning off the lights as she pursued them." (13 CT 3477N.)

The prosecutor was well aware that if either Nakei Powell or Larhonda Biggles had become witnesses, they would have confirmed the testimony by

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[2] These interview reports were appended as Exhibits A and B to trial counsel's Application For New Trial – Penalty Phase (Penal Code Section 1181), filed on June 11, 2003. (13 CT 3477C-3477P.)

Beverly Parks that Amy Parks severely abused all of Pearl Thomas' children, including appellant. The prosecutor thus had no evidence whatsoever to challenge the testimony of Beverly Parks as he did, and he had actual knowledge through discovery in hand which directly contradicted that challenge. For this reason, trial counsel argued in his Application For New Trial, "[T]he prosecutor did nothing to check the veracity of our reports; rather he waited until after the close of evidence to falsely imply that defense witnesses were lying." (13 CT 3477E.)

When a prosecutor makes assertions that he knows in fact to be false, he commits misconduct. As appellant noted in more detail in the AOB, the United States Supreme Court found such misconduct in *Berger v. United States* (1935) 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, overruled on other grounds by *Stirone v. United States* (1960) 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252, where the prosecutor invited the jury to conclude that a witness knew the defendant well but only pretended on the witness stand to not know him, and that this fact "was within the personal knowledge of the prosecuting attorney." (295 U.S. at p. 88.) The Supreme Court stated, "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Ibid.*)

In *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, the Court found misconduct where the prosecutor in closing argument asked the jury to infer that the defendant had fabricated his alibi, when the prosecutor was aware of evidence that contradicted some of his assertions. (*Id.* at p. 964.) In *People v. Hill* (1997) 17 Cal.4th 800, this Court found misconduct where the prosecutor in closing argument suggested that a defense witness had an undisclosed motive for lying, where no evidence had been introduced that

supported that suggestion. (*Id.* at p. 829.)

In *People v. Daggett* (1990) 225 Cal.App.3d 751, the appellate court found misconduct where the prosecutor argued in closing that even if the complaining witness had himself molested other children, this was behavior that he learned from being molested by the defendant – when the prosecutor knew that the complaining witness had previously been molested by someone other than the defendant. (*Id.* at p. 757.) In *People v. Varona* (1983) 143 Cal.App.3d 566, the court found misconduct where the prosecutor argued in closing that no proof had been offered that the complaining witness was a prostitute -- when the prosecutor knew that the complaining witness *was* a prostitute, because he had seen official records establishing that fact. Thus the prosecutor committed misconduct by knowingly "arguing a falsehood." (*Id.* at p. 570.)

The prosecutor here suggested that Nakei Powell and Larhonda Biggles, if they had testified, would have painted a different portrait of Amy Parks than Beverly Parks had. He knew this was not true. The prosecutor committed misconduct by arguing that the aggravating evidence outweighed the mitigating evidence because the mitigating evidence presented was false, while knowing that it was *not* false. Such argument, depending as it did on a falsehood, is so prejudicial that it constitutes a denial of Due Process under the Fourteenth Amendment and the right to a fair and reliable penalty determination under the Eighth Amendment.

Further, the prosecutor's improper argument also deprived appellant of his Sixth Amendment right to confront and cross-examine witnesses, since the prosecutor here treated the two relatives who did not testify as if they were *his* witnesses, and he knew what they would testify to if called as witnesses. (*People v. Gaines* (1997) 54 Cal.App.4th 821, 825.) In *Gaines*, the court held that a prosecutor commits misconduct when he purports to tell the jury why

a defense witness did not testify and what the testimony of that witness would have been. (*Id.* at p. 822.)

Appellant suffered prejudice from the prosecutor's misconduct. While the prosecution presented substantial aggravating evidence, in addition to the aggravating circumstances of the triple homicide itself, appellant also presented substantial evidence in mitigation. He established not only that his childhood was horrific, and that his teen years continued that horror when his older brother, whom he idolized, was viciously murdered, but also that he was diagnosed as seriously emotionally disturbed (SED) by the Los Angeles Unified School District before he was even 14 years old. (31 RT 5458-5462.)

Appellant also presented evidence that he suffered from abnormal brain functioning, Attention Deficit Disorder (ADD), poor impulse control and inability to control his anger. (32 RT 5681-5684.) Appellant inherited the 3 repeat allele MAOA gene that has been shown to be associated, in concert with childhood maltreatment, with severe antisocial behavior later in life. (32 RT 5855-5860.) It is reasonably probable that had the prosecutor not committed misconduct – in asking the jurors to make inferences that appellant's sisters, had they testified, would have contradicted the testimony of Beverly Parks about the extreme abuse appellant suffered at the hands of their grandmother Amy Parks, while knowing that both of appellant's sisters in fact would have confirmed and elaborated on that abuse had they testified -- the jury would have reached a different penalty verdict.

Respondent argues that appellant forfeited this claim by failing to object to the prosecutor's statements at the time they were made. (Respondent's Brief, pp. 65-66.) Respondent also points out that the trial judge denied this claim of prosecutorial misconduct in ruling on trial counsel's application for a new penalty trial. (Respondent's Brief, p. 66.) However, the trial judge ruled on the merits, finding that "any error" made was harmless.

(13 RT 6479.) Appellant contends that the trial judge erred in this judgment, but agrees that this claim of error must be resolved by a ruling on the merits.

III.

THE PROSECUTOR COMMITTED MISCONDUCT IN THE PENALTY PHASE BY ARGUING THAT THE DEATH OF CHRISTINE ORCIUCH WOULD BE A "FREEBIE" IF THE JURY DID NOT RETURN A VERDICT OF DEATH

As appellant explained in the AOB, the prosecutor twice told the jurors in closing that appellant needed to be punished with death for the murder of Christine Orciuch that occurred during the Lompoc credit union robbery in Santa Barbara County on August 8, 1997. This constituted misconduct because the prosecutor improperly argued that appellant should be punished by death for his factor (b) crimes, and that a life without the possibility of parole verdict would amount to giving appellant a "freebie" for the death of Mrs. Orciuch (as well as for all his other factor (b) crimes). (35 RT 6271; 6284; 36 RT 6410.) As a result of the prosecutor making this argument, this Court cannot reliably determine whether the jury sentenced appellant to death because of the triple homicide on October 7, 1994, or because of the murder of Mrs. Orciuch by another person during the Lompoc credit union robbery.

In his Application For New Trial, trial counsel argued that appellant should be given a new trial because of the "misdirection" created by the prosecutor's improper argument. As trial counsel pointed out, factor (b) evidence "is not admitted so defendant can be punished for it; it is admitted as aggravating evidence to help the jury determine the appropriate penalty for the murders in this case [i.e., the triple homicide of October 7, 1994]." (13 CT 3477F.) Trial counsel correctly stated, "The death penalty is the

punishment for the crime of murder in the first degree with special circumstances. It is not the penalty for factor (b) violence." (*Ibid.*) This Court stated this same legal point in *People v. Stanley* (1995) 10 Cal.4th 764, at p. 822 ("Evidence of prior ...violent conduct is admitted not to impose punishment for that conduct....")

Trial counsel also pointed out that the prosecutor improperly argued that appellant would *escape* punishment for the murder of Mrs. Orciuch if the jury did not return a death verdict. The prosecutor's argument "was patently false as the prosecutor was well aware that defendant had been convicted of that crime [the Lompoc credit union robbery and the murder of Mrs. Orciuch] and had received an LWOP sentence." (*Ibid.*) As appellant pointed out previously, a prosecutor commits misconduct if he makes factual statements that he knows are not true, or he argues inferences based on facts that he knows to be not true. (*People v. Hill, supra*, 17 Cal.4th at p. 829; *Berger v. United States, supra*, 295 U.S. at p. 88.)

Trial counsel also correctly stated that due to the prosecutor's improper argument, "[i]t is impossible to tell if the death verdict was reached as punishment for the Santa Barbara crimes, defendant's juvenile crimes, the credit union robberies or the jail incidents, rather than as punishment for the killing of the gangsters. The prosecutor misdirected the jury from their rightful task of setting the appropriate penalty for Counts 1–3, to an improper decision where the defendant's other crimes deserved the death penalty. This misdirection was especially harmful in conjunction with the false implication noted above that defendant had a 'freebie' regarding the death of Mrs. Orciuch." (13 CT 3477G.)

Appellant was prejudiced by the prosecutor's misconduct here, requiring the Court to reverse appellant's verdict of death. As appellant has previously noted, while the prosecution presented substantial aggravating

evidence at the penalty trial, but appellant also presented substantial mitigating evidence. Therefore, it is reasonably probable that had the prosecutor not committed misconduct in suggesting that the jurors punish appellant with death for his involvement in the murder of Christine Orciuch and his other factor (b) crimes, the jury would have reached a different penalty verdict. Further, because the Court cannot determine – due to the prosecutor's improper closing argument -- whether the jury sentenced appellant to death for the murders of the three gang members or for the murder of Mrs. Orciuch, the Court must reverse appellant's sentence of death.

CONCLUSION

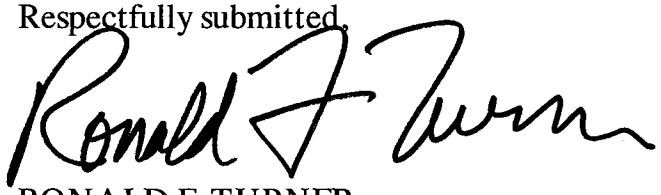
For all the foregoing reasons, appellant's convictions for murder and his judgment of death must be reversed.

Counsel's Certificate as to Length of Brief Pursuant to Rule 36(b)

I hereby certify that I have verified, through the use of my word processing software, that this Reply Brief, excluding the table, contains approximately 7,612 words.

DATED: June 26, 2013

Respectfully submitted,



RONALD F. TURNER
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Marcus Adams* Crim. No. S118045
(Los Angeles County Superior Court No. BA109664)

I, Ronald Turner, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 321 High School Road NE, Suite D3, PMB 124, Bainbridge Island, Washington, 98110.

On June 28, 2013, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the address shown, and by sealing and depositing said envelope in the United States Mail at Bainbridge Island, Washington, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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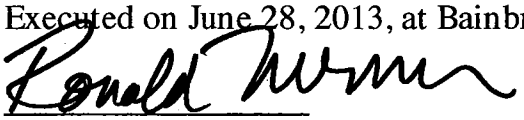
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 28, 2013, at Bainbridge Island, Washington.



Declarant