IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	Case No. S185305
	)	
v.	)	(F056337; Madera County
	)	Information No. CR10473)
RAYSHON DERRICK THOMAS,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Respondent argues that, because Penal Code section 781[1] should be liberally construed (RBM 7)[2], appellant was properly tried in Madera County where he committed his crimes (RBN 6, 8-9, 12-13), engaged in the requisite (prepatory) acts (RBM 6, 7, 8, 10-11), or caused the requisite effects. (RBM 6, 8, 13-14.) Alternatively, respondent posits any error was harmless because no federal constitutional right was implicated and any state constitutional error warrants reversal only under the unsustained miscarriage of justice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (RBM 14-15.)

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] RBM signifies respondent's brief on the merits. RBA represents respondent's brief in the Court of Appeal. CT symbolizes clerk's transcript. RT is reporter's transcript. ART denotes augmented reporter's transcript. Slip opn. stands for the Court of Appeal opinion.

Appellant contends that his rights to proper venue and vicinage are constitutionally protected by California Constitution, article I, section 16, the Sixth amendment's incorporated rights to trial by jury, the vicinage clause, the incorporated cross-section requirement, and the Fourteenth Amendment Due Process and Equal Protection Clauses. (§ IA 1-4, pp. 4-20.) These constitutional protections require a narrow construction of venue statutes that respects the accused's rights and limits the prosecution choosing a favorable forum and forum shopping. (§ IB 1-4, pp. 21-23.) The prosecution failed both constitutionally and with sufficient evidence to prove proper venue. (§ IC 1-3, pp. 23-35.) Even rationally grounded Madera County venire did not overcome the Sixth and Fourteenth Amendment violations. (§ IC4, pp. 35-36.) The convictions must be reversed because improper venue simply requires reversal (§ IIA, pp. 37-38), the violations of article I, section 16, the Sixth and Fourteenth Amendments were structural errors that are not amenable to harmless error review and require automatic reversal (§ II B-D, pp. 38-45), and any overruling of California cases must be prospective only and cannot be applied retroactively. (§ IIE, pp. 45-46.)

I

THE IMPROPER VENUE AND VICINAGE UNCONSTITUTIONALLY VIOLATED ARTICLE I, SECTION 16, THE SIXTH AMENDMENT'S UNDOUBTED PROTECTION FOR VENUE AND VICINAGE, THE INCORPORATED JURY TRIAL AND FAIR CROSS-SECTION GUARANTEES, THE FOURTEENTH AMENDMENT'S DUE PROCESS AND EQUAL PROTECTION CLAUSES

Appellant is African-American. (1ART 14.) In 2006, when the case was tried, the African-American population in Madera County was 2.53%. The African-American population in Fresno County was 4.89%. (State of California, Department of Finance, California County Race / Ethnic Population Estimates and Components of Change By Year, July 1, 2000-2008. Sacramento, California, June 2000. <http://www.dof.ca.gov/research/demographic/reports/estimates/e-3/by_year_2000_08/ <as of 02/17/11>>.) Thus, Fresno County had nearly twice as many African-Americans as Madera County as a percentage of its population.

Before trial, the defendant, who represented himself in propria persona, objected that he wanted "a fair cross-section" and "a jury of my peers," including African-Americans, that "represents my community when the crime was supposedly committed. It's where it's allegedly committed." (33RT 9635.) The trial court indicated that the venire would be gathered from the entire county of Madera, according to law. (33RT 9635.) Defendant objected that was not the proper jurisdiction for trial. (33RT 9636.) The trial court assured defendant that the litigated issue had been preserved for appeal. (33RT 9636.)

During the jury's selection, defendant exhausted all 20 of his peremptory challenges. (1ART 64; 71; 83; 91; 101; 116; 124; 133; 137; 2ART 331; 352; 374; 380; 385; 389; 408; 411; 418; 432; 453.) Before the nineteenth peremptory challenge, his mistrial motion was denied. (2RT 432.) After his last challenge, defendant sought to further question juror No. 218975, which the trial court denied because he had passed for cause. (2ART 453.) Appellant's constitutional rights to proper venue and vicinage, trial by jury, trial by a fair cross-section, due process, and equal protection guaranteed by article I, section 16 and the Sixth and Fourteenth Amendments were violated.

A. Appellant's constitutional rights to proper venue and vicinage.

1. *People v. Bradford* (1976) 17 Cal.3d 8 and article I, section 16 protected appellant's constitutional rights to proper venue and vicinage.

People v. Bradford, *supra*, 17 Cal.3d 8 (*Bradford*) protected appellant's constitutional rights to proper vicinage and venue. (*Id.* at pp. 15, 17.) At common law, a defendant had the right to be tried by a jury drawn from the vicinage, *i.e.,* the neighborhood where the alleged crime occurred. (*Id.* at p. 15.) The substance of this common law right was preserved in the federal constitutional, through the Sixth and Fourteenth Amendments, which guarantee a defendant in a state prosecution to be tried by a jury drawn from, *and comprising a representative cross-section of*, the residents of the judicial district in which the crime was committed. Section 777's provision that, except as otherwise provided by law, a criminal offense is to be tried in the district in

which it occurred, also reflected the preservation of defendant's right to vicinage. Defendant's right to be tried in the vicinage of the crime was interpreted so strictly at common law that an offense committed partly in one county and partly in another was not prosecutable at all. (*Bradford* at p. 15.) Section 781 broadened criminal jurisdiction beyond rigid common law limits by providing that an offense committed partly in one jurisdiction and partly in another may be prosecuted in either. (*Bradford* at p. 15.) "Our venue statutes must be construed in light of the importance historically attached to *vicinage*." (*Id.*, original emphasis.) A venue statute must be held inapplicable where, as here, the location of the crime is readily identifiable in light of "the federal constitutional right to a jury drawn from the vicinage in which the crime occurred[.]" (*Id.* at p. 17.) *Bradford* protected appellant's rights through the Sixth and Fourteenth Amendments.

In *People v. Betts* (2005) 34 Cal.4th 1039 (*Betts*), the Attorney General argued that *Bradford* should be reconsidered in light of *Price v. Superior Court* (2001) 25 Cal.4th 1046 (*Price*). *Price* concluded that the Sixth Amendment's vicinage clause was not incorporated and does not apply to the states through the Fourteenth Amendment Due Process Clause. (*Price* at pp. 1057-1069.) *Bradford*'s "narrow construction" of section 783 was supported by the importance of the right to be tried by a jury drawn from the vicinage under both the common law and "the Constitution." (*Betts*, *supra*, at p. 1059, fn. 6.) *Bradford* was not reconsidered. (*Ibid.*)

Appellant will briefly explain why *Bradford*'s *constitutional* underpinnings, as reiterated in *Betts*, still protect the accused's state *and federal* constitutional rights. First, although defendant's federal vicinage rights may not be protected solely by the Sixth Amendment's vicinage clause per *Price* (but see, § IA 2-4; post), *Price* concluded that a defendant does have a right to trial by a jury of the vicinage, as guaranteed by California Constitution, article I, section 16. (*Price*, at pp. 1071, 1076.) The right to trial by jury of the vicinage, as guaranteed by the California Constitution, is the common law right that existed in California in 1850, not the Sixth Amendment right. (*Price*, at p. 1076.) That right is not violated by trial in a county that has a reasonable relationship to the offense or other crimes committed by the defendant to the same victim. However, a crime may not be tried anywhere. The legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there is a reasonable relationship or nexus between the place designated for trial and the commission of the offense. (*Id.* at p. 1075.)

Second, *Bradford*'s vicinage protection under the Sixth Amendment is consistent with *United States v. Cabrales* (1947) 524 U.S. 1 (*Cabrales*), and progeny, which recognized a constitutional right to proper venue safeguarded by the Sixth Amendment. (See § A2, post.) *Price* did *not* cite *Cabrales*.

Third, *Bradford's federal* constitutional protection of defendant's rights was further based on the right to trial by jury drawn from *a representative cross-*

section (*Id.* at p. 15), which the Sixth Amendment has *already* incorporated. (See § A2, post.)

Fourth, *Bradford* also relied on *the Fourteenth Amendment*. Consistent with *Bradford*, appellant submits that his constitutional rights to proper venue and vicinage are constitutionally protected by the *Sixth Amendment's incorporated jury trial guarantee, vicinage clause, incorporated cross-section requirement, and the Fourteenth Amendment's Due Process and Equal Protection Clauses*. (See § A2-4, post.)

2. The Sixth Amendment's incorporated rights to trial by jury and incorporated cross-section and constitutional protection of proper venue and vicinage.

The Sixth Amendment guarantee of a fundamental right to trial by jury in criminal cases is protected against state action by the Fourteenth Amendment Due Process Clause. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148- 150, 155, 157-158.) Article III, section 2 commands: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the state where said Crimes shall have been committed." The Sixth Amendment further commands: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Both constitutional provisions were cited in the Sixth Amendment's incorporation. (*Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 152-153.) The federal jury trial guarantees reflect "a profound judgment" about the way in which law should be enforced and justice administered. (*Id.* at

p. 155.) "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." (*Ibid.*, fn. omitted.) "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (*Id.* at p. 156.)

Williams v. Florida (1970) 399 U.S. 78 indicated that the relevant Sixth Amendment inquiry to determine which features of the jury system were preserved in the constitution, beyond purely historical considerations, must be "the function that the particular feature performs and its relation to the purposes of the jury trial." (*Id.* at pp. 99-100.) Though a six-person jury was held not unconstitutional (*Id.* at p. 103), *Ballew v. Georgia* (1978) 435 U.S. 223 later held that a five-person jury violated the Sixth and Fourteenth Amendments because of the jury trial's fundamental importance to the American system of justice. Any further reduction promoted inaccurate and possibly biased decision making, prevented juries from truly representing their communities, and did not equally serve the defendant's interest in having the judgment of his peers interposed between himself and the prosecutor. (*Id.* at pp. 239, 241, 245.) Subsequently, *Burch v. Louisiana* (1979) 441 U.S. 130, 137-139, held that nonunanimous conviction by five members of a six-person jury violated the jury trial right guaranteed by the Sixth and Fourteenth Amendments.

Taylor v. Louisiana (1975) 419 U.S. 522, 530, 535-536, held that the fair cross-section requirement was fundamental to the jury trial guaranteed by the

Sixth Amendment. The jury's purpose was to "guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Taylor v. Louisiana*, *supra*, 419 U.S. at p. 530.) This prophylactic vehicle was not provided if large, distinctive groups were excluded from the pool. (*Ibid.*) Excluding identifiable segments playing major roles in the community could not be squared with the constitutional concept of jury trial. (*Ibid.*) The jury's broad representative character assured "a diffused impartiality'" and shared civic responsibility in the administration of justice. (*Id.* at pp. 530-531, citation omitted.) The systematic exclusion of women, who comprised 53% of the citizens eligible for jury service, did not satisfy the Sixth Amendment's fair cross-section requirement. (*Id.* at p. 531.) The Sixth Amendment's right to "a proper jury cannot be overcome on merely rational grounds." (*Id.* at p. 534, fn. omitted.) "What is a fair cross-section at one time or place is not necessarily a fair cross-section at another time or a different place." (*Id.* at p. 537.) Jury venues from which juries are drawn must not systematically exclude distinctive groups in the community and fail thereby to be reasonably representative thereof. (*Id.* at p. 538.)

Duren v. Missouri (1979) 439 U.S. 357 concluded that a prima facie violation of the cross-section requirement must show that: (1) the group allegedly excluded is a "'distinctive'" group in the community; (2) the

representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process. (*Id.* at p. 364.) The Sixth Amendment fair cross-section venire requirement assures that "in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." (*Id.* at p. 481.) "[T]he Sixth Amendment deprives the state of the ability to 'stack the deck' in its favor . . .." (*Ibid.*)

United States v. Cabrales, *supra*, 524 U.S. 1 approved "recounted law that is not in doubt" that the Constitution requires that a person be tried for an offense where that offense is committed. (*Id.* at p. 5.) "Proper venue" in criminal proceedings was a matter of concern to the Nation's founders. (*Id.* at p. 6.) "The Constitution twice safeguards the defendant's venue right: Article III, section 2, clause 3, instructs that 'Trial of all crimes . . . shall be held in the state where the said Crimes shall have been committed'; the Sixth Amendment case for jury trial 'by an impartial jury of the state and district wherein the crime shall have been committed.'" (*United States v. Cabrales*, *supra*, 524 U.S. at p. 6.) Even the Government acknowledged that "the venue requirement is principally a protection for the defendant." (*Id.* at p. 9.) Thus, the United States Supreme Court left no doubt that proper venue to be tried where the crime was committed is a constitutional right that has constitutional protection safeguarded by article III, section 2, clause 3, and the Sixth Amendment. (*United States v. Cabrales*,

supra, 524 U.S. at pp. 5, 6, 9; *United States v. Novak* (2nd Cir. 2006) 443 F.3d 150, 160; *United States v. Salinas* (1st Cir. 2004) 373 F.3d 161, 164; *United States v. Wood* (6th Cir. 2004) 364 F.3d 704, 709-710; *United States v. Bowens* (4th Cir. 2000) 224 F.3d 302, 308; *United States v. Hernandez* (9th Cir. 1999) 189 F.3d 785, 787.)

Significantly, *United States v. Cabrales* found no important distinction between article III, section 2, clause 3's venue provision that fixes the place of trial, and the Sixth Amendment vicinage provision that deals with the place from which jurors are to be selected. The Sixth Amendment's requirements that the jury be chosen from the state and district where the crime was committed presupposed the jury will sit where it is chosen. (*United States v. Morgan* (D.C. Cir. 2005) 393 F.3d 192, 195; "Stretching Venue Beyond Constitutional Recognition" (2000) 90 *J. Crim. L. & Criminology* 951, 952, fn. 7; "The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution" (1985) 52 *U. Chi. L.Rev.* 729, 729, fn. 2; Kershen, "Vicinage" (1976) 29 *Okla L.Rev.* 803, 805 & fn. 4, 830-831, 860 (hereinafter "Vicinage").) The resultant safety net from proper venue and vicinage ensures that a criminal defendant cannot be tried in an "unfriendly forum solely at the prosecutor's whim." (*United States v. Salinas*, 373 F.3d at p. 163.)

"Venue and vicinage define the community against which courts will assess the minority representation in the jury pool for constitutional purposes." (Alexander, "Vicinage, Venue and Community Cross-Section: Obstacles to a

State Defendant's Right to a Trial by a Representative Jury" (1991) 19 *Hastings Const. L. Q.* 261, 273 (hereafter Alexander).) The vicinage, the geographic area where the jury originates, defines the community. (*Id.* at p. 286.) "[T]he constitutional vicinage and venue provisions are still relevant today. The cross-section requirement prevents the government from manipulating the jury pool to exclude segments of the community from jury service. The jurisprudence of the Sixth Amendment right to a fair and impartial jury, and the Fourteenth Amendment right to equal protection, was inextricably linked to the composition of the jury pool to the lines defining the geographic limits of the community." (*Ibid.*) "That the Constitution's venue and vicinage clauses protect against transfer to a venue with a substantially different social character than the original venue supports the idea that courts should recognize differences in the racial composition of an alternative venue." (Brown, "The Role of Race in Jury Impartiality and Venue Transfers" (1994) 53 *Md. L.Rev.* 107, 140 (hereafter Brown).) "The greatest danger posed by neglecting the Sixth Amendment vicinage provision is the prosecution's potential ability to forum shop for what it perceives to be the most advantageous jury pool." (*Alexander*, *supra,* 19 *Hastings Const. L.Q.* at p. 286.) "Because the constitutional level of minority representation in the jury pool is tied to population in the community, a prosecution could manipulate venue and vicinage to obtain a minority-poor jury pool." (*Ibid.*)

Here, appellant was denied proper venue and vicinage. A representative jury was denied. The prosecution did not compete with the defense on an equal basis. The prosecution stacked the defense in its favor. The prosecution forum shopped and manipulated the jury pool composition to exclude and reduce appellant's African-American peers. The prosecution selected and chose its most advantageous jury pool that contained almost 50% fewer of appellant's African-American peers. By prosecuting appellant in Madera County, rather than Fresno County, the prosecution was able to select a jury from a pool of citizens comprised of almost 50% fewer African-Americans. The underrepresentation of African-Americans was due to a systematic exclusion of the group in the jury composition and selection process through improper venue and vicinage. Appellant's Sixth Amendment rights to incorporated trial by jury, incorporated fair cross-section, and proper venue and vicinage were violated. (*United States v. Cabrales*, *supra*, 534 U.S. at pp. 5, 6, 9; *Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 148, 150, 155, 156, 157-158; *Ballew v. Georgia*, *supra*, 435 U.S. at p. 239, 241, 245; *Burch v. Louisiana*, *supra*, 441 U.S. at pp. 137-138; *Taylor v. Louisiana*, *supra*, 419 U.S. at pp. 530-531, 535-536.)

3. The Fourteenth Amendment Due Process and Equal Protection Clauses protected appellant against the systematic exclusion of African-Americans from the jury venire's composition and the petit jury's selection.

In *People v. Hall* (1854) 4 Cal. 399 (*Hall*), defendant, a free white citizen of California, was convicted upon the testimony of Chinese witnesses. (*Id.* at p. 399.) Section 14 of the Criminal Act provided: "'No Black or Mulatto person, or

Indian, shall be allowed to give evidence in favor of, or against a white man.'" *Hall* concluded that the words Indian, Negro, Black and white were generic terms designating race. Therefore, Chinese and all other people not white, were included in the prohibition from bearing witness against whites. *Hall* reached the rule of statutory construction impelled by public policy due to "an actual and present danger." (*Id.* at p. 404.) "The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." (*Ibid.*)

Subsequently, the United States Supreme Court proclaimed that the Fourteenth Amendment's Due Process and Equal Protection Clauses were adopted to assure African-Americans[3] all their civil rights and to protect them wherever their enjoyment should be denied by the states. (*Strauder v. West Virginia* (1879) 100 U.S. 300, 305-306.) The Fourteenth Amendment is to be construed liberally to carry out its purpose. (*Strauder v. West Virginia*, *supra*, 100 S.Ct. at p. 307.) The national government was bestowed with the power that no state shall deny equal protection of the law because of the discrimination and the well-known prejudices that often exist against particular classes in the community which sway the jurors' judgment. (*Id.* at p. 309.) West Virginia's statute that discriminated in the selection of jurors against African-Americans

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[3] Throughout the cases, various terms are used. Appellant will utilize the term, African-American.

because of their color violated the Fourteenth Amendment Equal Protection Clause. (*Id.* at p. 310.)

In *Smith v. Texas* (1940) 311 U.S. 128, the Texas statutory scheme for grand selection was not in itself unfair. It was capable of being carried out with no racial discrimination whatsoever. (*Id.* at pp. 130-131 & fn. 5.) But by the wide discretion permissible in the plan's various steps, the scheme was also equally capable of being applied in such a manner as to proscribe practically any group thought by the law's administrators to be undesirable. (*Id.* at p. 131.) Chance and accident could hardly have brought about the listing of so few African-Americans for grand jury service from among the thousands possessing the legal qualifications. Nor could chance and accident have been responsible for the circumstances where an African-American's name almost invariably appeared as number 16 when number 16 was never called for service, unless it was impossible to obtain the required jurors from the first 15 names on the list. (*Ibid.*) Discrimination could arise from commissioners who knew no African-Americans as well as from commissioners who knew, but eliminated them. (*Id.* at p. 132.) The conviction would not stand because the Fourteenth Amendment prohibited racial discrimination in the selection of grand juries. (*Ibid.*)

In 1957, surveyed lawyers reported that no African-Americans had served on San Francisco grand juries. (Alschuler & Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 *U. of Chi. L.Rev.* 867, 896.)

In *Peters v. Kiff* (1972) 407 U.S. 493, 496, although the Fifth Amendment right to a grand jury did not apply in a state prosecution and the Sixth Amendment right to jury trial did not apply to state trials that took place before *Duncan*, the question whether jurors were excluded based on race from the grand jury and petit jury was considered under the commands of Fourteenth Amendment equal protection and due process. The Constitution prohibited systematic exclusionary practices against African-Americans in the selection of the grand jury, petit jury, or both. (*Peters v. Kiff*, *supra*, 407 U.S. at p. 497.) Such exclusion violated the Equal Protection Clause. (*Id.* at p. 498.) A state's subjection of a defendant to indictment and trial by grand and petit juries that were illegal in their composition denied due process of law. (*Id.* at p. 501.) Due process imposed limitations on the composition of the jury. (*Ibid.*) A state cannot subject a defendant to trial by jury that has been selected in an arbitrary and discriminatory manner consistent with due process. (*Id.* at p. 502.)

In *Vasquez v. Hillery* (1986) 474 U.S. 254, Hillery spent 16 years pursing appeals and collateral relief in the California state courts. (*Id.* at p. 256.) This court found that the total absence of blacks from the grand jury in the history of Kings County was an undisputed fact, yet denied relief. (*Id.* at pp. 256, 258.) The United States Supreme Court concluded that intentional discrimination in the selection of grand jurors based on race voided the conviction under the Fourteenth Amendment Equal Protection Clause. (*Id.* at pp. 262, 264.)

Batson v. Kentucky (1986) 476 U.S. 79 reaffirmed the principle that a state's purposeful or deliberate denial of participation as jurors in the administration of justice to African-Americans violates the Equal Protection Clause. (*Id.* at p. 84.) The defendant has the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. (*Id.* at pp. 85-86.) The Constitution required that the United States Supreme Court look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford protection against state action through its administrative officers in effecting the prohibited discrimination. The Constitution prohibited the selection of jurors on racial grounds in all forms. (*Id.* at p. 88, citing *e.g.*, *Avery v. Georgia* (1953) 345 U.S. 559 [no African-Americans served on the jury where the names of white persons were printed on white tickets and the names of African-Americans were on yellow tickets and the clerk had the duty to "'arrange'" the tickets and type in the list of persons to be called to serve on the panel].)

Holland v. Illinois (1990) 493 U.S. 474, 477, held that the Sixth Amendment entitled every defendant to object to a venire that was not designed to represent a fair cross-section of the community, whether or not he belonged to the systematically excluded group. Yet the Sixth Amendment did not incorporate the *Batson* test. (*Holland v. Illinois*, *supra*, 493 U.S. at p. 478.) A prohibition upon the exclusion of cognizable groups through peremptory

challenges was based on the Fourteenth Amendment Equal Protection Clause, not the Sixth Amendment. (*Ibid.*)

Powers v. Ohio (1991) 499 U.S. 400 reiterated its "unyielding" position that a defendant is denied equal protection of the laws when tried before a jury from which members of his race have been excluded by the state's purposeful conduct. (*Id.* at p. 404.) The defendant has the right to be tried by a jury whose members were selected by nondiscriminatory criteria. (*Ibid.*)

J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127, 135, enunciated that *Taylor*'s Sixth Amendment principles were "consistent with" heightened equal protection scrutiny afforded gender-based classifications. The State's suggestion that gender discrimination in the courtroom was "tolerable," unlike racial discrimination, was rejected because the prejudicial attitudes toward racial minorities and women had overpowering similarities. (*Ibid.*) African-Americans and women shared an embarrassing history of total exclusion. (*Id.* at p. 136.) "Where persons are excluded from participation in our democratic processes solely because of race or gender, the promise of equality dims, and the integrity of our judicial system is jeopardized." (*Id.* at p. 146.)

Johnson v. California (2005) 545 U.S. 162 reiterated that a single invidiously discriminatory act is not immunized by the absence of such discrimination in the making of other comparable decisions. (*Id.* at p. 169, fn. 5.)

Justice Thomas' concurrence in *Berghuis v. Smith* (2010) 130 S.Ct. 1382 recently indicated the defendant's right to a jury that represented a fair cross-

section of the community should rest less on the Sixth Amendment than on an amalgamation of the Fourteenth Amendment Due Process and Equal Protection Clauses. (*Id.* at p. 1396.)

"The ability of a prosecutor to manipulate the jury pool runs counter to the due process concept of the jury as a hedge against arbitrary abuses of governmental power, as well as a defendant's right to equal protection." (19 *Hastings Const. L.Q.* at p. 287, fns. omitted.) Appellant had the right to be tried by a jury whose members were selected by nondiscriminatory criteria. The Fourteenth Amendment prohibited racial discrimination in the composition and selection of the petit jury in all forms. The Fourteenth Amendment Due Process and Equal Protection Clauses protected the African-American appellant against the systematic racial exclusion of African-Americans in the jury venire's composition and the petit jury's selection. The prosecution improperly used venue in Madera, not Fresno, to unconstitutionally exclude by nearly 50% the pool of prospective African-Americans jurors from the jury's composition and selection. The venue provision's application violated appellant's Fourteenth Amendment rights to due process and equal protection. (*Vasquez v. Hillery*, *supra*, 474 U.S. at pp. 262, 264; *Peters v. Kiff*, *supra*, 407 U.S. at pp. 496, 497, 498, 501, 502; *Smith v. Texas*, *supra*, 311 U.S. at pp. 131, 132; *Strauder v. West Virginia*, *supra*, 100 U.S. at pp. 305-307, 309-310; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 84, 85-86, 88; *J.E.B. v. Alabama ex rel. T.B.*, *supra*, 511 U.S. at pp. 135-136, 146; *Johnson v. California*, *supra*, 545 U.S. at p. 169, fn. 5.)

4. *Bradford* created state liberty interests guaranteed by the Fourteenth Amendment Due Process Clause.

The denial of a state procedural law or right is not exclusively a matter of state concern because the accused's right to liberty against arbitrary state deprivation is guaranteed by the Fourteenth Amendment Due Process Clause. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see *e.gs.*, *Id.* at p. 347 [defendant's interest in the jury's exercise of discretion in imposing punishment]; *United States v. Curbelo* (4th Cir. 2003) 343 F.3d 273, 280 [defendant's right to jury verdict by 12 persons]; *Carter v. Bowersox* (8th Cir. 2001) 265 F.3d 705, 714-715, *cert. den.*, 535 U.S. 999 [unanimous finding that aggravating factor would warrant death sentence]; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970, *cert. den.*, 535 U.S. 935 [jury instruction on provision that the death penalty shall apply if aggravating circumstances outweighed mitigating circumstances when no similar provision existed in the statute under which defendant should have been sentenced]; *Toney v. Gammon* (8th Cir. 1996) 79 F.3d 693, 699-700 [court's erroneous belief that two consecutive life sentences were required]; *Walker v. Deeds* (9th Cir. 1996) 50 F.3d 670, 673 [individualized determination that it was "'just and proper'" that petitioner be adjudged a habitual offender]; *Jones v. State of Ark.* (8th Cir. 1991) 929 F.2d 375, 377, fn. 6 [state's failure to adhere to its own law].)

Here, even assuming, without conceding, that the Sixth and Fourteenth Amendments do not independently protect appellant's federal constitutional rights (see §§ IA 2 & 3, *ante*), *Bradford* created state liberty interests (see

§ IA 1, *ante*) guaranteed by the Fourteenth Amendment Due Process Clause. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346, 347; *United States v. Curbelo*, *supra*, 343 F.3d at p. 280; *Carter v. Bowersox*, *supra*, 265 F.3d at pp. 714-715; *Murtishaw v. Woodford*, *supra*, 255 F.3d at pp. 969-970; *Toney v. Gammon*, *supra*, 79 F.3d at pp. 699-700; *Walker v. Deeds*, *supra*, 50 F.3d at p. 673; *Jones v. State of Ark.*, *supra*, 929 F.2d at p. 377, fn. 6.) *Bradford* protects vicinage through the rights to be tried by a jury drawn from the residents of the judicial district where the crime was committed *and by a representative cross-section thereof.* (*Bradford*, at pp. 15, 17.) Venue is where the location of the crime is readily identifiable in light of the protected vicinage right. (*Id.* at p. 17.)

B. Respondent's improper forum shopping under the guise of a liberal construction of the venue statute contravenes state and federal rules for narrow statutory construction of venue statutes that respect defendant's constitutional rights.

1. California venue statutes must be construed narrowly in light of the importance constitutionally attached to the defendant's right to a trial by jury drawn from the vicinage where the crime occurred.

California venue statutes must be construed narrowly in light of the importance constitutionally attached to defendant's right to a trial by jury drawn from the vicinage where the crime occurred. (*People v. Bradford*, *supra*, 17 Cal.3d at pp. 15, 17; *People v. Betts*, *supra*, 34 Cal.4th at p. 1059, fn. 16; *People v. Crise* (1990) 224 Cal.App.3d Supp. 1, 5.)

2. Even if not constitutionally compelled by Article III, section 2 and the Sixth Amendment, venue statutes should be narrowly construed to respect, rather than disrespect, the constitutional concern for trial in the vicinage.

Even when a construction is not constitutionally compelled by Article III, section 2 and the Sixth Amendment, venue statutes should be narrowly construed to respect, rather than disrespect, the constitutional concern for trial in the vicinage. (*United States v. Johnson* (1944) 323 U.S. 273, 275, 276; *United States v. Ramirez* (2nd Cir. 2005) 420 F.3d 134, 146; *United States v. Morgan*, *supra*, 393 F.3d at pp. 195, 199, 201; *United States v. Salinas*, *supra*, 373 F.3d at p. 165.) Questions of venue in criminal cases are not merely matters of formal legal procedure. Venue matters closely touch the fair administration of criminal justice and public confidence therein. (*United States v. Johnson*, *supra*, 323 U.S. at p. 296; *United States v. Hernandez*, *supra*, 189 F.3d at p. 787; *Mississippi Publishers Corp. v. Coleman* (Miss. 1987) 515 So.2d 1163, 1165.)

3. Venue provisions should not be freely construed to give the prosecution the choice of a favorable tribunal.

Venue provisions should not be freely construed to give the prosecution the choice of a favorable tribunal. (*Travis v. United States*(1961) 364 U.S. 631, 634; *United States v. Salinas*, *supra*, 373 F.3d at pp. 169-170; *United States v. Hernandez*, *supra*, 189 F.3d at p. 792; *Neff v. State* (Ind. App. 2009) 915 N.E.2d 1026, 1035.) Unfair results occur when venue becomes the "'government's choice'" rather than a constitutional guarantee. (*United States v. Hernandez*, *supra*, 189 F.3d at p. 791.)

4. The prosecution's "'forum shopping'" is improper.

The prosecution's "'forum shopping'" is improper. (*Neff v. State*, *supra*, 915 N.E.2d at p. 1035; Alexander, *supra*, 19 *Hastings Const. L.Q.* at p. 286 ["The greatest danger posed by neglecting the Sixth Amendment vicinage provision is the prosecution's potential ability to forum shop for what it perceives to be the most advantageous jury pool."]; *Id.* at p. 287, fns. omitted ["The ability of a prosecutor to manipulate the jury pool runs counter to the due process concept of the jury as a hedge against arbitrary abuses of governmental power, as well as a defendant's right to equal protection."]; *Id.* at p. 292 [Sixth Amendment community cross-section requirement reflects the policy to prevent the prosecution from forum shopping]; "Vicinage," *supra*, 29 *Okla L.Rev.* at pp. 839-840 [Sixth Amendment vicinage guarantee limited the government's "'jury-shopping'" options].)

C. 1.(a) Madera County was not a place of proper venue for the charged possessory offenses and the location of the possessory acts.

Respondent asserts: "In legal terms, appellant actually possessed the key to and the receipts for the Fresno lockers *in Madera*, giving him constructive possession *in Madera* of the cocaine in the Fresno locker." (RBM 8, fn. omitted, original emphasis.) Respondent's position is without merit.

The opinion disagreed with respondent's assertion and the trial court's conclusion that evidence defendant constructively possessed the cocaine and firearm in Madera rendered Madera County venue proper. (slip opn., 5.) "The possessory crimes in this case occurred in Fresno and thus, the appropriate

venue was Fresno County under section 777. There is no evidence in the record that defendant ever possessed the subject cocaine and firearm within Madera County." (slip opn., 5.) "It is true defendant's right to control the contraband located inside the Fresno storage locker could be inferred from evidence found in Madera, including the key and receipts for the locker. It does not follow, however, that defendant constructively possessed the cocaine and firearm *in Madera*." (slip opn., 5, original emphasis.) "'Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another.' (*People v. Morante* (1990) 29 Cal.4th 403, 417.) 'For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled evidence.' (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 539.)" (slip opn., 5.) "Rather, under the principles set forth above, the law could fairly treat defendant as if he were in actual possession of the contraband, which was physically located and thus constructively possessed *in Fresno*." (slip opn.,, 5, original emphasis.)

The locus delicti must be determined from the nature of the alleged crime and the location of the constituent act or acts. (*United States v. Cabrales*, *supra*, 524 U.S. at pp. 7-8; *Johnson v. United States*, *supra*, 351 U.S. at p. 220; *United*

States v. Anderson (1946) 328 U.S. 699, 705.) A court performing this inquiry must initially identify the conduct constituting the offense and then discern the location of the commission of the criminal acts. (*United States v. Rodriguez-Moreno* (1999) 526 U.S. 275, 279.) The Court of Appeal opinion correctly performed its constitutional function, determined from the nature of the alleged crimes that possession was the identified conduct, and discerned that the location of the commission of the criminal acts was in Fresno, not Madera, County.

In *United States v. Cabrales*, *supra*, 524 U.S. 1, counts two and three charged Cabrales with money laundering crimes. Laundered currency derived from the unlawful distribution of cocaine in Missouri. The alleged money laundering occurred entirely in Florida. The district court granted motions to dismiss counts two and three. The Eight Circuit affirmed. (*Id.* at pp. 3-6.) The governmental appealed. Congress had provided that offenses begun in one district and completed in another could be prosecuted in any district where the offense was begun, continued, or completed. The United States Supreme Court confronted and decided the question whether the money laundering offenses charged crimes begun in Missouri and completed in Florida, rendered venue proper in Missouri, or did they delineate crimes that took place wholly within Florida. (*Id.* at p. 7.) Cabrales was not charged with conspiracy. Nor was he charged with trafficking. (*Ibid.*) The Government argued that when Cabrales acted after the fact to conceal a crime, the first crime was an essential element of

the second and the second facilitated the first and made it profitable by impeding its detection. (*Id.* at pp. 7-8.) But the question was the appropriate *place* to try the actor. The money launderer must know that she is dealing with funds derived from specified unlawful activity, through drug dealing, but the Missouri venue of that actively was "'of no moment.'" (*Id.* at p. 8, citation omitted.) Venue in Missouri for transactions begun, continued, and competed in Florida was improper. (*Ibid.*)

Finally, the Government urged the efficiency of trying Cabrales in Missouri because evidence there, not in Florida, showed that the money Cabrales allegedly laundered derived from unlawful activity. The Government recognized that "the venue requirement is principally a protection for the defendant." (*Id.* at p. 9.) The Government maintained that its convenience, and the interests of the community victimized by the drug dealers, merited consideration. The United States Supreme Court rejected the Government's position: "But if Cabrales is in fact linked to the drug-trafficking activity, the Government is not disarmed from showing that is the case. She can be, and indeed has been, charged with conspiring with drug dealers in Missouri. If the government can prove the agreement it has alleged, Cabrales can be prosecuted in Missouri for that confederacy, and her money laundering in Florida could be shown as overt acts in performance of the conspiracy." (*Ibid.*) *Cabrales* held that Missouri was not "a place of proper venue" for the charged money laundering offenses. (*Id.* at p. 10.)

Appellant was not charged with Madera drug sales or Madera manufacturing of cocaine base. Both counts charged possessory offenses. Like *Cabrales*, the question was the appropriate *place* to try defendant. The possessory offenses began, continued, and were completed in Fresno County. The venue requirement was "principally a protection for the defendant." (*Id.* at p. 9.) If defendant could be linked to drug sales or cocaine base-manufacture in Madera County, such evidence could be used to prosecute him separately for those offenses in Madera County. But it did not transform the location of the Fresno possessory acts to Madera County. The Court of Appeal's opinion was consistent with *Cabrales*. "The possessory crimes in this case occurred in Fresno and, thus, the appropriate venue was Fresno County under section 777. There is no evidence in the record that defendant even possessed the subject cocaine and firearm within Madera County." (OP 5.) (*United States v. Tingle* (7th Cir. 1999) 183 F.3d 719, 727, *cert. den.*, 528 U.S. 1048 ["Because the government failed to show that even part of the crime of distributing cocaine base to Oscar Rathers occurred in the Eastern District of Wisconsin, it was not a proper venue for her trial on this charge."].)

(b) The prosecution further failed to prove constructive possession in Madera by a preponderance of the evidence because defendant had no right to control and no immediate and exclusive access to the storage facility and locker contents.

Ambiguous circumstances (*United States v. Wood*, *supra*, 364 F.3d at p. 714), agent speculation (*United States v. Greene* (8th Cir. 1993) 995 F.2d 793, 801), tangential facts (*United States v. Douglas* (N.D. Cal. 1998) 996 F.Supp.

969, 973, *app. dism.* (9th Cir. 1998) 161 F.3d 15), and lack of clarity (*United States v. Passodelis* (3rd Cir. 1980) 615 F.2d 975, 978, *reh. den.*, 622 F.2d 567) fail to establish venue. The prosecution failed to establish constructive possession for Madera venue. (*United States v. Morgan*, *supra*, 393 F.3d at p. 197.)

"The accused has constructive possession when he maintains control or a right to control the contraband. Possession may be imputed when the contraband is found in a location which is *immediately and exclusively* accessible to the accused and subject to his dominion and control." (*People v. Showers* (1968) 68 Cal.2d 639, 643-644, emphasis added; *In Re Rothwell* (2008) 164 Cal.App.4th 160, 169; *People v. Glass* (1978) 44 Cal.App.3d 772, 776.) The locker was rented to Tameka Howard. (5RT 1210; 1216.) Defendant was not authorized to enter storage locker unit 452. (5RT 1222.) Thus, he had no right to control the locker. Also, the locker was not immediately and exclusively accessible to defendant. Moreover, a key to the locker did not even permit access into the facility which required an eight-digit password. (5RT 1223.) There was no evidence defendant possessed the numeric combination required to gain access to the mini-storage facility. (6RT 1552-1524.) The prosecution failed to prove constructive possession by a preponderance of the evidence because defendant had no right to control and no immediate and exclusive access to the storage facility locker and contents. (*People v. Showers*, *supra*, 68 Cal.2d at p. 644 [defendant did not have constructive possession of the contraband because his

access to the ivy patch was not exclusive and he did not control the location]; *People v. Glass*, *supra*, 44 Cal.App.3d at p. 776 [defendant did not reside at or jointly possess the premises]; *In Re Rothwell*, *supra*, 164 Cal.App.4th at p. 171 [even effort to obtain, request, and pay for heroin did not evidence its possession]; *People v. Barnes* (1997) 57 Cal.App.4th 552, 557 [demand for a "'real rock'" or money back did not prove the "'right to control'" the unseen vial]; *Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 540 [some control over the physical setting where the sale was to take place, agreed meeting, payment, and preparation to take immediate physical possession did not exercise "'control'" over the contraband]; *United States v. Morgan*, *supra*, 393 F.3d at p. 197 [prosecution did not prove constructive possession for venue]; *United States v. Kitchen* (7th Cir. 1995) 57 F.3d 516, 524 [constructive possession not shown when defendant acted as a broker in a drug transaction]; *United States v. Windom* (7th Cir. 1994) 19 F.3d 1190, 1201, *cert. den.*, 513 U.S. 862 [defendant's presence in a house where a backpack with drugs was found and possession of a $20.00 bill from a controlled buy did not prove constructive possession because the narcotics from the controlled buy were not in any way linked to the narcotics in the backpack]; *United States v. Watkins* (D.C. Cir. 1975) 519 F.2d 294, 298 [defendant's presence in an apartment where narcotics were found did not prove constructive possession.].)

2.(a) Requisite, preparatory acts are inapplicable and unconstitutional.

Respondent argues that possessory acts were requisite, preparatory acts to the consummation of his cocaine possession for sale with the sale in Madera. (RBM 6, 7, 8, 10-11.) But this argument relies on distinguishable cases. (*People v. Price* (1991) 1 Cal.4th 324, 384-386 [defendant committed Humboldt County preparatory acts in procuring a revolver and sawed-off shotgun by theft for later use to commit murder in Los Angeles]; *People v. Posey* (2004) 32 Cal.4th 193, 219-222 [preparatory telephone calls to Marin County from San Francisco as part of negotiations leading up to two sales of cocaine base in San Francisco]; *People v. Carrington* (2009) 47 Cal.4th 145, 185 [San Mateo County preparatory acts where defendant collected items (gloves, screwdriver, key and gun) which she planned to use to commit the crimes].) These distinguishable cases that the county of preparatory acts vests venue for later committed crimes have no application to this case because the possessory acts were not preparatory, but were the criminal acts themselves, and there were no later committed crimes.

Assuming, without conceding, that this Court considers the preparatory-acts doctrine applicable, those cases are unconstitutional. They emanate from a liberal construction of the venue statute which overlooks the need for narrow statutory construction to prevent the prosecution's choice of a favorable tribunal and to respect defendant's constitutional rights. (IB, *ante.*) They ignore that appellant's rights to proper venue and vicinage are

constitutionally protected by the United States Constitution. (IA2-4, *ante.*) Finally, they fail to recognize that the place where an offense is committed must be determined by and limited to the offenses' essential conduct elements. (*United States v. Cabrales*, *supra*, 524 U.S. at pp. 7-8; *United States v. Rodriguez-Moreno*, *supra*, 526 U.S. at pp. 279-280; *United States v. Bowens*, *supra*, 224 F.3d at pp. 309-311.)

In *Johnston v. United States* (1956) 351 U.S. 215, the defendants, Johnston and Sokol, were conscientious objectors who resided in Pennsylvania's Western Judicial District, registered there with local draft boards, were ordered to report to the boards for civilian work assignment in lieu of induction, and received instructions to report to state hospitals situated in the Eastern District. They reported to the boards, but refused to comply with the instructions, and were indicted in the Eastern District. The indictments were dismissed because venue could only be in the Western District. The Third Circuit Court of Appeals reversed because venue was where the defendants failed to report. (*Id.* at p. 216.)

Likewise, defendant Patteson was ordered to report in Oklahoma to his local board, reported, but refused to comply with instructions to report to a Topeka, Kansas state hospital. Indicted in Kansas, Patteson's case was transferred to Oklahoma, but was sent back to Kansas where venue was. The Kansas court dismissed the indictment because venue was in Oklahoma. The Tenth Circuit Court of Appeals affirmed. (*Id.* at pp. 216-217.)

The United States Supreme Court affirmed the Third Circuit and reversed the Tenth Circuit. (*Id.* at p. 223.) Venue was in the district where the civilian work was to be performed, in Kansas for Patteson, and in Pennsylvania's Eastern District for Johnston and Sokol. This conclusion resulted from the general rule that where the charged crime is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime. (*Id.* at p. 220.) Article III and the Sixth Amendment fixed the venue in the district where the crime shall have been committed. The place of the crime was determined by the accused's acts that violated the statute. The venue requirement stated the public policy that the situs of the trial was fixed in the vicinage of the crime. (*Ibid.*)

This Court's requisite *preparatory* act cases unconstitutionally expand venue beyond where the crime was committed, *i.e.*, commenced, continued, and consummated, to preparatory acts. (*United States v. Cabrales*, *supra*, 524 U.S. at pp. 6-10; *Johnston v. United States*, *supra*, 351 U.S. at p. 220; *United States v. Ramirez*, *supra*, 420 F.3d at p. 14 [venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense]; *United States v. Strain* (5th Cir 2005) 396 F.3d 689, 697, *reh. den.*, 407 F.3d 379 ["Strain's telephone conversations with Chavez and subsequent journey through the Western District of Texas toward Carlsbad, although indispensable to the ultimate act of harboring in New Mexico, were preparatory acts for the commission of the actual crime - much like purchasing a gun and traveling to a bank to commit a robbery - and thus insufficient to

support a finding of venue."]; *United States v. Beech-Nut Nutrition Corp.* (2nd Cir. 1989) 871 F.2d 1181, 1190 ["The principle that preparatory acts alone are insufficient to support venue applies also to continuing offenses"].)

(b) In any event, there was insufficient evidence defendant committed any preparatory acts in Madera leading to the possession of the cocaine and the firearm in the Fresno storage locker.

In any event, as the Court of Appeal correctly concluded: "While the prosecution's theory that defendant intended to sell the cocaine in Madera might have been factually true, the record discloses no evidence that any acts or effects' requisite to the consummation' (§ 781) of the crimes of possession of cocaine for sale (Health & Saf. Code § 11351) or possession of a firearm by a felon (§ 12021) occurred in Madera County. There was no evidence defendant engaged in any preparatory acts leading to his possession of the cocaine and the firearm in the Fresno storage locker." (slip opn. 6.)

3.(a) Even assumed, requisite effects of Madera drug sales did not determine proper venue when defendant was charged with possessory offenses, not sales, and a victimized community's interest did not determine proper venue.

Respondent argues that defendant caused requisite effects in and upon Madera County because he conducted an ongoing business there. (RBM 6, 8, 13.) The brief answer, as previously explained, is that defendant was charged with possessory offenses, not sales, and it is the charged offenses' location that determined the proper venue location. (*United States v. Cabrales*, *supra*, 524 U.S. at pp. 6-8; *Johnston v. United States*, *supra*, 351 U.S. at p. 220; *United*

States v. Clenney (5th Cir. 2005) 434 F.3d 780, 781-782 [offense element, "'the intent to obstruct the lawful exercise of parental rights'" did not establish venue because the element merely spoke to the offender's *mens rea* as he committed the conduct essential to the crime, but was not the required essential conduct element].)

Another answer is that *People v. Posey*, *supra*, 32 Cal.4th 193, 220, indicated that a requirement the defendant possess any mental state whatsoever with respect to a county for purposes of venue is absent from section 781, 777, and other venue provisions.

A further answer is that the interests of a community victimized by a related offense, including drug dealing, do not determine the place of proper venue. (*United States v. Cabrales*, *supra*, 524 U.S. at pp. 9-10 [interests of the community victimized by drug leaders' unlawful trafficking activity and convenience to the government did not make Missouri a place of proper venue]; *United States v. Bowens*, *supra*, 224 F.3d at p. 313 ["The (High) Court refused to adopt the government's reasoning or to consider the effects of money laundering on the Missouri community at all. See *Cabrales*, 524 U.S. at 9, 118 S.Ct. 1772. The unmistakable import of that refusal is that proper venue is limited to the place where the defendant's criminal acts are committed, without respect to Congress's underlying purposes in criminalizing those acts."]; *United States v. Villarini* (4th Cir. 2001) 238 F.3d 530, 534 [Fourth Circuit's earlier holding that generation of criminal proceeds eventually laundered was an

essential element of the crime of money laundering was abrogated in *Cabrales*; hence, proper venue for money laundering was not the district where alleged embezzlement of laundered funds occurred]; *United States v. Davis* (5th Cir. 1982) 666 F.2d 195, 200 [adoption of government argument that the parties intended the drugs be returned to that district for ultimate distribution at the street level "would undermine the guarantees of article III and the Sixth Amendment that defendant will be tried in the state and district where the crime itself was committed."].)

(b) In any event, there was insufficient evidence defendant sold or transacted to sell any of the subject cocaine in Madera.

In any event, the Court of Appeals correctly concluded: "Nor was there any evidence defendant sold or transmitted to sell any of the subject cocaine in Madera." (OP 6.)

4. Even rationally grounded Madera County venue did not overcome the Sixth Amendment violations and the Fourteenth Amendment Due Process and Equal Protection violations.

Finally, even assuming venue was rationally grounded by Madera County, the reasons for placing venue there did not overcome the Sixth Amendment violations and the Fourteenth Amendment Due Process and Equal Protection violations. (§ IA 2-4, *ante; Taylor v. Louisiana*, *supra*, 419 U.S. at p. 534; *Smith v. Texas*, *supra*, 311 U.S. at pp. 130-132.) The Sixth Amendment substantively protected the accused's rights to trial by jury, vicinage, and representative cross-section. The Sixth Amendment structurally functioned to

safeguard against the prosecution's stacking the deck in its favor, competing on an unequal field, shopping for a forum beyond when the alleged offense was committed, choosing a forum favorable for itself and unfriendly to the defendant, shuffling the jury venire to obtain a minority-poor jury pool, manipulating the jury pool composition to exclude racial segments of the community from participation, denying a representative jury, and excluding the accused's peers. The Fourteenth Amendment Due Process and Equal Protection Clauses are linked to the Sixth Amendment's substantive protections for the accused and structural safeguards limiting the prosecution. The Fourteenth Amendment Due Process and Equal Protection Clauses were adopted and construed liberally so that the state could not systematically discriminate in the composition and selection of jurors to exclude African-Americans and to prejudice and sway jurors' judgments. They guard against state action, vindicate the accused's rights to be tried by a truly representative jury whose members are selected by nondiscriminatory criteria, protect against systematic exclusionary practices whatever their form, limit the prosecution's manipulation of the jury pool and discrimination in the jury's composition and selection, and ensure the judicial system's integrity. California's rational grounds for Madera venue do not overcome the violations of appellant's Sixth and Fourteenth Amendment rights. (*Taylor v. Louisiana*, *supra*, 419 U.S. at p. 534; *Smith v. Texas*, *supra*, 311 U.S. at pp. 130-132.)

II

THE CONVICTIONS MUST BE REVERSED

Respondent briefly argues that any venue error was harmless because no federal constitutional right is implicated and any California constitutional violation is subject to the miscarriage-of-justice standard embodied in *People v. Watson* (1956) 46 Cal.3d 818, 836, which was not satisfied. (RBM5, 14-15.) Respondent is mistaken for the following reasons.

A. Improper venue simply requires reversal.

California cases hold that improper venue simply requires reversal. (*People v. Crise*, *supra*, 224 Cal.App.3d Supp. at p. 3; *People v. Pollack* (1938) 26 Cal.App.2d 602, 605.) Federal cases similarly reverse. (*United States v. Ramirez*, *supra*, 420 F.3d at pp. 136, 138; *United States v. Strain*, *supra*, 396 F.3d at p. 691; *United States v. Salinas*, *supra*, 373 F.3d at p. 162; *United States v. Morgan*, *supra*, 393 F.3d at pp. 194, 201; *United States v. Wood*, *supra*, 364 F.3d at pp. 706, 714; *United States v. Villarini*, *supra*, 283 F.3d at p. 536; *United States v. Bowens*, *supra*, 224 F.3d at pp. 304, 316; *United States v. Tingle*, *supra*, 183 F.3d at pp. 723, 728, 730; *United States v. Beech-Nut Nutrition Corp.*, *supra*, 871 F.2d at pp. 1184, 1191, 1199; *United States v. Davis*, *supra*, 666 F.2d at p. 202; *United States v. Passodelis*, *supra*, 615 F.2d at pp. 976, 979.)

B. The violation of California Constitution, article I, section 16 was structural error.

The California Constitution, article I, section 16 guarantees the right to trial by jury with essential attributes of number, impartiality, and unanimity.

(*Price v. Superior Court*, *supra*, 25 Cal.4th at pp. 1072-1073.) In some respects, article I, section 16's essential guarantees are broader than the Sixth Amendment's protections. (*Apodaca v. Oregon* (1972) 406 U.S. 404, 410-411 [non-unanimous, 10-of-12 jury verdicts are permissible]; *Williams v. Florida*, *supra*, 399 U.S. at p. 103 [six person jury not unconstitutional].) The violation of California Constitution article I, section 16 (see § IA1, *ante*) was structural error. (*People v. Collins* (2001) 26 Cal.4th 297, 311 [fundamental denial of jury trial was structural error]; *People v. Traugott* (2010) 187 Cal.App.4th 492, 505 [denial of 12-person jury rendering a unanimous verdict was structural error that was reversible per se].)

C. The Sixth Amendment violations were structural errors that require reversal, without the necessity of a prejudice determination.

The violation of the fundamental Sixth Amendment jury trial right (see § IA2, *ante*) was structural error that compels reversal, without the necessity of a prejudice determination. (*Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 156-158, 162; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) Additionally, the fundamental Sixth Amendment cross-section violation (see § IA2, *ante*) was structural error. (*Taylor v. Louisiana*, *supra*, 419 U.S. at pp. 537, 538.)

Also, *Gomez v. United States* (1989) 490 U.S. 858 (*Gomez*) concluded that the Federal Magistrates Act did not empower a magistrate to conduct voir dire and jury selection in a felony trial without defendant's consent. (*Id.* at pp. 871-876.) Jury selection was the primary means by which a court may enforce the defendant's right to be tried by a jury free from racial prejudice. (*Id.* at p.

873.) The Government argued any error was harmless because petitioner alleged no specific prejudice from the magistrate's conducting the voir dire examination. The United States Supreme Court concluded this argument was meritless. Defendant's basic right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside was not subject to harmless-error analysis. (*Id.* at p. 876.)

Nguyen v. United States (2003) 539 U.S. 69 (*Nguyen*) concluded that a panel of the Court of Appeals consisting of two Article III judges and one article IV judge did not have authority to decide petitioners' appeals. (*Id.* at pp. 71, 77.) The Government's invitation to assess the merits of petitioners' convictions or whether the fairness, integrity or public-reputation of the proceedings were impaired by the panel's composition was held inappropriate. (*Id.* at p. 80.) A judgment would be invalidated without an assessment of prejudice where the statutory error violated a strong policy concerning the proper administration of judicial business. (*Id.* at p. 81.) Although it was true that two judges of a three-judge panel constituted a quorum legally able to transact business, it was doubtful whether two judges had any authority to serve by themselves as a panel. (*Id.* at pp. 82-83.)

Gomez and *Nguyen* make clear that statutory errors require automatic reversal. (see also, *United States v. Curbelo*, *supra*, 343 F.3d at p. 280, fn. 6 ["The Supreme Court has clearly held that structural errors need not be of

constitutional dimension"].) Here, as in *Gomez,* and *Nguyen*, the adjudicator was wrongly invested with adjudicative power by a statutory violation.

United States v. Gonzalez-Lopez (2006) 548 U.S. 140 (*Gonzalez-Lopez*) held that the deprivation of defendant's Sixth Amendment right to counsel of choice was a structural error that defied harmless error analysis. (*Id.* at pp. 148-151.) Structural defects affect the framework within which the trial proceeds and are not simply an error in the trial process itself. (*Id.* at p. 148.) To determine the effect of a wrongful denial of counsel of choice would involve speculative assessments upon what matters rejected counsel would have handled differently. (*Id.* at p. 151.)

Here, as in *Gonzalez-Lopez*, the error affected the framework within which the trial proceeded and was not simply an error in the trial process itself. To determine the effect of a wrongful denial of a proper venue and vicinage would involve speculative assessments upon how a properly constituted jury from Fresno County, reflecting a fair-cross section of the community, including appellant's peers, would have seen and evaluated the evidence. "[T]he Sixth Amendment jurisprudence recognizes that juries can be constitutionally impartial and still reach verdicts very different from the verdicts that juries of other compositions (*i.e.*, representative of other communities) would likely reach." (Brown, *supra*, 53 *Md. L.Rev.* at p. 112.) Stated differently, the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) The wrong Madera

County entity judged the defendant guilty. (*Id.* at p. 281.) The structural error requires reversal, without the necessity of a prejudice determination. (*Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 156-158, 162; *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280, 281, 282; *Taylor v. Louisiana*, *supra*, 419 U.S. at pp. 537, 538; *Gomez v. United States*, *supra*, 490 U.S. at p. 876; *Nguyen v. United States*, *supra*, 539 U.S. at pp. 80-83; *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at pp. 148-151.)

D. The Equal Protection and Due Process violations that resulted from the jury's composition and selection from the wrong venue and vicinage are not amenable to harmless error review and require automatic reversal.

"If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." (*Smith v. Texas*, *supra*, 311 U.S. at p. 132.)

In *Peters v. Kiff*, *supra*, 407 U.S. 493, respondent argued that, even if the grand and petit juries were unconstitutionally selected, the white defendant was not entitled to relief because he had not affirmatively shown how he was actually harmed by the erroneous exclusion of African-Americans. (*Id.* at p. 498.) However, the exclusion of a discernable class from jury service injured not only those defendants who belonged to the excluded class, but other defendants because it destroyed the possibility that the jury will reflect a representative cross-section of the community. (*Id.* at p. 500.) The state could not subject defendant to indictment and trial by grand and petit juries that were illegal in their composition because to do so denied him due process of law. (*Id.* at pp.

501, 504.) A state could not subject a defendant to indictment or trial by a jury selected in an arbitrary and discriminatory manner consistent with due process. (*Id.* at pp. 502, 504.) Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process, created the appearance of bias in the decision of individual cases, and increased the risk of actual bias. (*Id.* at pp. 502-503.) The opportunity to appeal to race prejudice was latent in a vast range of issues, cutting across the entire fabric of our society. (*Id.* at p. 503.) Moreover, when any large and identifiable segment of the community was excluded from jury service, its effect was to remove from the jury room qualities of human nature and varieties of human experience that had an unknown and perhaps unknowable range. (*Ibid.*) The group's exclusion deprived the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. (*Id.* at pp. 503-504.) The nature of the challenged practices made proof of actual harm, or lack of harm, "virtually impossible to assess. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how the jury would have decided the case." (*Id.* at p. 504.) If African-Americans were systematically excluded from the grand and petit juries, defendant was indicted and convicted by tribunals that failed to satisfy the elementary requirements of due process, and neither the indictment nor the conviction could stand. (*Id.* at p. 505.)

In *Vasquez v. Hillery*, *supra*, 474 U.S. 254, California's Attorney General argued that discrimination in the grand jury was harmless error, claimed the

evidence against defendant was overwhelming, and urged any taint attributable to the indictment process was purged after his conviction with a fair trial. (*Id.* at p. 260.) The United States Supreme Court's acceptance of the Attorney General's theory would require abandonment of more than a century of consistent precedents. (*Ibid.*) Discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and our society as a whole. (*Id.* at p. 262.) Defendant's indictment by a grand jury from which members of a racial group were purposefully excluded denied his right to equal protection. (*Ibid.*) The Attorney General's argument that requiring a state to retry a defendant, sometimes years later, imposed an unduly harsh penalty for a constitutional defect bearing no relation to the trial's fundamental fairness was rejected. Intentional discrimination in the selection of grand jurors, possibly only under color of state authority, was a grave constitutional trespass. The only effective remedy for the violation was not disproportionate to the evil that it sought to deter. (*Ibid.*) "[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." (*Id.* at pp. 263-264.) The conviction was void under the Equal Protection Clause because a conviction cannot cure the taint attributable to a charging body selected on the basis of race. (*Id.* at p. 264.) The overriding importance to eliminate the systematic flaw in the charging process and the difficulty of assessing its effect on any given defendant required continued adherence to a rule of mandatory reversal. (*Ibid.*)

In *Miller-El v. Dretke* (2004) 545 U.S. 231, Dallas County office prosecutors followed a specific policy of systematically excluding blacks from juries for decades. (*Id.* at p. 263.) A district judge testified that when he had earlier served in the District Attorney's office, his supervisor warned him that he would be fired if he permitted African-Americans to serve on a jury. (*Id.* at p. 264.) An office jury selection manual authorized by a former prosecutor (and later judge) under the direction of District Attorney Office supervisors outlined the reasoning for excluding minorities from jury service, remained in circulation, and was available to one of the prosecutor's in Miller-El's trial. (*Ibid.*)

During jury selection, the prosecution resorted to "shuffling of the venire panel." (*Id.* at p. 253.) In Texas criminal practice, either side could literally reshuffle the cards bearing panel members' names, thereby rearranging the order in which members of venire panel were seated and reached for questioning. Once the order was established, panel members seated at the back were likely to escape voir dire altogether because those not questioned by the end of the week were dismissed. (*Ibid.*) The prosecution decided to seek jury shuffles when a predominant number of African-Americans were seated in the front of the panel. (*Id.* at pp. 254, 265.) By its own admission, the district attorney's office had used the process in the past to manipulate the jury's racial composition. (*Id.* at p. 264.) The jury selection was "infected by shuffling." (*Id.* at p. 266.) When the government's choice of jurors is tainted with racial bias, the overt wrong casts

doubt over the obligation of the parties, the jury, and the court to adhere to the law throughout the trials. (*Id.* at p. 238.) The prosecutor's discrimination jeopardized the very integrity of courts, invited cynicism respecting the jury's neutrality, and undermined public confidence in adjudication. (*Ibid.*) Repeatedly and consistently proclaimed for over a certainty, racial discrimination by the state in jury selection offended Equal Protection. (*Ibid.*)

Here, as previously explained (§§ IA3, B2-4, C4, IID, *ante*), the prosecution shuffled the Fresno County venire panel by selecting Madera County rather than Fresno County as the venue for defendant's prosecution, which reduced by nearly 50% the number of African-Americans, appellant's peers, denied a representative cross-section of the community, tainted the jury's structural integrity, and violated appellant's Fourteenth Amendment rights to due process of law and equal protection. The convictions are void and cannot stand because the Fourteenth Amendment violations are not amenable to harmless error review and require automatic reversal.

E. Reversal is required because any overruling of *Bradford* and / or California cases holding that improper venue requires reversal must be prospective only and cannot be applied retroactively to applicant's case consistent with the Fourteenth Amendment Due Process Clause.

Even assuming, without conceding, a violation of California Constitution article I, section 16 or the Sixth or Fourteenth Amendment did not occur or was not structural error requiring automatic reversal (§§ IA 1-4, IIB-D, *ante*); California cases hold that improper venue simply requires reversal. (§ IIA, *ante*.) Thus, even if this court concludes that a different standard of prejudice should

apply other than simple or automatic reversal, reversal is still required because any overruling of *Bradford* (see § IA, D, *ante*) and the other cases holding that improper venue requires reversal (§ IIA, *ante*) should be prospective only and not applied retroactively to appellant's case. (*People v. Simon* (2001) 25 Cal. 1082, 1108 [newly announced holding requiring defendant to object to venue before trial applied prospectively only]; *People v. Posey*, *supra*, 32 Cal.4th at p. 215 [newly announced holding that venue is a question of law for the court applied prospectively only].) Otherwise, the Fourteenth Amendment Due Process Clause would be violated. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-353; *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 911-912, 916, *cert. den.*, 549 U.S. 1027; [California Supreme Court's retroactive application of new interpretation of the felony-murder special circumstance statute to petitioner's case violated due process]; *People v. Digirolano* (Ill. 1997) 688 N.E.2d 116, 128 [amendment to venue statute eliminating state's burden to prove that alleged offense occurred in particular county enacted while appeal was pending did not apply retroactively to relieve prosecution's burden on substantive element of criminal offense].) Even when federal due process retroactivity analysis is inapposite, the newly announced case is not applied to appellant. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

CONCLUSION

In light of the foregoing reasons, the Court of Appeal's reversal must be affirmed.

Dated: February 16, 2011

Respectfully submitted,

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CERTIFICATE OF LENGTH

I, Carlo Andreani, counsel for Rayshon Derrick Thomas, certify pursuant to the California Rules of Court, based on the representation of the individual who word processed this document, that the word count for this document is 11,577 words, excluding the tables, this certificate, and any attachment permitted under rule 8.520(c). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on February 16, 2011.

Carlo Andreani

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PROOF OF SERVICE

CARLO ANDREANI hereby certifies:

I am a citizen of the United States and am employed in the City and County of San Francisco, California; I am over the age of eighteen years and not a party to the within action; my business address is 582 Market Street, Suite 811, San Francisco, California.

On February 16, 2011, I served the within

APPELLANT'S ANSWER BRIEF ON THE MERITS

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States post office mail box at San Francisco, California, addressed as follows:

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

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