IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CARL DEVON POWELL, Defendant and Appellant.	No. S043520

APPELLANT POWELL'S OPENING BRIEF

Volume I, pages 1 - 342

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
In and For The County of Sacramento, No. 113126
The Honorable James I. Morris, Presiding

NEOMA KENWOOD, SBN 101805
Attorney at Law
P.M.B. # 414
1563 Solano Avenue
Berkeley, California 94707
Tel & Fax: (510) 528-4775

KAT KOZIK SBN 145528
Attorney at Law
Post Office Box 2633
Berkeley, California 94702
Tel & Fax: (510) 524-4020

Attorneys for Appellant

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CARL DEVON POWELL, Defendant and Appellant.	No. S043520

APPELLANT POWELL'S OPENING BRIEF

Volume I, pages 1 - 342

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
In and For The County of Sacramento, No. 113126
The Honorable James I. Morris, Presiding

NEOMA KENWOOD, SBN 101805
Attorney at Law
P.M.B. # 414
1563 Solano Avenue
Berkeley, California 94707
Tel & Fax: (510) 528-4775

KAT KOZIK SBN 145528
Attorney at Law
Post Office Box 2633
Berkeley, California 94702
Tel & Fax: (510) 524-4020

Attorneys for Appellant

TABLE OF CONTENTS

People v. Carl Devon Powell
No. S043520

///

///

///

///

///

///

(* * * Nothing omitted * * *)

///

///

///

///

///

///

///

///

///

///

///

///

TABLE OF AUTHORITIES

CASES

Page

FEDERAL

STATE

CONSTITUTIONS

California Constitution

United States Constitution

STATE STATUTES

CALIFORNIA RULES OF COURT

CALJIC AND CALCRIM

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CARL DEVON POWELL, Defendant and Appellant.	No. S043520 (Sacramento County Superior Court No. 113126)

APPELLANT POWELL'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a death sentence, and is automatically taken to this Honorable Court pursuant to Penal Code section 1239(b).

INTRODUCTION

Appellant was an immature, mentally slow teenager when he met John and Terry Hodges, brothers who were older and more criminally sophisticated, shortly before the charged offenses. The three were jointly charged with the

robbery and capital murder of Keith McDade, the owner of a Kentucky Fried Chicken restaurant where appellant once worked. After his arrest, appellant told police he shot McDade due to fear and pressure, but he could not say everything that happened because he was deathly afraid of the Hodges. He was reluctant to identify them due to great fear for his family's safety. According to appellant, the Hodges "wanted everything to be on me...." The three defendants were tried together by dual juries: one for appellant and one for both Hodges.

Guilt Phase

Several highly unusual events occurred regarding whether appellant would testify during the guilt phase. Defense counsel represented in open court that appellant would testify as a prosecution witness at his own capital trial and furnished appellant's anticipated testimony to the prosecutor despite the lack of any offered consideration or agreement. The prosecutor chose to use appellant in order to secure convictions against all three defendants. In his opening statement, the prosecutor told both juries that appellant would testify that he approached McDade unarmed to discuss getting his job back, the Hodges robbed McDade without appellant's participation, and then they forced him at gunpoint to shoot McDade.

Appellant's attorneys leaned heavily on appellant to testify. Counsel for both co-defendants claimed that appellant's attorneys were pressuring appellant to testify and working with the prosecutor to convict the Hodges. Appellant feared that his counsel were aligned with the prosecution and, consequently, he repeatedly asked for substitute counsel. He vacillated

between exercising two unconditional, constitutional rights: to testify or to remain silent. Appellant knew that "snitches" were targets for assassination. He was routinely transported to court with the Hodges, and the subject of his testifying had been a subject of communication among them. Appellant ultimately chose to assert his right to remain silent.

The trial court granted the Hodges a mistrial because the prosecutor had exposed the Hodges' jury to appellant's version of events in his opening statement. The charges against the Hodges were dismissed, and the brothers vanished from the proceedings. At the same time, the trial court rejected appellant's claim that, having heard the prosecutor's undelivered promise of appellant's testimony, appellant's jury would hold his silence against him.

Appellant maintains that he was deprived of a constitutionally acceptable guilt phase trial. The prosecutor's unfulfilled promise of his testimony penalized his assertion of his right to silence and resulted in an unfair trial. (Argument I.) Although appellant's presence could have made a difference in proceedings concerning whether he would testify, he was frequently absent from them. (Argument XI.) Further, the trial court failed to adequately inquire whether appellant and his attorneys were embroiled in an irreconcilable conflict despite the remarkable backdrop of events described above. (Argument II.) The dual jury trial itself was also rife with difficulties resulting in gross unfairness to appellant. (Argument III.) Additionally, the trial court refused to instruct on appellant's defense theory of duress despite substantial evidence from the state's witnesses that the Hodges had coerced appellant. (Argument VI.) Multiple evidentiary errors also paraded before the

jurors prejudicial evidence of appellant's connection to guns, gangs and future robberies (Arguments VII-IX) and a particularly inflammatory photo of the decedent. (Argument X). Appellant also challenges the trial court's erroneous denial of his challenges for cause to two prospective jurors (Argument IV), the erroneous removal of a seated juror sympathetic to appellant (Argument V) and multiple instances of prosecutorial misconduct (Argument XX). Further, the fairness of the proceedings was undermined by numerous instructional errors allowing jurors to draw irrational inferences harmful to appellant (Arguments XII-XV), precluding consideration of lesser theories of criminal liability (Arguments XVI-XVII), and permitting conviction for an uncharged crime (Argument XIX). Additionally, appellant contends that his trial was infected by juror consideration of, and trial court failure to adequately investigate, prejudicial publicity concerning the mistrial and dismissal of the charges granted to the Hodges. (Argument XXI.)

Penalty Phase

The prejudice from the prosecutor's broken promise that appellant would testify was exacerbated by events at the penalty phase. The heart of appellant's case in mitigation was his argument that he was manipulated and compelled by the Hodges to kill McDade, an act he sorely did not want to commit. The trial court, however, erroneously refused to permit the defense mental health expert to testify to appellant's account of his behavior and thoughts at the time of the offense in order to support an opinion that appellant was coerced by the Hodges to shoot McDade.

While severely curtailing the defense ability to present evidence critical

to establishing mitigation, the court also erred in allowing the prosecution to introduce inflammatory evidence connecting appellant to gangs and guns. The prosecutor exploited a photograph of appellant and another young black man mockingly pointing guns at each other while throwing gang signs to trigger the jurors' fears. It further employed unsubstantiated rumor or gossip, diagnosed under a label of gang expert authority, to paint appellant as a hardcore gang leader who had committed uncharged gang crimes. The prosecution used both the photograph and the unsubstantiated gang expert opinion to attack appellant's mitigation that the Hodges manipulated and intimidated him.

During his penalty phase arguments, the prosecutor committed flagrant and prejudicial misconduct by urging the jury to put appellant to death on the basis of improper: (1) appeals to passion and prejudice, including a thinly-veiled racist allusion; (2) arguments regarding future dangerousness and lack of remorse; (3) misrepresentations of the evidence designed to both denigrate the case in mitigation and aggravate the circumstances of the crime and evidence offered under Penal Code section 190.3(b); (4) denigration of the defense; and (5) invocation of biblical authority to justify imposition of a sentence of death in this case. The prosecutor made unacceptable arguments designed to ensure that the jury would not consider mercy as a mitigating factor, urged the jurors to make a sentencing decision on the basis of their fears of gang violence and speculation that appellant could have killed others, and used emotionally charged arguments to dehumanize appellant and inflame the jury's fears and emotions. Moreover, the prosecution based the central tenet of its case in aggravation, an argument that appellant acted alone in committing the crime, on deliberate misstatements of the record.

Appellant maintains that he was deprived of a constitutionally acceptable penalty phase. The penalty phase, like the guilt phase, was infected by juror consideration of prejudicial publicity, compounded by trial court error in failing to adequately investigate it. (Argument XXII.) The trial court erroneously restricted the presentation of mitigating evidence. (Argument XXIII.) The prosecutor's many acts of misconduct during final argument urged the jury to impose a sentence of death on the basis of improper matters, while denigrating appellant's case in mitigation. (Argument XXIV.) Similar to the guilt phase, multiple evidentiary errors paraded before the jurors inflammatory evidence of appellant's connection to guns and gangs, suggesting that he committed uncharged gang crimes. (Argument XXV.) The jury was also allowed to consider erroneously admitted, prejudicial victim impact evidence. (Argument XXVI.) The jurors' ability to perform their duty of determining the appropriate sentence was impaired by the refusal of several instructions necessary to guide their consideration of mitigating and aggravating evidence. (Arguments XXVII & XXVIII.) Then the trial court improperly denied appellant's application for modification of the death sentence by attaching aggravating weight to factors which may only be mitigating and by failing to consider mitigating evidence. (Argument XXIX.)

Finally, appellant submits that California's death penalty statute, as interpreted by this Court and applied at his trial, violates the federal constitution (Argument XXX) and the cumulative effect of all of the errors requires reversal of both the guilt and penalty phase verdicts. (Argument XXXI.).

STATEMENT OF THE CASE

On June 17, 1992, appellant and co-defendants John and Terry Hodges were charged by Information filed in Sacramento County Superior Court with murder, with malice aforethought (Pen. Code, § 187) (count one) and robbery (Pen. Code, § 211) (count two), committed against Keith McDade on January 19, 1992. (1CCT[1] 47-48.) A special circumstance of murder during commission of robbery (Pen. Code, § 190.2(a)(17)) was alleged. (*Ibid.*) It was further alleged that appellant personally used a firearm (Pen. Code, § 12022.5(a)) and the Hodges were principles, one or more of whom were armed (Pen. Code, § 12022(a)). (1CCT 48-49.)

John Hodges was additionally charged with two prior prison term convictions (Pen. Code, § 667.5(a)): (1) June 1, 1985, convictions for rape (Pen. Code, § 261), robbery (Pen. Code, § 211), and burglary (Pen. Code, § 459); and (2) an October 10, 1990, conviction for auto theft (Veh. Code, § 10851). (1CCT 50-51).

Appellant, alone, was also charged with three counts of grand theft (Pen. Code, § 487(1)) committed between August 10, 1990, and June 1, 1991. (1CCT 49-50.) These were for $1,600 (count three), $2,200 (count four) and $800 (count five). (*Ibid.*)

On June 18, 1992, appellant was arraigned, entered pleas of not guilty and denied all special circumstance and enhancement allegations. (1CT 250.)

---

[1] "CT" refers to the original Clerk's Transcript, "CCT" refers to the Corrected Clerk's Transcript, and "RT" refers to the Reporter's Transcript.

On January 21, 1994, the superior court granted Terry Hodges's severance motion, and left up to the trial court how to implement the severance. (1CT 220.) On May 23, 1994, the trial court granted the prosecution's motion for a dual jury trial of the two Hodges and appellant: one jury was to hear the case against the Hodges and a separate jury was to hear the case against appellant.[2] (2CT 396.)

Jury selection for appellant's jury was conducted from late May to mid-June of 1994. (2CT 397, 422-23.) The Hodges jury was selected thereafter. (2CT 429, 435.) On July 12, 1994, both juries were sworn, and the joint guilt phase for all three defendants began with opening statements. (2CT 447.)

On August 22, 1994, after the prosecution and appellant rested their cases, all three defendants moved for a mistrial. (2CT 518-520.) The next day, the Court denied appellant's motion brought on the basis of *Griffin*[3] error, and it granted a mistrial for the Hodges. (2CT 520.) On August 26, 1994, the court granted the state's motion to dismiss its case against the Hodges brothers. (1CCT 30-31.)

Appellant's guilt phase trial continued. On September 1, 1994, the jury returned verdicts finding appellant guilty of all charges and special allegations. (2CT 550; 3CT 670, 672-684.)

Appellant's penalty trial began on September 20, 1994. (3CT 687.) On

---

2 Unspecified references to the "jury" or "jurors" are to the Powell jury.

3 *Griffin v. California* (1965) 380 U.S. 609.

September 30, 1994, the jury returned a verdict of death. (3CT 785, 819.) On November 7, 1994, the trial court denied appellant's Penal Code section 190.4(e) motion for modification of the death sentence, and judgment was entered on November 10, 1994. (3CT 881-888.)

This appeal is automatic.

STATEMENT OF FACTS

I. GUILT PHASE

A. PROSECUTION CASE

1. The KFC Thefts

Colleen and Keith McDade,[4] a married couple, were managers and part-owners of the Kentucky Fried Chicken (hereinafter "KFC") franchise on Freeport Boulevard in Sacramento. (16RT 6504-05.) In August of 1990, they hired appellant as a cook. (16RT 6505-06.) Initially, appellant was a good employee. (16RT 6506.) He had a good attitude, arrived on time, did his work well and even covered shifts of other employees when they could not come in. (16RT 6550, 6739.) Later, however, appellant began to "slack off;" McDade would confront him and encourage him to do a better job. (16RT 6546, 6548.) Appellant would do so for a while but then slack off again. (*Ibid.*) Appellant and McDade got along well; appellant looked up to McDade and respected him. (18RT 7290.)

In May of 1991, the KFC Freeport store suffered three thefts. (16RT 6506, 6510.) Two deposits, one for about $1,500 and another for about $2,000, were missing from bank bags deposited at the bank.[5] (16RT 6511-

---

[4] References to solely the surname "McDade" are to Keith McDade.

[5] At the end of each shift, the money was counted and placed in a locked bag and locked safe. (16RT 6507.) The McDades and their assistant managers, Junell Rodriquez, Ruben Martinez, and John Bradley, knew the safe's combination. (16RT 6508-09.) Twice daily, the McDades took the

6512.) A third deposit, for $800, disappeared during business hours. (16RT 6512-13.) Appellant worked on the days involving this missing money. (16RT 6513.)

The McDades told their employees that they had hired a detective to question everyone about the missing money. (16RT 6513-14.) The next day, appellant called to say he had to go to Los Angeles. (16RT 6514.) The McDades responded that if he did not finish his shifts for the rest of the week, he would not have a job when he returned. (RT 6514.) Appellant did not return that week and was terminated. (*Ibid.*)

Other thefts occurred after appellant's termination, including a loss of $3,000. (16RT 6541, 6554.) Colleen McDade suspected John Bradley III, an assistant manager, who quit a few days after she began making inquiries into the theft. (16RT 6541, 6554-55.)

2. Events Between July 1991 and January 1992

The McDades next saw appellant in July 1991, when he came to their KFC store to ask for his job back. (16RT 6514-15.) He was with his uncle, who said that the McDades should give him another chance. (RT 6515.) The uncle upset Colleen McDade, who started crying. (16RT 6516, 6552.) Keith McDade became angry and threatened to call the police. (16RT 6516, 6552.)

---

money bags to the First Interstate Bank on Freeport to be deposited. (16RT 6509-10.) McDade typically worked the evening shift and made the night deposit. (16RT 6509-10.) Occasionally, he skipped it and left the money in the safe overnight. (16RT 6641, 6693; 18RT 7331.) An employee usually accompanied one of the McDades for the deposit, and all the employees knew the procedure. (16RT 6602, 6919-20; 18RT 7329-30.)

He told appellant to return by himself if he wanted to discuss his termination. (16RT 6516.) Voices were raised, but appellant hardly spoke. (16RT 6547.)

That summer onward, appellant would call once or twice a month and periodically stop by the KFC, seeking to be rehired. (16RT 6517, 6549.) He would also buy food, say "hi" to McDade, and chat with employees who were his friends, such as Bruce Goulding and Kim Scott. (16RT 6548-49, 6575.) He came to the KFC at least a dozen times between June 1991 and January 1992. (*Ibid.*) The McDades treated him pleasantly but had no intention of rehiring him because of the missing money. (16RT 6517-18.)

Around Halloween of 1991, appellant arrived at the KFC with two or three others in a red car. (16RT 6570, 6615-16.) Appellant showed KFC employees Rodriquez and Martinez, who were working at the drive-through window, a gun which he pulled from his waistband. (16RT 6570-71, 6616-17, 6722-23.) Appellant's display of the gun was not threatening. (16RT 6758-59.) It was a small, dark-colored handgun. (16RT 6596, 6625-26, 6722-23, 6728-29.) Rodriquez described it as dark with a brown handle, whereas Martinez described it as black with a dark handle. (*Ibid.*) Rodriquez could not say what type of gun it was. (16RT 6595-6596, 6626, 6628.) Martinez identified it as a revolver, not an automatic. (16RT 6726.) Neither identified it as People's Exhibit T-18A (16RT 6598-99, 6725), a silver revolver with a dark handle (29CCT 8665), which the prosecution theorized was the murder weapon. (31RT 11187 [prosecutor's closing argument]). Martinez asked appellant what he was going to do with his gun and appellant replied, "whatever." (16RT 6726.)

On Halloween of 1991, KFC assistant manager Ruben Martinez received an unusual telephone call from appellant. (16RT 6717-18.) Appellant asked to speak to Bruce Goulding, an employee who was not working at the time. (16RT 6718.) Appellant then told Martinez that because it was Halloween, there were many "crazies" out and anything could happen, so Martinez should watch his back when he dropped off the deposit. (16RT 6718, 6736.) Martinez was not too concerned. (16RT 6718-19.) He told the managers about the call; they instructed him not to make the deposit that night but, instead, to lock the money in the safe overnight. (16RT 6719-20.)

About one week before the homicide, appellant visited a park with Gloria Eversole, Sherry Brogdon and another individual. (17RT 6841-44, 6853-54, 6918, 6949.) Eversole noticed that appellant had bullets with him. (17RT 6918-6919.) She did not want any trouble from the police so she asked appellant to dispose of them, and he threw them at a trashcan in the park. (*Ibid.*) Eversole gave inconsistent accounts of whether she also saw appellant with a gun. (17RT 6930; 23RT 8845-8846.) Brogdon briefly glimpsed appellant with one. (17RT 6853.) It was a small, silver revolver with a black handle made out of rough, permanent material. (17RT 6848-6849, 6850, 6852.) Brogdon did not recognize People's Exhibit T-18, which has a different handle. (17RT 6847-49, 6852.) Nevertheless, Brogdon testified that the two guns "possibly" could have been the same. (17RT 6850.) After appellant became a suspect in McDade's shooting, the women returned to the park to search for bullets. (17RT 6846-47, 6856.) Eversole collected a bullet, identified as a live .38 short lead round bullet (People's Exhibit No. T-20), by the garbage can appellant had targeted; she gave it to the police because she did not believe the accusation against appellant. (17RT 6847, 6851, 6919;

23RT 8839-40.)

According to Kim Scott, a former KFC employee who used to date appellant, appellant had some new clothes, a necklace and a car in May or June 1991. (18RT 7254-55, 7291-92.) Nine or ten times in November and December of 1991, appellant talked to Scott about robbing KFC. (18RT 7255, 7258-59.) In mid-November 1991, he told her that he was going to rob KFC because he got fired and he wanted money. (18RT 7255-58.) Appellant had said, "I'm going to get y'all." (18RT 7286, 7350.) Scott initially testified that appellant never used the word "rob," but later she testified he did use it. (18RT 7258-59.) Conflicting evidence was presented about whether it was Scott or detective Lee, who interviewed her, who first used the word "rob" during her interview. (18RT 7350-7351; 23RT 8836, 8898.) Scott never saw appellant with a gun. (18RT 7270.) Appellant said he would knock McDade out with a board or rock. (18RT 7271.)

Scott characterized appellant was a kidder -- a sweet guy who was always saying jovial, off-the-wall things. (18RT 7286, 7288-89.) Scott did not take appellant seriously. (18RT 7327-28; 21RT 8288-89.) He would tease her to see how she would respond. (18RT 7288-89.) It did not make sense for appellant to tell a KFC employee of his plans to rob the store. (*Ibid.*) Scott would always laugh when appellant said he was going to "get you guys." (18RT 7290.) She never told the McDades about appellant's comments because she thought he was kidding. (18RT 7339.) Had Scott thought appellant was serious, she would have reported him. (18RT 7356.) Appellant did not seem bitter to Scott about losing his job. (18RT 7291.) He liked working at KFC and wanted to get his job back. (18RT 7291.)

Appellant also told Scott that he used to take money from the safe when KFC was busy. (18RT 7261.) Appellant said that he took money three or four times: he took $1,000 the second time and $3,200 the third time. (18RT 7262-64.)

3. January 19, 1992

On January 19, 1992, Colleen McDade worked the day shift until 4:15 p.m., and then Keith McDade worked the evening shift. (16RT 6519-20.) Three other KFC employees also worked the evening shift: Rodriquez, Goulding, and a female named Iskara. (16RT 6558-59.)

Appellant came alone to the KFC store between 9:00 and 10:00 p.m. that evening. (16RT 6564, 6582.) Appellant asked Goulding for a dollar. (16RT 6564, 6581.) Appellant also spoke to McDade and asked him for a dollar for the bus. (16RT 6565, 6581.) While inside the KFC store, appellant looked out the window, presumably for the bus. (16RT 6565.) Appellant and McDade acted normally. (16RT 6603, 6572, 6583-84.) Rodriquez overheard McDade telling appellant to come back the next day and they would talk about it. (16RT 6565.) Rodriquez assumed this was about appellant getting his job back. (16RT 6584.) Appellant stayed ten or fifteen minutes and left at 9:30 or 9:45 p.m. (16RT 6566, 6582-83.) He walked out the front door; Rodriquez did not see where appellant went. (16RT 6566, 6568, 6582, 6593, 6622, 6633, 6689.)

Iskara left the KFC at 9:00 p.m., Goulding left at 9:45 p.m. and Rodriquez left around 10:15-10:20 p.m. (16RT 6558-59.) When Rodriquez

was leaving, McDade was finishing paperwork and would have been ready to leave within five or ten minutes. (16RT 6562-63, 6578.) Rodriquez saw just two cars in the KFC parking lot -- McDade's and her aunt's car. (16RT 6559-60.) Rodriquez had asked McDade if he was going to the bank later that evening, and McDade said no. (16RT 6629.) He said he would make the deposit in the morning on his way to work, which was unusual. (16RT 6629, 6638.)

Colleen McDade called the store at 10:30 p.m. and again, a little later, but received no answer. (16RT 6521.) She became worried and called Rodriquez, her mother, and the police. (16RT 6521, 6523.) When Sacramento City Police Officer Mark Chapman drove to the KFC at about 1:10 a.m. on January 20 to check on McDade, he found him sitting in the driver's seat of his car in the KFC parking lot. (19RT 7463-65.) McDade, who had been shot at close range in the left temple, was dead. (19RT 7466-67.) His shirt and chest were completely saturated with blood and the blood on his face and chest had dried. (19RT 7473, 7477; 29CCT 8643-8646 [People's Exhibit Nos. T-1–T-4].) McDade's car door was fully open, the keys were in the ignition, the car was not in gear, the emergency brake was engaged, and the motor was off. (19RT 7464-65, 7476, 7492; 23RT 8828.) There was no bank bag in view. (19RT 7478.) Colleen and her mother drove to the KFC store only to discover Keith McDade dead; Colleen became hysterical and was escorted home. (16RT 6523; 17RT 6893-94.)

McDade died of a single close-range gunshot wound to the head. (27RT 9972, 9984.) The bullet entered his left temple and basically went in a straight line towards the right side of his head. (27RT 9973, 9983-9984, 9988.) The

bullet, People's Exhibit No. T-56, was recovered during the autopsy and was moderately deformed. (27RT 9983, 9989.) It was in the range of .38 caliber, nine millimeter, or .357 caliber. (27RT 9983, 9989-90.) The pathologist opined that the bullet was a nominal .38 caliber, which includes nine millimeter and .357 caliber rounds (27RT 9991) and that it looked quite similar in size and shape to the .38 caliber bullet turned over to police by Gloria Eversole. (17RT 6851, 6919; 23RT 8839-40; 27RT 9993-94).

Based on the appearance of powder burns, the pathologist opined that the muzzle of the gun was between six and several inches away from McDade's head when fired. (27RT 9973, 9975-80.) Death would have been fairly instantaneous. (27RT 9986, 10002.) From the moment of the bullet's impact, McDade would have been rendered unconscious. (27RT 10002.)

4. Eyewitnesses

a. Balwinder Chatha

On January 19, 1992, between 7:00 and 7:30 p.m., Terry Hodges, his brother John Hodges, and another young man entered the Quick Stop Market at the corner of Fourth and Franklin Boulevard. (21RT 8182, 8185; 22RT 8372, 8375-76, 8394.) The market was a two-to-four minute drive from KFC. (22RT 8372.) Terry Hodges was driving his black Chevy Caprice. (21RT 8188; 22RT 8380-81, 8411.) Balwinder Chatha, the market's owner, recognized both Hodges as previous customers. (21RT 8182-83; 22RT 8410, 8414.) The brothers and the third individual, whom Chatha described as a very dark, skinny, young black male, about 5'10," 18-20 years old, stayed for two to

three minutes.[6] (21RT 8186-87; 22RT 8375-77, 8385, 8389, 8422.) They acted normally and purchased candy and gas. (23RT 8376, 8379.) Chatha had never seen the third man before and could not identify him as appellant. (22RT 8377-78, 8430, 8432-33.)

b. Charlie Schuyler

On that night, Charlie Schuyler was working on a car in the alley behind Kragen Auto Parts.[7] (17RT 6958-59.) Between 9:55 and 10:20 p.m., Schuyler saw a black male, who was 5'10", 160-180 pounds, come down the alley between KFC and Kragen, drop an object that resembled a book, pick it up and keep going. (17RT 6962-63, 6965, 6973.) The individual was moving fast, heading north in the alley, then turned west, just behind KFC. (17RT 6968-69, 7091.) It was dark and Schuyler was busy with his head under the car. (17RT 6984, 7000-01.) Schuyler glanced at the individual for three to five seconds at a distance of 40-50 feet. (17RT 7000-01, 7018, 7041, 7093, 7096.) Schuyler could not recall the individual's clothing and was unsure about his hair. (17RT 7018, 7041, 7051.) Schuyler never heard a gunshot. (18RT 7123.)

---

[6] At the time of the offenses, appellant was 18 years old, 5'8" and weighed about 130 pounds. (23RT 8850.) Terry Hodges was 19 years old and weighed 250 to 300 pounds. (People's Ex. No. T-49A; 30CCT 8967.) According to appellant, John Hodges appeared about 36 years old, 5'10", and 200 pounds. (30CCT 8980.) Chatha thought John was 25 years old. (22RT 8390.)

[7] The alley runs behind the businesses, including KFC and Kragen, for the entire block. (18RT 7376-77.) There are two or three stores between the liquor store parking lot and the KFC parking lot. (18RT 7399.) The alley was pretty dark near KFC and Kragen. (19RT 7590-91.)

Earlier that night, around 8:00 or 9:00 p.m., Schuyler had seen the same individual with three other black males at the liquor store across the street from KFC. (17RT 6970-71, 6973.) Schuyler identified Terry Hodges as one of those individuals and described him as 6'2", 200 to 260 pounds with a "Baby Huey" hair style. (17RT 6971-72, 7058-59.) He did not recall seeing John Hodges. (17RT 7060.)

The next day, Schuyler saw a news report about the KFC homicide[8] and thought that the suspect's picture somewhat resembled the individual he had seen. (17RT 6963-64, 6996-97.) Schuyler called the police and reported his observations. (17RT 6964; 18RT 7107.) Several days later, Schuyler grew more certain of appellant's identification after seeing him on television. (17RT 6966; 18RT 7179.) Schuyler again called the police. (17RT 6998-99.) Schuyler was never shown a line-up; he identified appellant in court. (17RT 6966, 7042.)

Schuyler had sustained numerous felony convictions and had served three prison terms. (17RT 6974-75, 7025-28, 7031, 7034-39.) He had a 20-year history of addiction and was under methadone treatment at the time of trial. (17RT 7038; 18RT 7190-91.) When he contacted the police, Schuyler was facing another potential term of incarceration because he was awaiting sentencing for a petty theft conviction. (17RT 7027-28; 18RT 7184.)

Prior to trial, Schuyler was charged with yet another offense for which

---

[8] Schuyler had been exposed to significant publicity about the KFC case, including two to three newspaper articles and one or two television stories. (17RT 7021-22.)

he again expected prison time. (17RT 6976, 7025, 7045-46.) Although Schuyler had been on probation at the time of the new crime, he was not violated. (18RT 7114.) Instead, he avoided a prison term and was allowed to serve his new sentence at home on work furlough. (17RT 6976, 7025, 7044-45.) Schuyler denied receiving any consideration in exchange for his testimony and attributed the favorable disposition to a "terrific" probation report. (17RT 6977-6978, 7047-7048; 18RT 7185.)

c. Jeanette Fletcher

Jeanette Fletcher walked past the KFC at approximately 10:10 p.m. (18RT 7359, 7361-62.) She saw a tall man counting money inside the KFC and a young woman run out to a van parked in the KFC lot, then run back inside the KFC. (18RT 7362-63; 19RT 7401-02, 7404.) Fletcher also saw a medium to large, very dark car in the liquor store lot. (18RT 7364, 7368-70.) She could see the silhouettes of the driver and one or two passengers in the car.[9] (18RT 7364, 7376-78; 19RT 7417-18.) It slowly drove through the alley behind KFC with its headlights off and turned into the parking lot behind the liquor store, which was very dark. (18RT 7361-62, 7372, 7374; 19RT 7405, 7444.) Both KFC and the liquor store were closed. (19RT 7444, 7450, 7454.) The car looked similar to photos of Terry Hodges' black, four-door, 1979 Chevrolet Caprice (People's Exhibits T-21(B) and (C)), but Fletcher could not positively identify it. (18RT 7378; 19RT 7445-46, 7409; 20RT 7790-92.)

d. Henrietta Senner

---

[9] Fletcher told police that she saw only two people in the car, the driver and one more possibly in the front seat. (23RT 8659.)

Henrietta Senner, who lived behind the KFC, heard a gunshot around 10:45 or 10:50 p.m., just before a movie she was watching ended at 11:00 p.m. (19RT 7583, 7585.) A police officer came to her house about 2:00 a.m. the next morning and asked if she had heard anything. (19RT 7584-86.) Senner told him that she heard a shot around 10:50 p.m. (19RT 7586.)

5. Crime Scene

McDade's car contained nothing of value except a locked bank bag under the right front passenger seat. (20RT 7845; 23RT 8830.)

In the early morning hours of January 20, 1992, officers collected, two cigarette butts, a cigarette filter and a Mickey Big Mouth 40-ounce beer bottle from the KFC parking lot.[10] (RT 7793-95; People's Exhibit T-16.) A brown paper bag containing a green bottle was observed in the parking lot, south of KFC. (RT 8539.)

Additionally, a live .38 caliber Smith and Wesson bullet was found on the ground outside the backdoor of Isolde's Flowers, a few doors down from KFC. (19RT 7640, 7642, 7647-48; 20RT 7805-06.) The owner of Isolde's, who found the bullet, testified that the bullet looked like People's Exhibit T-20A, the bullet collected by Eversole.[11] (19RT 7648-50; 20RT 7806-07, 7810;

---

[10] Scott had seen appellant drink Mickey's beer. (18RT 7266-67.)

[11] The bullet itself was destroyed before trial because police failed to connect it to a case even though the officer who booked it stated in his report that it could be linked to the KFC homicide. (19RT 7810, 7812-14, 7816.) Detective Lee never saw the bullet; Detective Stanfield told him that it was identical to People's Exhibit T-20A. (23RT 8661-62; 24RT 8904.)

23RT 8839-40.) It was a standard .38 round, which could be fired from a .38 special or a .357. (20RT 7810.)

On the morning of January 20, 1992, a slit KFC bank bag (People's Exhibit T-9B) was found in the gutter at the corner of Golf View Drive and Mangrum, a cul-de-sac area located about two and one-half miles from the KFC. (18RT 7138-39, 7148, 7151-52; 20RT 7763-64; 23RT 8835.) It contained ripped KFC gift certificates, which had been redeemed and listed on a bank deposit slip, as well as a torn personal check of Colleen and Keith McDade dated January 19, 1992, which was also listed on the deposit slip.[12] (19RT 7497; 20RT 7737, 7764; 21RT 8175, 8175-77, 8179.) Also found nearby were a KFC box,[13] a KFC paper bag,[14] a razor blade, a bank deposit slip and a First Interstate pen. (18RT 7140-42, 7149; 19RT 7498.) The total deposit shown on the deposit slip was for $1,707, $1,662 of which was listed as cash. (21RT 8170.)

6. Fingerprint Evidence

Four latent prints were lifted from the exterior of McDade's car: one from the driver's side door or roof (People's Exhibit T-44A) matched McDade;

---

[12] When redeemed, the gift certificates were handled like cash for deposit. (21RT 8174-75.)

[13] McDade intended to take chicken home for his family on the night he was killed. (21RT 8161, 8174.) KFC restocked its chicken boxes weekly because it virtually ran out of them by the end of each week. (21RT 8159.) Appellant last worked at KFC on or about May 28, 1991. (*Ibid.*)

[14] It was McDade's practice to put the bank bag in a white paper bag (like People's Exhibit T-13A) to conceal it when he took it to his car. (21RT 8161.)

the other three were of insufficient quality to permit any match. (20RT 7883-85, 7887-88, 7894-95; 21RT 8082-83.) Seven prints were lifted from Terry Hodges' Chevy Caprice: one print lifted from the exterior of the front right door (People's Exhibit T-45B) matched John Hodges; the other six prints either failed to elicit a match or were of insufficient quality to permit any match. (20RT 7908-12; 21RT 8079-82; 22RT 8500.)

Police also lifted latent prints off the Mickey beer bottle, KFC bank bag, bank deposit slip, razor blade, the KFC box, and torn papers located inside the bank bag.[15] (20RT 7930-33, 7935-36, 7939; 21RT 8015-20, 8022-24, 8027.) The prints lifted from these objects were compared with the rolled prints of appellant, John Hodges, Terry Hodges, Keith McDade, Bruce Goulding, Chris Hodges, Brandon Ward, Jonas Calhoun, Roosevelt Coleman, and James Vale.[16] (21RT 8058.) One print lifted from the KFC box and four prints lifted from the bank bag's torn papers matched appellant; no matches could be found for five other prints lifted from those torn papers. (21RT 8067, 8071, 8076-79, 8078, 8074; 22RT 8497-99.) No match could be made for the prints lifted from the Mickey beer bottle, KFC bank bag, bank deposit slip, and razor blade; another print lifted from the razor blade was of insufficient quality to permit any comparison. (21RT 8064-67, 8070.)

---

[15] No prints were found on the Merit cigarette butts (20RT 7929), cigarette filter (20RT 7929-30), bank bag found in McDade's car (20RT 7932; 21RT 8022), KFC bag (20RT 7934) or papers in the KFC box (20RT 7938).

[16] Chris Hodges is the brother of John and Terry Hodges. (22RT 8381.) Brandon Ward is, presumably, appellant's friend. (30CCT 8988.) Calhoun, Coleman and Vale are friends of appellant's who accompanied him to Los Angeles. (31CCT 9254, 9258; see also 28RT 10391.)

Sacramento Police Department identification technician, Joseph Avila, who performed the comparisons, was certain of all of the matches he found because of the unique nature of each person's prints. (21RT 8083-85.) No two people in the world have like prints. (21RT 8086.) In making matches, Avila looks for consistency in configurations and characteristics and no unexplainable differences. (21RT 8086, 8095.) There is no nationwide standard for the number of points of comparison required for a match; that is left to each individual examiner's opinion. (21RT 8089.) The examiner counts as many characteristics as needed until he is satisfied he has done a thorough job. (21RT 8089.) Avila's identifications had at least seven points of comparison (21RT 8088) and were confirmed by another technician. (21RT 8116-17, 8133-34, 8136; 22RT 8496, 8497-8501.)

7. Investigation and Events Leading to Appellant's Arrest

During the early morning hours on January 20, 1992, investigating officers Lee and Thurston began interviewing KFC employees; they considered everyone to be a potential suspect. (17RT 6896-97, 6903; 23RT 8832.) Junell Rodriquez was interviewed at 3:40 a.m. and then officers went to Bruce Goulding's residence. (22RT 8540-41; 23RT 8832.) Goulding consented to a search of his home and was interviewed and fingerprinted at the police station. (22RT 8540-41, 8556-57; 23RT 8623, 8832-33.) Ultimately, police eliminated Goulding as a suspect. (23RT 8622.) Officers also tried to find appellant at his residence at 1524 McAllister (corner of Freeport and McAllister), and at 4803 50th Street, but they could not locate him. (22RT 8541-42; 23RT 8833.)

At approximately 12:30 p.m. on January 20, Sacramento Police Sergeant Theodore Mandalla received a telephone call from someone who identified himself as "Powell." (17RT 6899.) The individual stated that he understood the police wanted to talk to him because they had "jammed up" his brother, and he wanted to know "about what?" (17RT 6901-6902.) Mandalla replied that the police did want to talk to him, but not over the telephone. (*Ibid.*) He asked the caller's location and when the caller could come to the station. (17RT 6902.) The caller asked, "what are you going to do -- lock me up?" (*Ibid.*) He continued that he was in Stockton on vacation and would come to the police station later that day. (*Ibid.*) He also said that he lived with his brother and the police had the address. (*Ibid.*) Appellant never turned himself in. (17RT 6902.)

On January 23, 1992, Angela Littlejohn drove to Coalinga to help her son Roosevelt Coleman, whose car had broken down on the way back from Los Angeles.[17] (31CCT 9255; 28 RT 10389-90, 10392.) He was with

---

[17] A videotape of Littlejohn's interview with Detective Thurston was played for the jurors (People's Exhibit T-60), and a transcript of the videotape (People's Exhibit T-60A, reproduced at 31CCT 9253-9292), was distributed as an aid. (29RT 10495, 10499-10501). Littlejohn claimed she was drunk during the interview, but Thurston disputed this. (28RT 10396, 10457; 29RT 10457, 10498.) Unless otherwise indicated, references to Littlejohn's "testimony" encompass both her testimony on the stand and her extrajudicial statement to authorities offered into evidence . The same is true for the testimony and statements of Eric Banks and Darryl Leisey.

The court admonished the jurors that the tape itself was the evidence, the transcript was simply someone's best effort to record what was said, and the jurors themselves were the ultimate judges of what was said. (29RT 10499-10500.) The court gave similar admonitions when other tapes were played and corresponding transcripts were distributed. (23RT 8862

appellant, who had paid him to drive, and with James Vale and Jonas Calhoun.[18] (31CCT 9258-59, 9262; 28 RT 10385, 10391-92.) Littlejohn picked them up and they all stayed at her sister's home in Stockton. (31CCT 9255, 9260; 28 RT 10406.) The next day, they attempted to push the disabled car back to Sacramento on Interstate-5. (31CCT 9255-56.) The California Highway Patrol stopped them and had their car towed to a tow yard while Littlejohn and the young men went to a motel in Firebaugh. (31CCT 9256-60; 28 RT 10393-94; 28RT 10407.) Littlejohn took the teenagers back to Sacramento the next day. (31CCT 9260-61; 28RT 10401-02, 10407-08.) Appellant asked her if he could stay at her home, but she wanted $200. (31CCT 9284.) He said that he would ask his mother for money, but Littlejohn responded that his mother did not have any and did not even want him. (31 CCT 9284.) Littlejohn dropped appellant off at East Parkway in Sacramento. (28 RT 10402.) Later, she returned to the Firebaugh area to deal with the disabled car. (31CCT 9272, 9279-80.)

During the trip with Littlejohn, appellant talked a lot about the KFC offenses – he just "spill[ed] his guts." (31CCT 9268.) Appellant told everybody that he shot McDade. (31CCT 9261, 9263, 9271, 9277; 28RT 10410, 10417.) He showed no remorse and said he would not give himself up

---

[appellant's statement]; 25RT 9315-16 [Banks's statement]; 29RT 10507 [Leisey's statement].) As with other taped interviews for which there is a corresponding transcript in the appellate record, appellant cites to the transcript for the convenience of the court and parties due to difficulty citing to the tape itself.

[18] Roosevelt, Jonas and James were all teenagers, approximately 15 to 18 years old, and appelland was 18 years old. (23RT 8850; 28RT 10423-33; 31CCT 9021-9022.)

without a fight. (31CCT 9263, 9265-9266.) Littlejohn thought appellant was "slow," "stupid" and "mental" because he acted like he did not realize the gravity of what he had done. (31CCT 9263, 9265-9266, 9269, 9291.) She thought he should be on "S.S.I." because he was so mentally slow. (28RT 10412, 10431.) She said she sat him down and "talked to him ... like he was my kid. ... I said, you know what, I hate to tell you this, but you're very stupid," and "what you did was wrong...." (31CCT 9266.)

Detective Thurston asked Littlejohn if she knew whether appellant had planned to rob McDade. (31CCT 9277.) Littlejohn replied that appellant said nothing about this. (31CCT 9278.) Rather, appellant said that he went to ask for his job back, but he and McDade got into an argument that "went on and on." (31CCT 9277-9278.) Appellant said "the guy had threatened him" and "had it coming." (31CCT 9263.) He added that the papers "got it all wrong," "nobody really [knew] the truth," and he had been "under pressure." (31CCT 9263, 9269.) The only ones who knew what had happened were appellant's two partners. (31CCT 9270.) Appellant said he kept $700 and gave each of them $500. (31CCT 9262, 9267; 28RT 10420-21.) Littlejohn believed that appellant's confederates "probably ... forced him to do it" because appellant is "weak. He's a follower and not a leader.... He's a weak person." (31CCT 9270; see also 31CCT 9288.)

Littlejohn blamed appellant for her trouble and expense of paying for the motel, towing the car, getting it out of storage, and repairing it. (31CCT 9272; 28RT 10409, 10424-27, 10427-28.) Appellant had nothing to contribute. (31CCT 9272-73.) According to Littlejohn, appellant "thought $700 was going to get him a long way," but he was broke after spending all his money

splurging on food, women and "having a big time." (31CCT 9262.)

When Littlejohn realized appellant had a gun with him, she told him that he had to get rid of it to ride with her. (31 CCT 9263-64; 28 RT 10399.) She made him give it to her sister and told him that he could get it back later. (31CCT 9264, 9287-88; 28RT 10402.) After returning to Sacramento, appellant and Vale called her repeatedly to retrieve the gun. (31CCT 9264-65, 9285; 28RT 10408-09.) Appellant said he needed it to get money. (31CCT 9273, 9285.) Littlejohn did not want to return it out of fear that her son might become involved with appellant in a robbery or murder committed with the weapon. (31CCT 9265-9267.) She lied that she had sold it. (*Ibid.*)

Littlejohn threw the gun in a dumpster. (31CCT 9276, 9285-9286.) On January 28, 1992, she led police officers to the dumpster, where they retrieved a gun, People's Exhibit No. T-18A. (19RT 7540-41, 7543-45; 28RT 10403-05.) She could not identify the gun in evidence as the gun she obtained from appellant because she did not pay much attention to it. (28RT 10404.)

That gun, People's Exhibit T-18A, fires a .38 Smith & Wesson caliber bullet, also known as a .38 short. (27RT 147-48.) It cannot shoot .38 special bullets. (27RT 10147-48.) The gun was missing a trigger guard and would only fire in double-action mode, which required a heavier than normal trigger pull. (27RT 10144-45.) This meant that pulling the trigger would activate the trigger mechanism to position the cylinder and also cock and release the hammer to fire. (27TR 10144.) Additionally, the shooter would only be able to fire one shot before having to manually pull the trigger back to its home position. (27RT 10145.)

Because the autopsy slug was so badly damaged, the state's criminalist could not identify it as being fired from People's Exhibit T-18A, but he did find that it was consistent with the gun's land and grooves: both had five lands and grooves. (27RT 10148-50; 28RT 10151.) Additionally, the criminalist could not determine whether the autopsy slug was fired from a .38 short or .38 special; he could only say that it was a nominal .38 caliber lead bullet. (28RT 10151.)

8. Appellant's Arrest, Statements to Police and Jail Telephone Calls

Appellant was arrested on January 27, 1992, at the Southgate Center Apartments, located off East Parkway in Sacramento. (19RT 7528-29, 7534-35; 23RT 8840-41.) Based on a tip, the police went to an apartment there around 1:30 p.m. (19RT 7527-29.) The found Calhoun, arrested him on an outstanding warrant and told him he was going to jail; he told them appellant was present. (19RT 7532-34, 7574.) A female renter gave police permission to search for appellant. (19RT 7534.) They found appellant standing in a child's bedroom, by a closet door. (19RT 7534, 7536-37, 7574.) They arrested appellant, read him his *Miranda* rights, and took him to jail. (19RT 7535, 7537.)

Appellant was interviewed by Detective Lee, the lead investigator in the case.[19] (23RT 8827, 8840-8841; 30CCT 8973 et seq.) Appellant told Lee that

---

[19] An edited videotape of the appellant's interview (People's Exhibit T-51) was played for the jurors, who received a transcript (People's Exhibit T-51A, at 30CCT 8973-31CCT 9036) as an aid. (23RT 8841, 8861-62, 8893.) Appellant's jurors were informed that although T-51 did not reflect the entire interview, it was accurate as to what it contained, and they should not speculate

he lived with his older brother Calvin, had not graduated from high school and had some difficulty reading. (30CCT 8973-74.) Lee asked if appellant went by any other names; appellant replied that "Scrooge" was his house name and "Baby Hoove" was his street name. (30CCT 8974.) He got the latter while living in Los Angeles. (*Ibid.*)

Appellant gave three versions of what happened. In the first, he said that he and some companions were "cruising one night" and needed money. (30CCT 8975.) His companions were "talking about hitting the place" and knew an ex-worker from the KFC. (30CCT 8975-76, 8983.) Appellant told them, "I'm with you all ... as far as the money is concerned, but don't kill him ... cause that was my friend. (30CCT 8976, 8983.) His companions agreed not to kill him. (*Ibid.*) When they arrived at the KFC, appellant was having second thoughts because the man had a family; appellant again asked them not to hurt the man. (30CCT 8983-84.) Appellant waited around the corner in their car, which they parked in the alley. (30CCT 8976, 8978.) It was quiet for 15 or 20 minutes and then appellant heard a gunshot. (30CCT 8976.) His companion came running with a bag of money and admitted that he had killed the man. (*Ibid.*) Appellant was upset because the man had a family and he and his companion got into a fight over the killing. (30CCT 8976-77.) They then split the money. (30CCT 8977.) Appellant believed that they netted $1,700 and his share was $500. (30CCT 8986.) They planned to do the robbery just two hours before its commission. (30CCT 8989.)

Afterwards, they picked up some females at some apartments on Mack Road and went to a Motel 6 located just north of Stockton, where they stayed

---

about what was missing. (23RT 8890-92.)

overnight. (30CCT 8984-86.) Then they parted ways. (30CCT 8977.)

Appellant used his money to travel to Los Angeles to see his mother. (30CCT 8987.) His friend, Roosevelt, who was only about 15 years old, drove him along with some other friends. (30CCT 8987-89; 31CCT 9021-22.) Appellant's mother said that the police were watching her home and asked appellant to turn himself in. (*Ibid.*) Appellant stayed only a few hours with her and then headed back north. (*Ibid.*) The young men became stranded in Coalinga when Roosevelt's car broke down, so Roosevelt called his mother, Littlejohn, to pick them up. (31CCT 9009, 9023; see 31CCT 9255.) Appellant's version of the trip, including surrendering his gun to Littlejohn (31CCT 9021-9030) basically coincided with Littlejohn's, which has been summarized above. (See § A.7, *ante*).

Initially, appellant would not identify his companions who robbed the KFC. (30CCT 8977.) Repeatedly, appellant expressed fear that they would harm his family should he reveal their identities. (30CCT 8977, 8981, 9011-12.) Appellant described them as brothers: one, whose first name was Terry, was big – 6'2" and 300 pounds, and about 19 years old; the other, John, was about 36 years old. (30CCT 8979-80; 31CCT 9011, 9014.) Appellant did not know their last name and was uncertain of John's first name. (31CCT 9012, 9014.) Appellant met John the day of the robbery and Terry two weeks earlier. (30CCT 8979, 8981; 31CCT 9012.) Terry drove his black Caprice that night.[20] (30CCT 8978-79.) John was the shooter. (30CCT 8979-80.) Eventually, after Lee assured appellant that the police already knew of the Hodges' involvement and would put them in jail where they could not harm appellant's family,

appellant identified the Hodges from photographs. (31CCT 9011-12, 9019-20.)

Lee told appellant he knew appellant had worked at KFC and had stolen money from the safe and deposits. (30CCT 8999.) Appellant admitted to three thefts, in the amounts of $1,600, $2,200, and either $800 or $1,100 before he was fired in June 1991. (30CCT 8991-92.) The thefts were easy because John Bradley had given him the combination to the safe. (30CCT 8993.) When Lee accused appellant of stealing $3,2000, appellant said Bradley stole that sum. (30CCT 8991, 8993-94.)

Lee next accused appellant of trying to get his job back so he could steal more money. (30CCT 8992-93.) Appellant vehemently denied this was why he wanted to work again at KFC. (*Ibid.*) He insisted that he wanted his job back to get off of the street and be straight. (30CCT 8992.) He explained that he had been a "good worker" because he came in on time, never called in sick, covered others' shifts and worked long hours. (30CCT 8996.)

Appellant said that he felt bad about Colleen losing her husband. (30CCT 8996-8997.) Lee said, "if you really feel that bad about it, how about telling me the real truth?" (30CCT 8997.) Appellant replied, "Cause I don't want my family... (INAUDIBLE.)" (*Ibid.*) Lee pressed on. He said the police already had appellant linked to a "silver colored 38," and he told appellant to at least have the decency to tell the truth: "nothing can bring Keith back except for the truth." (30CT 8997-99.)

At this point, appellant gave his second version of events. Appellant

---

[20] Terry Hodges owned a black 1979 Chevrolet Caprice. (20RT 7790-92.)

said, "Okay. Just cause I loved Keith and yep, I pulled the trigger." (30CCT 8999.) Appellant said he went up to McDade to ask for his job back because his brother was pressuring him to find work and that was the only job he was "really good at." (30CCT 8999-31CCT 9000.) McDade handed him the bag of money. (*Ibid.*) Appellant gave conflicting accounts of whether this was before or after he pulled out his gun. (31CCT 9000-01.) Then, according to appellant, McDade "wanted to get out of the car and hurt me; " McDade started "talking crazy" and threatening appellant and his family. (31CCT 9001-02.) Appellant wanted McDade to stop. (31CCT 9003.) McDade "got them evil eye" and was frightening and pressuring him and, as appellant related, "talking about having me killed or having something done to my house." (31CCT 9001-9003.) Appellant did not want to shoot McDade. (*Ibid.*) Appellant's gun "slipped," and appellant shot McDade unintentionally. (31CCT 9001.)

Lee insisted that appellant did not shoot McDade accidentally. (31CCT 9003.) Appellant then gave his third version of events: he did not want to kill McDade, but he did not shoot him accidentally, either; he shot him because he had to. (31CCT 9003-04.) Appellant had been thinking about robbing the KFC for about two weeks. (31CCT 9015.) He talked about it with Terry the night before. (31CCT 9014.) Appellant did not want to kill McDade and wanted to do the robbery by the bank "where nobody end up hurt." (31CCT 9015-9017, 9019.) Both Terry and John wanted McDade killed and the robbery to occur at the KFC so they hide. (31CCT 9015-17.) Lee asked why appellant gave in to them. (31CCT 9018.) Appellant replied that the Hodges "just kept talking," were more experienced, and he "was just like pressured." (31CCT 9019.)

Appellant explained that the Hodges "wanted everything to be on me cause ... whatever went down I had the gun...." (31CCT 9016.) His gun had just one bullet because that was all that was necessary. (31CCT 9004.) Appellant claimed that the two brothers remained unarmed in Terry's car parked in the alley. (31CCT 9011, 9014, 9017.)

Appellant asked Lee to ":keep my family out of it. ... I just want my family to be safe...." (31CCT 9021.) When Lee asked if he wanted to say anything to Colleen, appellant responded, "I'm real sorry, I didn't wanna have to do it. I was scared." (31CCT 9021.) Even after his arrest, appellant said, "I'm still scared." (31CCT 9006.) Further, in reference to the Hodges, appellant said, "if I went and told everything that really, really happened, ... ya'll would go swipe them, they got locked up and probably be out[21] and bam, there go my family...." (31CCT 9012.)

During his pretrial incarceration at the Sacramento County Jail, appellant made two monitored calls from the dayroom on January 30, 1992. (28 RT 10269, 10282.) In the first call, appellant spoke to a female named Sabrina and implored, "Baby, you got to tell your mom to say I was at your house with you the night of the shooting." Sabrina agreed. (28 RT 10282.) In the second call, appellant talked to someone he identified as Tony Scott. He told Tony, "call my lawyer Ron Castro and tell him that you saw me give the gun to Terry two weeks before the shooting went down." (28 RT 10271, 10283.)

---

[21] Appellant knew that Terry Hodges worked for a relative who was a bailbondsman. (31CCT 9013.)

9. John and Terry Hodges

John and Terry Hodges were arrested on January 27, 1992, at 7:15 p.m. (23RT 8843.) That evening, Detective Thurston interviewed Terry Hodges.[22] (30CCT 8967.) Terry denied being at KFC at the time of the offenses. (30CCT 8970.) He said he had no motive to rob and kill and pointed out, "I own businesses."[23] (30CCT 8969.) Terry stated that, on January 19, he picked up appellant about 1:00 p.m., they drove around and, at 7:30 p.m., they went to KFC, where appellant spoke to "some dude." (30CCT 8969-8970.) They stayed 30 minutes and left to get food. (30CCT 8970.) Later, Terry heard about a party that night called a "Pajama Jam," and they passed by KFC, but they did not stop. (*Ibid.*)

10. Eric Banks [24]

---

[22] Jurors viewed a redacted videotape of Terry Hodges's interview (People's Ex. No. T-49). (22RT 8548-8551.) No corresponding transcript was distributed due to disputes about its accuracy. (28RT 10339-40.) Appellant cites to the transcript in the record (People's Exhibit T-49 at 30CCT 8967-8970) due to difficulty citing to the tape itself.

[23] Terry Hodges did not file any income tax return for 1991. (23RT 8640-41.)

[24] In addition to hearing Banks's trial testimony, appellant's jurors heard Banks' preliminary hearing testimony read into the record (25RT 9409-9474) and viewed an unredacted videotape of Banks's April 28, 1992, interview with law enfocement (People's Exhibit T-55). (25RT 9312-24). A transcript of the interview (People's Exhibit T-55A) was distributed to appellant's jurors as an aid (*ibid.*) and is contained in the record at 31CCT 9132-9166. Appellant's jurors were told that they could consider the Banks evidence for any relevant purpose. (23RT 8747-48.) The Hodges jurors received the same evidence except with certain redactions and limitations inapplicable to appellant.

Eric Banks, a convicted felon who had served three prison terms, was incarcerated in the Sacramento County Jail in March 1992 with John Hodges while John was in custody in the instant case. (23RT 8713, 8717-18, 8754.) The men spoke daily for about two months. (23RT 8719; 25RT 9417-18.) Banks already knew John from the streets, having lived near him and having served two separate prison terms with him. (24RT 9016; 25RT 9414, 9471, 9474; 31CCT 9138-39.)

Banks related that John Hodges told him the following about the KFC case: John planned on beating the case by telling police he was driving by when he saw the his partner, the "youngster," running down the street with a bank bag and picked him up; they were at a woman's house on G Parkway, "kicking it," and needed money; the youngster said he knew where they could get some and suggested KFC, where he had worked before getting fired; "the youngster had the set up;" John planned the robbery; John said that the youngster would have to kill so there would be no witnesses; the youngster did not want to kill, but "John gave the order;" the youngster was very easy to manipulate because he was young and inexperienced; the youngster was the shooter and had taken the blame; and the robbery netted "grands," which were split three ways with John receiving the most; John smoked up his share. (24RT 9009-10, 9013-15, 9017-9023; 25RT 9419-27, 9450-51, 9453, 9463, 9472; 31CCT 9142, 9145-46, 9153-56, 9159-60.)

According to Banks, John Hodges characteristically "manipulates them youngsters ... that's his thing...." (31CCT 9144-45.) Banks had seen him do

---

(People's Exhibits T-58 & T-58A; 23RT 8447-48; 26RT 9836-37, 9841-42.)

it. (24RT 9015-9017.) John never identified the youngster nor directly stated that he (John) was present at the robbery. (24RT 9019, 9023.) Banks's familiarity with John led him to believe that John must have been present, probably with a firearm, to enforce his order to kill. (31CCT 9155-9156, 9158; 25RT 9462-9463.) Also, John wanted McDade killed so he would not identify "us," a pronoun indicating John's presence. (25RT 9461-63.)

Banks admitted that he contacted law enforcement in 1992 about John's statements to receive a "deal" which would keep him from returning to prison on a then-pending charge (felony escape). (23RT 8762, 8770; 24RT 8923-24, 9028.) At the time, Banks already had a "snitch jacket," was facing 16 months in prison and knew that if he was returned there he would be labeled a "snitch." (24RT 9028, 9037.) Snitches are often killed in prison. (23RT 8731.) After Banks gave police a taped statement, the prosecutor helped him receive one-year in county jail for his pending charge. (23RT 8755, 8843, 8762; 24RT 8954; 25RT 9429-30.)

By the time of appellant's trial in 1994, Banks again faced possible prison time for a new charge (petty theft with a prior). (23RT 8715, 8750.) He was a reluctant witness. (23RT 8750; 24RT 8958-59, 9053.) He again feared being killed as a "snitch" if he returned to prison. (23RT 8731; 24RT 8932.) He was in protective custody and feared he and his family might be harmed due to his testimony. (23RT 8723; 24RT 9025, 9053.) Banks' paramount concern was where he served his new sentence (jail or prison), not its length. (24RT 8958-59.) The prosecutor informed Banks that he would try to obtain jail time for him in exchange for his cooperation at trial. (23RT 8751.)

11. Daryl Leisey [25]

Daryl Leisey met John and Terry Hodges because he worked for their stepfather, Herb Tillman, a bail bondsman. (25RT 9478-79, 9483; 27RT 10013; 31CCT 9294.) Leisey tracked fugitives who jumped bonds for Tillman. (*Ibid.*) From 1989 through 1994, Leisey saw the brothers at the Tillman house and socialized with them and Tillman; however, he did not see John from 1990-1992, when John was serving multiple prison terms. (25RT 9471, 9474, 9482-87, 9481.)

Leisey learned about the KFC homicide from a television report. (25RT 9487-88.) Within about one week of the crimes, he spoke with Terry Hodges.[26] (25RT 9487-88, 9490; 26RT 9555.) Leisey had stopped at the Arco Mini-Mart Market on Broadway between 9:00 and 10:00 p.m. (25RT 9488, 9504; 26RT 9776-77.) As he was exiting the store, Terry Hodges drove up, approached Leisey and asked him if he had heard about what was going on;

---

[25] In addition to hearing Leisey's trial testimony, appellant's jurors also heard an audiotape of his January 31, 1992, interview with Detective Lee (People's Exhibit T-61). (29RT 10507.) A corresponding transcript was distributed to assist them (People's Exhibit T-61A) and is part of the appellate record at 31CCT 9293-32CCT 9322. Hodges jurors heard a slightly different version of the Leisey interview (People's Exhbit T-62). (29RT 10686-10688; see 28RT 10180-82.)

[26] As noted, the crimes occurred on January 19, 1992 (19RT 7463-65, 7583, 7585), and the Hodges were arrested on the evening of January 27, 1992. (23RT 8843). Leisey fluctuated significantly about when his conversation with Terry occurred. He stated it was around January 20 or 21 (27RT 9863-64), January 27 to 28, or on January 30, 1992. (26RT 9593, 9778-81, 9785-88, 9820-21; 27 RT 9886, 10009-10.) Counsel for Terry Hodges argued that Leisey never spoke with Terry at all. (15RT 6468.)

Leisey said yes. (25RT 9489-90.) Terry asked if Leisey could tell him how to get out of town and stay hidden. (25RT 9490; 27RT 10028.) Leisey, from his years of skip-tracing, knew what it would take for someone to disappear. (25RT 9491; 27RT 10028.) He told Terry he did not want to get involved. (25RT 9491.) Terry just started telling him what happened. (*Ibid.*)

Terry said "[t]he cops are jacking me up." (31CCT 9299.) Terry also told Leisey that he had given somebody a ride over at KFC; Terry and "the other guy," whom Terry called the "boy," were involved in the robbery; "[t]he guy started running off his mouth to ... the guy from KFC;" Terry was "right there" on the scene with the guy; the guy was taking too long so Terry had to "jack him up a little bit" – tell him to "get it over with;" Terry told him, "just whack the motherfucker" because Terry did not want to leave any witnesses; Terry returned to the car; a couple of minutes later, the boy, who was the shooter, came running to the car, and they took off; Terry's brother was the driver;[27] all they got was "chump change;" and Terry supplied the pistol that was used. (25RT 9491-95, 9497; 26RT 9827; 27RT 9930, 10032, 10054-55, 10065; 32CCT 9302-9308, 9311-12.)

Terry said that the shooter was a "wimp," "chicken-shit," and "didn't have no heart;" Terry had to tell the shooter that "big daddy was on the case" and "you need to jack this guy and let's go." (25RT 9498; 32CCT 9315.) Terry told Leisey that he had to coach the boy like his own, little son: "[l]et me tell you how to do it and get it over with. You know, don't waste no time.

---

[27] Leisey assumed the brother was John because Terry and John spent time together. (27RT 9930, 10068.)

You know, be a man. You know, Big Daddy's on the case. Let's get it over with, you know." (27RT 10034; 32CCT 9315.)

Based on Terry's statements about coaching the boy and telling him to get it over with so they could get out of there, Leisey believed Terry was actually present for the shooting. (27RT 10031.) Indeed, Terry told Leisey, "I was more than just ... at the scene." (32CCT 9306.) When Leisey asked why they did not just pistol whip the person, Terry responded: "I didn't want no witnesses" and "I told the dude to kill the motherfucker.... We don't play." (28RT 10195; 32CCT 9314.) Terry also said, "[n]o witness, no can find me" and "no witnesses, no can find.... That's why they can't charge me." (32CCT 9305.) Although, Terry never said that he shot and killed the victim, in Leisey's mind, Terry basically admitted something pretty close to it. (27RT 9889.)

According to Leisey, Terry owned a shotgun and some pistols. (32CCT 9303-9304.) He was an enforcer who was always armed. (32CCT 9311.) Terry sold crack cocaine. (27RT 10053.) He and John had committed drive-by shootings together. (*Ibid.*)

Leisey did not immediately report the conversation to the police because he did not want to testify. (25RT 9499; 26RT 9593; 27RT 9888.) He decided to come forward, however, after seeing Colleen McDade upset on television and because his narcotics anonymous advisor counseled him to do so. (25RT 9499-9500.)

Leisey was impeached with multiple felony convictions (25RT 9500-01, 9525-28; 26RT 9721, 9730, 9806-08) and lying about employment matters.

(26RT 9569, 9692, 9701-05; 27RT 9916). He had a pending criminal case and was on probation when he told authorities about his conversation with Terry Hodges. (25RT 9504; 26RT 9728-29.) Leisey had previously obtained leniency in other pending cases by assisting law enforcement. (25RT 9542-46, 26RT 9573-77, 9803.) Leisey had a history of drug and alcohol problems but had been clean and sober for nine months by the time of trial. (26RT 9694; 27RT 9896-97, 9899, 9917-18, 9925-28, 10016-18, 10046-47.) Shortly before trial, Leisey had been placed on a involuntary psychiatric hold. (26RT 9697-98, 9772-73.)

Leisey received nothing in exchange for his cooperation in this case. (25RT 9501.)

B. POWELL DEFENSE

A defense investigator testified to various measurements around KFC: (1) from the corner of Kragen to the wall behind KFC on the south side of its lot (behind the KFC) is 254 feet (29RT 10708); (2) from the corner of Kragen to the Meer Way sidewalk by KFC is 155 feet (29RT 10709-10); and (3) from that sidewalk, across the parking lot and dumpster, to the wall behind the KFC is 99 feet. (29RT 10708-12.)

Detective Lee identified a photograph taken of appellant at the time of his arrest on January 27, 1992 (Defense Exhibit TT). (29RT 10726, 10734; see 34CCT 10118 [copy of photo].) It showed appellant at 5'8", 130 pounds and 18 years of age. (23RT 8850.) Since it was taken, appellant has grown and gained weight. (29RT 10727.)

The defense also called KFC assistant manager Martinez regarding the telephone calls he received from appellant on Halloween of 1991. Appellant called Martinez and said, "Don't be surprised if the store gets robbed." (30RT 10799.) Appellant called back a second time to repeat his message; he also added that it was Halloween, many crazy people were outside, and Martinez had better watch his back when he took the deposit to the bank. (30RT 10800.) Martinez interpreted the calls as warnings, but also thought appellant was joking. (*Ibid.*)

C. MISTRIAL MOTIONS BY ALL THREE DEFENDANTS AND DISMISSAL OF CASE AGAINST BOTH HODGES.

During his opening statement, the prosecutor told both juries to expect appellant's testimony and described his anticipated testimony in detail. (15RT 6343-6346.) Appellant would testify that he approached McDade unarmed to discuss getting his job back; after 10 to 15 minutes, John and Terry Hodges approached with guns and robbed McDade; John then handed appellant a gun with just one bullet in it and, as Terry pointed his shotgun at appellant, John said, "[w]e ain't leaving no witnesses;" there was nothing appellant could do but shoot McDade. (15RT 6344-45.)

Appellant did not testify at trial. (30RT 10805, 10810.)

After all parties rested their cases, all three defendants moved for mistrials. (2CT 518-520; 30RT 10815.) Appellant argued that the prosecution's unfulfilled promise of appellant's testimony constituted *Griffin* error because, in essence, it encouraged jurors to draw an inference adverse to appellant based on his exercise of his right to remain silent. (2CT 521-527;

30RT 10820-21.) The Hodges contended that the prosecutor's opening statement was so grossly prejudicial that mistrials were required. (30RT 10829-30, 10838-39.) The Court denied appellant's mistrial motion; in contrast, it granted mistrials to both John and Terry Hodges. (2CT 520; 30RT 10837, 10840.) Further, on the eve of closing arguments and jury deliberations for appellant's guilt phase proceedings, it granted the prosecution's motion to dismiss the charges against both John and Terry Hodges. (1CCT 29-31.)

II. PENALTY PHASE

A. PROSECUTION

The prosecution introduced and argued aggravating circumstances under Penal Code section 190.3(a) and (b).

1. Victim Impact Evidence (Penal Code Section 190.3(a))

a. Colleen McDade

Colleen McDade, the widow of Keith McDade, testified that she met McDade in 1988 when they were both working at KFC. (32RT 11533.) The couple's daughter, Monique, was born in January 1990, they married in March 1990 and, in April 1991, their son, Andrew, was born. (32RT 11535-36.)

Colleen and Keith began as clerks at KFC; they worked their way up to become co-managers of the KFC on Freeport Boulevard. (32RT 11536.) After their marriage, they obtained 40% ownership of the store. (32RT 11536, 11538.) They were responsible for hiring, firing, handling the paperwork and ordering. (32RT 11537.) Each worked 80-hour weeks, and their children were

often at the store. (32RT 11537, 11547.)

The McDades wanted to build esteem in the young people they hired and treated them like family. (32RT 11539-40.) In August 1990, Keith hired appellant, age 16 or 17, as a cook. (32RT 11538, 11566.) Appellant told the McDades that he wanted to get off the streets and do something positive with his life. (32RT 11567.)

The McDades liked appellant; they joked with him, loaned him money if his paycheck was not ready and generally tried to help him. (32RT 11539.) He was a pleasant and good employee. (32RT 11540-41, 11565.) He did assigned tasks without problem and willingly worked extra shifts. (32RT 11540-41, 11568-69.) On his days off, appellant would come to the KFC just to visit. (32RT 11540.) He confided in the McDades about problems with girls or school and played with their children. (32RT 11539, 11547.) Appellant respected Keith and wanted to please him. (32RT 11568.)

Colleen did not consider appellant mentally slow; his job entailed detailed procedures, and he caught on quickly. (32RT 11566, 11599, 11602.) He followed a standard operating manual to prepare various foods. (32RT 11599-601.) Appellant was good and quick at cleaning and cooking chicken, which required following ten steps; he was one of the better cleaners. (32RT 11599, 11601.) Appellant always worked with another cook and caught on from that person. (32RT 11605-07.) He passed a test, written at the 8th or 9th grade level, containing multiple choice questions such as "Do you clean the chicken before you cook it?" (32RT 11606-08.) From among the 16 to 18 employees at the KFC, Colleen ranked appellant as having average

intelligence. (32RT 11610.)

In 1991, Colleen noticed a change in appellant: he started being late, not having a ride, or not calling in, and his performance fluctuated. (32RT 11541.) Appellant's personality also seemed to change. (32RT 11593.) The McDades told him that they wanted to help him. (32RT 11541-42.) Then a theft occurred, and appellant left for awhile. (32RT 11542.) In May 1991, the McDades gave appellant an ultimatum: if he did not show up to finish his week, he would be terminated. (*Ibid.*) Appellant did not complete his shift and was fired. (32RT 11542, 11544-45.)

Appellant returned in the summer of 1991 and asked for his job back. (32RT 11544-45.) During the summer, fall and following winter, appellant would come to the store once or twice a week and ask for his job back, order food or just visit with the McDades or the other employees. (32RT 11544-46, 11595.) The McDades never confronted appellant about the thefts; although they suspected him, they lacked proof.[28] (32RT 11545.) They never intended to rehire appellant, but they did not tell him that. (32RT 11594.) Keith would just say they were full and he should check back later. (32RT 11544-45, 11569, 11595-96.) Appellant did not get the message; he just kept asking for his job over and over. (32RT 11582-83.)

Colleen also testified concerning the acrimonious confrontation in July 1991 between the McDades and an older relative of appellant's when appellant

---

[28] After appellant left KFC, the McDades suffered an additional theft of about $3,200 from the safe. (32RT 11576.) Bradley, an assistant manager, accused appellant; two days later, Bradley quit. (32RT 11576-79.) No more thefts occurred after that. (32RT 11584.) Colleen knew that Bradley had taken

and the relative came to the store to ask for appellant's job back. (32RT 11547-49; see generally, § I.A.2, *ante* [summarizing guilt phase testimony about the event].) During the incident, Colleen told appellant that he knew why he had been fired, and Keith told him he could return later to discuss it. (32RT 11548-49.) Appellant continued to return to KFC to ask for his job back, but he never asked why he had been fired. (32RT 11549-50.)

Colleen described the sequence of events leading to her discovery of her husband in the KFC parking lot. When she had not heard from Keith by 10:30 p.m., she called the store but nobody answered. (32RT 11552.) Colleen thought about putting her children in her vehicle and driving to the store, but she could not wake her son. (32RT 11553.) Instead, Colleen called Rodriquez, who said that Keith was almost ready to leave when she left at 10:20 p.m. (*Ibid.*) Colleen tried calling the store a few more times; then she called her mother and 911. (32RT 11554.) While Colleen's stepfather stayed with the children, Colleen and her mother drove to the store. (32RT 11555.) When they approached, Colleen saw lights, Keith's car in the parking lot and the back of his head in his car. (*Ibid.*) Colleen tried to exit her car, but people pushed her back inside. (*Ibid.*) She recalled somebody holding her in the car and her mother driving home. (*Ibid.*)

Colleen remembered screaming at the scene that appellant did this; she just had a gut feeling. (32RT 11556.) Colleen did not want to believe that appellant did the shooting alone; he stole from them but was not violent. (32RT 11572.) She thought that others must have been involved. (32RT 11573.)

---

the $3,200. (32RT 11596.)

Initially after Keith's death, Colleen had no will to live. (32RT 11557.) People kept telling her that she had to persevere for her children. (*Ibid.*) Colleen did not eat or sleep, lost weight, and had nightmares during the entire first year; the nightmares were especially bad until appellant's arrest. (*Ibid.*)

When asked how her daughter Monique had been emotionally affected by her father's death, Colleen responded that Keith was everything to Monique. (32RT 11557-58.) At first, Monique acted normal after Keith's death; she never asked for him. (32RT 11558.) Eventually, Colleen told Monique that daddy was not coming home anymore, but Monique did not understand. (*Ibid.*) At the time of trial, Monique was four years old; she would constantly ask for Keith or say, "I see daddy in the sky. He's angry. He gets mad at me." (*Ibid.*) Monique asked Colleen to go to the store to get a new daddy, and she always made sure that Colleen was coming back for her. (*Ibid.*) Colleen described how Monique misses her father so much: she sees his picture and says that is her daddy and he is in the sky because somebody hurt him. (*Ibid.*)

Colleen related that Andrew was only nine months old when Keith died and thus did not know his father. (32RT 11561.) At the time of trial, Andrew could recognize his father from a picture. (*Ibid.*) He lacks the anger that Monique has. (*Ibid.*) Monique is in counseling because she becomes very angry for no reason and hits and wakes up screaming after bad dreams. (*Ibid.*) The counseling is helping Monique. (*Ibid.*)

Keith's death has also affected the family financially. In 1991, the McDades had a joint income of $80,000. (32RT 11562, 11588-89.) Colleen's

yearly income is now $30,000. (32RT 11562.) She can work only part-time because she must care for her children. (*Ibid.*)

When asked how her husband's death affected her plans for the future, Colleen recounted the couple's plans to buy a house and go to Hawaii. (32RT 11563.) Their store was their life and their dream. (*Ibid.*) According to Colleen, if they worked hard at the store for about five years, they would achieve a comfortable income, no longer have to work 80-hour weeks and could enjoy their family and home. (*Ibid.*) Keith's death turned her whole life upside down. Colleen lost her best friend, husband and career. (*Ibid.*) She had to find a new way of life, and it had not been easy. She related, "It's hard being a single parent. ... And it's hard to go on." (*Ibid.*)

b. Edwina Pama

Edwina Pama, Colleen's mother, testified that Colleen and Keith McDade had a wonderful relationship; Keith was the best son-in-law imaginable. (32RT 11612-13.) Pama also testified that it had been very difficult for Colleen and her children since Keith's death. (32RT 11613.)

Pama described driving Colleen to the KFC when Colleen discovered that Keith had been killed. (32RT 11613-14.) Colleen screamed and pounded on the car window; a police officer had to accompany them during the drive home to control her. (32RT 11614-15.) Once home, Colleen collapsed. (32RT 11615.) Pama tried to take care of everything that night because Colleen was lost. (32RT 11616.) The next day, Colleen was very angry and wanted to control everything. (*Ibid.*)

Pama recounted an incident on a stormy night after Keith's death when a black man came to Colleen's door. (32RT 11616.) Colleen phoned her and was extremely scared; they talked for a couple of hours. (32RT 11617.) Pama arranged for a male friend to go and stay with Colleen. (*Ibid.*) After this incident, Pama realized that Colleen and the children could not continue to live on their own and arranged for them to move in with her and her husband. (*Ibid.*)

According to Pama, Colleen was suffering continuing emotional problems as a result of Keith's death and needed much more help than she realized. (32RT 11622-23.) Colleen is on a roller coaster. Some days, she is great and strong. Other days, she just yells and screams. (32RT 1162.) Colleen says she does not know what she is doing and that she does not know how much she can take. (*Ibid.*) Pama worries about her. (*Ibid.*)

Andrew, also known as "Buddy," had his first birthday party at Pama's house, but "Daddy wasn't there." (32RT 11617.) Pama testified that everyone knew what Keith wanted for his son -- to play football with him and to teach him baseball. (32RT 11618.) Keith had many hopes and dreams for his children and their lives -- "[a]nd it was taken away." (*Ibid.*)

Keith's family consists of his mother, Roberta, two older brothers and a younger sister. (*Ibid.*) Pama had talked a number of times with Keith's mother. (32RT 11618-19.) Keith's death had been very hard on her. (32RT 11619.) At first, Roberta McDade did not want to talk about Keith. (*Ibid.*) If his name was mentioned, she became very quiet. (32RT 11620.) Pama also thought that it was difficult for Roberta and the rest of the family to see Keith

in Buddy; the two look exactly alike and Buddy has many of Keith's mannerisms. (32RT 11620-21.)

According to Pama, Monique had fared the worst. (32RT 11617.) Monique and Keith had been "like two peas in a pod;" they went everywhere together. (*Ibid.*) Although Monique was only two years old when Keith died, she remembered him. (*Ibid.*) Keith was good with Monique: he taught her to count. (*Ibid.*) Monique knew her numbers and alphabet before she was two years old. (*Ibid.*)

In Pama's opinion, Monique's emotional state was worsening instead of improving since Keith's death. (32RT 11623.) When Keith died, Monique knew something was wrong, but no one told her about the death for two weeks. (*Ibid.*) When told, Monique did not understand. (*Ibid.*) At the time of trial, Monique was saying that her daddy was up in the sky, but she would get very angry. (*Ibid.*) Pama had never seen a child get so angry and believed that Monique needed help to pull herself together. (*Ibid.*)

Pama also testified that Keith's death affected her by placing much stress upon her. (32RT 11624.) She has had to be strong for Colleen and increasingly deal with Monique. (*Ibid.*) Monique's problems grew since trial began; Monique was picking up on the stress it was causing Colleen. (*Ibid.*) Pama, too, could feel Colleen's stress. (*Ibid.*) Keith had been Monique's support; Pama was trying to fill the void in his absence. (*Ibid.*)

2. Juvenile Criminal Behavior (Penal Code Section 190.3(b))

c. David Hernandez Assault and Bicycle Robbery

David Hernandez testified to an assault and robbery of his $400 mountain bike in October of 1990 in South Sacramento, about a mile from Freeport Avenue. (32RT 11636-40.) Hernandez, then 15 years old, was riding his bike from the 7-Eleven when a young black male, age 15 or 16, approached him to ask the time; Hernandez was then hit from behind. (32RT 11636-37.) He fell off his bike and a group of teenagers hit and kicked him about 10 times. (32RT 11637, 11640.) Hernandez's eyes were closed , but he estimated that four or five people were striking him. (32 RT 11647.) When the attack stopped, he saw someone riding away on his bike. (33RT 11651.)

Hernandez recognized William Akens as the person who asked him for the time and rode off with his bike. (32RT 11637, 11642.) Hernandez did not know appellant and could not identify him as one of his attackers. (32RT 11643-44.)

Akens testified that he took Hernandez' bike and that appellant was also involved. (33RT 11782.) In October 1991, appellant told Colleen McDade that he had gotten into trouble and was at juvenile hall because he had been with a group of boys that had beaten a white boy for his bike. (32RT 11543, 11580.)

Hernandez suffered some bumps on his head but no cuts or bruises and did not go to the doctor. (32RT 11647; 33RT 11651-52.)

d. Harold Rigsby Assault

At the time of trial, Harold Rigsby was incarcerated for murder and was a member of the Broderick Boys street gang. (33RT 11679, 11689, 11693.) He testified that he recalled nothing about a November 1991 assault upon him at Land Park Bowl, a bowling alley on Freeport Boulevard, and he had never seen appellant before. (33RT 11678-81, 11704.) In 1991, Rigsby was 15 years old, was already a Broderick Boy, and wore red gang colors. (33RT 11685-86, 11689, 11691, 11693.) Member of the Blood gang also wore red, and Crips wore blue. (33RT 11691-93.)

Sacramento Police Department Detective Fermer testified to Rigsby's prior statements. Rigsby told Fermer that he was at the Land Park Bowl in November 1991 with his girlfriend, Naomi Dickinson. (33RT 11707-09.) When they exited, six male black juveniles, who identified themselves as Crips, asked them what they were doing in their hood. (33RT 11709-10, 11728.) The group hounded Rigsby and Dickinson as they went back and forth between the bowling alley and their car. (33RT 11710-11.) Eventually, after some verbal exchanges, the group assaulted Rigsby in the parking lot. (33RT 11711, 11722.) Rigsby was hit in the face with a belt, knocked to the ground, and then kicked and hit by the six young men. (33RT 11711.) Rigsby did not seek medical treatment; he reported some pain and exhibited redness. (33RT 11724, 11726-27.)

Rigsby tentatively identified appellant from a photo lineup; he stated that appellant "kind of" looks like the assailant who hit him with the belt and "looks more like him the more I look at him." (33RT 11714.) Rigsby is

Caucasian. (33RT 11723.) He described the parking lot as somewhat dark. (33RT 11722.)

e. Threats and Drive-By Shooting at Kennedy High School

Robert Visnick, a teacher at John F. Kennedy High School, testified that in late October or early November 1991, appellant and Akens entered his classroom during class and threatened a student named Zeke Moten. (33RT 11659-61.) Appellant told Moten: "Motherfucker, we're going to do you in; we're going to get your ass." (33RT 11660.) When Visnick stood up, they left. (*Ibid.*) Visnick knew them as former students. (33RT 11659-60.) He had seen many students challenge each other at school. (33RT 11665.) A challenge to "do you in" might mean a fistfight, but Visnick thought this challenge was more serious. (*Ibid.*)

Akens testified that he was a member of the "Freeport Crip" gang, and he and appellant used to be running buddies, i.e., close friends.[29] (33RT 11748-49, 11752.) Akens was 14 or 15 years old when he met appellant. (33RT 11779, 11783.) Appellant was also friends with others who were Akens' age: Jonas Calhoun, James Vale and Demetrius Duncan. (33RT 11783-85.) They young men were impressed by appellant because he was an older Crip from Los Angeles, but they really did not know anything about his background. (33RT 11783-86.) Akens did not consider appellant to be

---

[29] When asked if appellant was in a gang with him, Akens responded: "Yeah. He was there with me; he had my back. ... When me and Carl was together, it wasn't about a gang; it was about who had each other's back." (33RT 11752.)

sophisticated. (33RT 11779-80.) Appellant would try to keep Akens out of trouble, and Akens trusted appellant. (33RT 11780-81, 11792.)

Akens described Moten as a "gang banger," someone who is out to start trouble with a different color. (33RT 11758.) Moten was a member of the Freeport Crips, but left them to join the Bloods. (33RT 11749-50.) Akens considered Moten a traitor and a "buster" – someone who cannot make up his mind about his gang affiliation. (33RT 11750.)

Akens maintained that he, alone, entered the classroom and threatened Moten. (33RT 11750.) Akens explained that Moten or his friend had a beef with appellant and Moten was spreading rumors about wanting to fight Akens. (33RT 11751, 11793.) Appellant did not want to get into trouble, so Moten told him he would handle it and appellant remained outside. (33RT 11750-51, 11793.) Akens asked Moten: "What's up, cuz?"[30] (*Ibid.*) Akens admitted that this was a gang-related incident because he was the one who brought Moten into the Freeport Crips. (*Ibid.*)

Akens also testified to participating in a drive-by shooting about a week later. (33RT 11752-54.) Moten was standing at a bus stop with a group of people in front of the high school when Akens and others drove by. (33RT 11753-54.) Akens, sitting in the front passenger seat, stuck his foot out the car window to show Moten the blue color of his shoes and said, "What's up, cuz?" (33RT 11787-88.) Moten or one of his friends shot at Akens' car, so Akens shot back to protect himself. (33RT 11754.)

---

[30] According to Akens, "cuz" means Crip. (33RT 11788.)

According to Akens, appellant was in the backseat of the car, but Akens did not see him shoot or display a gun. (33RT 11789-91.) Although Akens testified at one point that appellant also shot at Moten, Akens explained that this was merely an assumption based on what police had told him. (33RT 11755, 11790, 11795-96.) Akens told the police that appellant did the shooting but explained that this was only an assumption, police intimidated him and he was on medications after a shootout with police. Akens did not know whether appellant possessed a .32-caliber pistol at that time but admitted that he and appellant took some pictures of themselves holding guns. (33RT 11795.)

Akens pled guilty to the drive-by shooting at the high school and admitted to the judge that he personally shot at Moten. (33RT 11759, 11798-99.) Akens also pled guilty to a felonious assault committed in Yolo County, which ended in a chase and shootout with the police. (33RT 11759-60.) He was sentenced to CYA for both cases. (33RT 11758-61.)

Akens testified about two street gangs that exist in Sacramento: the Bloods and the Freeport Crips, whose territory is the Freeport neighborhood by part of Freeport Boulevard. (33RT 11756-57.) Crips claim blue and Bloods claim red. (33RT 11761.) In gang vernacular, a "youngster" is an immature teenager – a "wannabe" trying to prove himself to get into gang ranks. (33RT 11762.) According to Akens, it would not be unusual for a couple of more sophisticated, higher-ranking Bloods to use a less sophisticated, youngster Crip to do their "dirty work." (33RT 11762-63, 11765.)

Akens knew John and Terry Hodges and that they had a reputation for being Bloods and "original gangsters" – older, wiser gang members who had

proven themselves. (33RT 11772-73.) According to Akens, an older gang member might use a "youngster," especially if the youngster is not "real quick mentally." (33RT 11775.) An older manipulator can scare a youngster into doing something he does not want to do, such as a robbery or a murder. (*Ibid.*) Additionally, an older gang member would have control over a youngster's decision about whether to testify in court. (33RT 11777-78.) Sometimes, a young gang member might claim responsibility for a crime to help an older gang member escape. (33RT 11778.) A younger gang member who testifies despite a directive not to risks death. (*Ibid.*)

Sacramento Police Detective Ronald Aurich testified to his interview of Akens in December 1991 regarding the Kennedy High drive-by shooting. (33RT 11803-04.) Akens appeared coherent and unintimidated. (33RT 11804-05.) He said he was in the car but did not shoot anyone; appellant was the shooter.[31] (33RT 11806.) Akens also said that he had a .25 automatic and appellant had a .32 automatic. (33RT 11808.)

Aurich, who was working in the gang unit in 1991, knew nothing of appellant, who had no felony convictions, until Aurich began investigating the Kennedy High shooting. (33RT 11804, 11814-15.) Aurich received information that appellant was a "main player" in the Freeport Crips. (33RT 11809-10.) A main player, according to the detective, is a "little more hardcore" gang member, a leader who promotes his gang, is involved in gang activity and gang-related crimes and exhibits criminal sophistication. (*Ibid.*)

---

[31] Aurich admitted that it was common for someone under arrest to place blame on someone else. (33RT 11812.)

Although Aurich had been a gang detective for about 10 years, he had never heard that either John or Terry Hodges was a gang member. (33RT 11804, 11810-11.) The detective attributed his ignorance of John Hodges's gang status to John's having spent five or six years in prison during this period. (33RT 11811.)

B. DEFENSE

1. Family and Friends

Appellant's mother, Lou Williams, and his brothers, Calvin and Lawrence Williams, and a family friend, Willie McNair, testified about appellant's upbringing. (33RT 11925, 34RT 12195, 35RT 12257 & 12312 et seq.) Appellant has five siblings – four older brothers and one older sister. (34RT 12197; 35RT 12257.) Calvin is 16 years older, and Lawrence is 12 years older, than appellant. (34RT 11925, 12196.) Appellant was born in Los Angeles; his mother could not recall his date of birth. (35RT 12258.)

The family lived in south-central Los Angeles in a rough area plagued by gangs, drugs and drive-by shootings. (33RT 11925-26; 34RT 12209-14, 12217-18.) Appellant grew up without a father.[32] Calvin, and to some extent, Lawrence, filled in as father figures because they were the oldest and worked to help support the family. (33RT 11938; 34RT 12212, 12216; 35RT 12259-

---

[32] Appellant's father occasionally visited during appellant's early years -- up to when appellant was age one or two according to appellant's mother and Lawrence; up to age eight or nine according to Calvin. (33RT 11939; 34RT 12211-12; 35RT 12259.) Everyone agreed that, at some point, he stopped visiting and never returned. (*Ibid.*)

60, 12262.) It was rough growing up; they did not have a lot of money. (34RT 12216-17; 35RT 12261.) Their mother worked in the nursing field but sometimes she did not have enough money to support her six children. (*Ibid.*) The family survived on food stamps for a couple of years, but appellant's mother left A.F.D.C. as soon as she could. (35RT 12261-62.) She often worked two jobs, leaving for work at 3:00 p.m. and not returning home until 9:00 the following morning. (35RT 12262.) Although they did not have a father, they were a family and loved each other; that love got them through many hard times and kept them together. (34RT 11973.)

Appellant regularly attended church with his family and the McNairs; Willie McNair was the minister of the Second Adam's Missionary Baptist Church in Los Angeles. (34RT 12206; 35RT 12314.) Appellant attended even after becoming a teenager; he was very obedient and ran errands for McNair. (35RT 12315-16, 12321.) Appellant was an usher and participated in the choir. (34RT 12206; 35RT 12268.) He especially enjoyed the younger children at church; he babysat, fixed them food, was patient and had a good rapport with them. (35RT 12316-18, 12321.) McNair considered appellant a bit of a loner because he seemed more comfortable around younger children than people his own age. (35RT 12320-21.)

When appellant was 16, the family decided that he should leave Los Angeles because it was getting too dangerous. (34RT 12198, 12209-10, 12217-18; 35RT 12263-65, 12270, 12276.) They wanted to keep him safe from the drugs, gangs, and violence in their neighborhood and to provide him a chance at an education and a future. (34RT 12209-14, 12217-18.) An incident at the junior high school precipitated appellant's move. As appellant was

waiting for the bus at school, he was jumped by some gang members, whom he identified to the school administration. (35RT 12263-65.) The administration advised appellant's mother that she should move appellant out of Los Angeles to keep him safe. (35RT 12263- 65, 12274.) Appellant and his mother were terribly frightened. (35RT 12265, 12274-76.) Appellant moved to Sacramento to be with Calvin. (34RT 12198-99.)

In Sacramento, appellant lived with Calvin, Calvin's, girlfriend Mary, and their two children in the Freeport area. (33RT 11928-29; 35RT 12276-77.) Appellant attended high school and helped take care of Calvin and Mary's children. (33RT 11930-31.) Appellant was good with the children, and Calvin trusted him to take care of them. (33RT 11930.) However, there was tension in the household: Mary resented appellant's presence and appellant, in turn, resented her. (35RT 12278-80.) They argued a lot, and Mary pressured appellant to get a job. (35RT 12280.)

Appellant was hired at KFC within a few months of arriving in Sacramento. (33RT 11940-41.) He liked the job, worked hard at it and often worked overtime. (33RT 11941, 11944; 34RT 12220, 12223.) Appellant's income helped his self esteem and allowed him to contribute to family expenses. (33RT 11945.) Appellant gave some of his earnings to Calvin, who saved them and parceled them back to appellant as needed. (34RT 12224.) Appellant worked anywhere from 24 to 45 hours per week at KFC and also attended school full-time. (34RT 11966.) Calvin and Mary told appellant that he had to work, contribute rent money and do well at school to continue living with them. (34RT 11965-66.)

In 1989 and 1990, appellant attended Kennedy High School for three semesters and started at a continuation school in 1991. (33RT 11931-32.) Appellant, who was already 17 years old in 10th grade, did not do well; he flunked many classes and passed only the easy ones.[33] (34RT 11960-62.) Understanding and retaining information came harder for him than for normal students. (34RT 11962.) Calvin was unhappy with appellant's performance and pushed him to work harder and do better. (33RT 11946-47.)

Calvin acknowledged that he and Mary pressured appellant to perform. (33RT 11944.) They were workaholics; they worked a great number of overtime hours at their jobs and compelled appellant to do the same. (*Ibid.*) They stressed the importance of both education and work. (*Ibid.*) Appellant respected Calvin and tried to please both Calvin and Mary. (34RT 11953-54.)

Calvin described appellant as a "happy go lucky kid." (33RT 11948.) Calvin never saw appellant behave violently or get upset. (33RT 11948, 11950.) Calvin felt that one of appellant's shortcomings was that he was too passive; when Calvin came down hard on him, appellant would just take it. (33RT 11947, 11950.) Lawrence, too, described appellant as easy-going; according to Lawrence, appellant is a follower who can be manipulated and duped into doing things. (34RT 12202, 12236-37, 12239; 35RT 12251-52.)

---

[33] Dr. Nicholas, a psychologist called by the defense during penalty phase, testified that appellant had to repeat both the 2nd and 8th grades. (34RT 12135.) Appellant's grades at Kennedy High School were very poor – mostly "D's" and "F's" except for a "B" in P.E. (34RT 12136; see 45CCT 13410-13 [Def. Penalty Phase Ex. P-A, appellant's school transcripts].) Dr. Nicholas thought appellant qualified for, and had probably been placed in, special education classes. (34RT 12136, 12139-40.) Appellant's mother denied this but admitted that appellant was a "little slow" and basically a "C" and "D" student

Appellant's mother testified that appellant could be frightened into doing a lot of things. (35RT 12281.)

After appellant was terminated from KFC, Calvin and Mary insisted that appellant return to work there or get another job. (33RT 11945.) The pressure they placed on appellant created tension in the household. (33RT 11941-44.) Appellant's personality and behavior changed and he became withdrawn. (33RT 11945; 34RT 11966.)

Calvin and Lawrence did not know appellant to belong to a gang; he tried to work like everyone did. (34RT 11963, 11957, 12247.) Appellant never seemed to have extra money, and he did not have a gun or ammunition. (34RT 11967, 11972.) He did not use gang slang or appear to be engaged in gang-related activity. (34RT 11963, 11965.) When appellant told Calvin that people often thought that he was in a gang because he wore blue, Calvin bought him some gray and brown clothing. (34RT 11967.)

Calvin knew of and was concerned about the Hernandez bike theft incident; he spoke to appellant, the magistrate and the probation officer. (33RT 11931-32; 34RT 11967-69.) When they reviewed the statements of the other young men involved, they concluded that appellant had been present but did not engage in any of the physical activity. (34RT 11968-69.)

Calvin surmised that appellant met Terry Hodges at Tony Scott's apartment, which was in the same apartment complex as Calvin's. (33RT 11933-34.) Kim Scott, appellant's friend and co-worker, lived with Tony, her brother; Calvin had once seen appellant and Terry Hodges at the Scott's.

---

in elementary school. (35RT 12270-72.)

(33RT 11933-34, 11937.) Lawrence knew Terry Hodges to wear red. (34RT 12230.) Lawrence had seen him while working at the continuation school which Terry attended. (34RT 12227-12228.) Lawrence considered him to be a rude bully. (34RT 12228, 12233.)

Calvin, Lawrence, and appellant's mother acknowledged the pain and harm the robbery and murder caused the McDade family and expressed their sympathy. (34RT 11956, 12234; 35RT 12289.) Appellant's mother and Lawrence acknowledged that appellant looked up to McDade and was fond of Keith and Colleen McDade; appellant's mother could not picture appellant hurting Keith. (34RT 122235; 35RT 12281.) Appellant's mother expressed that this was a tragedy for both the McDade family and her family. (35RT 12289.)

Appellant's relatives emphasized that appellant would not have acted unless others had pushed him into it. (34RT 11955, 12234.) They were frustrated that, although the Hodges had manipulated appellant, appellant was now facing the penalty phase jury alone. (33RT 11956-57; 35RT 12288, 12290.) Appellant would not incriminate the Hodges out of fear of reprisal. (33RT 11957.) Appellant's mother stated that the family had to speak for appellant, who could not speak for himself because of fear of the Hodges. (35RT 12290-91.)

Appellant's mother and Lawrence expressed that they were a caring family and did not want to see appellant put to death. (34RT 12240, 12243-45; 35RT 12289-90.) When appellant visited his mother in Los Angeles after the crimes, the family insisted that he return to Sacramento and turn himself in to

do the right thing. (34RT 12240-42.) Lawrence thought that appellant could do well in prison because he would be able to follow the rules. (34RT 12243.)

2. Gang Expert

Reverend Robert E. Lee, an ordained minister for the Ministry Against Drugs and Violence, testified as a gang expert for the defense. (33RT 11855, 11869.) Reverend Lee, who was a consultant and drug counselor at juvenile hall, gave workshops and spoke to students at different schools about drugs and gangs. (33RT 11865, 11868, 1877-80.) In his youth, the reverend was a gang member in south-central Los Angeles, was addicted to crack cocaine and sold drugs. (33RT 11856-57, 11861.) He had felony convictions for drug possession and possession for sale. (33RT 11861, 11915-16.) In 1987, he turned his life around, quit drugs, and started using his past to try to help others build a future. (33RT 11862-63, 11868.)

Reverend Lee first defined gang terminology. A "buster" is someone uncommitted to the gang. (33RT 11874.) "What's up cuz," if said to a Crip, means how are you doing? If it is said to a Blood, it is a challenge. (33RT 11899.)

The reverend then described gang hierarchy. "Street soldiers" are the "gang-bangers," the people who put in the work; they do the drive-bys and shoot at rival gangs. (33RT 11875.) "Shot-callers" are the men who possess and distribute drugs and have younger gang members working for them. (33RT 1175-76.) "Wannabes" are kids who hang out with gang members, have no criminal record, and would like to join the gang. (33RT 11876.) To become a "main player," i.e., to rise high in a gang, a gang member must

commit crimes to gain respect. (33RT 11877.)

According to Reverend Lee, if a young gangster is sharp and creative, he can work his way up the ranks, but if he is not, older gang members will use him. (33RT 11881.) For example, if a higher echelon gangster had a problem with someone, the gangster would put a pistol in a youngster's hand and have the youngster take care of it. (*Ibid.*) A shot caller will not himself take chances but will manipulate the weaker and younger gang members to do so. (33RT 11882.) Gangsters with low I.Q.s achieve a certain level and never go any higher, just like in any other business. (*Ibid.*) Those toward the top of the gang's ranks have seniority – they are chronologically older and have spent more time in the gang than other members. (33RT 11920-21.)

Reverend Lee testified that it would be highly unusual for a Crip and Blood to associate in Sacramento unless they were family members. (33RT 11885.) When asked hypothetically if it would be unusual for a sophisticated Blood to associate with a younger Crip, who has an I.Q. of 77, the reverend responded that, based on his experience, the Blood would have an ulterior motive. He might want to "play" (use, take advantage of, manipulate) the younger person. (33RT 11886-87.) The reverend explained that if a youngster looked up to a more sophisticated member of another gang, the more sophisticated gangster might well play the youngster to do a crime for him and "front off" the youngster. (33RT 11888-89.) To "front someone off" means to put that person between oneself and the police. (33RT 11889.) The older, more sophisticated gangster could do this, for example, by staying in the car in the alley and letting the youngster do the dirty work. (*Ibid.*)

Moreover, the older gangster would "prime" the youngster not to give him up if arrested. (33RT 11889-90.) Talking would put the lives of the youngster and his family at risk. (33RT 11890-92.) It is especially dangerous for someone who is considered a "rat" or "snitch" to go to prison because he will be subject to sexual assault and assassination there. (33RT 11890-91.) If a gang member is arrested after being played, it is safer for him to take the blame than become a "snitch." (33RT 11891.)

Reverend Lee acknowledged that more sophisticated members of an opposite gang could influence and use a youngster to commit an act he would not normally do. (33RT 11895-96.) The youngster would know that he was being used but would have no choice. (*Ibid.*)

The reverend testified that kids become involved in gangs for love, companionship, and acceptance. (33RT 11897.) Ghetto kids do it because they see their siblings, classmates and parents do it. (33RT 11898-99.) Reverend Lee opined that a young Black man growing up in the ghetto without a father at home is basically destined to become a gang member; the only ones who escape the lure of gangs are those who have a powerful adult involved in their lives who pulls them in a different direction. (33RT 11908-10.)

The reverend did not know appellant or the Hodges. (33RT 11918-19.) He based his testimony on his 25 years of experience as a gangster and on hypotheticals provided by defense counsel. (33RT 11912, 11915.)

3. Mental Health Expert

Dr. Larry M. Nicholas, a psychologist who had worked from 1983 to

1990 with California Youth Authority inmates, testified that he was retained by the defense to evaluate appellant. (34RT 11995, 11997-98.) Dr. Nicholas reviewed police reports and background information including some school records and family/friends interviews, interviewed appellant for two to three hours, and then administered intelligence and psychological testing. (34RT 11999-12000, 12065.) His interviews and testing occurred on May 13, 20, and 27, 1994. (34RT 11999.) Appellant was cooperative and did not try to "flunk" the intelligence testing. (34RT 12010-11.) Dr. Nicholas would have been able to detect such an effort. (34RT 12011.)

Dr. Nicholas gave appellant the WAIS-R (Weschsler adult intelligence scale, revised); appellant's verbal I.Q. is 77, his performance I.Q. is 76, and his full-scale I.Q. is 75.[34] (34RT 12002, 12006.) Appellant's overall I.Q. score falls a little below the fourth percentile; his intellectual abilities are above 4% but below 96% of the population in this country. (34RT 12007.) Appellant's intelligence scores are in the borderline mentally retarded range, meaning that he is not mentally retarded, but is not too far above that; he is in the mild mentally retarded range. (34RT 12032.) Appellant is not someone who is capable of abstract thinking or complex or advanced planning. Appellant would tend to live his life on a moment-to-moment basis. (*Ibid.*)

---

[34] Dr. Nicholas agreed that in testing an individual's intelligence by administering the WAIS-R, he does not consider the individual's background. (34RT 12066-67.) The doctor explained that education or training might cause an individual to score higher, but not much higher. Education might affect the verbal I.Q. score, but could only minimally, if at all, affect the performance I.Q. score. (34RT 12069-70.) Dr. Nicholas noted that this test measures the level at which an individual is functioning, not the individual's potential. (34RT 12067-68.)

Dr. Nicholas also administered the MMPI, a personality inventory which detects the presence or absence of psychosis and personality disorders. (34RT 12021-23.) Dr. Nicholas determined that appellant's reading ability was not adequate for him to read the MMPI test questions so the doctor read most of the questions to him to ensure appellant's understanding. (34RT 12008-10.) The MMPI requires a minimum sixth-grade reading level and Dr. Nicholas concluded that appellant reads at a third or possibly fourth-grade level, fifth-grade level at best.[35] (34RT 12008-09, 12018.) By and large, the MMPI questions are not tricky; the test contains a wide variety of questions, such as "I would like to be a florist." (34RT 12009.)

Dr. Nicholas discussed appellant's performance on one of the WAIS-R's sub-tests, which tests knowledge of general information. (34RT 12012.) Because the first four questions on that test are very basic and considered so easy, the testing normally starts with question number five. (*Ibid.*) If an individual fails the first four questions, that is the end of the test. (34RT 12013.) Appellant correctly answered the first two questions: he knew the colors in the American flag and what a thermometer measures. (*Ibid.*) However, he missed the next five questions in a row[36] and that concluded that sub-test. (34RT 12015-16.)

---

[35] During his police interview, appellant admitted that, although he could understand English "pretty good," he had difficulty with reading. (30CCT 8974.)

[36] Appellant failed the question "in which direction does the sun rise?" He also could not name four presidents since 1950 and did not know the number of weeks in a year. (34RT 12014-15.)

On the vocabulary test, appellant missed two, answered one correctly, and then missed five in a row, which concluded that sub-test. (34RT 12017.) Appellant did not know the following words: fabric, commence, domestic, ponder, designate, consume. (34RT 12016-17.) He defined "conceal" as "to close" and "regulate" as "make something regular." (34RT 12016.) Appellant thought that "tranquil" meant "control." (34RT 12017.)

Dr. Nicholas noted that because of his street talk and knowledge, appellant might, on a first superficial glance, appear rather normal in terms of his intellectual abilities. (34RT 12053-54.) He has a fairly average memory which aids in that deceptive appearance. (34RT 12054-55.) Recognition of appellant's inability to think abstractly and lack of knowledge and understanding requires more than superficial contact. (34RT 12053-54.) Dr. Nicholas opined that appellant would not be able to compensate for his intellectual deficiencies. (34RT 12056-57.)

Dr. Nicholas found no conflict between his intelligence testing results and Colleen McDade's testimony that appellant was able to follow the KFC manual's 10-step process to cook chicken. (34RT 12076.) In his opinion, working in a fast-food restaurant is not the kind of occupation that requires a high I.Q. (*Ibid.*) Individuals, with varying types of disabilities, including mental disabilities, are able to work in such environments. (*Ibid.*) Dr. Nicholas disagreed that it was more difficult to follow several recipes to cook food than to make change. Once an individual learns to follow the recipes, the routine becomes automatic, whereas making change requires some degree of thought process. (34RT 12077.)

As for the MMPI result, Dr. Nicholas saw nothing that would suggest psychosis. (34RT 12022-23.) Appellant's highest score was on the paranoid scale, indicating that appellant feels the world is out to get him, people should be distrusted, and he has to watch his back at all times. (34RT 12027.) Given his high score on that scale, appellant would probably misinterpret most situations to think he is personally threatened.[37] (34RT 12027-28.) Appellant's next highest score was on the schizophrenia scale. (34RT 12029.) This scale can be elevated when someone is experiencing much severe situational stress, such as incarceration in the county jail. (*Ibid.*) The elevation of this scale also supports the level of paranoia explained by Dr. Nicholas. This is a chronic and fairly severe level of paranoia for appellant; it is not just that he is suspicious, but that he would misinterpret reality under most circumstances. (*Ibid.*)

Appellant also scored high on the anxiety scale, indicating significant concerns, worries, and anxiety, and on the introversion/extroversion scale, indicating that he is a significantly introverted person. (34RT 12030.) Appellant is not comfortable in social situations and prefers to be a loner, but tends to cover his isolation by being a bit gregarious at times. (*Ibid.*) Dr. Nicholas' evaluation also revealed that appellant was criminally oriented and lacked remorse for the crime. (34RT 12106, 12113-14.)

---

[37] Dr. Nicholas agreed that in a restricted setting like a jail, appellant might become more stressed and paranoid to the point of requiring medication, but disagreed that he would necessarily become more dangerous. (34RT 12106, 12131-32.)

Based on appellant's description of his life, Dr. Nicholas described him as street-wise ("criminally sophisticated") and noted that appellant had ingrained antisocial traits.[38] (34RT 12110-11.) Appellant was born and raised in a Los Angeles community ruled by gangs and had himself probably been in a gang since age 10 or 12. (34RT 12088-89, 12097.) Dr. Nicholas explained that growing up in that area of Los Angeles and being pursued and influenced by gang members and activity would cause a person to become antisocial or criminally oriented by the age of 16, 17, or 18. (34RT 12126.) In Los Angeles, appellant was probably manipulated by more sophisticated gang members to engage in violent acts. (34 12115, 12125-26, 12129.)

According to Dr. Nicholas, appellant was a member of the Hoover Crips in Los Angeles. (34RT 12088-89.) When appellant, at age 16, moved to Sacramento, he continued his affiliation with the Crip gang, but it was a different Crip gang. (34RT 12099.) Because he was from a Los Angeles Crip neighborhood, appellant automatically had some degree of notoriety and respect in the Sacramento Crip neighborhood that he did not deserve. (34RT 12099-12100, 12127-28.) Appellant would have enjoyed this notoriety very much – suddenly he was something. (34RT 12128.) Appellant would have to find a way to live up to that respect and reputation. (*Ibid.*) As explained by

---

[38] The doctor disagreed that this rendered appellant less susceptible to manipulation by others. (34RT 12111-13.) Dr. Nicholas explained that these (exposure to the streets and susceptibility to manipulation) were two distinct issues: appellant could be street-wise and also be easily manipulated by more devious and intelligent individuals due to his need to seek approval and acceptance from individuals he respected. (34RT 12112-13.) Furthermore, appellant's capacity to be criminally sophisticated is limited by his intellectual abilities. (34RT 12113.)

Dr. Nicholas, whereas appellant might have commanded respect at first, after a period of time, other gang members would see that appellant, as a result of his low intelligence, could not assume a leadership role. (34RT 12101.) Appellant's attempts to try to maintain that respect would result in engaging in more fights.[39] (*Ibid.*)

According to Dr. Nicholas, appellant would almost certainly gravitate to a follower position, rather than leader, in a group of more than a few people, because his intellectual abilities and capacity for thinking would be at the bottom of the group. (34RT 12033.) An adolescent group, however, might look up to appellant, as he would be older. (*Ibid.*)

Dr. Nicholas also explained that because of his I.Q. and high need for approval, appellant would be susceptible to manipulation by older individuals whose approval he sought. (34RT 12083, 12114.) Dr. Nicholas noted that an individual like appellant with a low I.Q. is often much more susceptible to manipulation, but agreed that is not always the case. (34RT 12071.) The doctor disagreed, however, that a loner, such as appellant, is an independent kind of person who would not be subject to manipulation. (34RT 12071-72.) To say that appellant is a loner is simply to say that his tendency is to be introverted: his way of recharging himself is to be alone. (34RT 12072.) But both introverted and extroverted people might have a high or low need for approval by others. (*Ibid.*)

---

[39] In regards to the Hernandez bike theft, appellant told Nicholas that he was the one who hit Hernandez on his head. (34RT 12086.)

From his work at the Youth Authority, Dr. Nicholas had a fairly good working knowledge of gangs.[40] (34RT 12036-37.) According to Dr. Nicholas, individuals gravitate to gangs, because they do not have any kind of structure in which they command respect; gang membership is a family replacement. (34RT 12038.)

Dr. Nicholas explained that gangs have their own rules and if an individual is torn between gang rules and society's rules, he will normally choose gang rules. (34RT 12038-39.) That would be a very strong, compelling force, which would be true even when it comes to the commission of criminal acts. (34RT 12039.) Dr. Nicholas opined that a person like appellant, who has very low intelligence as well as a need to please and be accepted by other people, and who is not yet a full-fledged main player, would be influenced by someone who is bigger, stronger, older, and who has been in gangs for a longer time and may be more criminally oriented or antisocial. (34RT 12040.) The doctor explained that such influence would be particularly attractive to an individual like appellant, whose home life was not really secure and was not working out. (34RT 12041.)

Dr. Nicholas opined that the influence of such an older, more sophisticated gang member in this situation could propel appellant to commit a very serious criminal act, one that he was not prepared to do and would not do on his own. (34RT 12041, 12046.) Given the hypothetical that appellant was standing at the victim's car talking to him about getting his job back; the two older, more criminally sophisticated brothers went to appellant and gave him a

---

[40] Dr. Nicholas received training in gangs while he worked there and counseled gang members. (34RT 12037.)

gun; and then the larger, over-300-pound brother told him to "whack the motherfucker," Dr. Nicholas agreed that would be the type of situation where appellant might do something he would not normally do. (34RT 12042-44.) Eric Banks' testimony that John Hodges was known to manipulate young people and referred to appellant as a youngster who was easy to manipulate, reinforced the doctor's opinion that appellant could be manipulated and pushed to do something he would not ordinarily do. (34RT 12047-48.) Dr. Nicholas opined that an older individual like John Hodges, who was in his thirties and had been to prison, would be able to push appellant to do something he would not want to do, assuming appellant wanted acceptance or approval by that individual. (34RT 12046-47.)

Dr. Nicholas also opined that appellant could be intimidated not to testify at trial. (34RT 12041-42.) He explained that most gang members would think about the repercussions of "snitching" on anyone. (34RT 12050.) Once an individual testifies against another, his reputation as a "snitch" follows him everywhere – into CYA and the CDC. (*Ibid.*) Dr. Nicholas saw examples of the consequences that occur when a gang member, who did not follow gang rules, entered the CYA. (34RT 12052.) The doctor noted that an individual entering the CDC would be even more vulnerable to gang consequences, because the level of supervision of inmates is much lower in state prison than in the Youth Authority and gangs are more highly developed and ingrained in the CDC. (34RT 12052-53.)

4. <u>Jail Officers</u>

Sacramento County Sheriff Officer Scott Jones testified to his

knowledge and observations of appellant during his pre-trial incarceration at the Sacramento County Jail since his arrest in 1992. Appellant was an inmate worker, similar to a trustee, who takes care of the needs of the inmates in his pod and acts as a liaison. (34RT 12161-62.) Inmate workers serve the meals, deliver toiletries, relay messages from inmates to officers, and direct and assist in clean-up duties. (34RT 12175.) In return, they receive certain privileges, such as being allowed out of their cells, more food, extra linen and clothing in their cells, longer visits and better access to recreation activities. (34RT 1275-76.) Only six out of a hundred inmates are selected for this job; they are considered the "cream of the crop." (34RT 12170.) Jones looks for someone who can follow instructions and is trustworthy and non-combative. (34RT 12163-64.) Appellant meets those requirements and carries out his responsibilities without any problem or delay.[41] (34RT 12164, 12169.) To Officer Jones' knowledge, appellant had never been involved in any violence in jail; such acts would result in immediate loss of his trustee position. (34RT 12164.) Appellant had received very few complaints about his work which, according to Officer Jones, was "pretty rare" because "[u]sually you make some enemies." (34RT 12168-69.)

Another county jail officer, Sacramento County Deputy Sheriff Stephen Dickerson, testified similarly. Dickerson had voted in favor of appellant's selection as an inmate worker and had seen appellant work in that capacity for around one year. (34RT 2181-82.) Appellant did his work as told and was

---

[41] To Jones and Dickerson, appellant appeared of average or slightly above average intelligence; he did not exhibit signs of borderline retardation. (34RT 12174, 12194.)

reliable and well institutionalized -- capable of following directions and going along with the program at the jail. (34RT 12183, 12186- 87, 12193.)

C. PROSECUTION REBUTTAL

The People introduced People's Exhibit P-3, a photograph depicting appellant and Akens holding guns, and played a videotape (People's Exhibit P-4), news footage of appellant, with Detectives Thurston and Lee, at the time of his arrest on January 27, 1992. (35RT 12325-30, 12429-30.) It was stipulated that appellant and Akens were making Crip gang signs in the picture. (35RT 12429.)

ARGUMENT

GLOBAL ISSUES

I.

THE JUDGMENT MUST BE REVERSED BECAUSE THE PROSECUTOR PROMISED THE JURY IN HIS OPENING STATEMENT THAT APPELLANT WOULD TESTIFY HE DID NOT ROB MCDADE AND KILLED HIM ONLY UNDER DURESS FROM THE HODGES BROTHERS, BUT APPELLANT ULTIMATELY EXERCISED HIS RIGHT TO REMAIN SILENT.

A. Introduction

Defense counsel chose to present as a defense to the robbery and first-degree murder charges and accompanying robbery felony-murder special circumstance that appellant acted under duress from the Hodges brothers. Counsel desired that appellant testify in support of the defense and took the highly unusual step of making him available to the prosecution as a witness without any consideration in return. There was no guarantee appellant would actually testify. A criminal defendant has an absolute constitutional right to either take the stand or remain silent, even if the defendant's decision is against his attorney's wishes. Although counsel's representations that appellant would testify sounded firm, they were invariably accompanied by the disclaimer that there was no way to ensure he would do so. The trial court and all parties clearly understood that whether appellant would testify or remain silent remained uncertain until appellant actually took the stand or the trial ended.

This uncertainty loomed over the entire guilt phase. Due to it, appellant and the Hodges were tried by dual juries to protect the Hodges brother's *Aranda-Bruton* rights.[42] The uncertainty also affected jury selection, opening statements, the order and substance of witness testimony and evidence, jury instructions, closing arguments and, ultimately, the trial court's rulings on mistrial motions brought by all defendants at the end of the guilt phase.

With the one critical exception of the prosecutor's opening statement, the court and parties proceeded cautiously on the assumption that appellant would not testify since, again, there was no way to know for certain what he would do until he either took the stand or the trial ended. The prosecutor's opening statement deviated from this cautious framework. Desiring to improve a shaky case against the Hodges based on the testimony of Eric Banks and Darryl Leisey, both of whom had serious credibility problems, and operating under counsel's assurance that appellant would testify for the state, the prosecutor decided to use appellant's testimony in his case-in-chief. He reasoned that that appellant's being subject to confrontation and cross-examination by his codefendants eliminated their *Aranda-Bruton* objection to the admission of appellant's extrajudicial statement to detective Lee, which substantially incriminated them. As to appellant, the prosecutor maintained

---

[42] Under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123, introduction of a non-testifying defendant's extrajudicial statement powerfully incriminating a codefendant violates the codefendant's Sixth Amendment right of confrontation and cross examination. (*People v. Fletcher* (1996) 13 Cal.4th 451, 460-461; see also *id.* at p. 465 [*Aranda,* to the extent it requires exclusion of evidence beyond *Bruton,* was abrogated by Prop. 8 (Cal. Const., art. I, § 28)].) If the declarant-defendant testifies, and is thus subject to confrontation and cross examination, admission of his extrajudicial statement is constitutionally permissible. (*People v.*

that appellant's anticipated testimony about duress was false and appellant was still guilty of capital murder based largely on his statement to Lee. The prosecutor boldly told both juries in his opening statement that appellant would testify that he did not rob McDade, and he killed him only under duress from the Hodges. Additionally, the prosecutor read verbatim appellant's statement to Lee. The prosecutor made these references well aware that he risked a mistrial if appellant remained silent.

Appellant did not testify for either the prosecution or the defense. The Hodges successfully moved for a mistrial. The trial court granted it because the prosecutor's opening statement had exposed their jury to appellant's incriminating testimony, which was never produced, and appellant's incriminating extrajudicial statement, which was inadmissible against the Hodges under *Aranda-Bruton.*

Appellant also moved for a mistrial. He argued that the prosecutor's opening statement detailing his anticipated testimony, coupled with his exercise of his privilege against self-incrimination, was equivalent to adverse prosecutorial comment on appellant's exercise of his right to remain silent. The prosecutor's opening statement had drawn the jurors' attention to appellant's invocation of his right to silence in a way that was sure to cause the jurors to hold it against him. The trial court denied appellant's mistrial motion. This was error.

The prosecutor's comments not only set up an expectation that appellant would testify, but that he would testify to highly significant and dramatic

---

Coffman and Marlow (2004) 34 Cal.4th 1, 43.)

circumstances that were a complete defense to the capital charges. When that testimony never materialized, appellant's jurors were left with the devastating impression that appellant's claim of killing under duress and lack of involvement in the robbery was a sham. This impermissibly burdened appellant's exercise of his privilege against self-incrimination. Appellant's anticipated testimony was closely related to the mental state defense appellant ultimately presented at the guilt phase, and it bore directly on his efforts to raise lingering doubt in mitigation at the penalty phase. The damaging extraneous consideration that the prosecutor's broken promise invited severely undermined appellant's defense as to both guilt and penalty and resulted in a fundamentally unfair trial. Consequently, the judgment must be reversed in its entirety.

B. Factual Summary

1. The Trial Court Employed Dual Juries To Protect the Hodges' *Aranda-Bruton* Rights.

Pretrial, the prosecutor indicated his intention to introduce appellant's extrajudicial statement to detective Lee strongly incriminating the Hodges brothers. (2CCT 440-450.) Terry Hodges sought severance under *Aranda-Bruton.* (1RT 80-81; 2CCT 433-451.) Because appellant's statement could not be effectively redacted (1RT 82, 84), the trial court ordered appellant and the Hodges brothers to be tried by dual juries – one for appellant and one for the Hodges. (5RT 2175; see generally, Argument III, *post,* [challenging dual jury procedure]).

The decision to use dual juries was premised on the assumption that

appellant would not testify and be subject to confrontation and cross-examination. (2RT 1103-1104, 4RT 1785-1786, 1788, 5RT 1915-1916, 14RT 5914, 5932-5933; see *People v. Coffman, supra,* 34 Cal.4th 1, 43 [when declarant-defendant testifies, introduction of his extrajudicial statement incriminating a codefendant does not violate the 6th Amend.].) Use of dual juries allowed the Hodges jury to be excused when the prosecution presented appellant's statements.[43] (4RT 1785.) It thus avoided the risk, noted by the trial court, that a mistrial would be mandatory if the prosecutor presented appellant's extrajudicial statements incriminating the Hodges at a trial of all three defendant before a single jury but appellant ultimately remained silent. (4RT 1788.)

2. Appellant's Attorney Announced that Appellant Would Testify for the Prosecution that He Did Not Participate in the Robbery and Killed under Duress from the Hodges.

The trial court adopted the cautious multiple jury procedure although it knew that appellant's attorney, Ron Castro, had clearly stated at a pretrial conference that appellant would testify at his directive as a witness for the prosecution. (See 2RT 1018-1023 [Castro's representations at 4/18/94 pretrial conference]; 5RT 2175 [5/16/94 ruling adopting dual juries].) Castro explained that the evidence would show that appellant was coerced by the Hodges into shooting McDade. (2RT 1018.) According to Castro, appellant was willing to "testify ... when I tell him to ... for the District Attorney if it makes ... sure that the Hodges brothers don't get away." (2RT 1019; see also

---

[43] The prosecutor offered appellant's extrajudicial statements against appellant under the hearsay exception for party admissions. (15RT 6265-6266; Evid. Code, § 1220.)

14RT 5953-5956 [subsequently, at a 7/6/94 hearing, Castro stated that he has approached the prosecutor about using appellant's testimony].)[44] Castro's representation sounded "firm." (2RT 1023.)

3. Everyone Recognized That It Was Impossible to Guarantee That Appellant Would Testify.

Despite the firmness of Castro's representations, the trial court and parties all agreed that there was no way to guarantee that appellant would testify. (2RT 1021-1022, 1104, 14RT 5911, 5938.)

Appellant's *Keenan* counsel,[45] Brad Holmes, emphasized the point although it was at odds with Castro's assurances. (2RT 1022, 14RT 5934.) Holmes said, "that's [appellant's] final decision at any time. He couldn't give you a guarantee." (2RT 1022.) The trial court was doubtful that appellant would cooperate with the prosecutor who was "seeking to put him in the gas chambers...." (*Ibid.*) It stated, "I don't feel that any of us should operate with an understanding that something is guaranteed, as far as who is going to waive their privilege against self-incrimination and who's going to testify.... I think we need to assess the case, apart from what you would hope and expect out of one of the defendants...." (*Ibid.*) Even Castro had to ultimately acknowledge that, "in the arena of human affairs," there was no "ironclad guarantee" that appellant would testify. (4RT 1787; see also 1788.)

---

[44] Subsequently, John Hodges' counsel characterized Castro's representations that appellant would testify as a means of pressuring appellant into taking the stand. (29RT 10604; 29CCT 8486.)

[45] See *Keenan v. Superior Court* (1982) 31 Cal.3d 424.

Whether appellant testified stood to substantially impact if and how a dual jury trial was conducted. (2RT 1101-1104.) To eliminate the uncertainty, the court suggested the possibility of appellant undergoing a conditional examination. (2RT 1105 et seq.) Defense counsel and the prosecutor were open to the idea. (2RT 1106.) As counsel observed, a conditional examination would "lock in" appellant's version of events. (2RT 1107-1108.) Because the Hodges brothers opposed it (2RT 1109-1110, 1186-1187), the idea was abandoned. (2RT 1186-1187; see Pen. Code, § 1335 [prohibiting the procedure in a capital case].)

4. The Prosecutor Knew He Risked Mistrial If He Referenced Appellant's Anticipated Testimony in His Opening Statement But Appellant Chose to Remain Silent.

The prosecutor knew that he risked mistrials if he made a strategic decision to outline appellant's anticipated testimony and/or extrajudicial statements in his opening statement and appellant ultimately remained silent. Consequently, the prosecutor put careful thought into how to structure his opening statement. (14RT 5905, 5909.)

Notably, Castro warned the prosecutor that he should craft his opening statement "to protect himself" from a mistrial if appellant decided not to testify. (4RT 1788.) Holmes also emphasized that if the prosecutor outlined to both juries appellant's anticipated testimony but appellant remained silent, the prosecutor would have set himself up "for a couple of mistrials." (14RT 5934.)

James Sherriff, counsel for Terry Hodges, argued that if the prosecutor referenced appellant's anticipated testimony in his opening statement, "the

prejudice is obvious and overwhelming" and it would be an "obvious mistrial...." (14RT 5938.) Julian Macias, counsel for John Hodges, argued that the prosecutor's referencing appellant's anticipated testimony was "contrary to the notion of dual juries because the risk then becomes so great that we would have a mistrial" due to "*Griffin* error or ... *Aranda* error." (14RT 5949, italics added.)

The trial court often voiced similar sentiments. (E.g., 4RT 1788, 14RT 5912, 5934, 5947-5948.) For example, the court and Holmes engaged in the following exchange (14RT 5934-5935):

> MR. HOLMES: ... The thing we have to remember here is Mr. Powell himself is the one that that is in control up to the very last minute if he wants to get on the stand or not.
>
> And I think where somebody is setting themselves up for a couple of mistrials here if he in fact doesn't testify. He's already got up and told both juries what he's going to say.
>
> THE COURT: Well, that's what I've already I thought indicated. ... [¶] The prosecutor runs a risk that – if he gets up and in front of the juries – both juries he details what Carl Powell's going to say and Carl Powell doesn't take the stand --
>
> MR. HOLMES: Right.
>
> THE COURT: -- when it comes time to do so or at any time before the D.A. rests his case, then we have that dilemma.

5. <u>The Prosecutor Decided to Outline Appellant's Expected Testimony in His Opening Statement Because He Intended To Use Appellant as a Witness in His Case-in-Chief</u>.

On July 6, 1994, the Hodges brothers moved on due process grounds to

prohibit the prosecutor from representing that appellant would testify. (14RT 5938, 5950-5953, 5966.) They argued that, despite Castro's assurances, appellant could still invoke his right to silence. (*Ibid.*) Macias contended that "there is such an unknown element in this case that it is a violation of due process" to proceed with the uncertainty. (14RT 5966.)

The court ruled that the prosecutor could mention appellant's anticipated testimony in his opening statement. (14RT 5950.) It acknowledged that mistrials might be merited if the evidence did not unfold as described. (14RT 5965.) The determination would have to wait until the conclusion of appellant's defense case because the prejudice from the prosecutor's unfulfilled promise could be mitigated if appellant testified in his own case. (14RT 5948.) To reduce the chance of a mistrial due to *Aranda-Bruton* error, the trial court ruled that both juries would hear all opening statements except that the Hodges jury would be excused when anyone referenced appellant's extrajudicial statements. (14RT 5950, 5965, 5975-5976.)

On July 8, 1994, Castro outlined appellant's anticipated testimony to the prosecutor. (15RT 6267; 29CCT 8486 [John Hodges's Motion in Limine – Objection to Prosecution Order of Proof & Aranda Bruton Violation].) Soon after, the prosecutor provided a summary of the discussion in discovery to the Hodges brothers.[46] (*Ibid.*)

---

[46] The trial court ordered disclosure to the Hodges of any agreement between the state and appellant concerning appellant's testifying, including any consideration given by the state to appellant. (14RT 5962.) The record does not indicate that the prosecutor offered appellant any consideration in exchange for his testimony.

On July 11, 1994, the prosecutor announced that appellant would testify. (14RT 6095.) Given that this eliminated any *Aranda-Bruton* concerns posed by introduction of appellant's extrajudicial statements, the prosecutor sought clarification about what he could say in opening statement. (*Ibid.*)

The court and parties addressed the issue on July 12, 1994. (14RT 6108, 15RT 6263 et seq.) According to the prosecutor, Castro had assured him "several times" that appellant would testify for the state. (15RT 6266.) Because the prosecutor anticipated calling appellant in his case-in-chief, the trial court ruled that he could reference appellant's expected testimony and extrajudicial statements in his opening statement. (15RT 6266, 6270-6271, 6280-6281.) As noted, the court had ruled previously that opening statements would be presented before both juries. (14RT 5950, 5965, 5975-5976.)

Again, the Hodges brothers objected on the ground that Castro's assurances were inadequate to support a good faith belief that appellant would testify. (15RT 6267-6268, 6272.) Sherriff argued that because "no counsel ... in the universe can ... know that a defendant ... is going to testify," the prosecutor "should not be allowed to build in error." (15RT 6272.) Voicing the same sentiment, Macias contended that the trial court should preclude the prosecutor from mentioning appellant's anticipated testimony unless it first obtained appellant's *personal* assurance that he planned to testify. (15RT 6267-6268.) The trial court declined to question appellant personally. (15RT 6268.) Instead, it explained to him that "the decision about testifying or not testifying is yours and yours alone," and it informed him that he had a constitutional right to testify or not testify regardless of his counsel's wishes.

(15RT 6269.)

6. Well Aware that He Risked Mistrial, The Prosecutor Told the Jurors in Opening Statement that Appellant Would Testify.

Later that morning, the prosecutor began giving his opening statement. (15RT 6304.) When the jurors departed for lunch recess, the prosecutor informed the court and parties that a plea bargain offer he had extended to the Hodges brothers would remain open only until 1:30 p.m. (15RT 6229-6330.) At that time, continued the prosecutor, he would resume his opening statement and would risk a potential mistrial by detailing appellant's anticipated testimony. (*Ibid.*) The prosecutor explained that "[i]n case the Hodges brothers plead guilty," he wanted them to do so before he risked a mistrial. (*Ibid.*) The Hodges brothers did not accept the offer, and the prosecutor resumed his opening statement after lunch. (15RT 6337-6338.)

The prosecutor told both juries "in this case it is my understanding that Carl Powell will testify" (15RT 6343) and summarized appellant's expected testimony. (15RT 6343-6346). According to the prosecutor, appellant would testify that, as McDade was leaving KFC, appellant went up to him, unarmed, to discuss getting his job back. (15RT 6344.) After 10 to 15 minutes, Terry and John Hodges walked up and talked about robbing McDade. (*Ibid.*) John had a derringer and Terry had a short shotgun. (15RT 6344-6345.) Then (*ibid.*),

> John had his derringer out. Terry reached into the car and got the money. Or Keith handed him the money. ... [¶] John handed Carl his gun. Carl Powell could tell there was only one round in it based on its weight. Carl started to point the gun at

John. Terry drew down on Carl with a shotgun. Terry said, "Don't even think about it." Carl knew he had only one bullet.

John put the derringer to Carl's chest, said, "We ain't leaving no witnesses." Carl said there was nothing he could do; Carl pointed the gun at Keith and pulled the trigger.

The prosecutor also read verbatim appellant's statement to Lee. (15RT 6346-6410.) In it, appellant gave three accounts of the killing: (1) appellant sat in the car and did not participate in the robbery or killing, which were committed by the Hodges (15RT 6349-6358); (2) appellant took McDade's money and shot McDade accidentally (15RT 6374-6378); and (3) appellant took McDade's money and, although he did not want McDade dead, deliberately shot him because appellant felt pressured and scared and the Hodges wanted McDade killed. (15RT 6380-6381, 6394, 6398). When recounting the last scenario, appellant said that appellant was the one with the gun because the Hodges wanted "everything to be on me." (15RT 6395.)

Additionally, the prosecutor also outlined in his opening statements other extrajudicial statements by appellant incriminating the Hodges brothers, i.e., appellant's statements to James Vale (15RT 6323-6325), Angela Littlejohn (15RT 6325-6328), and Tony Scott (15RT 6339).

7. The Prosecution Presented Its Case Without Appellant's Testimony Over The Hodges' Numerous Objections.

The prosecution presented evidence in its case-in-chief from July 13, 1994, to August 22, 1994. (2CT 451-452, 518-519.) As its case progressed without appellant's testimony, the Hodges repeatedly pressed for appellant to

testify. When he continued to remain silent, they made multiple motions seeking redress for the prosecutor's having detailed appellant's testimony and extrajudicial statements in his opening statement.

On July 14, 1994, the second day of evidence presentation, Jesse Morris, co-counsel for John Hodges, informed the court that the Hodges "have a serious belief that Carl Powell will not testify based on certain statements that are made during the course of transporting ... Carl Powell." (16RT 6667.) These statements indicated a "conflict" within appellant's defense team which could have a "serious impact" on the trial. (*Ibid.*) Morris moved that the court "require [appellant] to testify immediately" to preclude the Hodges jury from shuffling in and out of the courtroom when the state presented appellant's extrajudicial statements incriminating the Hodges. (16RT 6666-6667.) In the alternative, Morris sought an order preventing the prosecutor from presenting such statements until after appellant testified. (16RT 6666-6669.) The trial court rejected both requests. (16RT 6669, 6671.)

The Hodges raised the matter again on July 15, July 18, and July 21, 1994. Macias, arguing for John Hodges, related his understanding that appellant's counsel had told the prosecutor "the status of the situation had changed and that it was no longer a guarantee" that appellant would testify. (17RT 6806.) Further, Macias accused the prosecutor and appellant's counsel of using appellant as a pawn in their efforts to convict John Hodges. (17RT 6807-6808.) Macias stated (17RT 6807):

> I believe that there is an element of collusion in this case between the prosecutor and counsel for Mr. Powell. I believe that Mr. Powell has not at times been fully apprised of the consequences of his decision to testify or not testify, and at which

> stages. I believe that the prosecutor and counsel to Mr. Powell have agreed among themselves, not necessarily to the inclusion of Mr. Powell, that he would testify.

Holmes responded that nothing had changed, and, as everyone knew, there was never a guarantee that appellant would testify. (17RT 6810.) "[A]ll counsel are aware that there's nothing anybody can do. We've tried various methods of guaranteeing" appellant's testimony, such as a conditional exam or some sort of written waiver on the record, but no one could "come up with anything." (*Ibid.*)

The Hodges sought dismissal of the case or an order that the prosecutor present appellant's testimony without further delay. (17RT 6805-6813, 6879, 6944; 29CCT 8485-8494, 20RT 7725-7726.) They accused the prosecutor of misconduct, in violation of due process, for perpetuating a "charade" that appellant would testify when, in fact, the prosecutor lacked a good faith belief appellant would do so. (17RT 6806, 6807, 20RT 7725-7726.) At a minimum, they asked the court to question the prosecutor about whether he still intended to call appellant. (17RT 6832.) The trial court denied these requests. (17RT 6812-6813, 6832, 6879, 6940, 20RT 7726.) It observed that the prosecutor might still present appellant's testimony, so dismissal would be premature. (17RT 6812.)

The trial court ruled, however, that the prosecution must first present evidence other than appellant's statements incriminating the Hodges; those statements could be introduced only after resolution of whether appellant

would testify.[47] (17RT 6941-6942, 20RT 7726-7727; see also 18RT 7315 & 19RT 7434.) It explained that this would prevent the prosecutor from potentially presenting appellant's extrajudicial statements twice, once in front of each jury, and would organize the evidence to assist the court in ruling on any mistrial motion if appellant ultimately remained silent. (*Ibid.*)

On July 27, 1994, the prosecutor candidly admitted, "Mr. Powell does not appear like he's going to testify in my case...." (22RT 8329; see also 29RT 10605.)

By August 3, 1994, about halfway through the state's case, it was clear appellant would not testify for the prosecution. The prosecutor started presenting solely to the Powell jury witnesses who testified to appellant's statements implicating the Hodges's *Aranda-Bruton* rights. On August 3, 1994, the state introduced appellant's statement to detective Lee. (23RT 8860, 8891, 8893-8894.) Subsequently, it presented appellant's statements to Angela Littlejohn (28RT 10383, 10385-10460, 29RT 10499-10501) and his jail phone calls. (28RT 10265-10285).

On August 17, 1994, towards the end of the prosecution's case-in-chief, the Hodges sought relief on the ground that the prosecutor had falsely promised to present appellant's testimony in his opening statement. (29RT 10585, 10600-10606.) Sherriff maintained that the prosecutor had committed misconduct because his opening statement had been in bad faith. (29RT 10600-10601.) The prosecutor, argued Sherriff, "knows that whether or not

---

[47] The prosecutor often found it challenging to schedule witnesses in compliance with this order. (E.g., 18RT 7314-7315, 19RT 7434, 7698-7700, 7701-7703, 21RT 8225-8237.)

Carl Powell testifies is up to Carl Powell, and despite the fact that Mr. Castro may have told him one thing or another, he can't rely on Mr. Castro's statements. Carl Powell decides when and if he testifies." (*Ibid.*) Macias added that, by representing that appellant would testify, the prosecutor had "psychologically pressured" appellant so he was "shoe-horned into taking the stand whether he wants to or not...." (29RT 10605-10606.) Also, Castro thought he could "somehow persuade" appellant to acquiesce to his strategy although appellant held the privilege against self-incrimination. (29RT 10604.) Further, maintained Macias, the prosecutor's opening statement was *Griffin* error because it highlighted appellant's silence and invited jurors to draw adverse inferences based on it. (*Ibid.*) Sherriff complained that the jurors had been tainted by the "specter of Carl Powell testifying" because they had heard all the evidence come in with appellant's anticipated testimony in mind. (29RT 10601.) Once again, the trial court denied the Hodges' motions and commented that ordering mistrial or dismissal would be premature. (29RT 10606.)

The prosecution rested its case on August 22, 1994, without having presented appellant's testimony. (2CT 518; 29RT 10702.)

8. Appellant Did Not Testify in His Defense Case.

Appellant presented his defense case the same day. (2CT 518.) The controversy continued between appellant and his attorneys over whether appellant would testify. Before opening statement, Castro asked for a recess to speak confidentially with appellant about "some decisions" that were "critical to the orderly presentation of the defense." (29RT 10692-10693.) When the

trial court asked why this had not occurred over the preceding weekend, Castro responded that he, Holmes and the defense investigator had each visited appellant during the weekend. (29RT 10692.)

The Hodges made dismissal and mistrial motions. (29RT 10693, 10695, 10697-10698.) Macias argued that it was obvious that appellant did not want to testify, and the pressure put on him by the prosecutor and his counsel to testify against the Hodges violated due process and had turned the trial into a "charade." (*Ibid.*) The court denied the motions as well as Sherriff's request that it advise appellant that whether or not to testify was solely his decision. (29RT 10695-10698.)

The trial court granted the recess Castro had requested. (29RT 10696-10697.) When proceedings resumed, Castro announced that he would waive his opening statement. (29RT 10697.) Appellant presented a brief defense case in which appellant did not testify. (29RT 10702-30RT 10805.) Appellant rested. (30RT 10805, 10816.)

Outside the presence of the juries, the Hodges brothers informed the trial court they intended to rest when their jury returned. (30RT 10809.) The prosecution also indicated it did not have any rebuttal evidence. (30RT 10810.)

9. Mistrial Motions

The trial court told the Hodges that it was inclined to grant them a mistrial due to the prosecutor's detailing in opening statement before the Hodges jury appellant's anticipated testimony and extrajudicial statements.

(30RT 10810-10811.) It cautioned that resting would waive their ability to move for a mistrial and presenting defense evidence would give appellant a chance to still testify. (*Ibid.*)

The court informed appellant that he had to make his final decision about whether or not to testify. (30RT 10811.) Additionally, the court announced that it would require a voluntary, knowing, and intelligent waiver of the right to testify from each defendant. (30RT 10814.) Appellant could not claim later that he failed to testify because he had been "pressured by the co-defendants or my counsel ... or threatened or promised certain things..." or due to fear for his life. (30RT 10812-10813.) The court stated, "I am not going to accept any reasons for not testifying later on, after verdicts or after everyone has rested, especially if I mistry the case against the two Hodges defendants...." (30RT 10812.)

John Hodges, Terry Hodges and appellant all moved for a mistrial. (30RT 10815.)

a. Appellant's Mistrial Motion

Holmes orally argued appellant's mistrial motion on August 22 and August 23, 1994, and submitted written points and authorities in support of it. (30RT 10818-10829, 10834-10838 [argument]; 2CT 521-527 [written motion].)

Holmes argued that a mistrial was required because the jury "heard details of what [appellant] would be testifying to" as a result of the prosecutor's opening statement, but appellant had remained silent. (30RT

10820, 10835-10836.) By detailing that appellant would testify he acted under duress from the Hodges, the prosecutor had, in essence, commented on appellant's decision to remain silent under *Griffin v. California, supra,* 380 U.S. 609. (30RT 10818, 10821; 2CT 523-524.) Although the court would instruct the jury to ignore the prosecutor's opening statement, jurors would still consider the prosecutor's promise of appellant's testimony due to the emphasis placed on it. (30RT 10821.) The "net effect is going to be negative." (*Ibid.*)

The trial court asked why appellant had not invited or waived the error. (30RT 10818-10819, 10822-10823, 10835.) It pointed out that defense counsel initially represented that appellant would testify, and the prosecutor could not have given his opening statement without counsel's having provided him with the substance of appellant's expected testimony. (30RT 10819, 10835.) The court accused the defense of "orchestrating" the error and, now that things did not look good for appellant, seeking the "best of both worlds" by requesting a mistrial. (30RT 10822.)

Holmes replied that there was no reason to object during the prosecutor's opening statement because counsel had wanted and expected appellant to testify. (30RT 10819-10820, 10822-10823, 10835.) He stressed that, despite counsel's views, the prosecutor and everyone else knew there was no way to guarantee that appellant would take the stand. (30RT 10819.) Fully aware of this uncertainty, the prosecutor chose to take the risk of referring to appellant's anticipated testimony in his opening statement. (30RT 10819-10820, 10823, 10835; 2CT 522, 526-527.) When both sides rested without appellant's testimony, the error became ripe for objection. (30RT 10836.) Holmes argued (30RT 10819-10820):

> ...[W]e discussed how we could not make any guarantees [that appellant would testify]. This was strictly my client's right to testify or not to testify. No matter how much advice or lack of advice he got from his counsel, this was still his decision. The D.A. knew this, and I think the D.A. was really taking his chances when he got up and made comments on this when he gave his opening statement.

According to Holmes, although appellant did not testify for the prosecution, counsel still intended to put him on during the defense case. (30RT 10820.) It was "kind of a surprise" to counsel when appellant finally decided to remain silent. (30RT 10820, 10822-10824.) At this point, the situation became "negative to [appellant]," and counsel objected. (30RT 10822.)

The prosecutor opposed appellant's mistrial motion for four reasons: (1) the defense waived the error by failing to object, (2) the defense invited the error by failing to object, (3) appellant was helped, not hurt, by the prosecutor's detailing his duress claim, and (4) opening statement is not evidence. (30RT 10824-10825, 10837.)

The court informed appellant that his opportunity to testify in this trial had passed because appellant's defense had rested. (30RT 10825-10826.) Further, stated the trial court, appellant's decision not to testify should have been based on his "best interest in front of this jury," not any promise anyone might have made that appellant would get a mistrial or succeed on appeal. (30RT 10826.) Additionally, the trial court told appellant that, whatever his reason for remaining silent, "later on, if you're convicted, ... [if] you want a new trial or you want to appeal because somebody either promised you something or threatened you with something, that's not going to be ... a basis

for you to get a new trial, or win an appeal." (30RT 10828.) As to each point, the trial court asked appellant if he understood;[48] appellant replied affirmatively.[49] (30RT 10826-10828.)

The trial court denied appellant's mistrial motion. (30RT 10837.) It found that "the D.A. operated in good faith on the representations that Carl Powell would testify." (*Ibid.*) Consequently, any error was invited and, in any event, could be cured by admonition. (30RT 10838.) Additionally, any error was harmless (1) in light of appellant's properly admitted statement to detective Lee and (2) because appellant's anticipated testimony helped the defense. (*Ibid.*)

b. The Hodges' Mistrial Motions

John Hodges asserted that the prosecutor's opening statement, which had outlined appellant's anticipated testimony in great detail, was "so

---

[48] The trial court questioned appellant in this fashion knowing that counsel for John Hodges had indicated that appellant's decision not to testify had been influenced by "certain statements ... made during the course of transporting of Carl Powell." (16RT 6667.) Appellant and the Hodges brothers were routinely transported to court together. (E.g., 14RT 6081-6082, 6120; 19RT 7423, 7433; 22RT 8577, 8594; see also 16RT 6667.) Previously, the trial court had addressed the possibility that threats by the Hodges might play a role in appellant's decision about whether to testify. (29RT 10635; see also 30RT 10812-10813.)

[49] During this interchange, the trial court also informed appellant that his decision not to testify in the guilt phase did not affect if he could testify in the penalty phase and any penalty phase testimony would go only to penalty. (30RT 10826-10828.) Although appellant said he understood, Holmes expressed doubt about appellant's comprehension. (30RT 10826-10828.) The two conferred and then stated that appellant understood everything discussed

damaging that it's irredeemable," and the only way to ensure a fair trial was to grant a mistrial. (30RT 10829, 10838.) Terry Hodges submitted the matter. (30RT 10830.) The prosecutor replied that opening statements are not evidence and any harm could be cured by appropriate instruction. (30RT 10839.)

The trial court granted the Hodges' mistrial motions. (30RT 10840.) It noted that the prosecutor's description of appellant's expected testimony went beyond any evidence before the Hodges jury in placing the brothers at the scene with firearms and forcing appellant to kill McDade under duress. (*Ibid.*)

10. Jury Instructions

The trial court gave CALJIC No. 1.02, which states in pertinent part that "[s]tatements made by the attorneys during the trial are not evidence." (31RT 11101; 2CT 560.) It also instructed the jury with CALJIC No. 2.60, which provides (31RT 11112; 2CT 586):

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. [¶] You must not draw any inference from the fact that a defendant does not testify. [¶] Further you must neither discuss this matter nor permit it to enter into your deliberations in any way.

Additionally, the court drafted an addendum to CALJIC No. 2.60 (30RT 10927), which it gave to the jury (31RT 11112; 2CT 587):

> You are further instructed that any references in the prosecutor's opening statement concerning the expected content of the testimony of the defendant is to be disregarded and not

---

so far. (30RT 10827-10828.)

> enter into your deliberations in any way. [¶] The fact that the defendant elected to exercise his right not to testify may not in any way be held against the defendant nor affect your verdict.

11. Closing Arguments

In his opening argument, the prosecutor read the addendum to CALJIC No. 2.60 to the jurors and told them that his statements were not evidence. (31RT 11164.)

Castro's closing argument, also discussed in detail in section C.5, below, advanced a defense theory that closely resembled the substance of appellant's promised testimony. Castro argued that appellant was a mentally slow youth, young for his age, who stood in the shadows of others and did not have what it took to commit the violent crimes charged against him. (31RT 11256, 11275, 11293-11295.) He was foolish, full of bravado, talked a lot and let it out that KFC was an "easy lick." (31RT 11275, 11331.) The Hodges brothers decided to use him. (31RT 11272, 11331.) "John and Terry had their plans made, and Carl was drafted as a soldier." (31RT 11331.)

Castro argued that appellant was not guilty of first degree murder based on either robbery felony-murder or murder committed with deliberation and premeditation. (31RT 11339.) According to Castro, appellant did not participate in the robbery. (31RT 11280, 11287-11291, 11326-11327, 11333.) Even if he did, when he shot McDade he did not do so with the necessary mental state for robbery or with deliberation and premeditation; appellant's mind was so clouded by fear of and pressure from the Hodges that he did not form these necessary mental states. (31RT 11313-11315, 11318, 11329-

11330, 11334.)

Emphasizing appellant's statements to Lee that there was more to what happened than what appellant was telling (31RT 11255, 11284-11285, 11287), Castro maintained that appellant's last story to Lee was untruthful in how it shielded the Hodges. (31RT 11254, 11257, 11271-11272, 11296). Appellant even told Lee that he was deeply afraid for his and his family's safety if he incriminated them. (31RT 11255, 11284-11287.) According to Castro, there was enough in appellant's statement to Lee, as informed by John Hodges' statement to Banks and Terry Hodges's statement to Leisey, for jurors to piece together the true version of events. (31RT 11246, 11252, 11335 [counsel argues that truth of what happened emerges from certain portions of appellant's statement], 11258, 11270, 11307-11310, 11313-11320 [counsel argues significance of Hodges brothers' admissions to Leisey and Banks and that there is even more to what happened than what they said].) It was not in appellant's character to commit violent crimes. (31RT 11276, 11326-11327.) Appellant did not want to rob or kill McDade. He went up to him to talk about getting his job back. (31RT 11280, 11290, 11318, 11333.) Appellant did eventually shoot McDade, but not, as he told Lee, because McDade threatened him and caused him to feel pressured and scared. (31RT 11256-11257, 11285-11286, 11333.) Rather, argued Castro, appellant shot McDade because he felt pressured and scared of the Hodges, who were standing right next to him. (31RT 11256-11257, 11330-11331, 11333, 11338-11339.) The brothers forced appellant to do it. (31RT 11314, 11334, 11339.) Castro summed up by calling appellant a "victim" and a "tragic figure" who was "captured by people and forces well beyond his control." (31RT 11339.)

C. Argument

"In some trials, the defendant's silence will be like 'the sun ... shining with full blaze on the open eye.'" (*Lakeside v. Oregon* (1978) 435 U.S. 333, 345, quoting *State v. Cleaves* (1871) 59 Me. 298, 301 (Stevens, J., dissenting).) This is such a case.

The question of whether appellant would testify or remain silent dominated appellant's trial. Fueled by a desire to "get" the Hodges, the defense announced that appellant would testify. (2RT 1018-1019.) Defense counsel took the highly unusual step of offering, without any consideration in return, appellant's testimony to the state which was actively seeking appellant's conviction for capital murder and death sentence. (2RT 1021-1022 [on 4/18/94, Castro offers prosecution chance to call appellant], 14RT 5954-5956 [on 7/6/94, Castro states appellant has been promised no consideration for his testimony for the state].)[50] To bolster an otherwise weak case against the Hodges brothers, the prosecutor decided to use appellant's testimony in his case-in-chief. (2RT 1020-1021, 1023, 15RT 6266, 6270-6271; 29CCT 8486.)

Having decided to use appellant's testimony, the prosecutor then made a strategic decision to tell the jurors in his opening statement not only that

---

[50] The trial court ordered disclosure of any agreement between appellant and the prosecutor concerning appellant's testifying for the state. (14RT 5962, 5964.) Castro stated that he would want any such agreement memorialized for the record. (14RT 5959.) To appellant's knowledge, the record does not reflect any such agreement. It simply shows that Castro gave the prosecution an outline of appellant's anticipated testimony on July 8, 1994. (15RT 6267; 29CCT 8486.)

appellant would testify but also to describe that testimony in detail. According to the prosecutor, appellant would testify that the Hodges robbed McDade without his participation; then John Hodges gave him a gun, said "we ain't leaving no witnesses" and Terry Hodges pointed a shotgun at appellant to ensure that appellant killed McDade. (15RT 6343-6346 [prosecutor outlines appellant's testimony in opening statement]; see also 4RT 1788 [defense counsel warns prosecutor to curb opening statement given impossibility of guaranteeing that appellant would testify].) The testimony was highly significant because, if believed, it was a defense to first-degree murder with a robbery felony-murder special circumstance. (See 31RT 11326-11327, 11331, 11333-11334, 11337-11338 [Castro's closing argument attacking specific intent to rob and deliberation and premeditation].)

The prosecutor's promise that appellant would testify put pressure on appellant, who was uncertain about whether he would testify (see 29CCT 8486; 29RT 10604), to waive his privilege against self-incrimination and perform the role laid out for him lest he disappoint the jurors. Having heard the promise of this dramatic and highly significant testimony, the jurors anticipated it as they sat through each day of the six-week long guilt phase (2CT 447, 518 [prosecutor gives opening statement on 7/12/94 and both sides rest on 8/22/94]). When the prosecution and appellant both rested without appellant's testimony (29RT 10702; 30RT 10805, 10816), appellant's silence resounded. The broken promise that appellant would testify to a defense to capital murder tainted appellant and his defense in the eyes of the jurors.

The prosecutor's failure to present appellant's testimony after

describing it in his opening statement was error for three reasons. First, it drew jurors' attention to appellant's exercise of his privilege against self-incrimination under circumstances which encouraged jurors to draw an adverse inference from appellant's silence. Jurors were apt to conclude that appellant did not testify as indicated because his promised testimony was false. This was *Griffin*-error in violation of the constitutional privilege against self-incrimination. (U.S. Const., amend. V; Cal. Const., art. I, § 15.) Second, the prosecutor's broken promise of appellant's testimony constituted prosecutorial misconduct in violation of due process and the right to jury trial. (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7, 15.) Appellant's promised testimony was highly significant and closely related to the mental state defense appellant presented. The adverse inference jurors were sure to draw against appellant due to his silence was extraneous to the evidence properly presented, but it would have directly extended to appellant's defense. It is fundamentally unfair for jurors to determine a defendant's criminal liability based on a matter beyond the evidence. Third, regardless of how blame is apportioned for what happened, i.e., whether it is attributed to the prosecutor, trial court, defense counsel or combination thereof, the net result was that appellant was deprived of a fundamental fair trial in violation of due process and the right to jury trial. (*Ibid.*)

1. The Prosecutor's False Promise of Appellant's Testimony Invited Jurors to Draw an Adverse Inference from Appellant's Silence and Burdened Appellant's Exercise of His Privilege Against Self-Incrimination.

In *Griffin v. California, supra,* 380 U.S. 609, the United States Supreme Court held that California's then-existing practice allowing the court and

prosecutor to comment on the defendant's exercise of his Fifth Amendment privilege against self-incrimination violated the Fifth Amendment, which was applicable to the states.[51] (*Id.* at pp. 611, 613, 615.) There, the trial court instructed the jury that although the defendant had a constitutional right not to testify, if he failed to deny or explain evidence against him which he could reasonably be expected to deny or explain because of facts within his knowledge, the jury could consider his silence as tending to prove the truth of the evidence and use it to draw inference adverse to the defendant. (*Id.* at p. 610.) Additionally, the prosecutor made much of the defendant's failure to testify in closing argument. (*Id.* at pp. 610-611.) *Griffin* considered these comments a penalty imposed on the defendant's exercise of his privilege against self-incrimination. (*Id.* at p. 613.) They essentially turned the defendant's silence into evidence against him, a practice harkening back to the inquisitorial system of justice. (*Id.* at pp. 613-614.) The opinion proclaimed that the constitution forbids a court-imposed penalty on the exercise of the right to remain silent. (*Id.* at p. 614.)

Griffin cited to the United States Supreme Court's opinion in *Malloy v. Hogan* (1964) 378 U.S. 1, decided in the previous year, holding that the Fifth Amendment privilege against self-incrimination applies to the states via the due process clause of the Fourteenth Amendment. (*Griffin, supra,* 380 U.S. 609, 611; *Malloy, supra,* at p. 6.) *Malloy v. Hogan* characterized the right to remain silent as the "essential mainstay" of our adversarial system. (*Id.* at p.

---

[51] The Fifth Amendment to the United States Constitution provides in key part that no person "shall be compelled in any criminal case to be a witness against himself...." The California Constitution is in accord. (Cal. Const., art. I, § 15.)

7.) The privilege prohibits the government from compelling a person to incriminate himself and requires that the government prove his guilt through independent evidence. (*Id.* at pp. 7-8.) A person is compelled to make a statement if he is threatened with punishment for remaining silent. (*Id.* at p. 7.) Under the Fifth Amendment, a defendant validly waives his right to silence only if his action is truly voluntary, i.e., he "chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for ... silence." (*Id.* at p. 8.)

"The Fifth Amendment prohibits a prosecutor from commenting, directly or indirectly, on a defendant's decision not to testify on his own behalf" (*People v. Taylor* (2010) 48 Cal.4th 574, 632, citations omitted) if the comment is adverse to the defendant. (*Lakeside v. Oregon, supra,* 435 U.S. 333, 338). Here, the prosecutor's detailing in opening statement appellant's dramatic testimony -- that the Hodges robbed McDade by themselves and then they forced appellant at gunpoint to kill him or be killed himself – combined with appellant's exercising his right to remain silent at trial, resulted in violation of appellant's privilege against self-incrimination. (U.S. Const., amend. V; Cal. Const., art. I, § 15.) The jurors would have been disappointed by the broken promise of this strikingly significant testimony and would have naturally concluded that appellant remained silent because he could not testify as indicated. The prosecutor's broken promise of appellant's testimony was a "speaking silence" that was the functional equivalent of an adverse comment on appellant's silence.

Research yields no decision involving the highly unusual circumstances presented here, a *prosecutor's* unfulfilled promise of the *defendant's* testimony

at the defendant's own trial.[52] Decisions addressing ineffective assistance of counsel claims directed at defense attorneys who promise witness testimony in opening statement but fail to deliver it are instructive. As discussed below, these cases recognize that such broken promises are highly damaging when the promised testimony is of central importance to the defense. (E.g., *Anderson v. Butler* (1st Cir. 1988) 858 F.2d 16; *Ouber v. Guarino* (1st Cir. 2002) 293 F.3d 19.) Jurors naturally conclude that the witness did not testify because he or she could not support the indicated testimony. (*Ibid.*; see also *Graves v. United States* (1893) 150 U.S. 118, 121 [party's failure to produce key witness available to party gives rise to presumption that witness's testimony would be unfavorable]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1301-1303, 1305 [upholding prosecutor's argument that reason jury did not hear from defense investigator is that investigator would not support defense counsel's position].)

In *Anderson v. Butler, supra,* 858 F.2d 16, the defendant was prosecuted for the first degree murder of his wife. (*Id.* at p. 16.) Defense counsel told jurors in his opening statement that two doctors would testify that the defendant was in an unconscious, robot-like state when he killed the victim. (*Id.* at p. 17.) Counsel presented lay witness testimony to this effect but rested the defense case without calling the doctors. (*Ibid.*) The First Circuit Court of Appeals found that counsel's broken promise constituted ineffective assistance. (*Id.* at pp. 17-19.) "The promise was dramatic, and the indicated testimony strikingly significant. The first thing that the ultimately disappointed jurors would believe ... would be that the doctors were unwilling, viz., unable, to live

---

[52] The situation does not arise, no doubt, because the plain language of the Fifth Amendment clearly applies to where "the prosecution seeks to call a defendant to testify against himself at his criminal trial." (*Michigan v. Tucker*

up to their billing. This they would not forget." (*Id.* at p. 17.) Although the court recognized that an advocate may need to change strategies in light of trial developments, in the case at bar, no unforeseeable circumstances justified counsel's conduct. Before and after his opening statement, counsel knew the strengths and weaknesses of the state's case and of the doctor witnesses, and he presented the same defense to which the doctors' testimony was relevant. (*Id.* at pp. 18-19.) The doctors' failure to testify was "surely a speaking silence" which caused jurors to draw a "heavy inference" against the defense. (*Id.* at p. 18.) Indeed, the unfulfilled promise of their testimony "greatly weaken[ed]" the mental state defense counsel continued to present because it conveyed that impartial experts would not support the lay witnesses' testimony. (*Id.* at pp. 17, 19.)

Harris v. Reed (7th Cir. 1990) 894 F.2d 871 involved a prosecution for murder arising from a shooting on a street. (*Id.* at p. 872.) The Seventh Circuit Court of Appeals found that defense counsel performed deficiently in several respects. (*Id.* at pp. 877-879.) This included counsel's "particularly disturbing" opening statement indicating that two eyewitnesses had identified someone other than the defendant fleeing from the crime scene. (*Id.* at pp. 873-874, 878.) The prosecution presented just one eyewitness who identified the defendant. The defense sought to undermine his testimony by pointing out its inconsistencies with a prior statement and emphasizing that the witness did not come forward until six weeks after the crime. (*Id.* at p. 874.) The defense rested without presenting any evidence. (*Id.* at p. 878.) The opinion reasoned that "counsel's opening primed the jury to hear a different version of the incident" than the prosecution's. (*Id.* at p. 879.) As in *Anderson,* the court

---

(1974) 417 U.S. 433, 440.)

concluded that the effect of the broken promise was to convey that the uncalled witnesses could not testify as described. (*Ibid.*) "When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up to the claims made in the opening." (*Ibid.*, citing to *Anderson v. Butler, supra,* 858 F.2d 16, 29.)

The Supreme Court of North Carolina held that trial counsel rendered ineffective assistance in a rape prosecution in *State v. Moorman* (1987) 358 S.E.2d 502 [320 N.C. 837]. There, counsel told jurors in opening statement that the defense would present evidence that the defendant was physically and psychologically incapable of rape and his prosecution was racially motivated. (*Id.* at pp. 510-511.) Instead of presenting any such evidence, the defense relied on a theory of consensual sex. (*Id.* at pp. 506-508.) Counsel's unsupported assertions "undercut the only defense supported by the evidence and defendant's own testimony" by robbing them of their credibility. (*Id.* at p. 511.)

In another case before the First Circuit Court of Appeals, *Ouber v. Guarino, supra,* 293 F.3d 19, it was the defendant's testimony which was promised but never delivered. The defendant was prosecuted for drug trafficking based on delivering, at her brother's request, envelopes containing drugs to an undercover agent. (*Id.* at pp. 20-21.) Defense counsel told jurors in his opening statement that defendant would testify to an innocent version of events in which she lacked knowledge that the envelopes contained contraband. (*Id.* at p. 22.) Defense counsel called a friend of the defendant's who saw her before and after her meeting with the narcotics officer and testified that she acted innocently; he also presented testimony from numerous

witnesses concerning the defendant's good character. (*Id.* at pp. 21-23.) He rested, however, without presenting the defendant's testimony. (*Id.* at p. 23.)

The circuit court found defense counsel rendered ineffective assistance by reneging on his promise to call the defendant. (*Ouber v. Guarino, supra,* 293, F.3d 19, 27-35.) When considered in isolation, the court found nothing wrong with either counsel's (1) opening statement promise to call the defendant or (2) advising the defendant not to testify. (*Id.* at p. 27.) These circumstances, however, were "inextricably intertwined" and had to be considered together reasoned the court. In combination, they amounted to a "broken promise" of the defendant's testimony which was "inexcusable" and "indefensible." (*Ibid.*) "When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered" because the defendant and defense have been irreparably tainted. (*Id.* at p. 28.) The negative inference that a jury is likely to draw under such circumstances is weighty. Since defense counsel had failed to inform the defendant that it would penalize her decision to remain silent, the court questioned whether the defendant's decision to waive her constitutional right to testify was knowing, intelligent and voluntary. (*Id.* at p. 31.) Although the court found that nothing occurred at the trial to justify defense counsel's decision to abandon defendant's promised testimony (*id.* at pp. 29-30), the court emphasized that, had counsel been uncertain about whether the defendant should testify, he should have "exercise[d] some degree of circumspection" and refrained from committing to call her as a witness in his opening remarks. (*Id.* at p. 28).

The foregoing decisions make clear that when an advocate promises and then fails to present certain witness testimony, jurors naturally and inevitably conclude that the witness did not testify because he or she could not support the anticipated testimony which the advocate has described. When the broken promise is of the defendant's testimony in support of his own defense, the disappointed jurors reason that the defendant remained silent because he could not testify as claimed. An advocate's broken promise of a defendant's testimony, therefore, serves essentially as an adverse comment on the defendant's exercise of his right to silence.

The United States Supreme Court has recognized that an advocate's false promise of the defendant's testimony can be tantamount to *Griffin* error. In *Lockett v. Ohio* (1978) 438 U.S. 586, the defendant did not take the stand. Subsequently, she challenged as *Griffin* error the prosecutor's numerous remarks in argument to the jury that certain state evidence was "unrefuted" and "uncontradicted." (*Id.* at pp. 594-595.) Prosecutorial argument that certain evidence is uncontradicted violates *Griffin* if the defendant is the person who could reasonably be expected to contract it. (E.g., *People v. Murtishaw* (1981) 29 Cal.3d 733, 757-758, superceded by statute on other grounds as stated in *People v. Boyd* (1985) 38 Cal.3d 762, 772-773; *People v. Vargas* (1973) 9 Cal.3d 470, 476-477.) *Lockett v. Ohio* rejected the defendant's claim. It observed that defense counsel had already "clearly focused the jury attention on [the defendant's] silence" by "outlining her contemplated defense in his opening statement and ... stating to the court and jury near the close of the case, that Lockett would be the 'next witness.'" (*Id.* at p. 595.) The court equated the prosecutor's remarks to defense counsel's false promise of the defendant's testimony. The opinion stated, "... the prosecutor's closing

remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand." (*Ibid.*)

Lockett is consistent with the high court's recognition that, under certain circumstances, the assertion of the right to remain silent can be as damaging as substantive evidence. (*Douglas v. Alabama* (1965) 380 U.S. 415, 416-420 [where accomplice repeatedly invokes privilege against self-incrimination on witness stand to the prosecutor's reading his confession and periodically pausing to ask accomplice if he made the statement, jurors are apt to treat the confession as if it had been admitted against the defendant].)

Here, the prosecutor's combined actions of describing appellant's anticipated testimony and failing to deliver it were equivalent to adverse comment or evidence based on appellant's right to remain silent. (*Griffin v. California, supra,* 380 U.S. 609, 613.) They invited jurors to draw an inference harmful to appellant due to his failure to testify. Consequently, they penalized appellant for exercising his privilege against self-incrimination "by making its assertion costly." (*Griffin v. California, supra,* 380 U.S. 609, 614.)

Based on the principle that the government cannot penalize a defendant for relying on his right to silence, *Brooks v. Tennessee* (1972) 406 U.S. 605 struck down a Tennessee statute requiring a defendant to testify as the first witness in the defense case or forego testifying at all. (*Id.* at p. 613.) The decision whether or not to testify, observed the court, is "often of the utmost importance" and involves meticulous consideration of its pros and cons in light of how the case progresses. (*Id.* at p. 608.) The high court ruled that a

defendant's privilege against self-incrimination can be violated even if the defendant ultimately remains silent if the government imposes a penalty on his exercise of the privilege. (*Id.* at p. 611, fn. 6.) The testify-first rule imposed such an impermissible penalty because it "cast[] a heavy burden" on the defendant's unconditional right to remain silent. (*Id.* at pp. 610-611.) It pressured the defendant, who might be uncertain about testifying at the beginning of the defense case, to take the stand as the first defense witness by foreclosing the option of his later testimony. (*Ibid.*) In so doing, it deprived the defendant of an adequate opportunity to see how the case progressed before realistically assessing whether or not to testify. (*Id.* at pp. 612-613; see also *United States v. Jackson* (1968) 390 U.S. 570, 583 [striking down federal kidnapping statute which exposed to death penalty defendant who insists on jury trial while capping the sentence at life for a defendant who consents to court trial because the government cannot "needlessly penalize[] the assertion of a constitutional right"].)

Although the circumstances in *Brooks* differ from those in appellant's case, *Brooks* is instructive in denouncing state pressure on a defendant to waive the privilege against self-incrimination or face some sort of punishment. Reminiscent of *Brooks's* testify-first rule, the prosecutor's opening statement pressured appellant to waive his privilege against self-incrimination and fulfill his expected role lest he disappoint the jurors in a manner which would encourage them to draw inferences adverse to him. As counsel for John Hodges argued in support of a mistrial motion brought by Terry Hodges, the Hodges had cause to believe that appellant did not want to testify (29RT 10604), but the prosecutor's opening statement "psychologically pressured" appellant so that he was "shoe-horned into taking the stand whether he wants

to or not...." (29RT 10605-10606). The promise of appellant's testimony hung like the sword of Damocles over appellant's head, ready to drop on appellant the adverse inferences the jurors would draw if he did not live up to his billing.

A criminal defendant differs from any other witness because the Fifth Amendment guarantees him an unconditional right to remain silent. He cannot be subpoenaed and compelled to testify upon pain of contempt. (*Michigan v. Tucker, supra,* 417 U.S. 433, 440.) The defendant can choose either to testify or remain silent, even over defense counsel's objection. (*Rock v. Arkansas* (1987) 483 U.S. 44, 49-53.) Consequently, the prosecutor had no legitimate means of ensuring that appellant would testify. Given the uncertainty surrounding appellant's testimony, the prosecutor should have "exercise[d] some degree of circumspection" and refrained from detailing appellant's anticipated testimony in his opening statement. (*Ouber v. Guarino, supra,* 293 F.3d 19, 28; *Anderson v. Butler, supra,* 858 F.2d 16, 18.) Nothing required him to describe it in order to preserve the ability to call appellant. (*Ibid.*; see also *People v. Hinton* (2006) 37 Cal.4th 839, 863 [it is safer and preferable for the prosecutor to refrain from mentioning in opening statement evidence whose which may not be admitted]; *People v. Corona* (1978) 80 Cal.App.3d 684, 725 [premature assertions in opening statement are ill-advised].)

Instead, motivated by the desire to use appellant to bolster an otherwise weak case against the Hodges (2RT 1020-1021, 1023), the prosecutor threw "into the scales the heavy inference the jurors would draw from the non-appearance" of appellant after his highly significant testimony had been promised and detailed. (*Anderson v. Butler, supra,* 858 F.2d 16, 18). This was

a penalty which made appellant's assertion of the privilege against self-incrimination costly (*Griffin v. California, supra,* 380 U.S. 609, 614) so that a decision by appellant to waive it would not be in the "unfettered exercise of his own will." (*Malloy v. Hogan, supra,* 378 U.S. 1, 8).

Therefore, the prosecutor's unfulfilled promise of appellant's testimony violated appellant's state and federal constitutional privilege against self-incrimination.

2. The Prosecutor's Unsupported Opening Statement Detailing Appellant's Testimony Constituted Prosecutorial Misconduct in Violation of Appellant's Fourteenth Amendment Right to Due Process and Sixth Amendment Right to Jury Trial.

"Neither the prosecutor nor the defense may ... refer to anticipated testimony that he or she later fails to produce." (Cal. Criminal Defense Practice (Matthew Bender) Vol. 4, § 81.22, p. 102.) Prosecutorial remarks emphasizing matters extraneous to the evidence, thereby "diverting the jury's attention from the specifics on which they must focus," are improper. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 60.) It is prosecutorial error or misconduct for a prosecutor to make assertions in opening statement that the state never proves. (*People v. Tolbert* (1969) 70 Cal.2d 790, 802; *People v. Barajas* (1983) 145 Cal.App.3d 804, 809.)

Whether a prosecutor errs does not depend on whether he or she acts in bad faith. *People v. Hill* (1998) 17 Cal.4th 800 explains that this has been the law since 1979, when this Court decided *People v. Bolton* (1979) 23 Cal.3d 208. (*Hill, supra,* at pp. 822-823.) *Hill* also made clear that the no-bad-faith rule applies to misconduct in opening statement. It explicitly cited this Court's

decision in *People v. Harris* (1989) 47 Cal.3d 1047, 1079, concerning a claim of misconduct during opening statement, for the principle that a showing of bad faith is not required. (*Hill, supra,* at p. 823; see also *People v. Barajas, supra,* 145 Cal.App.3d 804, 809; Witkin, 5 Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 519, p. 741; Cal. Criminal Defense Practice, *supra,* vol. 4, § 81.22, p. 103.)

As we have seen, the prosecutor told the jurors in opening statement that appellant would testify that the Hodges robbed McDade without his participation, and then they forced him at gunpoint to shoot McDade with a gun provided by John Hodges. (15RT 6344-6345.) This dramatic testimony never materialized because appellant exercised his right to remain silent during trial. (30RT 10820, 10835-10836.) Regardless of whether the prosecutor's unsupported references to appellant's testimony in opening statement were made in bad faith, they constituted misconduct.

Prosecutorial misconduct may violate a defendant's due process right to a fundamentally fair trial. (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7 & 15; *Darden v. Wainwright* (1986) 477 U.S. 168, 180-181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Hill, supra,* 17 Cal.4th 800, 815 [reversing because pervasive prosecutorial misconduct rendered defendant's trial fundamentally unfair].) Where the defendant is tried by jury, the misconduct implicates the right to jury trial as well. (U.S. Const., amend. VI & XIV; Cal. Const., art. I, § 16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281 [right to proof beyond reasonable doubt is inextricably linked to jury determination of such proof].)[53] Determining whether prosecutorial

---

[53] The Sixth Amendment right to jury trial applies to the states via the

misconduct violates due process is a matter of "constitutional line drawing." (*Donnelly v. DeChristoforo, supra,* at p. 645.) "[S]ome remarks included in an opening ... statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable." (*Frazier v. Cupp* (1969) 394 U.S. 731, 736.) This is the case here.

As noted above (see § C.1, *ante*), when jurors are promised significant witness testimony in opening statement, but the witness does not testify, the jurors naturally and inevitably conclude that the witness stayed off the stand because the promised testimony was untrue. (*Anderson v. Butler, supra,* 858 F.2d 16, 17.) When the promised witness is the defendant, jurors conclude that the defendant remained silent because his promised testimony was false. (*Ibid.*; *Ouber v. Guarino, supra,* 293, F.3d 19, 28.) Under such circumstances, the defendant's exercise of his right to remain silent functions like evidence adverse to the defendant even though it is extraneous to the evidence actually admitted at trial. (*Griffin v. California, supra,* 380 U.S. 609, 613 [although not formally admitted as evidence, defendant's silence, used as basis for adverse inference, functions like evidence against the defendant].) This violates due process. Due process contemplates that the jury shall determine the defendant's guilt or innocence "solely on the basis of the evidence introduced at trial, and not on grounds of ... circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485; see also *Turner v. Louisiana* (1965) 379 U.S. 466, 471-472 [denial of the right to a fair trial also implicates the jury trial guarantee where the defendant is tried by jury].)

Fourteenth Amendment's due process clause. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.)

The prosecutor's unfulfilled promise of appellant's testimony injected into the jurors' minds the inference that appellant's promised testimony was false. As explained more fully below in addressing prejudice (see § C.5, *post*), this had a profound impact on the jury's determination of appellant's criminal liability. (*Ouber v. Guarino, supra,* 293, F.3d 19, 28.) Appellant's described testimony, that he did not participate in the robbery and shot McDade under duress from the Hodges (15RT 6344-6345), was very closely related to the defense appellant actually presented without the benefit of his testimony. Defense counsel argued that appellant did not commit the robbery; and even if he did, when appellant robbed and shot McDade, he did so out of fear and pressure from the Hodges, not with the requisite mental state for robbery or deliberate and premeditated murder. (31RT 11249-11250, 11327, 11330-11331, 11337-11338 [excerpts from defense counsel's closing argument].) Because appellant's promised testimony was a more explicit version of the defense presented, the jurors' determination that appellant's promised testimony was false would have also extended to, and had a devastating effect on, appellant's defense theory of fear and pressure. The trial court's instructions that statements of counsel are not evidence (31RT 11101; 2CT 560 [CALJIC No. 1.02]) and directing jurors to ignore the prosecutor's opening statement remarks about appellant's testimony (31RT 11112; 2CT 586 [modified CALJIC No. 2.60) could not dispel the harm. The undelivered testimony and the properly introduced evidence on which the defense relied were so intertwined that it was an impossible "mental gymnastic" for jurors to ignore one but consider the other. (*People v. Aranda, supra,* 63 Cal.2d 518, 525, 529.)

The prosecutor's misconduct cannot be dismissed as inconsequential

under the totality of the circumstances. (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 645, 647.) It went to the "vitals" of appellant's defense. (*Anderson v. Butler, supra,* 858 F.2d 16, 18.) It crippled appellant's ability to defend against the charges by attempting to raise a reasonable doubt about appellant's mental state. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 293 [due process guarantees defendant opportunity to present a defense].) In so doing, it also impermissibly lightened the state's burden of proving this essential element beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 265 [government cannot be relieved of its burden to prove each essential element beyond a reasonable doubt].) As noted above (§ C.1, *ante*), the misconduct also violated appellant's constitutional right to remain silent. Additionally, it violated appellant's right to counsel because counsel could not effectively defend against matters extraneous to the evidence.[54] (U.S. Const., amends. VI & XIV; *Gibson v. Clannon* (9th Cir. 1980) 633 F.2d 851, 854 [juror consideration of extraneous matters deprives accused of assistance of counsel due to impossibility of defending against it].) That the misconduct also violated specific constitutional guarantees further supports that it denied appellant a fair trial. (*Darden v. Wainwright, supra,* 477 U.S. 168, 182 [finding no due process violation due to prosecutor's conduct in part because it not "implicate other specific rights of the accused such as ... the right to remain silent"].)

By severely undermining appellant's ability to defend against the charges, the prosecutor's unfulfilled promise of appellant's testimony "infected

---

[54] The Sixth Amendment right to counsel applies to the states via the Fourteenth Amendment's due process clause. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 341.)

the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 643.)

3. Appellant Was Deprived of a Fundamentally Fair Jury Trial, in Violation of the Sixth and Fourteenth Amendments, Due to the Unfulfilled Promise of His Testimony.

As shown above, the prosecutor's unfulfilled promise of appellant's testimony constituted prosecutorial misconduct because it amounted to adverse comment on appellant's assertion of his right to silence, in violation of the Fifth Amendment privilege against self incrimination (§C.1, *ante*) and introduced before the jurors considerations highly damaging to the defense which were extraneous to the properly presented evidence, in violation of the Due Process Clause of the Fourteenth Amendment (§C.2). Assuming, *arguendo,* that the error is not attributable solely to prosecutorial misconduct, appellant is entitled to relief. The prosecutor's broken promise of appellant's testimony deprived appellant of a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment, under the totality of the circumstances.

The right to due process, which safeguards a defendant's fundamental right to a fair trial, recognizes that the fairness of proceedings may be compromised by the combined actions of various players, regardless of whether each individual's conduct is erroneous or prejudicial. For example, in *Taylor v. Kentucky, supra,* 436 U.S. 478, the United States Supreme Court ruled that the defendant was denied due process due to the trial court's refusal of defense-requested instruction on the presumption of innocence combined with prosecutorial remarks to the jurors implying that the accused's status as an arrested and indicted defendant tended to show his guilt for the charged crimes.

(*Id.* at pp. 487-488.) The opinion did not find that either actor's conduct amounted to error or prejudice. (See *id.* at p. 487, fn. 14.) Rather, it focused on the cumulative unfairness that the defendant suffered under the totality of the circumstances. (*Id.* at p. 487, fn. 15.)

Although it did not specifically address whether an undelivered promise of crucial testimony violates due process, the First Circuit's opinion in *United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9 is instructive. There, the trial court ruled pretrial that the defense could present expert psychiatric testimony that a crucial government witness suffered from a mental condition which made him prone to exaggeration. In light of the ruling, counsel for each of the defendants told jurors in their opening statements to expect the expert testimony. Subsequently, the trial court reversed its ruling and precluded the testimony. Jurors never learned why the expert did not materialize. (*Id.* at p. 14.) Analogizing the case to *Anderson v. Butler,* where trial counsel rendered ineffective assistance by promising significant defense testimony he inexplicably never produced, *Gonzalez-Maldonado* reversed. (*Id.* at pp. 14-15.) It found "that promising to admit this important evidence and then failing to produce it [was] prejudicial as a matter of law...." (*Id.* at p. 15.) *Gonzalez-Maldonado* emphasized that, regardless of who was to blame for the promised but undelivered testimony -- whether defense counsel as in *Anderson* or the trial court as in the case before it -- the prejudicial effect on the jury was the same: jurors were apt to conclude that the witness did not appear because the promised testimony was false, and, therefore, "the defense [was] flawed." (*Ibid.*)

Here, if the blame for the prosecutor's broken promise of appellant's

testimony is not ascribed simply to prosecutorial misconduct (§§ C.1 & C.2), it may arguably be attributed to a combination of acts and omissions by the prosecutor, defense counsel and the trial court. Defense counsel told the prosecutor that appellant would testify for the prosecution (2RT 1018-1023) and furnished the prosecutor with a summary of appellant's anticipated testimony. (15RT 6267; 29CCT 8486). At the same time, because appellant had an unequivocal right to assert the privilege against self-incrimination, defense counsel emphasized that the prosecutor should curb his opening statement because there was no way to guarantee that appellant would take the stand. (4RT 1788; 14RT 5934.) The prosecutor obtained pre-approval from the trial court for his opening statement by emphasizing that the defense had assured him appellant would testify. (14RT 5950; 15RT 6266, 6270-6271, 6280-6281.) The prosecutor then made the tactical choice to inform jurors in his opening statement not only that appellant would testify but to also detail appellant's testimony even though he knew he risked mistrials if appellant asserted his right to silence. (14RT 5965, 15RT 6343-6346.) The trial court treated appellant as any other anticipated witness despite appellant's unequivocal right to assert the privilege against self-incrimination and the tremendous ramifications of whether or not he took the stand. Prior to opening statements, it rejected the Hodges' motions to preclude the prosecutor on due process grounds from mentioning appellant's expected testimony and to question appellant personally about whether he intended to testify. (14RT 5950-5953, 5966, 15RT 6268.)

Regardless of who is to blame for the prosecutor's unfulfilled promise of appellant's testimony, the effect on the jurors was the same. When appellant's promised testimony did not materialize, they would have drawn a

heavy inference against the defense. This is particularly so since the undelivered testimony was closely linked to the defense theory counsel ultimately presented. (See § C.5, *post.*) Under the totality of the circumstances, appellant was deprived of a fundamentally fair trial.

4. Appellant's Claims Have Been Preserved for Review.

After both sides rested, appellant sought a mistrial on the ground that the prosecutor's unfulfilled promise of appellant's testimony adversely drew attention to appellant's decision to remain silent. (30RT 10818-10829; 2CT 521-527.) In labeling the prosecutor's error as "*Griffin* error," counsel made clear that the factual basis of the claim was that appellant was harmed by the prosecutor's unfulfilled promise in opening statement of appellant's testimony. (*Ibid.*) This was sufficient to preserve his claims of *Griffin* error, prosecutorial misconduct and violation of the right to a fair trial. (See *People v. Partida* (2005) 37 Cal.4th 428, 436 [due process claim is cognizable on appeal if it is based on the same facts and argument as objection articulated on another ground]; *People v. Scott* (1978) 21 Cal.3d 284, 290 [claim of error will be preserved for review if, regardless of how trial counsel phrased it, the record shows that the trial court understood the nature of the objection]; *People v. Mills* (1978) 81 Cal.App.3d 171, 176 [even in absence of objection, claim of fundamental due process violation should be reached on appeal].)

During argument on the motion, the court questioned whether the defense had invited the error or forfeited the ability to raise it by failing to object when the prosecutor made his opening statement. (30RT 10818, 10822.) The prosecutor contended that the defense's "failure to object is in

effect invited error...." (30RT 10825.) The trial court denied appellant's mistrial motion. (30RT 10838.) One reason it articulated for its ruling was that any error had been invited. (*Ibid.*; see also 30RT 11007 [later, after ruling, the trial court explained the defense had invited the *Griffin* error and had waived it by representing that appellant would testify].) As explained below, appellant neither invited the violation of his right to remain silent nor forfeited the claim.

"The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.) It is based on the notion that it is unfair for a defendant to benefit from a trial court's error "[i]f defense counsel intentionally caused the trial court to err." (*Ibid.*) For invited error to apply, it must be clear from the record that counsel acted not out of ignorance or mistake but for a deliberate tactical reason. (*People v. Coffman, supra,* 34 Cal.4th 1, 49.) The doctrine typically bars claims on appeal, but it can presumably also apply at trial. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643 [upholding denial of mistrial motion based on defendant's own outbursts in open court].)

Appellant did not cause the trial court to either act or refrain from acting in any particular manner in connection with the prosecutor's opening statement. Defense counsel did not take a position when the Hodges unsuccessfully requested that the trial court preclude the prosecutor from mentioning appellant's anticipated testimony. (14RT 5938, 5950-5953, 5966, 15RT 6266-6268, 6270-6273.) Counsel's passivity did not invite the trial court

to err on appellant's behalf. (*People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8 [defense attorney's mere agreement with trial court's announced ruling is not invited error].)

Nor can the prosecutor's decision to tell jurors in his opening statement that appellant would testify be attributed to the defense. The prosecutor's decision to call appellant as a witness was separate from his decision to tell jurors in opening statement that appellant would testify in a particular manner. Appellant's attorneys assured the prosecutor that, to the best of their knowledge, appellant was available as a witness for the state. (2RT 1019, 15RT 6266.) If appellant asserted error concerning the prosecutor's calling appellant as a witness, a claim of invited error would be on much firmer footing. (30RT 10819.)

Appellant's claim of error, however, is premised on a different matter, what the prosecutor told jurors in his opening statement. Defense counsel made clear that they could not guarantee appellant's testimony because the final decision about whether or not to take the stand was appellant's, not counsel's. (2RT 1022, 4RT 1787-1788, 14RT 5934.) Given the uncertainty of appellant's testimony, both defense counsel *explicitly discouraged* the prosecutor from mentioning appellant's anticipated testimony in his opening statement. Castro warned that the prosecutor should craft his opening statement "to protect himself" from a mistrial if appellant decided not to testify. (4RT 1788.) Additionally, Holmes emphasized that if the prosecutor outlined to both juries appellant's anticipated testimony in his opening statement but appellant did not testify, the prosecutor would have set himself up "for a couple of mistrials." (14RT 5934.)

A prosecutor's decision to give an opening statement is discretionary. (Pen. Code, § 1093(b); Witkin, 5 Cal. Criminal Law, *supra*, Criminal Trial, § 517, p. 736.) When a prosecutor chooses to give an opening statement, nothing compels the prosecutor to mention a particular witness that the state seeks to call. One treatise advises that "it is often wise to leave a significant piece of evidence out of the opening statement ... so that it will have a greater impact when it emerges during the presentation of evidence." (CEB, California Criminal Law Procedure and Practice (2006) § 30.21, p. 903; see also *Ouber v. Guarino, supra,* 293 F.3d 19, 28; *Anderson v. Butler, supra,* 858 F.2d 16, 18.) Setting the jury up to expect a certain witness's testimony is risky if there is reason to doubt whether the witness will testify. (*Ouber, supra,* at p. 28; *Anderson, supra,* at p. 18; *People v. Hinton, supra,* 37 Cal.4th 839, 863.) Although defense counsel could have also addressed appellant's anticipated testimony in an opening statement, counsel decided not to. (2CT 491 [Castro reserved opening statement at start of prosecution's case], 518 [Castro waived opening statement for defense case].) The prosecutor made the opposite decision. Fully aware of the uncertainty of appellant's testimony and the risk that mentioning it entailed (15RT 6330), the prosecutor "took his chances" (30RT 10823) and made a strategic decision to not only promise that appellant would testify but to also set forth his expected testimony in detail. (15RT 6343-6346). The defense did not invite the prosecutor's tactical decision to summarize appellant's testimony in his opening statement.

Nor did appellant forfeit his right to seek redress from the prosecutor's broken promise of appellant's testimony by failing to object during opening statement. It is through the combination of two "inextricably intertwined"

events -- the prosecutor's promise that appellant would testify combined with the failure to deliver appellant's testimony -- that appellant's claim arises. (*Ouber v. Guarino, supra,* 293 F.3d 19, 27.) Objecting when the prosecutor made the promise, but before it was broken, would have been premature. (See 14RT 5947-5948, 5965 [in rejecting Hodges' motion to preclude prosecutor from mentioning appellant's testimony in opening statement, trial court stated that, if appellant did not testify as outlined, the matter should be addressed by way of mistrial motion].) As soon as both sides rested (29RT 10702, 30RT 10805, 10816) and it was clear that the promise of appellant's testimony would not be fulfilled, defense counsel promptly moved for a mistrial. (30RT 10818). Appellant's mistrial motion was timely.

An earlier objection would have been futile in any event. (*People v. Boyette* (2002) 29 Cal.4th 381, 432 [party need not make futile objection to preserve claim of error]; *People v. Hill, supra,* 17 Cal.4th 800, 820 [same].) Prior to the prosecutor's opening statement, the Hodges brothers moved on due process grounds to prohibit the prosecutor from representing that appellant would testify since, no matter what assurances defense counsel gave, appellant could always choose to remain silent. (14RT 5938, 5950-5953, 5966-5967, 5975-5976.) The Hodges were concerned about the prosecutor informing the jury of expected evidence which might never materialize into admissible evidence and the harmful effect it might have on their defense. (*Ibid.*) Despite the Hodges' explicit objection, the trial court refused to curb the prosecutor's opening statement outlining appellant's testimony. (14RT 5950, 5972, 5975-5976.) Plainly, had appellant raised the same objection, the trial court would have denied it as well.

Therefore, appellant neither invited nor forfeited his claims that the prosecutor's unfulfilled promise of his testimony violated his right to remain silent, his right to due process and constituted prosecutorial misconduct.

5. The Error Was Not Harmless Beyond a Reasonable Doubt.

Chapman v. California (1967) 386 U.S. 13 held that *Griffin* error, like most errors that violate the federal constitution, must be assessed for prejudice under the beyond a reasonable doubt standard. (*Id.* at pp. 22-24; *United States v. Hasting* (1983) 461 U.S. 499, 508 [accord]; *People v. Vargas, supra,* 9 Cal.3d 470, 478 [same].) The government, as the beneficiary of the error, must show beyond a reasonable doubt that the error was harmless because it did not contribute to the verdict. (*Chapman, supra,* at p. 24.) A constitutional violation does not contribute to the verdict under *Chapman* if it is "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)" (*People v. Low* (2010) 49 Cal.4th 372, 392-393].) *Griffin* error is prejudicial unless it is clear beyond a reasonable doubt that the jury would have returned the same verdict absent the impermissible comment on the defendant's silence. (*United States v. Hastings, supra,* at pp. 510-511.)

Prosecutorial misconduct in opening statement requires reversal when it results in prejudice or is so egregious to deny the defendant a fair trial. (*People v. Harris, supra,* 47 Cal.3d 1047, 1080.) When it violates the federal constitution, prosecutorial misconduct is also assessed for prejudice under *Chapman.* (*People v. Hill, supra,* 17 Cal.4th 800, 844; *People v. Bolton, supra,* 23 Cal.3d 208, 214.) The prosecutor's misconduct in referring in opening

statement to appellant's testimony which was never produced was prejudicial under *Chapman* for the same reasons the prosecutor's *Griffin* error was prejudicial: it invited jurors to draw a highly damaging inference against appellant, due to his silence, which was not effectively dispelled by the trial court's instructions.

a. The Jurors Had a Plausible Basis to Render a Verdict More Favorable to Appellant.

The strength of the government's evidence against a defendant is significant to determining if constitutional error was prejudicial. (*Anderson v. Nelson* (1968) 390 U.S. 523, 523-524 (per curiam) [considering if evidence could have supported acquittal in assessing prejudice from adverse comment].) In formulating the prejudice standard applicable to federal constitutional error, *Chapman* cautioned against overemphasis of whether the state's evidence was "overwhelming." (*Chapman v. California, supra,* 386 U.S. 18, 23.) Even if it was "reasonably strong," there is a "reasonable possibility" that the constitutional error affected the verdict if, in the error's absence, "honest, fair-minded jurors" might have returned a verdict more favorable to the defendant. (*Id.* at pp. 24-26.) The focus, therefore, is on whether there was a plausible basis for a more favorable verdict had the error not occurred. (*Ibid.*; *Anderson v. Nelson, supra,* at p. 524 [in addressing prejudice from *Griffin* error, noting that "the evidence could have supported acquittal"]; cf., *Neder v. United States* (1999) 527 U.S. 1, 19 [in context of instructional error removing element from jury's consideration, error is prejudicial under *Chapman* if there is evidence that "could rationally lead to a contrary finding" on the element].) This is the case here.

The prosecution sought to convict appellant of first degree murder (Pen. Code, § 189) with the special circumstance that the murder was committed during commission of robbery (§ Pen. Code, § 190.2, subd. (a)(17)). It presented two theories of first degree murder: robbery felony-murder and deliberate and premeditated murder. (27RT 9957, 31RT 11159, 11164.)

The centerpiece of the state's case was appellant's statement to detective Lee. (15RT 6346-6410 [prosecutor read appellant's statement to Lee verbatim during opening statement]; 31RT 11238 & 11247 [prosecutor's and counsel's arguments to jury]; People's Ex. Nos. T-51 [video] & T-51A [transcript, at 30CCT 8973-31CCT 9032.) In it, appellant gave three different versions of how the offenses happened. In the first version, appellant and his companions talked about committing a robbery. Appellant was interested in the money, but he did not want McDade hurt. He waited in the car while his companion(s) robbed and killed McDade, and then he received a share of the proceeds. (30CCT 8975-8989.) In the second version, appellant demanded McDade's money, which McDade handed over either before or after appellant pulled out his gun. Appellant then accidentally shot McDade because he felt pressured and scared. (30CCT 8999-31CCT 9003.) He said that his companions stayed in the car and were unarmed. (31CCT 9011, 9014.) The third version was like the second except appellant stated that the shooting was not accidental; although appellant did not want to shoot McDade, he did so because he was pressured and scared. (31CCT 9003-9004, 9019, 9021.)

Although appellant's statement was damaging, the state's evidence could have resulted in a verdict more favorable to appellant. Appellant's first version of events, if believed, was largely exonerating. (See 31RT 11178-

11180 [prosecutor acknowledges it does not support the special circumstance].) Rational jurors could have doubted appellant's guilt as an aider and abettor to either robbery or murder because appellant simply sat in the car, did not participate in the robbery and did not want McDade killed. Under this version, jurors could have found appellant was neither a direct perpetrator nor an aider and abettor to murder. (See *People v. Beemon* (1984) 35 Cal.3d 547, 560 [aider and abettor must both know of direct perpetrator's criminal purpose and also specifically intend direct perpetrator accomplish it].) Appellant's liability for robbery as an aider and abettor and hence robbery felony-murder were also questionable. Although evidence of a the G-Parkway discussion involving appellant and John Hodges indicated appellant's interest in theft from KFC (31CCT 9145, 9154-9155, 9159), rational jurors could have concluded that appellant merely provided information about KFC on which Hodges capitalized but that appellant did not specifically intend for Hodges to rob McDade. (31RT 11309, 11331-11332 [defense counsel's closing argument].) As defense counsel argued, robbing at gunpoint was not in appellant's character. (31RT 11326-11327.) Appellant wanted his KFC job back, and he liked and respected McDade. (31RT 11256, 11287-11291, 11324-11325.) When employed at KFC, appellant managed to steal from the safe without confronting anyone. (31RT 11272, 11275-11276, 11326.) Actively assisting Hodges in robbing McDade would have jeopardized appellant's relationship with him and any chance of reemployment at KFC. Thus, under appellant's first version of events, jurors could have rejected appellant's liability for murder and robbery and convicted him of only receiving stolen property, a lesser offense to robbery, based on evidence that he shared in the robbery's proceeds. (31RT 11338 [Castro argues against robbery and felony-murder]; 32

RT 11366-11367 & 3CT 635-636 [court gives CALJIC No. 14.65, defining receiving stolen property]; 31CCT 9262 & 25RT 9472 [appellant spent his share of the money taken from McDade, which had been split three ways].) Receiving stolen property is not a predicate offense for felony murder or the felony murder special circumstance. (Pen. Code, §§ 189 & 190.2(a)(17).)

The jurors also had cause to doubt the state's evidence in regards to the second and third versions appellant gave Lee in which appellant acknowledged that he robbed and shot McDade while the Hodges stayed in the car, unarmed. More than once, appellant told Detective Lee that he was not telling him the full story. The reason he gave for holding back was that, if he told all, the Hodges would harm his family. (30CCT 8978 [appellant initially refused to identify Terry Hodges because "I don't want my family ... done up or nothing"], 31CCT 9011 [same], 30CCT 8981 ["I don't want nothing done to my family. ... I'm not, not gonna give everything I know..."], 8997 [when Lee asks why appellant does not tell him the real truth, appellant replies, "[c]ause I don't want my family ... [INAUDIBLE]", 31CCT 9012 ["if I went and told everything that really, really happened," the Hodges brothers would "[get] locked up and probably be out and bam, there go my family their way"].) Additionally, shortly before his arrest, appellant told Littlejohn that there was more to the story than anyone knew. He said, "'nobody really know the truth about why I killed him, the papers got it all wrong'" (31CCT 9263) and "'nobody knew nothing, he was under pressure.'" (31CCT 9269).

Further, the evidence indicated that about 30 minutes elapsed between when McDade left KFC and when he was shot. (19RT 7583-7586 [Senner heard shot at 10:45 or 10:50 p.m., just before movie ended at 11 p.m.]; 31CCT

9020 [appellant and Hodges arrived around 10:15 p.m., when McDade was getting off work]; 16RT 6521, 6558-6559, 6562-6563, 6578 [McDade leaves KFC around 10:20 to 10:30 p.m.].) If appellant confronted McDade simply to rob and kill him, he could have accomplished this in mere moments. (31RT 11280.) The unaccounted for time, coupled with appellant's statements, suggests that something else was going on, and it caused appellant to feel pressured and frightened of the Hodges. (31RT 11276-11284, 11329, 11333-11334 [defense counsel's closing argument].)

The defense presented a two-pronged attack on the prosecution's theory of the case. First, for reasons discussed above in connection with appellant's initial version of events, the defense sought to raise a reasonable doubt about whether appellant participated at all in the robbery,[55] which, as noted, was the basis for the robbery felony-murder theory of first degree murder and robbery felony-murder special circumstance. To this end, it secured instruction on the lesser crime of receiving stolen property. (32 RT 11366-11367 & 3CT 635-636 [court gave CALJIC No. 14.65].) The trial court's decision to give the instruction indicates there was substantial evidence to support it. (*United States v. Solano* (9th Cir. 1993) 10 F.3d 682, 683.)

Second, the defense contended that even if appellant did commit the offenses, his mental state was so clouded by fear of and pressure from the Hodges that he did not actually form the requisite mental state for robbery or first degree deliberate and premeditated murder. (31RT 11053-11054 [counsel articulated that the fear of and pressure appellant felt from the Hodges was

---

[55] Appellant's discussion of the reasons to doubt appellant's liability for robbery as an aider and abettor also apply to his liability as a direct perpetrator.

"instrumental in creating the whole scenario"]; see also 31RT 11249-11250, 11327, 11330-11331, 11337-11338 [excerpts from closing argument]; cf. *People v. Anderson* (2002) 28 Cal.4th 767, 784 [jury may decide that where defendant kills out of coercion, he did not deliberate and premeditate or, for felony-murder, he did not act with the volitional intent necessary for the underlying felony]; Pen. Code, § 28, subd. (a) [evidence of mental disease, defect or disorder is admissible on whether accused actually formed intent, malice and premeditation and deliberation].) This avenue of defense was closely akin to the defense of duress, on which the trial court had refused to formally instruct in the absence of appellant's testimony.[56] (31RT 11055-11057 [trial court declines duress instruction].)

In support of the mental state defense, counsel emphasized appellant's statements that he had not told all and had acted out of fear and under pressure. (31RT 11255, 11284-11287.) Although appellant told Lee that the fear and pressure was from McDade (see 31CCT 9001-9003, 9019), counsel argued that this made no sense; appellant was truly in fear of the Hodges. (31RT 11255-11257, 11285-11286, 11334). Appellant repeatedly said, even after the offenses, that he was still scared, both for himself and for his family. (31RT 11285.) Counsel maintained that appellant had no reason to still be scared of McDade, but he did have reason to fear the Hodges. (31RT 11285-11286, 11334.) He reminded the jurors that they had a chance to see how frightening the Hodges brothers appeared in court. (31RT 11257.) Although appellant told

---

[56] The defense of duress requires that the accused act out of actual and reasonable fear of immediate threat to his or hear life. (*People v. Petsnick* (2003) 114 Cal.App.4th 663, 666-677.) Appellant challenges the trial court's decision not to instruct on duress in Argument VI, *post.*

Lee that McDade's "evil eye" scared him (31CCT 9002), the jury could see from its observations of John Hodges that the eyes appellant referred to were John's.[57] (31RT 11257). Counsel also pointed out that the Hodges were older and far more criminally oriented than appellant. John had been to prison. Also, according to Leisey, Terry carried a shotgun, and the brothers committed drive-bys for hire. (31RT 11298-11301, 11313, 11316.)

Counsel argued that the evidence was consistent with the following scenario. Appellant approached McDade alone to discuss getting his job back, not to rob or kill him. (31RT 11333.) As previously discussed, appellant truly valued his job, did not have violence in his character, and respected McDade. (31RT 11256, 11287-11291, 11326-11327.) The half-hour between appellant's initially approaching McDade and when the shot rang out supported that appellant lacked criminal intent because it takes very little time to rob and kill at gunpoint. (31RT 11280.)

Counsel maintained that the Hodges had made their plans and decided to use appellant after they heard him say it KFC was "an easy lick." (31RT 11319-11320, 11331.) Terry, who was known to carry a shotgun, came up with John to appellant and McDade, and the brothers put appellant in such fear and under such pressure that he succumbed to their will and shot McDade.[58]

---

[57] Juror No. 11 complained to the court attendant that the manner in which the defendants looked at her caused her to feel frightened. (27RT 10093-10094.)

[58] Defense counsel did not explicitly argue how the robbery occurred under this scenario, which was consistent with appellant committing it out of fear and pressure or enabling the Hodges to do it once he shot McDade. (See also 31RT 11338 [counsel argued that if appellant did not specifically intend to rob and

(31RT 11313-11315, 11318, 11329-11330, 11334.) The bullet found in the alley by Isolde's Flowers, combined with appellant's statement that he had just one bullet in his gun, indicated that appellant's gun had been unloaded so it carried only one bullet. (31RT 11268-11270.) Although counsel did not explicitly so state, he sought to raise an inference that the Hodges had orchestrated events to diminish appellant's ability to resist them.

Counsel urged the jurors to see appellant's efforts to exculpate the Hodges by stating they were in the car, unarmed, as a lie born out of his fear of them. (31RT 11254, 11257, 11271-11272.) He urged the jurors to convict appellant of the lesser crime of second degree murder because appellant was a "victim in a very real sense" and a "tragic figure" who had been "captured by people and forces well beyond his control." (31RT 11339.)

The testimony of Banks, Leisey and Littlejohn[59] strongly supported that appellant's mental stated was so clouded by fear of and pressure from the Hodges that appellant did not form the requisite mental state for the offenses. Banks, who knew John Hodges from the street and having lived and served time with him (31CCT 9138-9139, 25RT 9414, 9471), testified that John "manipulates them youngsters.... [T]hat's his thing." (31CCT 9145.) Banks and John spoke a number of times about the KFC offenses when they were both in jail in March of 1992. (31CCT 9140-9141, 25RT 9444.) John just laughed, which was characteristic of an admission, when Banks told him, "I know how you are with youngsters." (31CCT 9150-9151, 9153.) According

---

just wanted his job back, he probably was not involved in the robbery at all].)

[59] For brevity, appellant refers as "testimony" to both a witness's in-court testimony and extrajudicial statements admitted for their truth.

to Banks, John said that the police had arrested the shooter, a youngster, who had taken the blame. (31CCT 9142, 9150, 25RT 9419.) The youngster was "very easy to manipulate ... 'cause he's young, he ain't never, never been in to nothing." (31CCT 9154.) John said that "the youngster didn't wanna kill" McDade but John "gave the order...." (31CCT 9146; see also 31CCT 9151, 25RT 9426.) John wanted McDade killed so he would not identify "us," a pronoun that indicated John was at the crime scene. (25RT 9463.) Banks believed John had to be present, probably with a pistol, to enforce his order to kill. (31CCT 9155-9156, 9158, 25RT 9462-9463.) John said the robbery proceeds were split three ways. (25RT 9472.)

Darryl Leisey testified to statements made by Terry Hodges. Leisey knew Terry because Leisey worked as a "skip tracer" (someone who tracks fugitives who have jumped bail) for the bail bond business run by Terry's stepfather. (25RT 9478-9479, 31CCT 9294-9295.) Leisey and Terry ran into each other at a mini-market within a week after the offenses. (25RT 9487-9488, 26RT 9590-9592, 9778, 27RT 10009-10010.) Terry asked Leisey if he could tell him how to leave town without a trace (25RT 9490, 27RT 10028) and said that the police were investigating him for "the shit going on." (25RT 9491, 31CT 9299). Although Terry never mentioned KFC, Leisey understood that this is what he was talking about. (27RT 10029-10030, 31CCT 9299.) Terry said he was on the scene ("Big Daddy was on the case") with a "boy" to commit robbery. (25RT 9493-9495, 27RT 10032, 10054-10055, 32CCT 9302-9303.) Terry, who was always armed and owned a shotgun, had gotten the boy a pistol. (27RT 9869, 32CCT 9303-9304, 9311.) The boy was taking too long, so Terry had to "jack him up" and tell him to get it over with and just "whack the motherfucker" so there would be no witnesses. (25RT 9494, 27RT 9869,

32CCT 9305-9306.) Terry had to coach the boy like a child and be the enforcer because the boy was a "wimp," "chickenshit" and "didn't have no heart." (25RT 9498, 27RT 10032-10034, 32CCT 9311, 9315) Terry said, "you need to jack this guy and let's go." (25RT 9498.) Terry went to the car to join his brother. (32CCT 9306-9307.) A couple of moments later, the boy came running up and said "it's finished," and they took off. (26RT 9789, 32CCT 9308.) Leisey asked Terry why they did not just pistol whip the victim, and Terry replied, "[w]e don't play." (27RT 9904-9905, 32CCT 9314.) According to Leisey, although Terry never said he shot the victim, his words were pretty close to that effect. (27RT 9889.)

Littlejohn met appellant when she came to rescue her son, Roosevelt Coleman, appellant and two other young men after their car broke down on their way back from Los Angeles. (28RT 10389-10392, 31CCT 9258-9259.) Appellant talked a lot about the killing and took credit for it. (31CCT 9261, 9268.) He said he had split the money with his two confederates and had spent his entire share on what Littlejohn called "having a big time." (31CCT 9262, 9267.) Littlejohn thought appellant was "slow," "stupid" and "mental" because he acted like he did not realize the gravity of what he had done. (31CCT 9263, 9265-9266, 9269, 9291.) She thought he deserved to be on "S.S.I." because he was so mentally slow. (28RT 10412, 10431.) Littlejohn made appellant surrender his gun. (31CCT 9263-9264, 9288.) Littlejohn believed that appellant's confederates "probably ... forced him to do it" because appellant is "weak. He's a follower and not a leader.... He's a weak person." (31CCT 9270; see also 31CCT 9288.)

In light of the foregoing, jurors had a rational basis to return a verdict

more favorable to appellant than the verdict rendered.

b. The Prosecutor's Unfulfilled Promise that Appellant Would Testify He Acted Under Duress Prejudiced Appellant Because It Caused Jurors to Doubt Appellant's Mental State Defense, Which Closely Resembled His Anticipated Testimony.

The state cannot show beyond a reasonable doubt that there was no effect on the verdict due to the prosecutor's broken promise that appellant would testify he did not participate in the robbery and shot McDade only because the Hodges threatened to shoot him if he did not. Appellant's promised testimony was only one step removed from the mental state defense of fear and pressure that appellant actually presented. Because the promised and actual defenses were so close, the jurors' conclusion that appellant did not testify as indicated because the promised testimony was untrue would have carried over to undermine his defense.

Chapman analysis of *Griffin* error asks what was the probable impact of the error on the mind of the average juror? (*People v. Vargas, supra,* 9 Cal.3d 470, 478, citing *Harrington v. California* (1969) 395 U.S. 250, 254.) An advocate's unfulfilled promise of a key witness's testimony has a devastating effect on the average juror because the juror will conclude that the promised testimony was untrue. "The first thing that the ultimately disappointed jurors would believe ... would be that the [promised witness was] unwilling, viz., unable, to live up to [his] billing. This they would not forget." (*Anderson v. Butler, supra,* 858 F.2d 16, 17.)

Typically, the damaging inference typically operates against the party

who has promised the undelivered testimony. (*People v. Gleason* (1899) 127 Cal. 323, 325.) Under the unusual circumstances in the present case, it operated against appellant, not the prosecutor. Appellant's testimony was favorable to his defense. The prosecutor chose to use it only because it would help him bolster an otherwise weak case against the Hodges. (See 2RT 1020-1021.) If appellant testified, the prosecutor could introduce against the Hodges appellant's extrajudicial statement to Lee as a prior inconsistent statement. (14RT 5927, 6095, 15RT 6271-6272.) From the outset, however, the prosecutor intended to argue that the exonerating aspects of appellant's testimony were lies. The state never wavered from its objective of convicting appellant of capital murder. (31RT 11340 [prosecutor argued in rebuttal that state has nothing in common with appellant and its purpose has always been to convict him of murder with special circumstances].) By falsely promising appellant's testimony, the state's case against appellant lost nothing in front of the jurors.

In contrast, appellant's case was severely damaged because appellant's undelivered testimony was closely related to the defense he presented. When a witness's promised testimony is expected to compliment and solidify the defense actually presented, the witness's failure to testify has the effect of affirmatively detracting from the defense. In *Anderson v. Butler, supra,* 858 F.2d 16, defense counsel promised jurors in opening statement that he would present testimony by two doctors that appellant was in a "robot-like" state, "walking unconsciously toward a psychological no exit," and "programmed for destruction" when he killed his wife. Counsel called lay jurors who testified to the defendant's impaired mental condition, but he did not present the doctors' testimony. (*Id.* at p. 19.) The First Circuit Court of Appeals observed that the

jurors would naturally assume that the doctors did not testify because they could not support their promised testimony. (*Id.* at p. 17.) Because they were more qualified to render an opinion about the defendant's mental state than the lay witnesses, the doctors' non-appearance actually detracted from the lay witnesses' favorable testimony. (*Id.* at p. 19.) The effect of defense counsel's unfulfilled promise of the doctors' testimony "was greatly to weaken the very defense [the defendant] continued to assert; a weakening that would not have occurred if he had omitted mention of the doctors in the first place." (*Ibid.*)

Here, the jurors' would naturally conclude that appellant did not testify as the prosecutor promised because it was untrue that the Hodges forced him at gunpoint to kill McDade or be killed himself, and it was likewise untrue that appellant did not participate in the robbery. These conclusions severely crippled appellant's chance of convincing jurors of his defense theory that the Hodges put appellant in such fear and under such pressure that he killed McDade without the *mens rea* for deliberate and premeditated murder or specific intent to rob. The obvious implication of appellant's defense was that the Hodges applied fear and pressure to appellant by threatening to kill him. Similarly, the jurors' conclusion that appellant's promised testimony that he did not participate in the robbery was a lie would have undermined the defense's efforts to raise a reasonable doubt about whether the robbery was carried out solely by the Hodges.

Griffin error is prejudicial under *Chapman* if it "'touch[es] a live nerve in the defense....'" (*People v. Vargas, supra,* 9 Cal.3d 470, 481, quoting *People v. Modesto* (1967) 66 Cal.2d 695, 714, disapproved on another point as stated in *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383 fn. 8.) Because

the "speaking silence" of the prosecutor's unfulfilled promise of appellant's testimony "went to the vitals of [appellant's] defense" (*Anderson v. Butler, supra,* 858 F.2d 16, 18), it was not harmless beyond a reasonable doubt.

c. The Prejudice from the Prosecutor's Broken Promise of Appellant's Testimony Was Not Dissipated by the Trial Court's Instruction to Disregard the Prosecutor's Opening Statement.

The trial court instructed the jury that the statements of the attorneys are not evidence pursuant to CALJIC No. 1.02. (31RT 11101; 2CT 560.) It also gave CALJIC No. 2.60, which provides that a defendant has a constitutional right not to testify, the jurors cannot draw any inference if he does not testify and the matter should not be discussed or affect deliberations in any way. (31RT 11112; see 2CT 586.) Additionally, the court also gave a special addendum to CALJIC No. 2.60 concerning the prosecutor's opening statement (31RT 11112; 2CT 587):

> You are further instructed that any references in the prosecutor's opening statement concerning the expected content of the testimony of the defendant is to be disregarded and not enter into your deliberations in any way. [¶] The fact that the defendant elected to exercise his right not to testify may not in any way be held against the defendant nor affect your verdict.

These instructions were insufficient to dispel the harmful effect of the prosecutor's unfulfilled promise of appellant's testimony. (See *People v. Vargas, supra,* 9 Cal.3d 470, 479 [whether the trial court admonished jurors to disregard prosecutor's statements in violation of *Griffin* bears on the prejudice inquiry].)

CALJIC No. 1.02's provision that the statements of the attorneys are not evidence sidestepped the prejudice resulting from the prosecutor's unsupported opening statement. Its harm was *not* that jurors would consider as proven what the prosecutor asserted appellant's testimony would be, i.e., that the Hodges robbed McDade without appellant's participation and then forced appellant to shoot him. Rather, it was prejudicial because it invited jurors to infer the opposite, that this version of events was false, because appellant would not testify to it. Thus, CALJIC No. 1.02 did not address the damaging inference the jurors would draw from appellant's silence.

Although CALJIC No. 2.60 and the addendum thereto did address appellant's decision to remain silent, they were also inadequate to dispel the prejudice from the prosecutor's unfulfilled promise of appellant's testimony. CALJIC No. 2.60, and the second sentence of the addendum, which simply reiterates CALJIC No. 2.60, is a standard jury instruction given on request in any case in which the defendant remains silent. It is designed not to cure *Griffin* error but to preempt the natural and inevitable tendency of jurors to draw an inference adverse to the defendant from his silence where no *Griffin* error occurs. (See generally *Carter v. Kentucky* (1981) 450 U.S. 288 [federal constitution requires that, on request, trial judge instruct jury not to draw adverse inference from defendant's failure to testify].) *Griffin* error, such as the broken promise that a defendant would testify, throws more on the scales than simply a defendant's failure to testify. "The fact that the jury was advised not to draw a negative inference from the petitioner's failure to testify is ... irrelevant; the attorney's mistake was not in invoking the petitioner's right to remain silent, but *in 'the totality of the opening and the failure to follow*

through.' [Citation.]" (*Ouber v. Guarino, supra,* 293 F.3d 19, 35, italics added.) Therefore, CALJIC No. 2.60 did not eliminate the prejudice from the prosecutor's unfulfilled claim that appellant would take the stand. The same applies to the second sentence of the addendum to CALJIC No. 2.60 because it simply reiterated the standard portion of the instruction.

Although the first sentence of the addendum to CALJIC No. 2.60 directed jurors to entirely disregard the prosecutor's opening statement concerning the content of appellant's testimony, its addition to the pattern instruction was insufficient to dispel the prejudice that resulted when appellant failed to take the stand for several reasons.

The addendum to CALJIC No. 2.60 was given approximately two and one-half days after both sides rested without having presented appellant's testimony. (2CT 518 [on 8/22/94, both sides rested], 31RT 11112 [on 8/24/94, trial court instructed the jury].) This left jurors significant time to draw and let sink in negative inferences from appellant's ultimate decision to remain silent after his testimony had been promised and described in detail. The curative effect of the instruction was substantially diminished because it was not given promptly to combat the error. (See *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1546-1547 [because cautionary instruction was not "immediate," it did not render the prosecutor's improper remarks harmless].)

Appellant's promised testimony was both dramatic and highly relevant. Given the lack of other percipient witnesses, appellant was, obviously, in a key position to explain what happened. He could also directly testify to his mental state. (See *People v. Falck* (1997) 52 Cal.App.4th 287, 299 [mental state is

rarely subject to direct proof].) Jurors would have eagerly anticipated his testimony because he was the central player in the tragic drama of McDade's death. More evidence focused on appellant than on any other individual. The jurors' anticipation would have grown the longer they sat through the lengthy guilt phase without hearing from him.

Along the way, the jurors heard numerous items of evidence that raised questions that appellant was uniquely situated to answer. To what was appellant referring when he said there was more to the story than he was willing to tell because he feared for his family? (30CCT 8981, 8997, 31CCT 9011-9012, 9263, 9269.) What happened during the half hour between when McDade left KFC and he was shot? (Compare 31CCT 9020 with 19RT 7583-7586.) What sort of pressure and fear caused appellant to shoot? (31CCT 9003, 9019, 9269.) What did John and Terry Hodges do to make sure appellant committed the crimes? (25RT 9498, 27RT 10032-10034, 32CCT 9311, 9315 [pertaining to Terry Hodges], 31CCT 9146, 9154 [pertaining to John Hodges].) Why did appellant's gun have only one bullet? (31CCT 9004.) A natural desire for appellant to cast light on these questions would have enhanced the jurors' desire to hear appellant testify, as promised. When jurors realized at the trial's conclusion that they would never hear appellant's testimony, they would have been greatly disappointed. As explained above, the first thing they would have concluded was that he did not testify because his promised testimony was untrue. (*Anderson v. Butler, supra,* 858 F.2d 16, 17.) Appellant's promised testimony was so key and likely to have been anticipated with such intensity by the jurors that "it is the essence of sophistry and lack of realism" to think that an instruction to ignore the failure to deliver

it "can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [in context of admission of highly prejudicial other crimes evidence].) One cannot "unring a bell." (*People v. Hill, supra,* 17 Cal.4th 800, 846 [citation and internal quotations omitted].)

The addendum to CALJIC No. 2.60 was also ineffective because jurors would have been constantly reminded of appellant's promised testimony when evaluating appellant's mental state defense. As noted, the promised testimony was a more explicit version of the fear and pressure defense presented. That defense rested on a patchwork of key witness statements selectively lifted from their overall testimony. (See § 3.a, *ante*; see also 31RT 11246, 11252, 11335.) The same evidence permitting inferences necessary for appellant's mental state defense (e.g., appellant's statements that he could not tell everything that happened and that he acted out of fear and under pressure) would have also corroborated appellant's promised testimony, had he chosen to take the stand. Because of the interlocking nature of appellant's undelivered testimony and the defense presented, jurors could not have simply put the undelivered testimony out of their minds.

The parties' closing arguments underscore how the jurors' attention would have been repeatedly drawn to appellant's undelivered testimony. For example, defense counsel stated that he wished detective Lee had continued interrogating appellant and not left off where he had (31RT 11284) to drive home that appellant had said there was more to the story than he could tell. (31RT 11271). The prosecutor responded in rebuttal that appellant did tell all. (32RT 11353.) In considering what, if anything, appellant might have held back, jurors would have naturally recalled appellant's promised testimony that

the Hodges forced him at gunpoint to kill McDade.

Jurors would have also recalled that testimony when defense counsel explicitly argued that Terry Hodges did not walk away from appellant and McDade but stood next to them when he forced appellant to shoot: "[i]f you got to be there to force a kid to do something you stand there and – while he does it, because if you walk away he might not." (31RT 11314.) The prosecutor objected that there was no evidence Terry forced appellant to do anything. (*Ibid.*) After a brief exchange, the trial court let the argument stand. (*Ibid.*)

Other portions of counsel's argument would have also drawn the jurors' attention to appellant's anticipated testimony about acting under duress. Counsel argued that appellant's statements that he was scared at the time of the offenses and he was still scared made sense if what he was really scared of were the Hodges. (31RT 11287.) In considering why appellant would have been so scared of them, jurors would have naturally seen the image, painted by the prosecutor's opening statement concerning appellant's testimony, of Terry Hodges bearing down on appellant with his shotgun as John Hodges put his derringer to appellant's chest and said, "[w]e ain't leaving no witnesses." (15RT 6344-6345.) A similar image would have been evoked in the jurors' minds due to counsel's argument that appellant had more in common with the prosecutor than his codefendants and that appellant was a "victim" who was "captured by people and forces well beyond his control." (31RT 11243, 11339.) Likewise, counsel's references to the Hodges's connection to firearms also would have triggered recall of appellant's anticipated testimony. Counsel mentioned that Terry was known to carry a shotgun to emphasize that the

Hodges were far more criminally sophisticated than appellant. (31RT 11334.) Additionally, counsel sought to make the point that there was truth to appellant's first version of events because when people lie, they tend to shift around things that are true to suit their purposes. To illustrate, counsel noted that in his first version appellant put the gun that killed McDade in the hands of John Hodges, not Terry. (31RT 11271.) While counsel's references to firearms were designed to support appellant's mental state defense of fear and pressure, they would have surely evoked in the jurors' minds appellant's promised testimony.

Each time the evidence and argument would have caused jurors to recall appellant's promised testimony, the jurors would have been obligated by the addendum to CALJIC No. 2.60 to try to ignore it. But the addendum was like telling jurors to forget the shout that generates a series of echoes while they carefully listen to those echoes. It is not realistic to assume that jurors so frequently reminded of the damaging matter they were directed to ignore could truly put it out of their minds. (Cf., *People v. Aranda, supra,* 63 Cal.2d 518, 525, 529 [jurors cannot perform the "mental gymnastic" of considering against declarant defendant his confession that he committed the crime with his codefendant but then ignore the confession when considering the evidence against the codefendant]; *People v. Kirkes* (1952) 39 Cal.2d 719, 726 [series of admonitions to prosecutorial misconduct interspersed throughout closing argument could not have cured its damaging effect and might have even augmented it].) As illustrated by Marc Anthony's repeated proclamations that "Brutus is an honorable man" in Shakespeare's Julius Caesar, repeating words over and over can forcefully convey their exact opposite meaning. (See *Lakeside v. Oregon, supra,* 435 U.S. 333, 345-346 & fn. 6 (Stevens, J.,

dissenting) [quoting Act III, § II of Julius Caesar].)

Accordingly, the trial court's addendum to CALJIC No. 2.60 did not dispel the prejudice of the prosecutor's broken promise that appellant would testify to killing McDade under duress.

6. Conclusion

For the foregoing reasons, the prosecutor's false promise of appellant's testimony constituted prejudicial error. Appellant's convictions for first degree murder and robbery and the special circumstances finding cannot stand.

Reversal of the guilt phase verdict also requires reversal of the penalty phase verdict. (U.S. Const., Amends. VIII & XIV; Calif. Const., art. I, §§ 7, 15 & 17; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [8th Amend. right to reliable penalty determination necessarily depends reliability of guilt determination]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 642-643.)[60] The harm resulting from appellant's undelivered testimony was especially great at the penalty phase. Appellant's case in mitigation sought to raise a lingering doubt about appellant's guilt based on the theory that appellant acted under pressure and domination by the Hodges – the same theory that had been crippled by the false promise of appellant's testimony at the guilt phase. (See, e.g., 35RT 12523-12550; 36RT 12551-12591, 12595-12597 [Holmes argues lingering doubt]; 35RT 12440-42 [prosecutor argues lack of evidence that appellant acted under substantial domination by the Hodges].)

---

[60] The Eighth Amendment prohibition against cruel and unusual punishment applies to the states via the due process clause of the Fourteenth Amendment. (*Robinson v. California* (1962) 370 U.S. 335, 341.)

The judgment must be reversed in its entirety.

II.

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT CONDUCTED AN INADEQUATE INQUIRY INTO THE EXISTENCE OF AN IRRECONCILABLE CONFLICT BETWEEN APPELLANT AND TRIAL COUNSEL.

Appellant requested substitution of counsel three times during the guilt phase. He complained that he distrusted counsel because counsel was not defending him and was siding more with the prosecution than with him. This case presented highly unusual circumstances which rendered appellant's concerns understandable: counsel adopted a defense strategy closely aligned with the state; furnished the prosecutor with client confidences; and insisted that appellant would testify for the prosecution, without any consideration in return, even though it was solely up to appellant to decide if he would testify or remain silent and testifying would make him a target for retaliation. Although the foregoing raised red flags about whether appellant and counsel were embroiled in an irreconcilable conflict that hindered effective representation, the trial court glossed over this critical issue during the *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) hearings it conducted. Because its inquiry into the existence of an irreconcilable conflict was inadequate, the judgment must be reversed.[61]

A. Factual Background

---

[61] In conjunction with this brief, appellant has filed a notice pursuant to California Rules of Court, rule 8.328(b)(4). (See also Cal. Rules of Court, rule 8.610(b)(3) [in capital appeal, all sealed records must comply with rule 8.328].)

1. August 15, 1994, *Marsden* Hearing

On August 15, 1994, towards the end of the prosecution's case, the trial court read a note from appellant into the record. (27RT 10124-10125.) Appellant requested a mistrial due to Castro's "misrepresentation." He complained that Castro was "siding with the D.A." and "hasn't been fair for me at all, because Mr. Castro hasn't made one motion on my behalf." Appellant also requested substitute lead counsel whether or not the court granted a mistrial. (*Ibid.*) The court directed appellant's attorneys to discuss the matter with appellant during a recess. (27RT 10125, 10130.)

Shortly thereafter, the court held an *in camera* hearing concerning appellant's complaints.[62] (27RT 10132 et seq.) Appellant told the court that he believed that Castro "threw the case" and "has basically given the case to the D.A. because he hasn't filed any motions to try to get anything that could hurt me thrown out." (27RT 10136.) Appellant also said that he felt "very uncomfortable" because Castro was close to the prosecutor, with whom Castro laughed and exchanged notes. (27RT 10134.) Appellant said he did not want to fire Castro then, he just wanted a new trial so more motions could be filed for him. (27RT 10134-10135.)

Castro stated that appellant had voiced his "misgivings" to him on "a number of occasions" and this made Castro "really ... worried" that appellant would lose trust in him and stop confiding in him. (27RT 10135.) He

---

[62] The prosecutor and the Hodges' attorneys were excluded from all *Marsden* hearings. (27RT 10133, 29RT 10627, 30RT 10885.)

characterized his relationship with the prosecutor as purely professional and stated that his personal style of maintaining a friendly relationship with opposing counsel benefited appellant. (27RT 10134-10135.)

The trial court denied appellant's mistrial motion because it was not brought by counsel and took no further action regarding appellant's request for new counsel since appellant had retreated form it. (27RT 10136.)

2. August 17, 1994, *Marsden* Hearing

On August 17, 1994, appellant personally informed the court that he desired to bring a mistrial motion. (29RT 10572.) When the court replied it had to be brought by counsel, appellant stated he wanted "to fire him because he ain't making no motion." (*Ibid.*)[63]

In camera, appellant explained his dissatisfaction with counsel as follows (29RT 10628 (*sic*)):

> [T]his don't seem like they doing they – The defense job. They prosecuting; I mean, I see that he stipulate and agree with everything that [the prosecutor] says, and how do I know that if [the prosecutor] say do something wrong to me, he won't stipulate to that? That's chances I can't take.

The court responded by explaining why it believed appellant's attorneys were performing satisfactorily. It noted that the evidence against appellant was substantial; based on appellant's statements to detective Lee and Angela

---

[63] That day, the Hodges brothers brought unsuccessful motions for acquittal, severance and mistrial. (29RT 10572-10597, 10601-10606.) They had been making such motions consistently throughout the state's case. (See Argument

Littlejohn, counsel could not easily dispute that appellant was the shooter. (29RT 10628-10629.) Appellant's fingerprints were also on the bank bag. (29RT 10633.) The court told appellant that, based on the prosecutor's outline of appellant's anticipated testimony, appellant's attorneys were attempting to shift blame to the codefendants by contending that they coerced appellant. (29RT 10629.) Evidence that the Hodges were older and more criminally sophisticated than appellant, who was mentally slow, supported the approach. (29RT 10629, 10633.) Appellant's dissatisfaction with counsel over how the evidence was building up against him was understandable, continued the court, but it was inevitable regardless of who was counsel. (29RT 10630.) The court also stated that it could not think of any motions that appellant's attorneys neglected to make. (*Ibid.*)

Appellant complained that his attorneys should have attacked his confession. (29RT 10572, 10631.) Holmes replied that he and Castro did not see any basis for doing so. (*Ibid.*) Further, Holmes continued, he had explained to appellant that the Hodges' motions did not necessarily pertain to him. (29RT 10632.) For example, counsel had decided not to join in the Hodges' mistrial motion that day because they concluded that appellant was better off proceeding with the current trial than obtaining a new one. (*Ibid.*)

The court then shifted focus to what it called the "big issue," whether or not appellant was going to testify. (29RT 10635.) The trial court stated that although it was up to appellant alone to decide whether to testify, appellant should listen to the advice of his attorneys, and not to anyone else. (29RT 10637-10638.) Further, the court told appellant that he should not let any

---

I, § B.7.)

threats either force or prevent him from testifying. (29RT 10635.) When questioned, appellant denied having been threatened. (29RT 10636.)[64] Appellant asked if his decision not to testify could be grounds for a mistrial. (*Ibid.*) The court said no. (*Ibid.*; see also 29RT 10637.) It described the matter simply: if appellant remained silent, the jurors would decide the case based on the evidence they had heard, not including his testimony; if appellant testified, the jurors would consider appellant's testimony along with the remaining evidence. (29RT 10636.) Appellant said he understood. (29RT 10631, 10635-10638.)

3. August 23, 1994, *Marsden* Hearing

On August 22 and 23, 1994, Holmes orally argued appellant's mistrial motion based on the prosecutor's false promise in opening statement that appellant would testify and his detailing of appellant's expected testimony. (30RT 10815, 10818-10829, 10834-10838.) The trial court grilled counsel about whether counsel had (1) invited the error by telling the prosecutor that appellant would testify for the state and/or (2) waived the error by failing to object to the prosecutor's opening statement. (30RT 10818-10819, 10822-10823, 10835.) It pointed out that, because the Hodges had objected to the prosecutor's opening statement, they were on surer footing in seeking a mistrial based on it. (30RT 10823.)

---

[64] Appellant was routinely transported to court with the Hodges and, of course, attended trial with them. (E.g., 14RT 6081-6082, 6120; 19RT 7423, 7433; 22RT 8577, 8594.) Appellant had repeatedly told detective Lee of his deep fear of the Hodges. (30CCT 8978, 31CCT 9011, 9012.) Consequently, it is hardly surprising that appellant denied having been threatened. (See also 17RT 6807-6808 [Macias accuses appellant's counsel and the prosecutor of pressuring appellant to testify].)

Subsequently, on August 23, 1994, the trial court denied appellant's mistrial motion. (30RT 10837.) It found that any error was invited, could be cured by admonition and was harmless. (30RT 10838.) At the same time, the court granted the Hodges's mistrial motion. (30RT 10840.)

Later on the same day, appellant again sought substitute counsel. (30RT 10883.) Referencing page 10818 of the daily transcript, appellant complained to the court, "you basically ... indicated that only reason I'm not getting a mistrial is because they didn't try to grant one earlier on in the case – When they was objected to a mistrial, you know, and I wanted a mistrial, but they was objecting to them." (30RT 10886 (*sic*).) Holmes interpreted appellant to complain that counsel's failure to object to the prosecutor's opening statement caused the court to deny appellant's mistrial motion. (*Ibid.*)

When questioned by the trial court, Holmes confirmed that counsel believed appellant would testify at the time of the prosecutor's opening statement. (30RT 10886-10887.) He said counsel were surprised when appellant decided to rely on his right to remain silent. (30RT 10887.)

Castro stated that "regardless of what [appellant's] desires were," the only defense they could present was the one they chose, and it was structured with an understanding that appellant would testify. (30RT 10887.) He further indicated that he began the defense case expecting appellant to testify. He acknowledged that appellant had frequently vacillated on the issue in the preceding five days. (30RT 10887-10888.) Castro lamented that, without appellant's testimony, significant defense efforts to elicit corroborating evidence had been in vain. (30RT 10888.)

The trial court ruled, "[b]ased on what was stated by [appellant] as the basis for his *Marsden* motion, the motion is denied." (30RT 10889.)

B. Argument

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution both guarantee a criminal defendant the assistance of counsel. These provisions entitle a defendant to substitute appointed counsel for another appointed attorney if (1) present counsel is providing inadequate representation or (2) the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Valdez* (2004) 32 Cal.4th 73, 95-96; *People v. Smith* (1993) 6 Cal.4th 684, 696; see also *id.* at pp. 606-607 [elements of state violation of right to counsel under *Marsden* and its progeny are consistent with federal violation].) Upon a proper showing, a defendant is entitled to substitute counsel at any stage of the proceedings where he is entitled to effective representation. (*Id.* at p. 695; see also *People v. Roldan* (2005) 35 Cal.4th 646, 681, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

When a defendant requests substitution of counsel, the trial court shall allow the defendant to voice his or her grievances against counsel, allow counsel to respond and shall itself conduct a sufficient inquiry to intelligently determine if substitution is required. (*People v. Valdez, supra,* 32 Cal.4th 73, 95-96; *People v. Smith, supra,* 6 Cal.4th 684, 694.) It must make a record adequate to reflect that the defendant's grievances were sufficiently aired and considered. (*People v. Eastman* (2007) 146 Cal.App.4th 688, 696.) This

applies whether the defendant complains about specific instances of counsel's incompetence (*People v. Hill* (1983) 148 Cal.App.3d 744, 753-754) or if there is cause to believe the defendant and counsel are embroiled in an irreconcilable conflict. (*Eastman, supra,* at pp. 695-697). Denial of substitute counsel is an abuse of discretion if the record shows that a failure to replace present counsel would substantially impair the defendant's right to effective assistance. (*Smith, supra,* at p. 694.) Moreover, inadequate inquiry into the defendant's grievances is itself error. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1128; *Eastman, supra,* at pp. 696-697; see also *United States v. Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772, 777-778.)

Conflict-free representation is an essential component of the right to counsel (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Doolin, supra,* 45 Cal.4th 390, 417-418) and facilitates the mutual trust and cooperation necessary for effective representation. (*People v. Munoz* (1974) 41 Cal.App.3d 62, 66). "To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.)

Appellant repeatedly voiced concerns that he did not trust his attorneys because they had sided with the prosecution. Although directed primarily at Castro, who was in charge of the guilt phase, appellant's complaints also went to Holmes, who was *Keenan* counsel. The two attorneys acted as a team: Holmes assisted Castro with the guilt phase, and Castro assisted Holmes during the penalty phase. Appellant's complaints raised colorable concerns that a

"fundamental breakdown had occurred in the attorney-client relationship that required replacement of counsel." (*People v. Eastman, supra,* 146 Cal.App.4th 688, 696; see *id.* at p. 695 [defendant's complaint that counsel "was acting in cahoots with the district attorney" signaled potential breakdown in attorney-client relationship].) Consequently, the trial court "was obligated to make a record" that this issue "had been adequately aired and considered." (*Id.* at p. 696.) It did not do so. This was error that violated appellant's state and federal constitutional right to counsel.

At the August 15, 1994, hearing, appellant stated that Castro's close "personal relationship with the D.A. is ... outweighing the profession [*sic*] and making me feel very uncomfortable." (27RT 10134.) Appellant complained that Castro "threw the case" and "has basically given the case to the D.A." (27RT 10136.) At the August 17, 1994, proceeding, appellant again voiced distrust due to counsel's alignment with the prosecution. He complained that counsel "don't seem like they doing ... [t]he defense job. They prosecuting; I mean, I see that he stipulate and agree with everything that [the prosecutor] says, and how do I know that if [the prosecutor] say [or] do something wrong to me, he won't stipulate to that? That's chances I can't take." (29RT 10628 (*sic*).) At the August 23, 1994, hearing, appellant complained his fear had come true: counsel's failure to object to the prosecutor's opening statement detailing his anticipated testimony had cost appellant a mistrial. (30RT 10886.)

Castro also expressed concern about appellant's trust in him. At the August 15, 1994, hearing, he stated that he was "really ... worried" about whether appellant could trust him since appellant had frequently told him he

had "misgivings" about him. (27RT 10135; see *People v. Hart* (1999) 20 Cal.4th 546, 604 [trial counsel's assessment of his relationship with defendant deserves weight].)

The trial court was aware of the highly unusual circumstances of this case which motivated appellant's distrust of counsel. (See *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1197 [history of judicial proceedings beyond defendant's control, combined with defendant's paranoid mental state, made "it ... understandable that [defendant] would mistrust the judicial process and his counsel" to extent he could not work with counsel].)

In our adversarial system, where the prosecution's objective is to convict the defendant, it is simply unheard of for a defendant to testify at his own criminal trial for the prosecution without any consideration in exchange for his testimony. Such a scenario is especially remarkable when the stakes are as high as they were here. The prosecution sought to convict appellant of a capital offense and put him to death. (See 2RT 1022 [trial court expresses wonder that appellant would cooperate with state actively seeking to put him in the gas chamber].) Appellant's counsel expected appellant to do the unheard of and testify for the state without its giving appellant any consideration. (2RT 1018-1023, 14RT 5953-5956.) Further, to facilitate this remarkable scenario, counsel turned over to the prosecution appellant's statements protected by the attorney-client privilege. (15RT 6267; 29CCT 8486.) This, too, was extraordinarily unusual. One of counsel's most basic duties is to safeguard client confidences falling within the attorney-client privilege, which is a fundamental component of our justice system. (*People v. Navarro* (2006) 138 Cal.App.4th 146, 156-157.)

In taking these unprecedented steps, Castro helped appellant's adversary bolster its case against the Hodges. Without appellant's testimony, the state's case against them was weak. (2RT 1020-1021, 1023.) With it, the prosecutor could introduce appellant's statement to detective Lee, otherwise objectionable under *Aranda-Bruton,* which substantially incriminated the Hodges. (14RT 5927, 6095, 15RT 6271-6272.)

Yet the prosecution had no regard for appellant's interests. Its objective was always to convict appellant of first degree murder with special circumstances and obtain a death sentence. (31RT 11340.) If appellant testified as the prosecutor promised in his opening statement (15RT 6344-6345), the state would use that testimony against him and argue that any of its mitigating aspects were lies. If appellant remained silent despite the prosecutor's promise and jurors concluded his promised testimony was false (*Anderson v. Butler, supra,* 858 F.2d 16, 17), the state's case against appellant would not suffer. Castro gave control of appellant's most precious confidences to appellant's adversary bent on his annihilation. This raised serious concerns about whether Castro was acting as a zealous advocate for appellant and whether the adversarial process was functioning properly. (*United States v. Cronic* (1984) 466 U.S. 648, 656-657 [rights to counsel and fair trial are violated if the trial "loses its character as a confrontation between adversaries"].)

Cognizant of the foregoing, counsel for the Hodges lambasted Castro's cozy relationship with the prosecutor as a violation of due process. Macias accused the prosecutor and appellant's counsel of using appellant as an

uninformed pawn in their efforts to convict the Hodges. (17RT 6807-6808.) Macias stated (17RT 6807):

> I believe that there is an element of collusion in this case between the prosecutor and counsel for Mr. Powell. I believe that Mr. Powell has not at times been fully apprised of the consequences of his decision to testify or not testify, and at which stages. I believe that the prosecutor and counsel to Mr. Powell have agreed among themselves, not necessarily to the inclusion of Mr. Powell, that he would testify.

The conflict between appellant, on the one hand, and counsel and the prosecutor, on the other, about whether appellant would waive his privilege against self-incrimination and testify greatly exacerbated the tenuous nature of the relationship between appellant and counsel. (16RT 6667 [Hodges expressly bring conflict to court's attention in moving to have appellant testify immediately].) Castro and Holmes vehemently wanted appellant to testify. (30RT 10819, 10887.) Appellant was uncertain and vacillated about what he would do. (30RT 10887-10888.) Appellant knew that if he incriminated the Hodges at trial, he would be labeled a "snitch" and he and his family members might be seriously harmed or killed. (30CCT 8978, 8981, 31CCT 8997, 9012 [appellant's statements to Det. Lee regarding fear for self and family if he incriminated the Hodges]; 15RT 6268 [Macias argues that appellant's testimony serves no purpose other than getting appellant a snitch jacket]; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 147 [snitches are in danger of retribution].) Nevertheless, from the outset, Castro chose a defense, "*regardless* of what [appellant's] desires were," structured around the expectation that appellant would testify. (30RT 10887, emphasis added.) Castro repeatedly stated in open court that appellant would not only testify, but

he would do so for the prosecution, as if setting up an expectation for appellant's behavior. (2RT 1018-1023, 14RT 5953, 5956.)

Counsel's expectation that appellant would testify was always tempered, however, because a criminal defendant has an unconditional right to testify or remain silent, regardless of counsel's wishes. (*Rock v. Arkansas, supra,* 483 U.S. 44, 53, fn. 10; *Jones v. Barnes* (1983) 463 U.S. 745, 751; *People v. Robles* (1970) 2 Cal.3d 205, 215; see also 17RT 6810.) Thus, appellant's constitutional right to remain silent (*Malloy v. Hogan, supra,* 378 U.S. 1, 7) was pitted against counsel's authority to choose what defense to present. (*People v. Cole* (2004) 33 Cal.4th 1158, 1193). As Morris, counsel for John Hodges saw it, appellant's attorneys sought to bully appellant into taking the stand. (29RT 10604.) The opening statement of the prosecutor, with whom appellant's defense team had aligned itself, added to the pressure on appellant. By outlining appellant's anticipated testimony for the jury (15RT 6344-6345), the prosecutor set up a penalty for appellant's assertion of his right to silence: jurors would conclude that appellant remained silent because his outlined testimony was false. (*Anderson v. Butler, supra,* 858 F.2d 16, 18; see generally, Argument I, *ante*). As Morris put it, the prosecutor's conduct "psychologically pressured" appellant so he was "shoe-horned into taking the stand whether he wants to or not...." (29RT 10605-10606.)

Not only was the trial court well aware of this confluence of extraordinary circumstances which raised concerns about the existence of an irreconcilable conflict between appellant and counsel, it knew that appellant brought his requests for substitute counsel towards the end of the prosecution's case, when it was necessary for him to finally resolve the "big issue" of

whether he would testify. (29RT 10635.) Appellant was entitled to the assistance of counsel functioning as his active advocate at this key juncture. (*United States v. Cronic, supra,* 466 U.S. 648, 656; *Entsminger v. Iowa* (1967) 386 U.S. 748, 751; *People v. Smith, supra,* 6 Cal.4th 684, 695.) Although whether or not to testify remains the sole decision of the defendant, an effective advocate must advise the defendant about which option is in his best interest. (*Brooks v. Tennessee, supra,* 406 U.S. 605, 608-610, 612-613 [decision whether or not to testify is "of the utmost importance" and involves "the guiding hand of counsel" to advise defendant after meticulous consideration of its pros and cons]; *People v. Carter* (2005) 36 Cal.4th 1114, 1198 ["the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel"].) If appellant's relationship with his attorneys had suffered a complete breakdown, counsel could not effectively fulfill their duty to guide appellant through this crucial decision. (See *United States v. Graham* (D.C. Cir. 1996) 91 F.3d 213, 221 ["'the right to effective representation by appointed counsel ... may be endangered if the attorney-client relationship is bad enough"].)

Faced with appellant's requests for substitute counsel and statements of distrust of his attorneys against the backdrop of this remarkable conglomeration of events, the trial court abdicated its duty to inquire into whether an irreconcilable conflict had undermined an effective attorney-client relationship. (*People v. Eastman, supra,* 146 Cal.App.4th 688, 695-697.)

At the August 15, 1994, proceeding, although appellant stated that he was "very uncomfortable" with counsel because counsel had "given the case to the D.A.," with whom counsel appeared exceptionally close, and Castro

himself acknowledged having serious worries over whether appellant could trust and communicate with him, the court simply allowed appellant and Castro to state their positions. (27RT 10132-10136.)

It likewise failed to inquire into the existence of an irreconcilable conflict at the August 17, 1994, proceeding. There, too, appellant voiced distrust of counsel because counsel was not doing "[t]he defense job" and was always agreeing with the prosecutor. (29RT 10628.) Rather than delving into the extent and nature of any conflict between appellant and his attorneys, including whether they could cooperate regarding the critical issue of appellant's testifying and the delicate confidences that needed to be shared for an effective penalty phase case, the trial court lectured appellant about why it perceived counsel to be providing adequate representation. (29RT 10628-10630.) The explanation, however, failed to convey to appellant, who had been described by Littlejohn as "slow" and with "special needs" (28RT 10412, 10431), why it was acceptable for appellant's defenders to align themselves with his adversary, the prosecutor. Consequently, it did not "ease [the defendant's] dissatisfaction, distrust and concern." (*Brown v. Craven, supra,* 424 F.2d 1166, 1170.) Also, the court's focus on the adequacy of counsel's representation was misplaced. A defendant and an attorney may be embroiled in an irreconcilable conflict even if counsel's representation is competent. (*United States v. Adelzo-Gonzalez, supra,* 268 F.3d 772, 778; *United States v. Walker* (9th Cir. 1990) 915 F.2d 480, 483, overruled on other grounds as stated in *United States v. Nordby* (9th Cir. 2000) 225 F.3d 1053, 1059.)

Similarly, the trial court did not probe any breakdown in the attorney-client relationship when appellant asked for substitute counsel on August 23,

1994. Appellant's faulting counsel for not objecting to the prosecutor's opening statement outlining his testimony (30RT 10886) underscored the fundamental conflict between appellant's absolute right to decide whether or not to testify and counsel's power to choose what defense to present. Castro emphasized the friction as well by stating that he chose the coercion defense, which counted on appellant's testimony, "*regardless* of what [appellant's] desires were." (30RT 10887, emphasis added.) That appellant vacillated about testifying and ultimately refused to testify despite counsel's strong desire that he do so (2RT 1018-1023, 30RT 10887-10888) also indicated a serious lack of mutual cooperation and understanding between appellant and counsel on this critical issue. (See *People v. Cole, supra,* 33 Cal.4th 1158, 1193 [disagreement about tactics may be severe enough to indicate a complete breakdown of the attorney-client relationship]; *People v. Robles, supra,* 2 Cal.3d 205, 215 [same, in context of disagreement about defendant's testifying].) Nevertheless, the trial court failed to probe whether appellant's relationship with counsel was irredeemably broken.

"A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request." (*People v. Marsden, supra,* 2 Cal.3d 118, 123.) Such knowledge may come from listening to the specifics of the defendant's complaint, or it may require some probing of what lies just below the surface of the defendant's words. "The semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right." (*Id.* at p. 124.) A lay defendant may be unaware of the proper manner in which to demonstrate his entitlement to substitute counsel. (*Id.* at p. 126.) For this reason, the trial court

has a duty to make adequate inquiry into relevant circumstances.

In *People v. Eastman, supra,* 148 Cal.App.3d 744, the defendant complained that his attorney was "in cahoots with the district attorney" and that the two had teamed up to falsely state his mother would testify against him. (*Id.* at p. 695.) The reviewing court observed that the defendant's comments suggested a "fundamental breakdown" in the attorney-client relationship which might require substitution of counsel. (*Id.* at p. 696.) Consequently, the trial court erred in abdicating its obligation to conduct further inquiry into the matter. (*Ibid.*) In *People v. Munoz, supra,* 41 Cal.App.3d 62, the defendant complained that counsel did not want to fight the case, was convinced of his guilt and was not helping him. (*Id.* at p. 64.) The reviewing court noted that a defendant has a right to representation by an attorney with undivided loyalty and found that the trial court erred by not sufficiently inquiring into this issue. (*Id.* at p. 66.)

Federal decisions also recognize that the Sixth Amendment requires adequate, on the record inquiry into whether an irreconcilable conflict jeopardizes the attorney-client relationship. (*Schell v. Witkek* (9th Cir. 2000) 218 F.3d 1017, 1025; *Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, 1320.) In *United States v. Adelzo-Gonzalez, supra,* 268 F.3d 772, the defendant stated he did not get along with counsel and complained that counsel did not pay attention to him, had used bad language and had threatened to "sink [him] for 105 years." Counsel attempted to block defendant from moving for substitute counsel and actively opposed his request. He also called defendant a liar and accused him of feigning ignorance. (*Id.* at p. 778.) The Ninth Circuit concluded, "[d]espite such striking signs of a serious conflict, the district court

made no meaningful attempt to probe more deeply into the nature of [defendant's] relationship with the appointed counsel" and instead focused only on counsel's competence. (*Ibid.*)

United States v. Walker, supra, 915 F.2d 480 also criticized the district court's inadequate inquiry into the existence of an irreconcilable attorney-client conflict. There, the defendant requested new counsel and complained that his appointed attorney was preparing an anemic defense and had failed to contact important witnesses about which he had told her. (*Id.* at p. 482.) She replied by asking to withdraw due to an irreconcilable conflict with the defendant. (*Ibid.*) Deeming her competent, the district court required her to continue her representation. (*Ibid.*) The Ninth Circuit faulted the lower court for making virtually no attempt to discover the causes of the defendant's dissatisfaction with counsel. (*Id.* at p. 483.) It found that the court should have focused its inquiry on the nature and extent of appellant's conflict with counsel, not counsel's competence. (*Ibid.*)

Appellant's case is similar to the above decisions. The trial court had ample cause to believe that appellant had lost all trust in Castro and Holmes and that his relationship with them was irreparably broken. Nevertheless, it failed to conduct even a minimal inquiry into the existence and nature of an irreconcilable conflict. This was error.

When a trial court fails to make an adequate inquiry during a hearing on defendant's request for substitute counsel, it cannot intelligently exercise its discretion to rule on the request and reversal is required. (*People v. Hernandez* (1985) 163 Cal.App.3d 645, 652-653.) In *People v. Marsden, supra,* 2 Cal.3d

118, the trial court erred not by failing to adequately inquire into the defendant's specific complaints against counsel. This Court determined that, had the trial court discharged its duty, the defendant might have made a sufficient showing to merit appointment of new counsel. Applying the harmless error standard for federal constitutional error set forth in *Chapman v. California, supra,* 386 U.S. 18, it ruled that it was impossible to find beyond a reasonable doubt that ineffective assistance did not taint the defendant's conviction. (*Marsden, supra,* at p. 126; see also *People v. Eastman, supra,* 146 Cal.App.4th 688, 697 [trial court's failure to inquire into irreconcilable conflict between defendant and counsel is prejudicial under *Chapman* because one cannot say what defendant would have shown had inquiry been conducted].)

The same result is compelled here for both the guilt and penalty phase verdicts. The failure to conduct an adequate inquiry into the existence of an irreconcilable conflict between appellant and counsel results in a silent record making intelligent appellate review impossible. (*People v. Hill, supra,* 148 Cal.App.3d 744, 755.) It is impossible to say, beyond a reasonable doubt, that either verdict is untainted by ineffective representation due to irreconcilable conflict between appellant and defense counsel. Accordingly, the judgment must be reversed in its entirety.

In the alternative, appellant's case should be remanded for so that the trial court may inquire into the existence and nature of an irreconcilable conflict between appellant and counsel. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1402; *Schell v. Witek, supra,* 218 F.3d 1017, 1027-1028.)

III.

APPELLANT'S TRIAL WITH THE HODGES BROTHERS USING DUAL JURIES RESULTED IN IDENTIFIABLE PREJUDICE AND GROSS UNFAIRNESS IN VIOLATION OF DUE PROCESS AND REQUIRES REVERSAL OF THE JUDGMENT.

Appellant and the Hodges brothers were tried together using two juries: one for appellant and one for both brothers. Although trying multiple defendants in a single trial by dual juries is not inherently prejudicial, in appellant's case, the procedure resulted in identifiable prejudice and gross unfairness in violation of due process which warrants reversal.

Had appellant's case been fully severed from the Hodges brothers', appellant's jury would have never heard the prosecutor's gravely prejudicial, unfulfilled promise in his opening statement that appellant would testify to shooting McDade under duress from his codefendants. Nor would appellant have been pitted against two adversaries in addition to the prosecutor, counsel for each of the Hodges brothers, who sought to destroy the credibility of Eric Banks and Darryl Leisey, state witnesses on which appellant's defense heavily rested. Additionally, appellant's jury would not have observed the Hodges brothers suddenly vanish from the case shortly before guilt phase deliberations under circumstances strongly suggesting that the case against them had been dismissed. Further, the proceedings were plagued by logistical difficulties caused by cramming two juries into a courtroom meant for just one. Appellant's jury and attorneys had trouble seeing and hearing the evidence presented. It was also difficult for counsel to fulfill their duties because they were largely confined to their seats at counsel table despite the need to

communicate with counsel for the codefendants and investigators. In addition to these case-specific harms, was the harm, endemic to dual jury trials, that appellant's jury would speculate about the evidence it was missing when excused from the courtroom.

Appellant's trial with the Hodges brothers using two juries violated appellant's due process right to a fundamentally fair trial under the Fourteenth Amendment, his right to remain silent guaranteed by the Fifth Amendment, his rights to trial by jury and effective assistance of counsel guaranteed by the Sixth Amendment, and his right to a reliable guilt and penalty determination guaranteed under the Eighth Amendment. Accordingly, the judgment must be reversed in its entirety.

A. General Factual Background

1. Choice to Use Dual Juries Instead of Complete Severance

Pretrial, Terry Hodges moved to preclude the prosecutor from introducing statements by appellant and John Hodges incriminating him or, in the alternative, for severance on *Aranda-Bruton* grounds. (1RT 80-81; 2CCT 433-451.) The prosecutor announced his intention to introduce appellant's statement to detective Lee incriminating the brothers and contended it could not be effectively redacted. (1RT 81, 83; 2CCT 440-450.) Over appellant's objection, the lower court found that the statement could not be redacted, and it granted severance. (1RT 81-84.)

John Hodges then moved for a joint trial using dual juries as an alternative to severance. (1RT 84-85.) The court backtracked from its original

ruling and decided to leave it up to the trial court to choose between severance and dual juries – one for appellant and one for the Hodges brothers.[65] (1RT 85; see also 1RT 85-88.) After the court announced its ruling, appellant's counsel joined in the request for dual juries. (1RT 85.)

Subsequently, the trial court addressed whether full severance or dual juries were warranted. (1RT 104.) The prosecutor argued in favor of "one trial, two juries, three defendants." (2CCT 498-505 [prosecutor's memorandum of points and authorities]; 5RT 2077.) Appellant's counsel characterized this approach as "reasonable." (*Ibid.*) The trial court agreed that a single trial with two juries was "manageable" in light of its *Aranda* rulings, and it ruled that the trial would proceed thusly. (5RT 2175.) It did, however, express substantial reservations about conducting a dual jury trial in the small courtroom being used. (*Ibid.*)

Counsel for appellant vacillated concerning appellant's position on severance. He stated that he opposed severance because he wanted appellant's jury to hear the Hodges brothers' statements to Leisey and Banks. (13RT 4533-4534.) But even if appellant were tried alone, counsel stated that he would seek to admit the statements as admissions against penal interest. (13RT 4532-4534.) Thus, counsel also characterized his position on severance as "neutral." (13RT 4534.)

---

[65] The severance motion was heard and decided by the Hon. Gerald S. Bakarich. (1RT 80.) Trial was conducted before the Hon. James I. Morris. (1RT 104, 2RT 1001.)

2. Trial Mechanics

Selection of the Powell jury proceeded without participation by the attorneys for the Hodges brothers, and vice versa. (6RT 2208-2211; 1CT 397-400, 410-414, 416-417, 421-423 [Powell jury selection]; 23CCT 6717-6718, 24CCT 7029, 25CCT 7402, 26CCT 7589, 27CCT 7961, 28CCT 8332 [Hodges jury selection].) Prospective Powell jurors were informed that one trial would be conducted for appellant and the Hodges brothers, but there would be two juries, one for appellant and one for the brothers, and that they were being questioned for possible service on the Powell jury. (E.g., 47C3AT 13775-13776; 6RT 2426-2428, 7RT 2683.)

At trial, one jury sat in the jury box and the other sat on one side of the courtroom audience on a platform to "hopefully" elevate the jurors' heads over counsels'. (14RT 5943, 15RT 6285.) Each week, the juries switched positions. (14RT 5943.) The court allowed jurors to stand in the back row and advised them to raise their hands if they could not see or hear and contact the courtroom attendant with any concerns. (15RT 6285-6286, 6290.) The court cautioned the two juries to "maintain separateness" and noted that both wore differently colored badges. (15RT 6298.)

Just before opening statements, the trial court instructed the juries concerning the dual jury procedure (15RT 6303):

> ...[B]ecause this is a dual jury, a two-jury case, there will be periods of time during the trial – perhaps even during the opening statement, because there are some issues of evidence that are relevant only to one jury as opposed to the other jury, when the relevant evidence for one case or one jury is being discussed in the

> opening statement or presented through the witnesses, the other jury will, for those periods of time, have to step out into the hallway and will be admonished, whenever this occurs, not to speculate as to what is being discussed or taken, as far as evidence while the one jury is absent and the other is present.

Throughout the proceedings, both juries were generally present for all evidence. (13RT 4527, 4549-4551; 29RT 10651-10655.) The court explained that in a single trial, all relevant evidence is admissible as to all parties, whether it is helpful or harmful. (*Ibid.*) One of the juries would be excused only if evidence whose admissibility was limited to the other jury was to be presented, such as when there was an *Aranda-Bruton* problem. (6RT 2420, 13RT 4526-4527, 4549-4551.) The Hodges brothers and their attorneys could stay for, but not participate in, proceedings conducted solely in front of the Powell jury. (23RT 8872-8873, 8890.) One or both of the Hodges typically remained in the courtroom to hear the evidence presented to the Powell jury when the Hodges jury was excused. (23RT 8888, 8890, 25RT 9305-9307; 28RT 10265-10268, 29RT 10369, 10383; see also 25RT 9470-9475 & 30RT 10797 [no indication either Hodges defendant left].)

Over appellant's objection (29RT 10644), attorneys for codefendants John and Terry Hodges cross-examined witnesses appellant called in his defense. (29RT 10714-10721, 10733-10735; see also 29RT 10651-10655.)

3. Jury Shuffling

The Powell jury was excused twice, for the playing of Banks's and Leisey's statements to detective Lee, while evidence was presented to the Hodges jury. (People's Exhibit No. T-58 [Bank's statement]; 2CT 487

[clerk's minutes 8/10/94]; 26RT 9829, 9839-9842; People's Exhibit No. T-62 [Leisey's statement]; 2CT 518 [clerk's minutes 8/22/94]; 29RT 10686-10688.)[66]

The Hodges jury was excused at least seven times while the Powell jury heard evidence, i.e., for appellant's statement to detective Lee (People's Exhibit No. T-51; 2CT 482 [clerk's minutes for 8/3/94]; 23RT 8860-8861); Banks's full, unedited statement to Lee (People's Exhibit No. T-55; 25RT 9302-9303, 9312, 9320-9324; CT 484 [clerk's minutes for 8/8/94]); portions of Banks's preliminary hearing testimony not presented to both juries (25RT 9471-9475); Sheriff Jungsten's testimony (28RT 10265-10266);[67] Littlejohn's testimony, her taped statement to Lee, certain testimony by detective Thurston, and Leisey's statement to Lee (People's Exhibit No. T-60 [Littlejohn]; People's Exhibit No. T-61 [Leisey]; 2CT 491, 508 [clerk's minutes for 8/16/94 and 8/17/94]; 29RT 10383, 10464-10465, 10467, 10494-10495, 10499, 10501, 10507-10508); part of appellant's examination of Lee (30RT 10786-10789; 2CT 518 [clerk's minutes for 8/22/94]), and appellant's examination of Ruben Martinez. (30RT 10798-10799).

---

[66] The Powell and Hodges juries each heard different versions of Banks's and Leisey's statements to Lee. (See People's Exhibit Nos. T-55 & T-58 [Banks] and T-61 & T-62 [Leisey].) In regards to the playing of the Leisey statement to the Hodges' jury, both juries were summoned to the courthouse (29RT 10503, 10506, 10508), but only the Hodges jury was invited into the courtroom. (29RT 10680-10681, 10686-10688).

[67] After the Hodges jurors were excused for Jungsten's testimony, they were not called back to attend Littlejohn's. (28RT 10265, 10286.)

Both juries knew evidence would be presented in their absence. Prior to excusing one of the juries, the court and/or parties often made comments to this effect. (E.g., 25RT 9302-9303 [court tells Hodges jurors that Powell evidence will continue in their absence]; 26RT 9652 [court tells Powell jurors Hodges jury will hear evidence in their absence], 28RT 10264 -10265 [before excusing Hodges jury, court ascertains from prosecutor that his next group of witnesses will pertain to appellant only]; 29RT 10730, 10736 [court states that appellant's examination of Lee must wait until Hodges jury excused].)

Counsel for John Hodges repeatedly objected to jury shuffling or comments suggesting that evidence would continue to be presented despite one jury's absence. He contended this invited jurors to speculate about what they were missing. (25RT 9533-9534; 30RT 10787.) Towards the end of the proceedings, the trial court admonished both juries not to speculate about what was happening in their absence and to limit consideration of the evidence to solely what was presented to them. (30RT 10792.)

Further factual background pertinent to appellant's challenge to the use of dual juries shall be presented in the body of the argument below.

B. Appellant's Challenge to the Dual Jury Procedure Is Cognizable on Appeal.

Appellant objected to severance of his case from that of the Hodges brothers. (1RT 81-82.) He did not specifically object to the empanelment of multiple juries. Appellant's failure to object to multiple juries does not bar appellate review of his challenge to the procedure.

First, the propriety of trial of multiple defendants by multiple juries is of constitutional stature. It is ultimately assessed by whether the procedure resulted in "identifiable prejudice" or "gross unfairness" in violation of due process. (U.S. Const., amend. 14; Cal. Const., art. I, §§ 7 & 15; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287; *People v. Harris* (1989) 47 Cal.3d 1047, 1075.) Typically, the failure to raise at the trial level a timely and specific objection urging the same grounds as advanced on appeal forfeits review of the matter. (*People v. Seijas* (2005) 36 Cal.4th 291, 301.) But when an "error is fundamental, so gross in character as to result in a denial of due process," a reviewing court should excuse lack of objection below and reach the merits of the claim. (*People v. Mills, supra,* 81 Cal.App.3d 171, 176; *People v. Chambers* (1964) 231 Cal.App.2d 23, 28.) This does not thwart the forfeiture rule's purpose of ensuring that errors are promptly brought to the trial court's attention for correction. (*People v. Williams* (2008) 43 Cal.4th 584, 624.) The trial court is ultimately responsible for ensuring that the defendant receives a fundamentally fair trial, irrespective of the acts or omissions of the parties. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626-627; *People v. Drake* (1992) 6 Cal.App.4th 92, 98.) When a defendant's fundamental constitutional rights "have been invaded, ... and the opportunity arises on appeal to undo the wrong, the court cannot allow itself to be hampered by the failure of counsel to register an objection." (*People v. Rodriguez* (1943) 58 Cal.App. 415, 421.) This is particularly so where, as here, the claim of error presents only a question of law arising from undisputed facts. (*Mills, supra,* at pp. 175-176.)

Second, by the time of appellant's trial, this Court had already approved of the dual jury procedure as a viable alternative to severance in *People v.*

Harris, supra, 47 Cal.3d 1047, 1075-1076. Had appellant made a general objection to employing dual juries at the pretrial stage, when severance and alternatives thereto were litigated, the trial court would have rejected it. Consequently, objection should be excused as futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) The issue really boils down to whether appellant suffered identifiable prejudice or gross unfairness from the dual jury procedure as implemented. (*People v. Cummings, supra,* 4 Cal.4th 1233, 1287.) This assessment could not have been made pretrial. "The basic fairness of the dual jury procedure can only be properly evaluated in light of the trial itself by determining whether ... the procedure specifically prejudiced a litigant's defense." (*United States v. Lewis* (D.C. Cir. 1983) 716 F.2d 16, 20.)

Third, appellant did object to severance of his case from either or both of the Hodges brothers. (1RT 81-82.) Empanelment of multiple juries is a type of partial severance. (*People v. Cummings, supra,* 4 Cal.4th 1233, 1286-1287 [contrasting "complete severance" with dual jury procedure actually employed].) Appellant's objection to full severance therefore encompassed an objection to partial severance under the principle that "the greater includes the lesser."

Although appellant's counsel ultimately joined in John Hodges's request that the trial proceed by way of dual juries (1RT 85), he did so only *after* the pretrial court's (1) initial ruling granting full severance over his objection (1RT 81-84) and (2) decision to retreat from its initial ruling in favor of ordering that the trial court chose between full severance or partial severance by way of dual juries. (1RT 84-85.) Once appellant's objection to

full severance had been overruled, counsel's expression of approval of the dual jury procedure was merely a "defensive move" seeking to make the best of the situation. (See *People v. Calio* (1986) 42 Cal.3d 639, 643 ["endeavoring to make the best of a bad situation for which [a party] was not responsible" does not waive a claim of error in regards to the ruling creating it]; cf., *People v. Spencer* (1967) 66 Cal.2d 158, 169 [where defendant testifies to mitigate the damage of his erroneously admitted confession, his testimony does not render the evidentiary error harmless].) Further, since counsel's joinder in John Hodges's motion occurred only belatedly, after the trial court had already ruled, it did not affect the ruling. (Cf., *People v. Bonilla* (2007) 41 Cal.4th 313, 336 [refusing to deem adequate counsel's belated objection to prosecutorial misconduct]; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 372, Insufficient or Belated Objection, pp. 461-462.) Consequently, it cannot have invited it.

For these reasons, appellant's challenge to the dual jury procedure is cognizable on appeal.

C. Reversal Is Required Where Trial By Dual Juries Results in Identifiable Prejudice or Gross Unfairness.

1. General Principles

Penal Code section 1098 sets forth a statutory preference for joint trials. A "classic case" for a joint trial occurs when defendants are charged with the same offense, involving the same facts, against a single victim. (*People v. Hardy* (1992) 2 Cal.4th 86, 168.) Nevertheless, a trial court has discretion to order separate trials. (*Id.* at p. 167.) "The court should separate the trial of

codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917; see also *Hardy, supra,* at p. 167.)

When separate trials are required, this Court has approved of use of dual juries as an alternative to complete severance. (*People v. Cummings, supra,* 4 Cal.4th 1233, 1287; *People v. Harris, supra,* 47 Cal.3d 1047, 1070-1075). Most typically, dual juries are used when the prosecution offers the out-of-court statement of a non-testifying defendant incriminating a codefendant as discussed in *Aranda-Bruton.* (*Id.* at pp. 1070-1071; see also *Louisiana v. Watson* (1981) 397 So.2d 1337, 1339; *Ewish v. Nevada* (1994) 871 P.2d 306, 312.) They may also be used to mitigate the prejudice of a joint trial in which defendants present antagonistic defenses. (E.g., *People v. Rodriguez* (Ill.Ct.App. 1997) 680 N.E.2d 757, 759, 767 [289 Ill.App.3d 223].) It is widely agreed that trial involving dual juries is not inherently prejudicial. (*Harris, supra,* 47 Cal.3d 1047, 1071; *Ewish, supra,* 871 P.2d 306, 312-313.)[68]

---

[68] Jurisdictions vary regarding the degree to which they embrace or shun dual jury trials. Many federal jurisdictions have approved the practice. (*Harris, supra,* 47 Cal.3d 1047, 1073 & citations therein.) Even these jurisdictions, however, have tempered their approval by expressing reservations. (See *Wilson v. Sirmons* (10th Cir. 2008) 536 F.3d 1064, 1099 ["The dual jury procedure is not without problems," including disruption in the presentation of evidence, diverting counsel's attention away from his or her client and potential for juror confusion and mismanagement]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1304, reversed on other grounds in *Lambright v. Stewart* (*Lambright II*) (1999) 191 F.3d 1181, 1187 [the dual jury procedure "introduces additional complexity and likelihood of error into the trial and

A defendant may demonstrate that the trial court abused its discretion, in light of information available to it at the time of its ruling, in choosing to employ dual juries rather than granting full severance. (*People v. Cummings, supra,* 4 Cal.4th 1233, 1287.) If the trial court's ruling was proper at the time it was made, the defendant may still obtain relief by showing that the dual jury procedure resulted in "identifiable prejudice or 'gross unfairness ... such as to deprive the defendant of a fair trial or due process of law.' [Citations.]" (*People v. Cummings, supra,* 4 Cal.4th 1233, 1287; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1296 [same in context of claim that severance motion was wrongly denied, regardless of any dual jury concerns].)

2. Application

---

thereby impairs a defendant's ability to conduct his defense"]; *United States v. Lewis, supra,* 716 F.2d 16, 19 [acknowledging "warnings" voiced by other jurisdictions about using dual juries].)

A number of state courts are more openly speculative about use of dual juries. (E.g., *Woolbright v. State* (2004) 160 S.W. 3d 315, 324-325 [357 Ark. 63] ["we join the majority of courts that have expressed concern about dual juries" and prohibit the practice until adoption of a rule addressing "the practical considerations necessary for safeguarding the defendants' rights"]; *State v. Corsi* (1981) 86 N.J. 172, 178 [430 A.2d 210] [the multiple jury procedure "can involve substantial risks of prejudice to a defendant's right to a fair trial. ... [T]here are too many opportunities for reversible error to take place. We do not recommend it. If it is to be used at all, it should be used in relatively uncomplicated situations"]; *Scarborough v. State* (Md.Ct.App. 1981) 50 Md.App. 276, 279 [437 A.2d 672] ["The multiple jury system ... is precarious because all the risks inherent in the traditional jury system become two-fold; as a result, courts which have sanctioned its use have done so hesitantly"].)

The pre-trial judge ordered that, due to *Aranda-Bruton* concerns, appellant's trial had to be completely severed from that of the Hodges brothers, or appellant and the Hodges had to be tried by separate juries. (1RT 81-84.) The trial court chose the later option, with one jury empanelled to try appellant's case and another jury empanelled to try the Hodges' case. (5RT 2175.) Appellant maintains that his dual jury trial with the Hodges brothers resulted in identifiable prejudice and gross unfairness due to a number of harmful factors which would not have occurred had appellant been tried alone.

a. The Prosecutor Falsely Promised Appellant Would Testify to Duress

Trying appellant jointly with the Hodges brothers using dual juries rather than completely severing appellant's trial from the Hodges' set the stage for the prosecutor's severely prejudicial, unfulfilled, promise in his opening statement that appellant would testify he killed McDade under duress from the brothers. (See generally, Argument I, *ante.*)

Appellant's defense was that he killed under duress from the Hodges brothers. (2RT 1017-1020 [Castro outlines duress defense at pretrial conference].) Appellant's testimony was highly significant to its successful presentation. No one besides appellant, John and Terry Hodges and, at the end, McDade, truly knew what led to and precipitated the killing. Consequently, defense counsel greatly desired that appellant testify. (2RT 1019 [Castro's statement at pretrial conference], 30RT 10823 [at close of evidence, Holmes confirms defense always wanted appellant to testify].)

Counsel took the highly unusual step of seeking to have the prosecution call appellant as its own witness – this despite the prosecution's goal of convicting appellant of capital murder and sentencing him to death (2RT 1022) and its refusal to give him any leniency in exchange for his cooperation. (2RT 1042, 14RT 5955-5956). To orchestrate this scenario, counsel repeatedly represented that appellant was willing to testify as a state witness (e.g., 2RT 1021, 15RT 6266) and furnished the prosecution with appellant's anticipated testimony (15RT 6267; 29CCT 8486).

The prosecutor chose to use appellant to convict all three defendants. He told both juries in his opening statement that appellant would testify he left his gun in Terry Hodges's car and approached McDade to discuss getting his job back. (15RT 6344.) John and Terry Hodges appeared, each armed with a firearm, and robbed McDade. (15RT 6344-6345.) John Hodges then handed appellant his gun, which contained only a single round, and said, "we ain't leaving no witnesses." Terry pointed his shotgun at appellant. Because he had no choice, appellant shot McDade. (*Ibid.*)

The prosecutor also read verbatim appellant's statement to Lee. (15RT 6346-6410.) In it, appellant gave various other accounts of the killing: one of his accomplices did it while appellant sat in the car (15RT 6349-6358), appellant shot McDade accidentally (15RT 6374-6378), and appellant deliberately shot McDade because appellant felt pressured and scared and Terry and John wanted McDade killed. (15RT 6380-6381, 6394, 6398).

Ultimately, appellant did not testify for either the prosecution or the

defense. He relied on his right to remain silent. (30RT 10812-10817, 10828.) Appellant's silence was hardly surprising since there was no way to guarantee that appellant would testify. (2RT 1022; 4RT 1787, 14RT 5934, 5938, 5947-5948, 15RT 6269-6270.) A criminal defendant has a constitutional right to testify or remain silent regardless of his counsel's wishes. (*Rock v. Arkansas, supra,* 483 U.S. 44, 51-53; *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231.)

As discussed in greater detail in Argument I, *ante,* the prosecutor's unfulfilled promise that appellant would testify he did not rob McDade and killed him under duress from his codefendants violated appellant's rights to remain silent, trial by jury, due process and reliable guilt and penalty determinations. (U.S. Const., amends. V, VI, VIII & XIV.) It was severely prejudicial. When a jury has been promised certain specific testimony helpful to a defendant but that testimony never materializes, the jury will naturally draw the devastating inference that it was omitted because it was false.

Had appellant's case been fully severed from that of the Hodges brothers, so that solely appellant was pitted against the state, the prosecutor would have never made the same, grossly prejudicial, undelivered promise in his opening statement. Without the Hodges brothers present, appellant and the prosecution would have battled it out as classic adversaries with no need for, or possibility of, special alliances concerning the Hodges brothers. The defense would have never offered to cooperate with the prosecution. The prosecutor would have lacked reason to present appellant as his own witness. He would not have needed appellant to bolster an otherwise weak case against the

Hodges. (2RT 1014-1015, 1020-1021 [prosecutor concedes at pretrial conference that state's case against the Hodges is weak].) Appellant would have either testified for the defense or relied on his right to remain silent.

Accordingly, keeping appellant's trial together with that of the Hodges brothers by using dual juries as an alternative to severance resulted in tremendous harm to appellant's case. It set up the prosecutor's grossly prejudicial, unfulfilled promise that appellant would testify to duress.

b. Because Appellant's Defense Was Antagonistic to the Hodges', Counsel for the Hodges Functioned as Additional Prosecutors Against Appellant.

The defenses presented by appellant and his codefendants were not simply conflicting. They were irreconcilable. The dual jury procedure also harmed appellant by subjecting him to trial with not merely the prosecutor as his adversary but also with two additional adversaries, counsel for each of the codefendants. This violated appellant's Fourteenth Amendment due process rights to present a defense and have the prosecution prove his guilt beyond a reasonable doubt, Sixth Amendment rights to have the jury decide if the state had carried its burden and to the effective assistance of counsel and Eighth Amendment right to a reliable guilt and penalty determination.

Codefendants have mutually antagonistic or exclusive defenses when the acceptance of one codefendant's defense "precludes the other['s] acquittal." (*People v. Carasi, supra,* 44 Cal.4th 1263, 1296; see also *United States v. Zafiro* (1991) 506 U.S. 534, 542 (Stevens, J., conc.), citing *State v. Kinkade* (1984) 140 Ariz. 91, 93 [680 P.2d 801] [defining "mutually

exclusive" defenses].) A joint trial "is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor.... [J]oinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary." (*Zafiro, supra,* at pp. 543-544 (Stevens, J., conc.).) A danger exists that the trier of fact will resolve the logical inconsistency of mutually exclusive defenses by crediting the case of the government, which it might otherwise question, because the government's theory is the only coherent and consistent one presented. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082.)

This Court considers conflicting defenses a factor that may mandate complete severance of otherwise properly joined defendants. (*People v. Carasi, supra,* 44 Cal.4th 1263, 1296; *People v. Massie, supra,* 66 Cal.2d 899, 917.) A joint trial is prohibited where "'the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty.'" (*People v. Hardy, supra,* 2 Cal.4th 86, 168.) Put another way, complete severance is required "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States, supra,* 506 U.S. 534, 539.)

Appellant's defense was that the Hodges committed the robbery without appellant's participation and were guilty of the homicide as principals. (See 15RT 6343-6346.) Appellant was also a principal, but his culpability was

excused because the codefendants coerced him. (Pen. Code, § 26, subd. 6.)

To support his duress defense, appellant relied heavily on testimony and statements by Banks and Leisey, prosecution witnesses who claimed that John and Terry Hodges admitted coercing appellant to shoot McDade. (2RT 1017-1018, 5RT 1996-1997; see 31CCT 9143-9146, 9154-9155 (People's Ex. No. T-55(A)) [according to Banks, John Hodges manipulated the shooter, a youngster, and said he gave the order to kill]; 25RT 9493-9494, 9498 [according to Leisey, Terry Hodges said the shooter did not have any heart and was taking too long so Terry "had to go up there and jack him up" to kill with the gun Terry supplied].) Counsel for appellant portrayed Banks' and Leisey's testimony as credible. (31RT 11258, 11299-11320 [defense counsel argues in closing in favor of Banks's Leisey's credibility].) He considered it so crucial that he would have offered it in appellant's defense case if the prosecution was not already presenting it or if appellant were tried separately. (4RT 1793-1794, 5RT 1996-1997.)

In contrast, the Hodges brothers' defense was lack of any involvement in the robbery or killing. (2RT 1013 [prosecutor outlines anticipated Hodges defense]; 15RT 6457-6458, 6461-6462 [attorney Macias's opening statement].) The Hodges claimed appellant lied about their involvement (15RT 6461-6462, 6473-6475) and sought to raise a reasonable doubt by suggesting that his real accomplices were Bruce Goulding and/or the individuals who accompanied him on to Los Angeles. (15RT 6463, 6471, 6474 [opening statements by attorneys for John and Terry Hodges]; 29RT 10739-10741, 30RT 10756, 10765-10770 [Hodges's examination of detective Lee during defense case]).

John and Terry Hodges vehemently attacked Banks and Leisey. They sought to exclude the witnesses' testimony altogether. (12RT 4085 [counsel for John Hodges raises due diligence objection to introduction of Banks's prior testimony when prosecution had not yet secured Banks's presence for trial]; 5RT 2032-2066 [court and parties discuss Terry Hodge's motion to exclude Leisey's testimony on ground that he is incapable of telling the truth]; 3CCT 712-715 [Terry Hodges's written motion to exclude Leisey's testimony].) When these efforts failed, the Hodges's attorneys vigorously cross-examined Banks and Leisey in an effort to destroy their credibility. (23RT 8761-8806, 24RT 9025-9036, 9045-9081, 9115-9130 [attorney Macias's cross-examination of Banks]; 25RT 9503-9526, 25-26RT 9534-9586, 26RT 9590-9627, 9652-9706, 9720-9737, 9769-9818 [attorney Sherriff's cross examination of Leisey].) After Banks and Leisey testified, the Hodges contended that they were so patently unreliable that the court should not even allow the jury to consider their testimony. (29RT 10575-10585.)

Appellant's duress defense was irreconcilable with the Hodges brothers' claim that they were not involved at all in the charged crimes. Acceptance of the Hodges brothers' defense precluded appellant's acquittal based on their coercion of him. Only if the Hodges brothers were guilty could appellant's duress defense succeed. (See *United States v. Troiano* (D. Hawaii 2006) 426 F.Supp.2d 1129, 1135 [defendants rely on mutually exclusive defenses where defendant claims lack of involvement and codefendant seeks to portray him as a "'predator' who bullied or manipulated him into providing ... information" about layout, ATM and safe of robbed store].)

Had appellant's case been completely severed from that of the Hodges, it would not have been marked by the severe antagonism between appellant and his codefendants which permeated the trial. As defense counsel stated in his closing remarks, "anything bad that happens to the Hodges brothers was good for Mr. Powell." (31RT 11243.) Attorneys for the Hodges often called appellant's counsel an additional prosecutor (5RT 2059-2060, 27RT 9966, 29RT 10562) and accused the prosecution and appellant of collusion to convict their clients. (17RT 6807, 15RT 6274, 29RT 10695). As noted, appellant and the Hodges took diametrically opposed positions concerning the truthfulness of Leisey and Banks. The antagonism was so great that it caused counsel for Terry Hodges to threaten appellant's counsel over the latter's rehabilitation of Leisey. (27RT 9965-9966.)

Appellant conceded he was the shooter. (31RT 11249.) The main disputed issue at trial was whether appellant had the culpable mental state necessary for robbery and murder in light of the Hodges' brothers actions. (See Argument I, §§ B.2 & C.5 [appellant initially seeks to present duress defense but ultimately presents a closely related mental state defense of fear and pressure].)[69] Had the trial court granted full severance, the prosecutor could not have sat back and watched appellant and the Hodges brothers attempt to destroy each other. And, helpful to appellant, the prosecutor would have been required to take consistent positions concerning Banks' and Leisey's

---

[69] The trial court's refusal to instruct on duress (see Argument VI, *post*), caused the defense to shift from arguing duress to arguing that appellant's mental state was so clouded by fear and pressure from the Hodges that appellant did not form the mental state for robbery and murder. (31RT 11088-

credibility at separate proceedings. (*In re Sakarias* (2005) 35 Cal.4th 140, 155-156.)

An opinion from our sister state of Illinois is instructive. In *People v. Rodriguez, supra,* 680 N.E.2d 757, the minor and a codefendant, A.P., were tried in a single trial using two juries for various crimes arising out of shootings at a market. (*Id.* at p. 759.) Several witnesses to the crimes implicated A.P. and/or a third party as the shooters in pretrial statements to the police. At trial, the witnesses dismissed their prior statements as false and maintained that the minor was the culprit. (*Id.* at pp. 760-762, 766.) The minor's defense was that the witnesses initially told the truth and that their trial testimony was suspect. (*Id.* at p. 767.) In contrast, "by arguing on cross-examination that the witnesses were telling the truth at trial, A.P. was presenting evidence to defendant's jury that defendant was the shooter." (*Id.* at p. 766.) The minor, therefore, not only defended against the prosecution's case, he "was also defending against his codefendant's theory of the case." (*Id.* at p. 767.) Although the trial court impaneled two juries in an effort to mitigate the damage from the antagonistic defenses, it undermined these efforts by allowing the minor's jury to hear A.P.'s cross-examination of the witnesses. (*Ibid.*) Finding that the minor's trial was fundamentally unfair and in violation of the Sixth Amendment's jury trial guarantee, *Rodriguez* reversed. (*Ibid.*)

United States v. Tootick, supra, 952 F.2d 1078 reached a similar conclusion in the context of two defendants tried jointly by one jury. The Ninth Circuit reversed the defendants' convictions for assault because the

---

11089.)

defendants were severely prejudiced by enduring a single trial where they presented mutually exclusive defenses. (*Id.* at pp. 1080-1086.) Each claimed he was present but not involved in the knife attack, and each attempted to support his own innocence by forcefully advocating for the other's sole guilt. (*Id.* at p. 1081.) Counsel for each of the defendants did so, in part, by using "[c]ross-examination of the government witnesses ... [as] and opportunity to emphasize the exclusive guilt of the other defendant or to help rehabilitate a witness that has been impeached." (*Id.* at p. 1082.) The net effect of such antagonism and inconsistency in the defense positions was to make the government's case seem especially attractive. (*Id.* at p. 1081.)

Therefore, the mutually antagonistic defenses presented by appellant and his codefendants contributed to the gross unfairness resulting from appellant's trial with the Hodges by way of multiple juries.

c. The Hodges' Disappearance from the Proceedings Right Before the Powell Jury Started Guilt Phase Deliberations Put Pressure on the Powell Jury to Convict Appellant for the Harshest Offenses Available.

The Hodges brothers' sudden disappearance from the case on the eve of the Powell jury's guilt phase deliberations also contributed to the overall unfairness of the dual jury proceedings.

Both the prosecution and appellant rested on August 22, 1994. (29CCT 8588; 29RT 10702; 30RT 10805, 10816.) Appellant did not testify for either. (29RT 10827-10828 [appellant personally verifies his decision not to testify].) On August 23, 1994, the trial court granted the Hodges brothers' mistrial

motion due to the prosecutor's unfulfilled promise in his opening statement that appellant would testify he killed under duress from the Hodges. (30RT 10829-10831, 10838-10842; 29CCT 8605.) The Hodges brothers, their counsel and investigators and the Hodges jury left the proceedings, which continued solely against appellant.[70] (30RT 10841, 10867-10869; 1CCT 28-29 & 41C3AT 12144-12145 [proceedings against appellant continue].)

The trial court informed the Powell jurors of the termination of the case against the Hodges brothers without detail: "With the Carl Powell defense and the prosecution having rested, we are going to proceed as soon as we are able to with the arguments and the instructions. The co-defendants Terry and John Hodges will not be present for any of that. [¶] And as to the status of their case, I'm not going to advise you folks any further." (30RT 10867-10868.) The court further advised the jurors to continue to avoid any news reports "about any of the cases and not to speculate also as to the status of the case against Terry and John Hodges." (30RT 10868.) It reminded them that they had been selected to decide the case against appellant and observed that the arguments they would soon be hearing would pertain only to the evidence against appellant. (*Ibid.*)

When appellant's jury next returned to court on August 25, 1994, and August 29, 1994, proceedings resumed against appellant with the giving of instructions and closing arguments by the prosecutor and appellant's counsel. On August 29, 1994, appellant's jury began deliberations. (1CCT 28-29 &

---

[70] The case against the Hodges brothers was continued (30RT 10856) and then dismissed. (1CCT 30-31; 41C3AT 12160).

41C3AT 12144-12145.) On September 1, 1994, it returned a verdict convicting appellant as charged. (2CT 228, 3CT 673-678.)

The Hodges brothers' disappearance from the trial shortly before the Powell jurors started deliberations was, unquestionably, highly a dramatic event for the Powell jurors. For over one and one-half months, the Powell jurors were present in a crowded courtroom with the two Hodges brothers, their four attorneys, their investigators and the Hodges jurors and alternates. The Powell jurors had observed the Hodges' counsel take an active role at trial, particularly via their opening statements and adversarial stance to Banks and Leisey. They saw attorney Sherriff joking with and putting his arm around Terry Hodges, like he was an "all around good guy." (2CT 471 [Letter from McDade family to court concerning Sherriff's conduct].) When the seating at counsel table changed, they gained a better view of John Hodges, whose demeanor was, in itself, remarkable. (31RT 11257 [in closing argument, counsel argues jury's ability to see the Hodges brothers, including John Hodges's eyes, was very helpful to appellant]; 27RT 10093-10094 [Juror No. 11 reports feeling frightened of defendants after change in courtroom seating].) The Powell jurors played musical chairs with the Hodges jurors in the packed courtroom (see § A.2, *ante*) and suffered through difficulties seeing and hearing the presentation of evidence due to the presence of this additional jury. (See § C.2.e, *post*). The Powell jurors were cognizant of the Hodges jurors even on breaks. The two sets of jurors had been given different colored badges and instructed to avoid each other. (15RT 6298.) The sudden and inexplicable disappearance of the Hodges defendants, counsel and jurors from the proceedings at the very conclusion of the case, just before deliberations began,

was startling. Like a deafening silence, it was something that the Powell jurors could not easily ignore.

It was to be expected that the Powell jurors would wonder why they continued on the case but the jury for the Hodges brothers did not. Since there was no indication that the Hodges jurors reached verdicts, let alone deliberated, the Powell jurors would have naturally thought that the case against the Hodges had either been dismissed or resolved favorably to them. Although the trial court instructed the Powell jurors not to speculate about the reason for the Hodges brothers' disappearance, it would not be realistic to expect the Powell jurors to refrain from wondering. (See *Turner v. Louisiana, supra,* 379 U.S. 466, 473 [unrealistic to expect that jurors would be unaffected by fact that two deputy sheriffs who served as jury shepherds were also prosecution witnesses]; *Wilson v. Sirmons, supra,* 536 F.3d 1064, 1100 ["we are aware that cautionary instructions cannot entirely eliminate juror suspicion"].) The Hodges brothers had been too active a force in the trial proceedings to be forgotten so easily at such a key moment in the case. At a minimum, the trial court should have sought assurances from the Powell jurors that they were able and willing to put the Hodges brothers' disappearance out of their minds and not allow it to influence their verdict. (E.g., 15RT 6444-6445 [court questions all members of both juries about if they had seen a newspaper article about the case, follows up by questioning individuals and asks counsel if they are satisfied with questioning].) The trial court's terse and generic admonition to the Powell jurors not to speculate about why the Hodges brothers had vanished was inadequate to accomplish its objective. (Cf., *United States v. Tootick, supra,* 952 F.2d 1078, 1084, 1086 [brief, generic instructions that statements of

counsel are not evidence "were not sufficient to neutralize the effects of the prejudicial incidences" of counsel for codefendant acting as second prosecutor and promising evidence against defendant which was never delivered].)

The Hodges brothers' disappearance from the case under circumstances suggesting some sort of favorable disposition for them prejudiced appellant and added to the "gross unfairness" of the dual jury trial. It implied that the Hodges were less culpable than appellant, who remained on trial, and thus detracted from appellant's defense. (See generally, Argument I, §C.5, *ante.*) It further put pressure on the Powell jurors to hold appellant as severely accountable as possible for McDade's tragic killing since he was the only suspect left. Although the Powell jurors had always been informed that their job was to decide if the prosecution had sufficiently proved its case solely against appellant, the sudden shift in the context in which they were to do so – knowing that there was no one who could hold the Hodges brothers accountable – unfairly slanted their deliberations against appellant. This, in turn, violated appellant's Fourteenth Amendment right to due process and proof beyond a reasonable doubt and Sixth Amendment right to jury determination of guilt or innocence. The unfairness wrought by the Hodges brothers' disappearance would have been avoided had full severance been granted.

d. Contentiousness Between Counsel

The dual jury procedure also harmed appellant by forcing him to undergo trial in a poisonous atmosphere created by extreme contentiousness between, on the one hand, Mr. Sherriff, counsel for Terry Hodges, and, on the

other hand, Mr. Castro, appellant's counsel, as well as the prosecutor.

The trial court characterized the contentiousness between counsel as the worst it had ever seen. (21RT 8239.) At one juncture, hostilities erupted between Sherriff and Castro. Castro complained, outside the juries' presence, that Sherriff had threatened him twice. (27RT 9965.) On one of the occasions, related Castro, Sherriff told him that if he kept trying to rehabilitate Leisey, Sherriff would "hang or crucify" him and his client. (*Ibid.*; see *People v. Hill, supra,* 17 Cal.4th 800, 835 [prosecutor's threat to witness is blatantly unethical and endangers integrity of adversarial process].) Sherriff denied threatening Castro. Instead, he characterized his remarks as that he would "go after" appellant if Castro kept acting as an "assistant prosecutor" working to obtain a death verdict for all three defendants. (27RT 9965-9966.)

The contentiousness between Sherriff and the prosecutor was more pervasive and extreme. (21RT 8239.) Most occurred outside the juries' presence and consisted of Sherriff's personal attacks on the prosecutor as "stupid and incompetent," "unethical," "incredibly simplistic," operating with "blind zeal," demonstrating "incredible incompetence," and guilty of "outrageous behavior." (15RT 6272-6273, 6485-6486, 6492-6493, 21RT 8209, 25RT 9287.) Sherriff made such comments in the context of berating the prosecutor for bringing what he characterized as a very weak case, dependent on the testimony of a completely unreliable witness, Leisey, against his client, and for promising jurors that appellant would testify. (15RT 6272, 17RT 6831-6832.) The court admonished him that, although it had given him some latitude outside the jury's presence, his conduct was "very offensive. [¶]

The continual nature in which you find devious, unprofessional – and the other characterizations you give it, of, you know, of your opponent." (17RT 6830-6831.)

Some of Sherriff's blatant hostility against the prosecutor spilled over in front of the jurors. For example, while cross-examining Junell Rodriquez, Sherriff walked over to the prosecutor's table and, with his back practically turned to the witness and eyes fixed on the prosecutor, posed his question. (16RT 6712, 6786-6787.) Of its own accord, the trial court directed Sherriff to examine the witness "civilly" because his tone and manner were offensive. (*Ibid.*; see *People v. Harmon* (1992) 7 Cal.App.4th 845, 852 [non-verbal conduct in courtroom may communicate offensive attitude].) On another occasion, Sherriff openly accused the prosecutor of misleading the jury, a remark which the trial court admonished the jurors to disregard. (20RT 7774.) Sherriff also questioned Stephen Frank, an investigator for the district attorney's office, about whether the court had called "lazy" the prosecutor's efforts to secure the live testimony of Banks. (25RT 9272.) The court sustained the prosecutor's and appellant's objections to the question. (*Ibid.*) Additionally, when the prosecutor was examining fingerprint examiner Joseph Avila, Sherriff approached the prosecutor to retrieve certain exhibits. The prosecutor took issue with Sherriff interrupting him, which led to an exchange concerning whether Sherriff or the prosecutor should have custody of the exhibits. (21RT 8066-8067.) Ultimately, the court allowed Sherriff to retrieve documentation that the prosecutor had left lying close to the jury. (21RT 8068.) Members of the McDade family who attended trial complained to the court that Sherriff engaged in "diversionary tactics," such as walking around

and audibly whispering, especially when the prosecutor was examining witnesses. (21RT 8212-8213.) The prosecutor expressed concern that Sherriff's activities made it difficult for jurors, particularly those in the back of the courtroom, to hear. (21RT 8214.)

The contentiousness introduced into the proceedings by Sherriff's antics reduced the trial to child-like quibbling and bullying. To a large extent, the trial degraded into a contest based on the force of counsels' personalities and resort to opprobrious epithets. Sherriff's misconduct harmed appellant by diverting the jury's attention away from the evidence and the seriousness of the proceedings. (Cf., *People v. Hardy, supra,* 2 Cal.4th 86, 157 [codefendant's counsel may violate defendant's constitutional rights by commenting on defendant's silence]; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095-1096 [finding that misconduct by codefendant's counsel violated due process and requires reversal].) The poisonous atmosphere violated appellant's right to due process under the Fourteenth Amendment and Sixth amendment right to trial by jury. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [tainted trial atmosphere can undermine right to impartial jury verdict]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 351-352 [due process guarantees that verdict be based solely on evidence, not extraneous matters].) It also impacted appellant's Sixth Amendment right to the effective assistance of counsel because it forced counsel to function in an uncivil atmosphere not fitting for the solemnity of judicial proceedings. (*People v. Hill, supra,* 17 Cal.4th 800, 821-822, 838 [defense counsel cannot effectively discharge duties when thwarted by grossly unethical conduct of prosecutor which endangers integrity of adversarial process].)

e. Difficulty Seeing, Hearing and Remembering

Furthermore, it was often difficult for jurors to hear witness testimony in the crowded courtroom. On numerous occasions, the court, counsel or even a juror asked witnesses to speak up or use an amplifier. The amplifier did not work well much of the time or it was in use in another courtroom. (16RT 6714, 6734, 6747-6750, 6773, 22RT 8369, 8373, 8380, 8382, 8536, 23RT 8638-8639, 8666-8667, 8718, 8767, 8772, 8774, 8784-8785, 24RT9143, 9192-9193, 25RT 9280, 9477, 9495-9497, 28RT 10387, 29RT 10454.) The jurors behind the bar, in the far back corner of the courtroom audience, had the greatest difficulty hearing. (E.g., 15RT 6454 [in opening statement, attorney Macias states, "I know it's much more silent in the back than in this part of the courtroom"]; 23RT 8638 [court tells witness, "if you can keep your voice elevated so that the jurors in the far corner of the courtroom can hear you"]; see also 8718, 24RT 9012, 9143.) Courtrooms are designed for a reason to have the jury will be seated in the box on the same side of the bar as the bench and counsel table. This "protect[s] ... the jury from any distractions, intrusions or influences..." (*Sheppard v. Maxwell, supra,* 384 U.S. 333, 355 [discussing purpose of courtroom bar separating audience from key players at trial].)

It was also challenging for everyone to see in the small, crowded courtroom. Although the difficulties affected everyone, they were especially pronounced for the jurors in the back of the courtroom audience. (22RT 8548-8549 [video of Terry Hodges's statement, People's Ex. No. T-49, played twice in a row to help each jury see it]; 25RT 9310-9311 [court notes that it is difficult for court, counsel and defendants to see the monitor when videotapes are played]; 25RT 9394-9395, 26RT 9647, 27RT 10093-10094 [Juror No. 11

could not see Hodges brothers well before courtroom seating was rearranged]; 26RT 9572 [John Hodges repositioned because attorney Sherriff cannot see witness Leisey]; 26RT 9555-9556 [attorney Macias asks witness Leisey to move items because Macias cannot see him]; 26RT 9589 [attorney Macias cannot see witness]; 29RT 10701 [court inquires of Powell jurors if they have difficulty seeing witnesses and states plans to put more platforms in courtroom audience]; 29RT 10705-10706, 10718-10719 [exhibits maneuvered to help jurors in back see].)

Compounding the juries' troubles seeing and hearing was the need for one jury to frequently leave the courtroom while the other jury remained. Jury shuffling occurred at least nine times. The Powell jury left twice and the Hodges jury left at least seven times. (See § A.3, *ante.*) The frequent exits by one of the juries were disruptive and invited the departed jury to speculate about what it was missing. The excused jurors were explicitly informed that evidence would be presented to the remaining jury in their absence. (E.g., 15RT 6303, 25RT 9302-9303, 28RT 10264-10265.) Although the trial court twice instructed the juries not to speculate about the additional evidence (15RT 6303, 30RT 10792), whether the instructions were effective is questionable. (*Richardson v. Marsh* (1987) 481 U.S. 200, 208 [rule that jurors are presumed to follow limiting instructions is "rooted less in absolute certitude that the presumption is true than in belief it represents a reasonable, practical accommodation"].)

The visual difficulties were due in part to the "strange configuration" of counsel table in which some counsel and defendants were seated "around the

corner" from each other. (15RT 6289.) The court and counsel had struggled to make minute adjustments to the position of counsel table to facilitate viewing. (14RT 5942-5943, 6119.) When the court introduced the clerk, he described her as "*hiding* behind the ... bench ... in the corner ... under this strange configuration of counsel table" (15RT 6290) since it was difficult for everyone to see.

The auditory and visual challenges of proceeding with two juries in a small courtroom meant for one impacted counsel's movements and communications. Counsel had to take special care not to block the ability of 32 jurors and alternates, six other attorneys and the three defendants to see the witnesses. (16RT 6786; 20RT 7785; 21RT 8097; 25RT 9476.) The court directed counsel to assume particular positions just to see. (26RT 9572 [court directs attorney Sherriff to remain at counsel table while questioning Leisey and Sherriff replies that he is moving around because it is difficult for him to see the witness]; 26RT 9589 [attorney Macias asks court to direct Leisey to reposition himself because Macias cannot see him; because Leisey complains of discomfort, court directs Macias to stand].) It also confined counsel to remain at counsel table "to the fullest extent possible," despite a need to communicate with each other, investigators and the defendants, and directed counsel to lower even their whispers.[71] (21RT 8215-8217, 8219.)

The defense attorneys defended their movements and communications as necessary to prepare their cross examinations of state witnesses. This was

---

[71] The defense investigators did not sit at counsel table except one of Terry Hodges's investigators did so during Sherriff's cross examination of Leisey. (25RT 9394-9395.)

particularly so, counsel stated, in light of the court's ruling that their cross examinations not cover duplicate topics. (21RT 8217-8219.) The court lamented the "problem" of holding the trial in a small courtroom given the number of participants, jurors and spectators involved. (21RT 8216.)

Additionally, counsel had difficulty keeping track of which witnesses and what evidence should be presented in front of which jury. (15RT 6323-6325, 6335-6337 [Hodges brothers move for mistrial because prosecutor refers in opening statement to appellant's statements to Vale and Calhoun implicating them in violation of *Aranda-Bruton*]; 15RT 6413-6414, 6422-6425 [Terry Hodges moves for mistrial because prosecutor referred in opening statement to his excluded statement to detective Lee]; 29RT 10667-10668 [attorney Castro prefers that the Hodges jury be absent for his opening statement so he does not have to worry about what evidence is admissible only in front of Powell jury]; 30RT 10796-10797 [Castro cannot recall if defense witness Ruben Martinez is to testify in front of both juries or just Powell's]; 31RT 11079-11080 [Castro asks court permission to enter courtroom on dark day to review exhibits so he will not make any big mistakes about what evidence was admitted against whom, such as when he mistakenly believed all of one of Terry Hodges's statements had been admitted].)

The difficulties for the Powell jurors, counsel and, presumably, appellant to see and hear the proceedings affected appellant's Sixth Amendment right to jury trial and effective assistance of counsel. Counsel's restricted communications with investigators and each other and their trouble keeping track of what evidence was admissible in front which jury also

undermined the Sixth Amendment's guarantee of effective assistance of counsel. These problems further evidence the actual prejudice and gross unfairness caused by appellant's dual jury trial with the Hodges.

D. *Chapman* Analysis

As demonstrated above, appellant's dual jury trial with his codefendants resulted in identifiable prejudice and gross unfairness in violation of due process. Under the circumstances, it is not necessary to address whether the error was harmless. (*United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 906 [in context of erroneous denial of severance motion in single jury case].)

Assuming, *arguendo,* a discussion of prejudice is required (see *People v. Burney* (2009) 47 Cal.4th 203, 240), the dual jury trial was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 367 U.S. 18, 24). Appellant has previously shown why the evidence of his guilt for first degree murder and robbery was open to competing inferences on which the jury could have legitimately relied to return a more favorable verdict. He respectfully directs the court's attention to that portion of his brief. (See Argument I, § C.5, *ante.*)

JUROR RELATED ISSUES

IV.

THE TRIAL COURT'S ERRONEOUS REFUSAL TO EXCUSE PROSPECTIVE JURORS LESLIE GONZALEZ AND JUDITH PERELLA FOR CAUSE REQUIRES REVERSAL.

A trial court should grant a challenge for cause against a prospective juror whose responses on voir dire create a "'definite impression'" that his or her personal views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" (*People v. Holt* (1997) 15 Cal.4th 619, 650-651 quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 & 426; see also Code Civ. Proc., § 225(b)(1)(C) [juror may be challenged for cause for "actual bias," i.e., a state of mind on the part of the jurors "which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party"].) Although this standard has been articulated in the context of death-qualification (see *Witherspoon v. Illinois* (1968) 391 U.S. 510), it stems from traditional reasons for excluding prospective jurors. Thus, it applies likewise to determining for-cause challenges for reasons unrelated to imposition of the death penalty. (*Witt, supra,* at p. 423.)

The trial court erred in denying appellant's challenges for cause against prospective jurors Leslie Gonzalez (11RT 3762, 3770) and Judith Perella (9RT 3328, 3336). Both jurors' views in favor of the death penalty were so strong that they substantially impaired their ability to vote for death only if aggravating factors substantially outweighed mitigating factors. Additionally,

Gonzalez could not adequately assure the court that she would follow its instructions to evaluate the testimony of police officer witnesses under the same standards as civilian witnesses.

The trial court's erroneous ruling violated appellant's right to trial by a fair and impartial jury (U.S. Const., amend. VI; Cal. Const., art. I, § 16), due process of law (U.S. Const., amends. V & XIV; Cal. Const., art. I, §§ 7 & 15) and a fair and reliable penalty determination (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, § 17) under the state and federal constitutions.

A. The Claim Has Been Preserved for Review

"To preserve a claim of error relating ... to the denial of a challenge for cause, the defendant must usually exhaust his peremptory challenges. ... The rationale is ... that the defendant may not complain of error when he himself had the opportunity and the ability to prevent any ensuing harm." (*People v. Ashmus* (1991) 54 Cal.3d 932, 964, fn. 8, internal quotations & citations omitted.) Appellant exhausted all 20 of his allotted peremptory challenges, including against prospective jurors Gonzalez and Perella. (13RT 4332 [20 challenges allotted for each side]; 13RT 4489 [challenge against Gonzalez]; 13RT 4493 [challenge against Perella]; 13RT 4495-4496 [appellant exercises 20th peremptory].)

Appellant's jury was selected in May and June of 1994. (2CT 397, 422.) The jurors were sworn on July 12, 1994. (15RT 6287-6288.) Subsequently, this Court issued *People v. Crittenden* (1994) 9 Cal.4th 83, which ruled that the defendant must express dissatisfaction with the jury

ultimately selected to preserve for review the denial of a challenge for cause. (*Id.* at p. 121, fn. 4.) Because appellant's jury selection occurred before *Crittenden,* this additional requirement does not apply. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1055.)

Thus, appellant preserved his claim that the trial court erroneously denied his challenges for cause.

B. Standard of Review

A trial court's ruling denying a challenge for cause to a prospective juror is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 715; *People v. Mendoza* (2000) 24 Cal.4th 130, 169.) A trial court abuses its discretion if its ruling exceeds the bounds of reason (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478), is arbitrary and capricious, or is rendered without knowledge and consideration of "all the material facts ... together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86).

A reviewing court will uphold the trial court's ruling if it is supported by substantial evidence and, in so doing, it shall accept as binding the trial court's determinations as to the prospective juror's state of mind when the juror has made statements that are conflicting or equivocal. (*People v. Mendoza, supra,* 24 Cal.4th 130, 169; *People v. McDermott* (2002) 28 Cal.4th 946, 981-982; *People v. Wash* (1993) 6 Cal.4th 215, 254.)

C. Gonzalez's Bias In Favor of Police Officer Witnesses

An "impartial jury," as guaranteed by the Sixth Amendment, consists of "jurors who will conscientiously *apply the law* and find the facts." (*Wainwright v. Witt, supra,* 469 U.S. 412, 423, emphasis added.) A prospective juror should be excused for cause if the juror cannot set aside any personal opinion that would interfere with being impartial. (*Id.* at pp. 423-424, citing *Patton v. Yount* (1984) 467 U.S. 1025, 1036.) "A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict." (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.) "Applying ... different standards to the evaluation of different witnesses is, of course, contrary to the court's instructions and violative of the juror's oath of impartiality." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.)

The trial court erred in denying appellant's challenge for cause to prospective juror Leslie Gonzalez because she stated that she found police officers more credible than citizen witnesses, and never indicated that she would set aside her personal opinion to judge the credibility of both by the same standards. (See Code Civ. Proc., § 223(b) [jurors must swear to follow court's instructions and decide case based only on evidence presented in court]; *People v. Barnwell, supra,* 41 Cal.4th 1038, 1053 [bias against police officers in general is grounds for juror's disqualification]; *People v. Thomas, supra,* 218 Cal.App.3d 1477, 1482-1485 [sitting juror properly discharged for cause due to bias that police officers routinely lie].)

Here, prospective jurors were asked on the written questionnaire about their attitudes concerning police officer testimony as compared to testimony by

civilian witnesses. (E.g., 58CT4A 17,224 [question No. 18].) Gonzalez stated that she thought the testimony of police officers was "equally truthful" as that of lay witnesses because police officers "are human." (58CT4A 17,224.) However, on subsequent questioning by defense counsel, she stated that police officers were especially worthy of belief. She explained that her husband was a police officer, he was very truthful and, because she lived with him, she heard about "all the 'goings-on that a lot of people don't understand.'" (11RT 3755-3757.) Also, she stated her belief that police officers were "trained to look for specific things." (11RT 3757.) Consequently, she said she would believe a police officer over another witness, and it would "possibly" be harder to convince her that a police officer was lying. (11RT 3758-3759.)

The prosecutor then examined Gonzalez. He gave a long example concerning a police officer testifying about an identification that he made under questionable circumstances. (11RT 3763.) The prosecutor then asked Gonzalez if she agreed to consider all the circumstances before judging if the officer were telling the truth rather than simply concluding, "he's a police officer so he must be right ... every time?" (11RT 3763-3764.) Gonzalez agreed that she would consider all the circumstances in determining officer credibility. (*Ibid.*)

The court asked Gonzalez if she could apply legal criteria which would be given to the jurors about evaluating witness credibility – specifically, that all witnesses "start[] out on the same level."[72] (11RT 3767-3768.) Gonzalez

---

[72] Ultimately, the selected jurors were given a number of pattern instructions concerning evaluation of witness credibility. (See 2CT 570-578 [jury instructed with CALJIC Nos. 2.70, 2.21.1, 2.21.2, 2.22, 2.23, 2.21, 2.25

said she "could" judge witness credibility by this method. (11RT 3768.) The court then asked her if she agreed "to set aside your attitude generally that police are more credible than other people in their ability to be accurate?" (*Ibid.*) Significantly, Gonzalez did not agree. Instead, she explained in a lengthy answer "*why I feel I could believe a police officer over a witness....*" (*Ibid.*. emphasis added.) She stated (*ibid.*, emphasis added):

> Well, taking and considering everything, so generalized – You know, a witness could have been at a scene long before the police officer, and he comes up, you know, moments after. Of course, he hasn't seen as much and, you know, just listening to what he has seen – A witness could be upset and not see the same thing as a police officer, when he's trained and retraining the information. *That's why I feel I could believe a police officer over a witness,* because they're trained and see situations time and time again, that they take this in and it's – It's just everyday work to them.

Because Gonzalez could not give adequate assurance that she "would ... put aside [her] ... attitude generally that police are more credible than other people," her voir dire conveyed a "'definite impression'" that her views concerning police officer credibility "'would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and oath."' [Citation.]" (*People v. Holt, supra,* 15 Cal.4th 619, 650-651.)

This case resembles *People v. Merced* (2001) 94 Cal.App.4th 1024. There, a prospective juror indicated on his written questionnaire that he believed in the power of jury nullification. (*Id.* at pp. 1027-1028.) On voir

---

& 2.27].)

dire, the trial court asked him if the prospective juror would refuse to follow the court's instructions if they conflicted with the juror's conscience. The juror answered affirmatively, and the trial court excused him for cause. (*Id.* at p. 1028.) The reviewing court upheld the trial court's decision because the prospective juror indicated he would not necessarily follow the court's instructions. (*Id.* at p. 1030.) Like the juror in *Merced,* Gonzalez held personal beliefs inconsistent with acting as an impartial juror, and she failed to assure the court that she would put her beliefs aside.

Significantly, this occurred after considerable efforts by the court and parties to educate her about the legal standards for evaluating witness credibility. Plainly, these efforts failed. The court would not have directly asked her if she would set aside her views unless it believed that obtaining such assurance was necessary. (See *People v. Wilson* (2008) 44 Cal.4th 758, 789 [court should ask additional questions of prospective juror if it is uncertain about the juror's ability to serve].) Gonzalez did not give it. The trial court erred in failing to excuse Gonzalez for cause.

D. Death Penalty Views

"A prospective juror who would be unable to conscientiously consider all of the sentencing alternatives ... is properly subject to excusal for cause." (*People v. Coffman* (2004) 34 Cal.4th 1, 48.) A prospective juror cannot conscientiously do so if he or she would (1) automatically vote for one of the penalty options (*People v. Holt, supra,* 15 Cal.4th 619, 650, citing *Witherspoon v. Illinois, supra,* 391 U.S. 510) or (2) not be able to consider voting for one of

the penalty options as a "reasonable possibility" (*People v. Ashmus, supra,* 54 Cal.3d 932, 963). Where a prospective juror "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do," he or she is subject to dismissal for cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729; see also *id.* at p. 735.)

1. Gonzalez

The trial court erred in denying appellant's for cause challenge against Gonzalez not only due to her views on police officer credibility (§ C, *ante*), but also because she could not assure the court that she would consider the penalty of life without possibility of parole as a "reasonable possibility."

In her written questionnaire, Gonzalez wrote that she believed the criminal justice system was defective because "[t]o[o] many criminals just get their hands slapped [sic]." (58CT4A 17232.) She also strongly disagreed that even the worst criminals should be considered for mercy and stated that "inmates still have it pretty good inside" state prison. (58CT4A 17234.)

During voir dire, defense counsel asked Gonzalez if she had any penalty preference were a verdict returned convicting for murder committed under special circumstances. (11RT 3751.) Gonzalez replied, "I favor the death penalty." (*Ibid.*) Counsel then asked for her opinion on the same topic when considered in light of the information she knew about appellant's case as "explained ... in the questionnaire and by the Judge." (*Ibid.*) Again, Gonzalez replied, "Would I vote for the death penalty? ... Probably, yes." (*Ibid.*) Next, counsel asked if Gonzalez were "leaning one way" in regards to penalty "and

then I would have to get you back to zero before you listen to me, or do we start both –" (*Ibid.*) Gonzalez interrupted counsel and replied, "Probably not, probably not." (11RT 3752.) Because Gonzalez interrupted counsel, it is unclear what she meant. Nevertheless, she clarified her answer immediately thereafter by stating, "[i]f you say murder, I favor the death penalty." (11RT 3752.) Defense counsel then probed Gonzalez further (*ibid.*, emphasis added):

> Q. [By defense counsel] Would you listen to my side of the story as – And give it as much worth as you would [the prosecutor's] side of the story? [¶] By that I mean, I'm not asking you how you would decide. But would you listen to both –
>
> A. I would listen to both sides.
>
> Q. Impartially?
>
> A. *Impartially. Honestly, probably not.*

Given Gonzalez's near-automatic viewpoint that a murder conviction warrants the death penalty and statement she would not consider the penalty phase evidence with impartiality, the trial court interceded. It asked Gonzalez if she would have any difficulty in following the law that jurors cannot vote for death unless "the aggravating factors – That is, whatever the D.A. is arguing in presenting in support of the death penalty -- ... substantially outweigh the mitigating factors – that is, the arguments and evidence the defense is presenting in favor of the penalty of life in prison without parole...." (11RT 3753.) Gonzalez responded, "I would try to." (*Ibid.*) The court followed up by asking if Gonzalez would vote for death if the aggravating and mitigating factors were evenly balanced. (11RT 3754.) Gonzalez stated, "Yes I would." (*Ibid.*) The court next asked Gonzalez if she was saying she would not follow

the law's requirement that aggravating factors substantially outweigh mitigating factors before voting for death. (*Ibid.*) Gonzalez stated she did not know how to reply because she did not know the law. (*Ibid.*) The court then asked if Gonzalez could set aside her personal attitudes, if different from the law, and follow the law. (*Ibid.*) Gonzalez agreed that she could follow the law. (*Ibid.*) The court explained again that the law required aggravating factors to substantially outweigh mitigating factors before a juror could vote for death and asked if the prospective juror could follow the law in this regard. (11RT 3755.) Gonzalez agreed that she could, but when she explained it in her own words, she stated, "[y]es. In other words, what you're saying is just listen to both and make your decision after you listen to both." (*Ibid.*) The court stated that she also had to follow the law, even if she disagreed with it and asked if she could do so. (*Ibid.*) Gonzalez replied, "I believe so, yes." (*Ibid.*) The court then asked her point blank, "[c]an you follow the law?" (*Ibid.*) Gonzalez responded, "Yes." (*Ibid.*)

On voir dire by the prosecutor, Gonzalez stated that she would consider aggravation and mitigation evidence and not automatically vote for death. (11RT 3766.) She also stated that she could apply the law that if circumstances in aggravation substantially outweighed circumstances in mitigation she could vote for either life or death. (*Ibid.*)

Gonzalez's answers created a "definite impression" that she not only strongly favored death over life as the penalty for murder with special circumstances but also that her pro-death penalty views would interfere with her fairly considering voting for life. During questioning by defense counsel,

she repeatedly said she would favor death as a nearly automatic a penalty for murder with special circumstances. (11RT 3751, 3752.) Significantly, when asked if she could listen with impartiality to the penalty phase cases of both the defense and prosecution, she candidly admitted, "[h]onestly, probably not." (11RT 3752.) A prospective juror's admitted lack of impartiality warrants disqualification for cause. (Code Civ. Proc., § 225(b)(1)(C) [juror may be excused for cause for "actual bias" if his or her state of mind "will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party"].) When the admission comes from a strongly pro-death juror in the context of explaining why she would not listen to both sides with impartiality during the penalty phase, the conclusion is inescapable that she would not reasonably consider the possibility of voting for life. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 822 [prospective juror Guerrero properly excused where he voiced serious reluctance to impose death penalty and admitted that the prosecution probably did not have a "fair shot" with him on the jury].)

Furthermore, Gonzalez stated that she would vote for death even if the aggravating and mitigating factors were evenly balanced. (11RT 3754.) The trial court explained to her that this was contrary to the law and sought her assurance that she would vote for death only if the aggravating circumstances substantially outweighed the mitigating circumstances. (11RT 3753-3755.) Its efforts, however, fell flat. Gonzalez failed to assure the court that she would vote for death only if the penalty phase evidence reached this critical level.[73]

---

[73] The prosecutor's voir dire of Gonzalez sidestepped whether she would vote for death *only* if aggravation substantially outweighed mitigation. Instead, it covered whether, once the aggravating evidence reached this critical level,

(11RT 3754-3755.) Thus, the record indicates that Gonzalez's pro-death stance would influence her to vote for death upon less of a showing of aggravation than required by law. Clearly, Gonzalez's views in favor of the death penalty would have substantially impaired her ability to "consider the evidence of aggravating and mitigating circumstances as the instructions require [her] to do." (*Morgan v. Illinois, supra,* 504 U.S. 719, 729.)

The trial court's subsequently extracting from Gonzalez an agreement to follow the law, first reluctantly ("I believe so, yes") and then explicitly ("Yes") (11RT 3755), does not undermine her stated willingness to view the defense penalty case without impartiality or to vote for death upon less of a showing in aggravation than the law demands. Once Gonzalez explicitly stated her specific problems with discharging a juror's duties during the penalty phase, it was too late for her to persuasively retreat to abstract generalities about her willingness to discharge her duties. As this Court has cautioned, penalty phase voir dire should not be so abstract that it fails to identify those prospective jurors whose views on capital punishment would substantially impair performance of their duties. (*People v. Coffman, supra,* 34 Cal.4th 1, 47; see also *People v. Samayoa, supra,* 15 Cal.4th 795, 822 [juror Hines's statement that she would "go by the law" in choosing life or death penalty pales in comparison to her statement that she thought no one had the right to take another's life]; cf. *People v. Farris* (1977) 66 Cal.App.3d 376, 386 [seated juror may be excluded where claim of impartiality is clearly outweighed by other factors].)

Gonzalez would consider both life and death. (11RT 3766.)

In *People v. Wash, supra,* 6 Cal.4th 215, prospective juror Revak expressed uncertainty about whether he could impose the death penalty. Ultimately, he said he could not. The trial court excused him for cause, and this Court affirmed the ruling. (*Id.* at pp. 254-256.)

In *People v. Holt, supra,* 15 Cal.4th 619, prospective juror Jones could not assure the trial court that she would be able to vote for the death penalty because she had come to no longer believe in it. This Court affirmed the trial court's decision to excuse Jones for cause. (*Id.* at pp. 652-654 & fn. 5.)

In *People v. Welch* (1999) 20 Cal.4th 701, the trial court excused prospective juror Gilens, who stated that he could vote for death if appropriate, but he did not know if he would ever be in a position to find it appropriate. This Court affirmed the trial court's excusing Gilens for cause. (*Id.* at p. 747.)

Although the foregoing cases involved anti-death jurors, they nevertheless provide useful guidance. In contrast to *Wash* and *Welch,* juror Gonzalez never expressed uncertainty about her ability to vote for one of the penalty alternatives. Instead, her voir dire leaves the definite impression that she did not consider the life penalty a realistic option. Further, like the juror in *Holt,* Gonzalez never gave the trial court an adequate assurance that she could vote for either penalty alternative. Rather, her voir dire conveyed that death was the only realistic choice for her to make.

Therefore, Gonzalez's penalty views substantially impaired her ability to discharge her duties as a juror. She never backed away from her admissions

that she (1) would "probably not" be able to view the penalty phase evidence of both sides with impartiality and (2) would vote for death even if aggravating and mitigating circumstances were evenly balanced. The trial court erred in denying appellant's challenge for cause against Gonzalez.

2. Perella's Pro-Death Penalty Views

Prospective juror Judith Perella also strongly favored death as the penalty for all intentional murders. She stated that anyone who intentionally kills deserves death, she could not be impartial about penalty and failed to give adequate assurance that her views would not substantially impair her guilt phase verdict. The trial court should have granted appellant's for cause challenge against Perella.

In her written questionnaire, Perella stated that convicted felons deserved no mercy (11CCT 3199), prisons were too lenient (11CCT 3199, 3214, 3216), executions should be swift (11CCT 3212, 3218), the death penalty should be imposed more often and expanded to cover crimes besides murder (11CCT 3212, 3217) and certain murders automatically merited the death penalty (11CCT 3212). Perella also stated that she would feel uncomfortable considering factors such as the defendant's background in deciding what penalty to impose (11CCT 3216), she was unsure if she could give both sides a fair trial (11CCT 3219) and her views on the death penalty would prevent or substantially impair her ability to vote for life without possibility of parole or guilt with special circumstances. (11CCT 3215.)

On voir dire by defense counsel, Perella stated that death was the

appropriate penalty for murder, and "it would be very difficult" for her to impose a more lenient punishment. (9RT 3317, 3319.) She felt that when a person kills another, receiving the death penalty "should be cut and dry;" if the killer is punished less severely, this is a "loophole." (9RT 3323-3324.) According to Perella, an intentional killing, particularly one committed with a gun, merits capital punishment. (9RT 3324-3327.) Further, Perella was disinclined to consider the defendant's background in regards to penalty. (9RT 3321.) If the court told her it was appropriate to do so, she would try, but "[i]t would be difficult. ... [¶s] It's really hard to fight ... against what you believe in." (9RT 3321-3322.) Perella also explained that she was unsure if she could be impartial. (9RT 3327-3328.) For her to be impartial, "the evidence would have to be awfully strong. ... [¶s] I do not believe in killing another man. That's the death penalty. ... [¶] I have to fight with myself because another person was killed." (*Ibid.*) Her remarks plainly showed that she would automatically vote for death for an intentional killing accomplished by gun use or, at the least, that there was no "reasonable possibility" she would vote for life over death. (*People v. Holt, supra,* 15 Cal.4th 619, 650; *People v. Ashmus, supra,* 54 Cal.3d 932, 963.)

The prosecutor's and court's attempts to rehabilitate Perella missed the mark. After outlining at length what jurors would determine during the guilt phase and the basic framework for the penalty phase (9RT 3328-3329), the prosecutor finally asked Perella merely about the guilt phase, i.e., if she could "consider the elements of the crime as to whether or not it's first degree murder first, and then after that then consider whether or not it's – a special circumstance...." (9RT 3329-3330.) She replied, "[y]es I could." (9RT

3330.) Her assurance answered only the prosecutor's question about guilt and did not address penalty.

Sensing the gap, the court intervened. It elicited Perella's assurance that she would not let her attitudes about penalty influence her guilt decision. (9RT 3331-3332.) It then explained that each juror must make an individual determination about penalty and discuss it with the other jurors to reach a unanimous agreement. (9RT 3332.) Perella said she understood, and the following exchange occurred (*ibid.*):

> Q. [The Court] And the attorneys have discussed this procedure – evaluating aggravating and mitigating factors, and ... the law also states that the jury is not to return the death penalty unless they agree that the aggravating factors substantially outweigh the mitigating factors. [¶] And if they don't reach that agreement, it's to be life in prison without parole rather than death. [¶] Do you understand that part?
>
> A. [Perella] I do now, yes.
>
> Q. Do you think you could follow that requirement of the law?
>
> A. Yes, I do.

This exchange did not address Perella's view that someone who intentionally kills using a firearm should always be sentenced to death. Perella remained free to individually decide that aggravating factors automatically outweigh mitigating factors under such circumstances. Indeed, a careful reading indicates that the court's questioning addressed juror agreement that aggravators outweigh mitigators and that life without possibility of parole is

the default punishment if no such agreement is reached. This did not rehabilitate Perella's opinion that imposition of the death penalty is "cut and dry" for an intentional killing.

Perella's subsequent questioning demonstrates that she held firm to this view. After referencing her earlier replies concerning intentional killing using a firearm (9RT 3333) counsel then asked the prospective juror if commission of intentional murder with a special circumstance, such as robbery or rape, "would almost always in your mind bring or warrant the death penalty; is that correct?" (9RT 3334.) Perella replied, "[y]es." (*Ibid.*) Perella's response clearly revealed that Perella would not in good faith "conscientiously consider all of the sentencing alternatives...." (*People v. Coffman, supra,* 34 Cal.4th 1, 48.)

Next, counsel returned to the same question Perella had already flip-flopped about on her questionnaire and during court questioning (compare 11CCT 3215 with 9RT 3331-3332.) Despite having assured the court only moments earlier that she would not let her death penalty attitudes substantially impair her guilt phase decision (*ibid.*), Perella gave the opposite answer to the same question posed by counsel (*ibid.*):

> Q. ... [Y]ou said you felt that your attitudes toward the death penalty would substantially impair your ability on voting as to the innocence or guilt in the first part of the trial. [¶] That's question 105. [¶] Is that still true?
>
> A. I think it would.
>
> But I still think I got an open mind. I believe in the things I believe in.

> But if the judge says – or the evidence is such that it's so strong that – I still think I've got an open mind.

Perella's thrice-shifting replies to the same question indicate that she did not grasp what was being discussed or was just trying to say what she thought was expected.

Counsel's next interchange with Perella reinforces these conclusions. Counsel asked if appellant were convicted of first-degree murder with a special circumstance, would the defense have to present an "enormous dog and pony show here to even begin to convince you that he should deserve life without possibility of parole." (9RT 3334-3335.) Revealing her true colors, Perella replied, "Yeah." (9RT 3335.) She then quickly shifted once again, adding, "I – no. [¶] Because I don't believe either one of them is – is a piece of cake." (*Ibid.*) She did not explain why she was shifting from her multiple written statements that prison is "too lenient." (11CCT 3199, 3214, 3216.) She concluded by emphasizing her sympathy with the victim's right to live and his or her family. (*Ibid.*)

The court stepped in once again and asked Perella directly if she could set aside her personal views and apply the law according to its instructions, including that "there is not to be any automatic decision for death or life in prison without parole." (9CT 3335-3336.) Perella replied that she could do this although "I know it's contradictory." (9CT 3336.) She did not explain what she meant.

Perella's last, knee-jerk response to the court was patently unconvincing

given the fervor of her initial pro-death remarks and inescapable conclusion that Perella either did not understand the voir dire or simply attempted to say what was expected. (*People v. Samayoa, supra,* 15 Cal.4th 795, 822; cf. *People v. Farris, supra,* 66 Cal.App.3d 376, 386.) She admitted that following court instructions conflicting with her own views "would be difficult" because "[i]t's really hard to fight ... against what you believe in" (9RT 3321-3322), but her examination gave no cause to conclude that she had the resolve to win this fight and conscientiously consider life as a possible sentence. Perella's saying she would not automatically vote for death did not amount to an assurance that she would *fairly* consider both life and death as sentencing alternatives. She never retreated from her statement that it would take "awfully strong" evidence for her to reach a state of impartiality about penalty. (9RT 3327-3328.)

In sum, Perella's written questionnaire and voir dire leave a "definite impression" that she could not impose life without possibility of parole as a "reasonable possibility." The court erred in denying appellant's challenge for cause against her.

E. Prejudice

Appellant used peremptory challenges to remove Gonzalez and Perella from the jury (13RT 4489, 4493) and ultimately exhausted all of his peremptory challenges. (13RT 4332, 4495). A number of the seated jurors exhibited characteristics warranting the defense to exercise a peremptory challenge against them.[74] Had appellant not been forced to use two of his

---

[74] For example, Juror No. 1 stated on her questionnaire that, based on media coverage, she had "no question" about appellant's guilt (47CT4A

allotted peremptories to remove Gonzalez and Perella by the trial court's erroneous failure to excuse them for cause, appellant could have struck two of the jurors that were ultimately seated. This would likely have impacted how the prosecution chose to exercise its peremptories as well. The error, therefore, affected composition of the jury guaranteed under the Sixth Amendment right to trial by jury. Ultimately, it also undermined appellant's Eight Amendment right to a reliable penalty determination and his due process right to a state created liberty interest in jury selection conducted via use of peremptory challenges. (U.S. Const., amends. V, VI, VIII & XIV; see *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

In *Gray v. Mississippi* (1987) 481 U.S. 648, the prosecutor used up all his peremptory challenges yet sought to excuse another prospective juror he believed held death penalty views unfavorable to the state. He asked the trial court for an extra peremptory on the ground that the court had improperly denied the state's earlier challenges for cause against other jurors. The trial

---

13701), she strongly believed that a criminal defendant should be required to prove his innocence (47CT4A 13711), if a defendant did not testify it probably meant he was guilty (*ibid.*), she was not sure if she could reach a guilt phase decision without prejudice towards appellant (4CT4A 13712), defendants often use mental defenses to escape responsibility (47CT4A 13718), she could not be fair in a case where gun use was alleged (47CT4A 13721), and race factors in a person's tendency towards violence, lying and criminality (47CT4A 13722-13723).

Juror No. 5 stated that he thought a defendant brought to trial was probably guilty and should be required to prove his innocence (CT4A 13871), mental defenses are often used to evade responsibility (CT4A 13878) and he could not be fair in a case where gun use was alleged (CT4A 13881).

court excused the juror. Because the juror was not objectionable for cause, this was error. A closely divided high court reversed. The majority decided that the nature of jury selection defies harmless error analysis. (*Id.* at p. 665.) "[T]he relevant inquiry is 'whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error.'" (*Ibid.*) Thus, the improper removal of a potential juror for cause requires per se reversal.

Ross v. Oklahoma (1988) 487 U.S. 81, decided the following year, reached a different conclusion. There, the trial court erred in failing to grant a challenge for cause against a pro-death, prospective juror. The defense was forced to use a peremptory challenge to remove the juror and ultimately utilized all its allotted peremptories. The majority did not consider the needless use of the peremptory on the biased juror constitutionally significant because peremptories are provided by state law only. (*Id.* at p. 88; see also *Rivera v. Illinois* (2009) ___ U.S. ___ [129 S.Ct. 1446, 173 L.Ed.2d 320] [trial court's erroneous disallowance of defendant's peremptory challenge against a juror not objectionable for cause does not implicate federal constitutional concerns].)

A dissenting opinion, authored by the four justices from the *Gray* majority still remaining on the court, noted that *Gray* stands for the proposition that reversal is mandatory when "the composition of the jury panel as a whole could possibly have been affected by the trial court's error." (*Ross v. Oklahoma, supra,* 487 U.S. 81, 92 (dis. opn. of Marshall, J.).) This is so,

---

Additionally, Juror No. 5 strongly favored the death penalty, including the

argued the dissent, regardless of whether the error is based on improper exclusion or improper denial of a challenge for cause under *Witherspoon-Witt.* Either error affects composition of the jury panel under *Gray.* (*Id.* at p. 93.)

The *Gray* and *Ross* decisions are incongruent, and the efforts of the *Ross* majority to limit *Gray* to its facts are unpersuasive. In *Gray,* the high court reaffirmed the per se reversal rule of *Davis v. Georgia* (1976) 429 U.S. 122, 123. (*Gray v. Mississippi, supra,* 481 U.S. 648, 667; see also *Swain v. Alabama* (1965) 380 U.S. 202, 219 ["[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice"].) The decisions in *Gray* and *Davis* are grounded on the real world recognition that mistaken exclusion of a scrupled juror or the failure to remove a pro-death enthusiast changes the dynamics of jury selection. *Ross,* in contrast, is based on a myopic view of the peremptory challenge as a creature of state law. It fails to consider the larger picture of the constitutional and procedural framework of how a capital jury is selected.

In sum, the trial court's erroneous denial of appellant's challenges for cause against Gonzalez and Perella affected the composition of the jury panel that was selected to try appellant. This Court should deem the error prejudicial per se.

---

possibility of expanding it to crimes besides murder. (CT4A 13884-13885.)

V.

THE TRIAL COURT'S ERRONEOUS REMOVAL OF JUROR NO. 11 WITHOUT SUFFICIENT CAUSE TO CONCLUDE SHE COULD NOT DISCHARGE HER DUTIES AS A JUROR REQUIRES REVERSAL OF THE JUDGMENT.

Due to the effects of insomnia,[75] Juror No. 11 reported that she was experiencing strong and sometimes difficult emotions while serving on appellant's jury. At a hearing on the matter, she did not seek to be dismissed and indicated improvement in her condition. The trial court removed her over appellant's objection. The record fails to show that, as a "demonstrable reality," Juror No. 11 could not discharge her duties as a juror. Since she was sympathetic to the defense, her removal was error requiring reversal of the judgment.

A. Factual Background

On August 15, 1994, the court informed the parties that Juror No. 11 had left a message on the court's machine stating she had been unable to sleep for the last five days, needed counseling and was feeling distraught.[76] (27RT 10093.) She also told the court attendant she felt a "general fear" due to

---

[75] Statistics vary widely on the percentage of the population suffering from insomnia. One study reports that 58 percent of doctors' patients reported insomnia whereas doctors reported 14 percent of their patients suffered from the condition. (See http://www.dummies.com/how-to/content/suffering-from-insomnia-the-likeliest-candidates.html [reporting results of National Sleep Foundations 2000 poll].)

[76] Counsel has redacted the juror's name and replaced it with identifying number. (See 72CT7A 21373-21374 [counsel has duty to redact juror names in certain parts of record]; 2CT 422 [6/14/94 minute order of jury selection];

rearrangement of the defendants, them looking at her and questioning by attorney Sherriff. (27RT 10093-10094.) The court announced its intention to question the juror. (27RT 10094.)

When juror No. 11 arrived, the court asked her if she sought to be excused or was making a different request. (27RT 10108.) It also asked her if she felt that she could not be fair and impartial to any of the parties. (*Ibid.*) Juror No. 11 neither asked to be excused nor expressed any reservations about her ability to be fair. (27RT 10108-10118.) She insisted that she was "a fair and impartial person." (27RT 10115.)

Juror No. 11 explained that she had been having trouble sleeping, and this was bringing up personal, emotional issues that she had never resolved. (27RT 10108-10109, 10114.) "I find myself identifying with all of the parties and feeling empathy with everybody. ... As each issue is brought up, I identify it with myself. [¶] But I think that's just because of the sleep deprivation." (27RT 10110.) For example, Leisey's testimony about having been threatened triggered her recollection of a "very frightening experience" in which a stranger had threatened her by phone. (27RT 10109, 10114.) Juror No. 11 also referred to an experience she had in 1992 which resembled something discussed at trial, but she did not go into details. (27RT 10110.) Additionally, she related that she had been putting herself in the defendants' shoes and felt confused and "frightened of the situation." (27RT 10114.) She described feeling like she might "explode" and that she was nearing the "end of my rope." (27RT 10112.) When she has trouble sleeping, explained Juror

---

15RT 6282-6283 [jury sworn].)

No. 11, she becomes more and more frightened in a general way. (27RT 10116.)

At the same time, Juror No. 11 related that she presently felt "okay" after having taken some sleep medication the night before. (27RT 10112.) She said she was not confused that day, just a little upset. (27RT 10115.) Further, she emphasized that she had experience handling "explosive" situations at work so long as she was sleeping enough. (*Ibid.*)

Juror No. 11 stated that taking a short break so she could collect herself would help. (27RT 10111.) Primarily, she wanted an opportunity to talk to a counselor about her unresolved personal issues. (27RT 10108, 10110, 10112, 10117.) If she did not, she expected to continue to feel frightened and confused as she lost sleep. (27RT 10116-10117.) She said she did not know how many counseling sessions she would need. (27RT 10118.) When pressed, she agreed with the prosecutor's suggestion that it would probably take multiple sessions ("three, four, five, ten" sessions). (27RT 10118.) Juror No. 11 related that she had already spoken to her supervisor, who advised her to continue focusing on the trial because she had invested so much into it. (27RT 10112-10113.) She expressed a desire to see a counselor downtown (27RT 10117-10118), presumably to accommodate her continued jury service.

Defense counsel vigorously argued that Juror No. 11 should remain on the jury. (27RT 10119-10120.) Counsel noted the Juror No. 11 did not ask to be excused, and postulated that her difficulties might well be addressed by even a single counseling session and a "good night's sleep." (27RT 10120.)

She deserved to be accommodated, as had been other players in the case -- Mr. Mullen (one of the attorneys for Terry Hodges) and a juror with a bad back -- when they experienced illness or physical distress. (*Ibid.*) Counsel saw Juror No. 11 as stabilizing after having "bottomed out" the day before. (*Ibid.*) Although acknowledging that Juror No. 11 was a sensitive individual, counsel observed that some sensitivity in jurors was to be expected and was a favorable trait for the defense. (*Ibid.*) Counsel considered Juror No. 11 a "very excellent juror for my client." (*Ibid.*)

In contrast, the prosecutor argued that Juror No. 11 should be excused. (27RT 10121.) He characterized her as emotionally fragile and "spiraling down" due to lack of sleep. (*Ibid.*) The prosecutor also emphasized that it was unknown how many counseling sessions Juror No. 11 would need. (*Ibid.*) Additionally, he read into her remarks that she could not be fair unless she became more emotionally stable. (*Ibid.*)

The trial court announced its decision to excuse Juror No. 11. (27RT 10121.) It expressed concern that Juror No. 11 appeared emotionally fragile and could experience a significant emotional breakdown. (27RT 10118-10119.) It refused to accommodate Juror No. 11's desire for counseling, regardless of the number of sessions needed. Although neither of the attorneys had raised any concern about juror misconduct, the court ruled out Juror No. 11's discussing her feelings with a counselor because this would violate the prohibition against jurors discussing the case outside of deliberations. (*Ibid.*)

Immediately after the court announced its ruling but before it acted on

it, Mr. Macias, counsel for John Hodges, stated that he had worked on a case recently involving a similarly distressed juror. The situation was resolved after the juror attended a single counseling session and took some prescribed medication. (27RT 10122.) Counsel for appellant adopted Mr. Macias's argument. (*Ibid.*)

The court dismissed Juror No. 11. (27RT 10122-10124.) It replaced her with Alternate No. 1. (27RT 10139-10140; see 2CT 422.)

B. The Error

Penal Code section 1089 provides that a trial court may remove a seated juror where "good cause" is shown that the juror is "unable to perform his or her duty."[77] This may occur when the juror has "become[] physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

Whether to dismiss a seated juror is left to the trial court's discretion. (*People v. Barnwell, supra,* 41 Cal.4th 1038, 1052.) Because removing a juror is a "serious matter," the trial court should exercise "great care" in its ruling. (*Ibid.*) It may not remove a juror unless the juror's inability to perform his or her duty affirmatively appears on the record as a "demonstrable reality." (*Ibid.*; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 807; *People v.*

---

[77] Penal Code section 1089, which has not been materially changed since appellant's trial, provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefore, the court may order the juror to be discharged" and replaced by an alternate.

Compton (1971) 6 Cal.3d 55, 60; *People v. Hamilton* (1963) 60 Cal.2d 105, 125-126, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637 fn. 2 and disapproved on another ground in *People v. Daniels* (1991) 52 Cal.3d 815, 864-866.) Good cause for dismissal cannot be established by speculation (*People v. Holt* (1997) 15 Cal.4th 619, 658-659), and "court[s] must not presume the worst" of a juror. (*People v. Lucas* (1995) 12 Cal.4th 415, 489; see also *Jablonski, supra,* at p. 807 [trial court cannot presume juror is biased]). The "demonstrable reality" requirement "requires a 'stronger evidentiary showing than mere substantial evidence.' (*People v. Wilson* (2008) 44 Cal.4th 758, 821, quoting *People v. Cleveland, supra,* 25 Cal.4th 466, 488 (Werdeger, J., concurring).) This "heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Barnwell, supra,* at p. 821.)

A trial court's decision to remove a juror under the "demonstrable reality" standard will be upheld only if the reviewing court is "confident" that the decision "is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell, supra,* 41 Cal.4th 1038, 1053.) The reviewing court shall consider the evidence pertaining to the juror's disqualification, the entire record and the reasons given by the trial court. (*Ibid.*)

A juror's core duties consist of maintaining an open mind, conscientiously listening to the evidence, following the court's instructions, and discussing the case only during deliberations with the remaining jurors in an effort to reach a verdict. (Pen. Code, § 1122 [listing general duties of jurors on which court must instruct]; Code of Civ. Proc., § 232(b) [jurors must swear

to render a verdict according to the evidence presented and the court's instructions]; Code Civ. Proc., § 225 [prospective juror may be excused for cause during jury selection due to actual or implied bias]; CALJIC No. 0.50 [pre-trial admonition].) Here, the record fails to reflect as a "demonstrable reality" that Juror No. 11 could not fulfill these obligations, and, therefore, it does not support "good cause" for her discharge. The trial court's removal of Juror No. 11 was error that violated appellant's rights under state law and under the Sixth, Eighth and Fourteenth Amendments.

Juror No. 11 related that she was seriously sleep deprived and this condition was causing her emotional distress. (27RT 10108, 10110.) She concretely related her distress to her insomnia: "I think that's just because of the sleep deprivation." (27RT 10110.) Her inability to sleep caused her to feel frightened, not of any player at trial but in general. She related feeling frightened of the defendants because they were looking at her, but then she realized she was not scared of them, she was "frightened of the situation." (27RT 10116.) She described "the situation" as follows: "[e]very night I'm afraid that I'm not going to be able to sleep. It's a general fear." (27RT 10116.) Juror No. 11 also described experiencing additional emotions due to her insomnia: confusion (27RT 10114-10115), pressure (27RT 10114), being "a little upset" (27RT 10115), close identification "with all of the parties" and "empathy with everybody." (27RT 10110; see also 10115). Further, what she saw and heard at trial triggered emotionally charged memories of her own personal experiences which she had never resolved. (27RT 10108-10110.) Juror No. 11 stated that she had experienced difficulty sleeping for about one week. (27RT 10108, 10115.) She had taken sleep medication the night before

her questioning, and this caused her to feel "okay." (27RT 10112.)

Notably, Juror No. 11 did not request to be excused despite the court's direct inquiry on the matter. (27RT 10108; see e. g., *People v. Van Houten* (1980) 113 Cal.App.3d 280, 285-288.) She consistently conveyed that she wanted to continue serving on the jury. (27RT 10108-10118.) She related her employer's advice that she continue what she had started in a manner indicating that she agreed. (27RT 10112.) When discussing seeing a counselor, Juror No. 11 mentioned trying to find one around downtown. (27RT 10117-10118.) Presumably, this would allow her to fit the counseling around her continued jury service. Although Penal Code section 1089 lists good cause that a juror cannot perform his or her duty as a separate cause for dismissal from good cause to discharge a juror who has requested discharge, whether a juror actually requests discharge can be highly relevant to whether the juror cannot perform his or her duties. Juror No. 11 knew herself better than anyone and was, therefore, in the best position to know if she could continue as a juror. Her self-evaluation is entitled to substantial weight. (See *People v. Bennett* (2009) 45 Cal.4th 577, 619-621 [upholding trial court's retention of juror who appeared upset about continued service but wanted to remain on the jury].)

Further, the record fails to support that Juror No. 11 was biased. (See *People v. Keenan* (1988) 46 Cal.3d 478, 532 [juror's actual bias, such as would support for cause challenge during jury selection, is good cause for discharge].) A juror is biased when he or she harbors a state of mind that would prevent discharging the duties of a juror with impartiality and without prejudice to the

substantial rights of either party. (Code Civ. Proc., § 225(b)(1)(B) & (C) [defining juror bias warranting for cause dismissal].) Juror No. 11 did not make any statement suggesting she was biased in favor of the defense or prosecution. Because she stated that she could see herself in the defendants' shoes, the prosecutor asked her if she could give the prosecution a fair trial. Juror No. 11 replied that she felt empathy for all parties and was fair and impartial. (27RT 10113-10116.)

Next, nothing suggests that Juror No. 11 could not conscientiously listen to the evidence. (See *People v. Roselle* (1912) 20 Cal.App.420, 424 [party is "entitled to the undivided attention of every juror while evidence [is] being taken in the trial"].) To the contrary, Juror No. 11 reported listening to the evidence with enough acuity that she felt empathy for whoever was its source. (27RT 10110.) Juror No. 11 did not report that she could not follow the proceedings or remember them later. Her case differs from those in which jurors have been excused for inattentiveness. (*People v. Johnson* (1993) 6 Cal.4th 1, 16, 21, 23; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 626-629.) That Juror No. 11 could listen to the evidence attentively is also supported by her examination. She was coherent and articulate about emotional issues that are often difficult to put into concrete terms. (27RT 10107-10118.) Although she reported being very tired and exhibited a somewhat flat affect (27RT 10112), she followed the questions presented and answered them appropriately.

Nor is there cause to conclude that Juror No. 11 could not follow the court's instructions. (See, e.g., *People v. Warren* (1986) 176 Cal.App.3d 324,

325-327.) The matter was not explored during Juror No. 11's examination. She never said she could not follow the court's instructions, and there was no independent evidence calling into doubt her ability in this regard.

The court was concerned that if Juror No. 11 continued on the jury, she might suffer an emotional breakdown and that asking her to continue serving would be asking "too much" of her. (27RT 10119.) Juror No. 11 reported feeling frightened and confused due to lack of sleep, and she was concerned the situation might get worse if her insomnia continued. (27RT 10114, 10116.) Nevertheless, she took sleep medication the night before she was questioned, and, on that day, she described herself as "okay," just a "little upset" and "very tired." (27RT 10112, 10115.) Defense counsel characterized her as starting to recover after having "bottomed out." (27RT 10120.)

Like other aspects of life, jury service, particularly on a capital case, can be extremely trying for certain jurors. (*Caldwell v. Mississippi, supra,* 472 U.S. 320 [capital jurors sense the "gravity of their task" and "awesome responsibility" of deciding the defendant's fate].) Because jurors come from all walks of life and bring their background and experiences with them, there will be some, like Juror No. 11, who are prone to insomnia and experiencing strong, sometimes distressful emotions. "Jurors are not automatons. They are imbued with human frailties as well as virtues." (*In re Carpenter* (1995) 9 Cal.4th 634, 654-655.) Thus, "[i]f the system is to function at all, we must tolerate a certain amount of imperfection.... To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*Ibid.*)

While the trial court's concern over Juror No. 11's feelings is laudable, the record fails to support that her emotions prevented her from discharging her duties. As noted, she was able to listen to the evidence, maintain impartiality and follow the court's instructions. This case stands in stark contrast to those in which jurors experiencing emotional turmoil have been properly dismissed. In those cases, there is a clear connection between the dismissed juror's emotional state and inability to discharge the functions of a juror. For example, in *People v. Van Houten, supra,* 113 Cal.App.3d 280, 285-288, a juror reported feeling so emotionally upset at graphic evidence of multiple murders that she had to tune out the evidence being presented in order not to become physically ill. In *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, a juror was so anxious about her job and daughter's move that she could not deliberate. Additionally, in *People v. Collins* (1976) 17 Cal.3d 687, a juror was dismissed because her upset state interfered with her rendering a verdict based on the evidence and in accordance with the trial court's instructions.

At best, the record shows that Juror No. 11 feared that her emotions *might* render her unable to fulfill her duties in the *future.* Speculation about future inability to serve does not rise to a "demonstrable reality" of inability to serve. (*People v. Holt, supra,* 15 Cal.4th 619, 658-659 [good cause for dismissal cannot be established by speculation].) *People v. Fudge, supra,* 7 Cal.4th 1075 is instructive. There, Juror Ashe wrote the court a note stating that the impending start date of her new job and her daughter's anticipated move might affect her ability to deliberate. When questioned, she retreated from this position. On the same day that the jury then returned guilt phase verdicts, Juror Ashe wrote the court another, similar note and asked to be

discharged. When examined, the juror stated that, although her personal issues would cause her "anxiety," this would not affect her ability to deliberate. The court refused to discharge the juror at this point. (*Id.* at p. 1098.) Subsequently, Juror Ashe contacted her employer and learned of the need to fill out certain paperwork. When questioned again if her personal life would affect her deliberations, Juror Ashe replied affirmatively. The trial court then discharged her. (*Id.* at pp. 1098-1099.) The defendant argued on appeal that the lower court should have excused the juror earlier. This Court ruled that good cause to excuse Juror Ashe arose only after the juror spoke to her employer. (*Id.* at pp. 1099-1100.) *Fudge* thus stands for the proposition that speculation about a juror's future inability to serve does not constitute good cause for juror discharge.

The trial court also strayed down the wrong path in concluding that Juror No. 11's continued service was conditioned on her violating the duty not to discuss the case with a non-juror. (27RT 10119.) A juror commits misconduct if he or she discusses the case with a nonjuror before return of the verdict. (*People v. Pierce* (1979) 24 Cal.3d 199, 207.) Juror No. 11 expressed desire to speak with a counselor about her unresolved emotional issues in order to be able to continue serving on the jury. (27RT 10108, 10110-10112, 10116-10117.) Yet, as demonstrated above, the record supports that Juror No. 11 could discharge her duties as a juror, even without counseling. Juror No. 11 clearly tied her emotional distress to insomnia: "[a]s each issue is brought up, I identify it with myself. [¶] But *I think that's just because of the sleep deprivation.*" (27RT 10110, emphasis added.) She also stated that she was feeling "okay" on the day of her examination and related this to taking sleep

medication the night before. (27RT 10112, 10115.) Juror No. 11's desire for counseling, while heartfelt, was not an absolute prerequisite to her ability to continue jury service.

More importantly, even if Juror No. 11 saw a counselor, this would not necessarily run afoul of her duties as a juror. Juror No. 11 never intimated that she wanted to *discuss the case*. Rather, she emphasized her need to discuss her *own feelings and experiences* for which she had never received any counseling. (27RT 10108-10110, 10114.) She described these as "personal issues," "unresolved issues" and "some personal things that have happened to me," and she gave as an example the frightening experience of when a stranger made phone threats to her. (*Ibid.*) Jurors are human, and it is to be expected that they will experience emotions during their jury service. When a juror discusses his or her own feelings, this does not amount to discussing the case. (*People v. Danks* (2004) 32 Cal.4th 269, 300, 304[juror's telling husband of stress she was feeling in having to make a penalty decision did not amount to improper discussion of the case with a non-juror].) Juror No. 11's speaking with a counselor about her own, unresolved emotional issues would not amount to impermissibly discussing the case with a nonjuror. (See also *People v. Marshall* (1996) 13 Cal.4th 799, 844 [juror's remark to husband, relating wonder if jurors would be in danger of getting shot if they convicted, was not misconduct because it had nothing to do with the facts of the case].)

In sum, the trial court erred in dismissing Juror No. 11 from appellant's jury. The record does not reveal a "demonstrable reality" that Juror No. 11 was unable to continue serving on the jury.

C. The Prejudice

The erroneous discharge of a juror on a showing less than a "demonstrable reality" of inability to serve violates Penal Code section 1089. Violation of state law is reviewable for prejudice under the "miscarriage of justice" test. (*People v. Watson* (1956) 46 Cal.3d 818, 836.)

Wrongful removal of a juror also violates the state and federal constitutions by allowing the prosecution to obtain a conviction without convincing all the jurors that conviction is warranted. (*United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 595-596; see *People v. Barnwell, supra,* 41 Cal.4th 1038, 1051-1052 [dismissal of juror implicates U.S. Const., amends. VI & XIV and Cal. Const., art. I, § 16].) A criminal defendant is constitutionally entitled to remain free from conviction except upon a unanimous verdict of guilt. (U.S. Const., Amends. VI; Cal. Const., art. I, § 16; *Apodaca v. Oregon* (1972) 406 U.S. 404, 405-414 [right to unanimous verdict is part of 6th amend. jury trial guarantee]; *People v. Jones* (1990) 51 Cal.3d 294, 321 [art. I, § 16 of Calif. Const. guarantees juror unanimity].) The federal right to a unanimous verdict is not applicable to the states. (*Apodaca, supra,* at pp. 405-414.) Because California law confers the right to a unanimous jury verdict, a criminal defendant has a state-created liberty interest in such a verdict which is guaranteed by the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343 [arbitrary denial of state conferred liberty interest violates 14th amend.].) Error that violates federal constitutional provisions is assessed for prejudice under the stringent *Chapman* standard. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

Reversal is warranted for the erroneous dismisses of a juror favorable to the defense. (*People v. Wilson, supra,* 44 Cal.4th 758, 841; *People v. Cleveland, supra,* 25 Cal.4th 466, 486; *People v. Hamilton, supra,* 60 Cal.2d 105, 128.) In *People v. Hamilton, supra,* 60 Cal.2d 105, the trial court erroneously removed a juror who asked a question during the penalty phase concerning the parole-eligibility of a defendant with prior convictions. The question suggested that the juror was considering the penalty of life imprisonment without possibility of parole. The prosecutor sought the juror's disqualification and expressed concern that she could not return a verdict of death. (*Id.* at pp. 122, 127-128.) This Court observed that neither side "is entitled to have removed from the panel any qualified and acting juror, who, by some act or remark made during the trial, has given the impression that he favors one side or the other." (*Id.* at p. 128.) *Hamilton* reversed the penalty determination. (*Id.* at pp. 122, 128.)

Here, the record supports that Juror No. 11 was favorable to the defense. Defense counsel objected to her discharge and characterized her as a "very excellent juror" for appellant. (27RT 10120.) Juror No. 11 stated that she felt "empathy with everybody," was identifying with the defendants and also felt like she could stand in their shoes. (27RT 10110, 10113-10115.) Her comments were of a caliber that motivated the prosecutor to openly question whether she was capable of voting for guilt. (27RT 10115-10116.) Because the trial court sustained defense counsel's objection to this line of questioning, Juror No. 11 did not directly reply. (27RT 10116.) Elsewhere, however, she affirmed that she was fair and impartial. (27RT 10108, 10115; see also 48CT4A 14096-14132 [written questionnaire].) Regardless, the prosecutor

sought her dismissal. (27RT 10121.)

Juror No. 11's ability to identify with appellant and put herself in his position made her especially receptive to appellant's mental state defense at the guilt phase. (See Argument I, § C.5, *ante.)* Counsel argued that appellant was a "tragic figure," "a victim," who "was captured by people and forces beyond his control." (31RT 11339.) According to counsel, appellant approached McDade to discuss getting his job back. (31RT 11287-11291, 11333.) Appellant's mind was so clouded by fear of and pressure from the Hodges that appellant did not form the requisite mental state for robbery, robbery felony-murder or premeditated murder. (Argument I, § C.5, *ante.*) He shot McDade out of fear of the Hodges brothers (31RT 11334) after John gave the order to kill (31RT 11318) and Terry "told [appellant] to kill the motherfucker." (31RT 11314).

The defense theory, based on appellant's fear of the Hodges brothers, would have certainly resonated with Juror No. 11 because she, too, feared them. Juror No. 11 reported feeling frightened after rearrangement of the defendants' courtroom seating. (27RT 10093-10094; see also 25RT 9394-9395, 26RT 9647 [references to seating change on 8/9/94].) Defense counsel argued in closing that the threatening nature of the Hodges brothers was so palpable that "the best thing that ever happened in this trial for [appellant]" was that the jurors "got to see the people he was with." (31RT 11257.)

For the same reasons, Juror No. 11's dismissal also prejudiced appellant at the penalty phase, where the sentencer has discretion in determining

sentence on a "moral and normative" basis, rather than a factual one. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Counsel stressed that appellant's mental retardation made him an easy target for manipulation by the Hodges brothers, who were older and much more sophisticated. (35RT 12547, 36RT 12574, 12578-12582.) Counsel argued that the jurors had ample cause to entertain a lingering doubt about whether the Hodges brothers were the true culprits who forced appellant to do the killing he did not want to do. (35RT 12531, 12546, 36RT 12590, 12584-12585, 12596-12597.)

Given Juror No. 11's leanings towards the defense, the state cannot prove beyond a reasonable doubt that her erroneous discharge was harmless to either 24.) the guilt or penalty phase verdicts. (*Chapman v. California, supra,* 386 U.S. 18,

GUILT PHASE

VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THAT DURESS IS A DEFENSE TO ROBBERY AND MURDER AND MAY RAISE A REASONABLE DOUBT ABOUT THE EXISTENCE OF SPECIFIC INTENT TO ROB OR DELIBERATION AND PREMEDITATION; THEREFORE, APPELLANT'S CONVICITONS FOR ROBBERY AND MURDER AND THE ACCOMPANYING ENHANCEMENTS AND SPECIAL CIRCUMSTANCE FINDINGS MUST BE REVERSED.

Appellant's defense was that appellant robbed and killed McDade because the Hodges threatened to kill him if he did not commit the crimes. Initially, the trial court was open to appellant's requested instructions on the defense of duress. But after questions were raised about whether the defense applied to the charge of capital murder, it cooled to the idea. The court decided that "the simplest thing ... to do" was to "eliminate ... this issue" by finding insufficient evidence to support instruction on duress. Because the record contains substantial evidence of the defense, the court erred. The denial of duress instructions requires reversal of appellant's convictions for robbery and murder and the accompanying enhancements and special circumstance findings.

A. Factual Background

Appellant requested that the trial court give three instructions related to the theory that he committed the robbery and homicide under duress from the

Hodges. (2CT 528-529.) First, appellant requested former CALJIC No. 4.40, as modified, to include the last paragraph set forth below (2CT 529):

> A person is not guilty of a crime when he engaged in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:
>
> 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and,
>
> 2. If such person then believed that his life was so endangered.
>
> This rule does not apply to threats, menaces, and fear of future danger to his life.
>
> This defense, through its immediacy requirement, negates criminal intent. If the evidence raises a reasonable doubt as to whether the danger perceived by defendant negated criminal intent, you must find that such intent was not formed.

Second, appellant requested that the court instruct that duress may raise a reasonable doubt concerning specific intent for robbery (2CT 528):

> If the evidence presented in this trial has created a reasonable doubt whether the defendant, Carl Powell had the specific intent required in the charge of robbery, you should find him not guilty of that charge. This doubt may be created if you find he acted under immediate threats against his life.

Third, appellant asked that the court instruct that duress may raise a reasonable doubt about the premeditation and deliberation necessary for first

degree murder (2CT 528):

> If the evidence presented in this trial has created a reasonable doubt whether the defendant, Carl Powell had an honest and reasonable belief that his life was endangered, and that he engaged in the act of killing Keith McDade under such fear and threat, you should negate the "premeditation" and "deliberation" mental states required to find murder in the first degree.

Because appellant did not testify, the court expressed reservations about whether the evidence supported instruction on duress. (30RT 10911-10912.) It asked defense counsel to cite evidence showing that appellant's life was in immediate danger if he did not shoot McDade. (30RT 10925-10926, 10928.) After hearing counsel's response (30RT 10923-10926, 10928-10930, 10932-10934), the court decided there was a sufficient basis for duress instructions and ruled that it would give former CALJIC Nos. 4.40 and 4.41.[78] (30RT 10934, 10937.) The court and parties assumed these instructions applied to both the robbery and murder charges. (30RT 11018.) The court also voiced approval of the principles in appellant's requested pinpoint instructions. (*Ibid.*)

CALJIC No. 4.41 provides that duress is not a defense to a crime punishable with death. (2CT 655.) The prosecutor initially objected to both CALJIC Nos. 4.40 and 4.41. (30RT 10928.) After the court announced it

---

[78] Since appellant's trial, CALJIC Nos. 4.40 and 4.41 have been consolidated into one instruction. (California Jury Instructions – Criminal (CALJIC) (Spring 2010 ed.) p. 184; see also Judicial Council of California, Criminal Jury Instructions (CALCRIM) (Fall 2009 ed.), CALCRIM No. 3402, p. 883.)

would instruct on duress, he requested CALJIC No. 4.41. (30RT 10934.) Appellant objected to it. (30RT 10940-10941.)

The court and parties engaged in lengthy discussions concerning the interplay between CALJIC Nos. 4.40 and 4.41 and their applicability in light of Penal Code section 26, subdivision Six (hereinafter "section 26(6)"), which recognizes the defense "unless the crime be punishable with death." (30RT 10934-10937, 10940-10941, 10960-10963, 10965, 11016-11042.) Everyone was troubled by the inconsistency between how duress negates criminal intent but is not a defense to a capital crime. (30RT 11018-11020, 11037.) They did not have the benefit of this Court's decision in *People v. Anderson* (2002) 28 Cal.4th 767 ("*Anderson*"), decided after appellant's trial, holding that duress is not a complete defense to any charge of murder, capital or not. Exasperated, the court stated that "the simplest thing for me to do" is "eliminate all of this issue" by not instructing on duress at all. (30RT 11023.) It declared that the evidence that appellant's life was in immediate danger if he did not commit the crimes was insufficient to warrant instruction on duress. (30RT 11023, 11048, 31RT 11051.)

B. General Legal Principles

1. Duress

Penal Code section 26(6) provides: "[a]ll persons are capable of committing crimes except ... [¶s] ... Persons (unless the crime be punishable with death) who committed the act ... charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." The rationale for the defense is that "'it

is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.' (LaFave, Criminal Law [(3d ed. 2000)] § 5.3, p. 467.)" (*Anderson, supra,* 28 Cal.4th 767, 772.)

The duress defense can be seen in somewhat differing lights. In one respect, it reflects a policy decision to excuse an otherwise guilty defendant (one who commits a criminal act with the requisite *mens rea*) of criminal culpability. (*Anderson, supra,* 28 Cal.4th 767, 772; *People v. Heath* (1989) 207 Cal.App.3d 892, 899 [at common law, "[d]uress was said to excuse criminal conduct ... violating the literal terms of the criminal law"]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1011 [on proper showing, duress is an excuse for otherwise criminal conduct].) In another respect, it is a mental state defense. The defendant commits the crime not with a guilty mind but to save himself or herself. Thus, the defense seeks to raise a reasonable doubt about whether the defendant formed the requisite criminal intent. (*People v. Mower* (2002) 28 Cal.4th 457, 479-480 & fn. 7 [duress relates to defendant's guilt or innocence because it relates to an element of the crime]; *People v. Heath, supra,* at p. 900 [duress negates proof of defendant's criminal intent, which is attributed to the coercing party]; *People v. Beach* (1987) 194 Cal.App.3d 955, 973; *People v. Graham* (1976) 57 Cal.App.3d 238, 240.)

To establish duress, the evidence must show that the defendant committed the crime due to another's demand and pursuant to an actual and reasonable belief that, if he or she refused, the defendant's life was in immediate danger. (*People v. Steele* (1988) 206 Cal.App.3d 703, 706; *People*

v. Keating (1981) 118 Cal.App.3d 172, 178, fn. 1.)

In *Anderson,* this Court looked to the statutory history of Penal Code section 26(6) to determine to what extent, if any, duress is an affirmative defense to a homicide-related crime. (*Anderson, supra,* 28 Cal.4th 767, 772.) It determined that the Legislature intended to codify the common law rule that duress is not a complete defense to any murder charge. (*Id.* at pp. 770, 774-777.)

Anderson observed, nevertheless, that evidence that the defendant committed an offense due to threats on his or her life may assist the defense in a prosecution for first degree murder in two ways. (*Anderson, supra,* 28 Cal.4th 767, 779-780, 784.) One, "duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. ... If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony." (*Id.* at p. 784; see also *People v. Hinton* (2006) 37 Cal.4th 839, 883 [accord].) Two, "a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances. If a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder." (*Anderson, supra,* at p. 784; see also *People v. Burney* (2009) 47 Cal.4th 203, 249 [accord].)

2. Instructional Obligations

A trial court must instruct *sua sponte* on a defense "if there is substantial evidence of the defense and if it is not inconsistent with the defendant's theory of the case." (*People v. Wilson* (2005) 36 Cal.4th 309, 331; *People v.*

Breverman (1998) 19 Cal.4th 142, 157.) "Substantial evidence" of a defense means evidence which, if believed by a rational jury, would be sufficient to raise a reasonable doubt about the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.) It does not necessarily require a defendant's testimony and may be based on circumstantial evidence. (*People v. DeLeon* (1992) 10 Cal.App.4th 815, 824.) When considering the sufficiency of the evidence to warrant defense instruction, the evidence should be "taken as a whole" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1146), and doubts regarding its sufficiency "should be resolved in favor of the accused." (*People v. Wilson* (1967) 66 Cal.2d 749, 763).

Upon request, a trial court shall also give an instruction pinpointing the crux of the defense as it relates to raising a reasonable doubt about proof of an essential element. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) A pinpoint instruction may be refused if it is argumentative or cumulative of other, properly given instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1138.) It, too, must be supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.)

Applying the foregoing, a trial court must instruct on duress as a defense to a felony charge that is the underlying felony in a prosecution for felony-murder when there is substantial evidence of duress and the instruction is not inconsistent with the defense theory. (*People v. Wilson, supra,* 36 Cal.4th 309, 331.) It must also give a requested pinpoint instruction supported by substantial evidence providing that duress may raise a reasonable doubt about

the existence of deliberation and premeditation or the mental state necessary for the underlying felony for felony-murder. (*People v. Burney, supra,* 47 Cal.4th 203, 249.)

The erroneous refusal of instructions on the theory of defense violates the defendant's right to due process under the Fourteenth Amendment. (*Mathews v. United States* (1988) 485 U.S. 58, 63; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099.) It also implicates a defendant's Sixth Amendment rights to counsel and jury trial. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-741; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875-876.) Additionally, in a capital case, it violates the defendant's Eighth Amendment right to a reliable penalty determination, which necessarily depends on a reliable guilt determination after the defendant has had an opportunity to meaningfully contest the state's guilt case. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 328-330; *Beck v. Alabama, supra,* 447 U.S. 625, 637-638, 642-643.)

C. The Trial Court Erred in Refusing Appellant's Requested Instructions on Duress as a Defense to Robbery and Means of Raising a Reasonable Doubt about the Existence of Specific Intent to Rob and Deliberation and Premeditation.

The evidence permitted the inference that appellant did not want to rob or kill McDade. It could reasonably be seen as showing that appellant approached McDade not to rob him but simply to discuss getting his job back. Statements by appellant and both Hodges brothers clearly established that appellant did not want to kill McDade. Also, the 30-minute gap between when appellant first approached him and the shot was fired was inconsistent with the

prosecution's theory that appellant simply executed a planned out robbery and homicide. Appellant respectfully directs the Court's attention to his previous discussion of how the evidence reasonably supports this scenario. (Argument I, § C.5.a, *ante.*)

There was sufficient evidence for jurors to determine that appellant robbed and killed McDade because the Hodges coerced him. Counsel for John Hodges observed that if the testimony of Eric Banks were given "100 percent weight," it "indicated that John Hodges basically coerced Powell into shooting Mr. McDade," and the same was true for Darryl Leisey's testimony concerning Terry Hodges. (29RT 10577.) Neither Banks's nor Leisey's testimony was inherently unbelievable. (29RT 10594-10597.)

The evidence established that both brothers demanded that appellant commit the crimes. (Compare *People v. Keating, supra,* 118 Cal.App.3d 172, 179 [defendant not entitled to duress instruction where codefendant made no demand, barely spoke to him and said only, "Let's go. You are driving, pal"].) John Hodges manipulated appellant to do his will and gave the order to kill. (31CCT 9154-9155.) Terry Hodges's remarks were broad enough to encompass both the robbery and killing. Terry said he was frustrated because appellant was taking too long with McDade. (25RT 9492, 9494.) Terry told him, "you need to jack this guy and let's go" (25RT 9498) and "just whack the motherfucker." (25RT 9494; see also 32CCT 9305-9306). Terry said he had to coach appellant like a child and told him, "let me tell you how to do it and get it over with. You know, don't waste no time. You know, be a man. You know, Big Daddy's on the case. Let's get it over with, you know." (27RT

10034; see also 25RT 9498, 32CCT 9315.)

Further, jurors could have reasonably interpreted the evidence as showing that the Hodges were present when appellant committed the crimes. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1190-1191 [for threat of danger to defendant to be immediate, evidence must show threatener was present when defendant committed the crime]; *People v. Heath, supra,* 207 Cal.App.3d 892, 902 [threatener was within shooting range of defendant].) John Hodges stated that he ordered appellant to kill McDade so McDade would not identify *"us."* (25RT 9426, 9462-9463, 31CCT 9156, emphasis added.) John would not have been concerned about McDade identifying him unless he had approached McDade with appellant. (25RT 9463; see also 31RT 11318 [counsel's closing argument].) Eric Banks, who was familiar with John's *modus operandi* of manipulating youngsters, believed John must have been on the scene to order the shooting. (31CCT 9144-9145, 9155.)

Similarly, according to Leisey, Terry Hodges told appellant that he had to kill McDade so that he, Terry Hodges, would not be charged with the robbery. (32CCT 9305.) Terry said, "I tell the reason why he had to kill him. ... Because no witnesses, no can find. ... That's why *they can't charge me.* ... [¶s] No witness, no can find *me.*" (*Ibid.* emphasis added; see also 32CCT 9314.) Like John, Terry would not have been concerned about McDade identifying him unless he had been present for the crimes. (27RT 10031.) Terry even admitted he was on the scene. (32CCT 9302, 9306-9307.) Although Terry claimed that he walked back to the car and waited for appellant to finish (32CCT 9307), defense counsel persuasively argued that the jury

should discredit this claim. (31RT 11313-11315). Pointing to Terry's remarks that he coached appellant like a child, counsel argued that Terry must have remained by appellant to ensure that appellant did as he was told. (*Ibid.*)

The totality of the evidence also permitted a rational inference that the Hodges brothers conveyed an implied threat of imminent death to appellant if he did not comply with their demands. The reason they gave for insisting that appellant kill McDade was so there would be no witnesses (plural). (31CCT 9160 & 25RT 9424 [John Hodges]; 32CCT 9305-9306 [Terry Hodges].) One of them gave appellant the pistol that appellant used. (31CCT 9155 [according to Banks, John probably had "the pistol"]; 32CCT 9303 [according to Leisey, Terry gave appellant the gun].) It had only one bullet in it. (31CCT 9004.) Another bullet that would have fit the pistol was found by Isolde's Flower Shop in the alley near KFC, suggesting it had been unloaded there. (19RT 7640, 7642, 7647-48; 20RT 7805-7806, 23RT 8661-8662, 27RT 10147-10148, 10152; 31RT 11268-11270 [counsel's argument].) These circumstances conveyed to appellant that if he was not with the Hodges, he was against them. If appellant sided with McDade, he, too, was a "witness" who could identify the Hodges and had to be eliminated. (See 31RT 11308-11310, 11313, 11316 [defense counsel's argument].) Because appellant had only a single bullet in his pistol, he had no realistic hope of resisting the two Hodges, who had at least a shotgun between them, and possibly a pistol as well. (31CCT 9155, 32CCT 9303, 9311.)

Further, the evidence supported appellant's reasonable fear that the Hodges would kill him if he did not comply with their demands. Terry Hodges

made clear, "we don't play." (32CCT 9314.) Leisey described Terry as a drug dealer who was customarily armed and owned a shotgun. (32CCT 9303, 9311.) From this, jurors could infer that Terry was armed with a shotgun on the night of the charged crimes. (Evid. Code, § 1105; *People v. Webb* (1993) 6 Cal.4th 494, 529.) Banks believed that John Hodges was probably armed. (31CCT 9155.) Additionally, the brothers were known for committing drive-by shootings together, and Terry was known as an "enforcer." (32CCT 9311.) The Hodges were older and more criminally sophisticated than appellant. (25RT 9471, 9474 [John had been to prison at least twice], 31CCT 9018-9019 [appellant tells Lee he gave into the Hodges' demands because they knew more about how to commit crimes]; 31CCT 9151 [John was the mastermind because he was older and more criminally experienced than appellant], 30CCT 8980 [appellant believed John to be about 36 years-old], 31CCT 9295 [Terry appeared to be in his early 20's]; see also 31RT 11298-11301 [counsel's closing argument].) As defense counsel emphasized, the jurors could see that the Hodges were "pretty bad dudes" from simply observing them in the courtroom. (30RT 11005, 31RT 11054, 11257 [counsel's remarks]; see also 25RT 9394-9395, 26RT 9647, 27RT 10093-10094 [Juror No. 11 reports fear of defendants after courtroom seating is changed to give a better view of the Hodges].)[79] Consequently, jurors could rationally conclude that a reasonable person in appellant's shoes would have taken the Hodges' threat seriously.

Appellant's subjective fear of the Hodges can also be readily inferred from the evidence. (*People v. Falck* (1997) 52 Cal.App.4th 287, 299 [since a

---

[79] Photographs of the Hodges brothers in newspaper articles have been reproduced in the record at 34CCT 10068 (Def. Ex. No. T-F1, admitted at 30RT 10894) and 46CCT 13504 (Def. Ex. No. T-I, admitted at 28RT 10331).

defendant's subjective mental state is rarely susceptible to direct proof, it must typically be inferred from all relevant circumstances].) Appellant repeatedly told Detective Lee that he committed the crimes because he was in fear and under pressure from threats. (31CCT 9001-9003, 9019, 9021.) Although appellant attributed the fear and pressure to McDade (*ibid.*), rational jurors could have seen through this as an effort to take the fall for the real culprits, the Hodges brothers. (31RT 11255-11257, 11285-11286, 11334; see 31CCT 9142 [According to John, "The dude [appellant] is saying he took it"].) Counsel argued that appellant had nothing to fear from McDade. (31RT 11256; see also 31CCT 9003 [Det. Lee remarks that McDade did not seem like a threatening type of person].) In contrast, the Hodges brothers were frightening, criminally oriented individuals. (31RT 11257, 11300, 11313, 11316, 11334.) Counsel emphasized appellant's statement to Lee that he was "*still* scared," for himself and his family while he was in custody. (31RT 11285-11287; 31CCT 9006.) Since McDade was deceased, appellant had no reason to still fear him. The Hodges brothers, however, remained a threat. (31RT 11285-11286, 11334-11335.) Appellant expressed his fear of them when he told Lee, "now if I went and told everything that really, really happened, ya'll ... would go swipe them [the Hodges], they got locked up and probably be out and bam, there go my family their way." (31CCT 9012.) Counsel argued that appellant's continued fear after the Hodges' arrest indicated that they were truly the source of his fear at the time of the crime. (31RT 11257, 11285-11287.)

Therefore, substantial evidence supported that appellant committed the offenses under duress. Angela Littlejohn saw what happened clearly:

appellant was "weak" and a "follower" and must have been forced to commit the crime by the Hodges. (31CCT 9270, 9288.) The trial court erred in denying appellant's requested instructions that duress is a defense to robbery and that it may raise a reasonable doubt about whether appellant had the specific intent to rob or deliberation and premeditation.

D. The Trial Court Also Erred in Refusing Appellant's Requested Instruction that Duress Is a Defense to Murder.

Appellant's request for CALJIC No. 4.40 encompassed both the robbery and murder charges. (2CT 529; 30RT 11018.) As noted, in *Anderson* this Court ruled that duress is not a complete defense to any charge of murder by interpreting the legislative intent behind Penal Code section 26(6). (*Anderson, supra,* 28 Cal.4th 767, 770, 774-777.) The opinion did not address if the Legislature may constitutionally restrict the defense to non-murder offenses. Appellant maintains that the Due Process Clause of the Fourteenth Amendment prohibits it from doing so.

Duress negates the state's proof of the essential element of criminal intent. (*People v. Mower, supra,* 28 Cal.4th 457, 479-480 & fn. 7; *People v. Heath, supra,* 207 Cal.App.3d 892, 900; *People v. Beach, supra,* 194 Cal.App.3d 955, 973; *People v. Graham, supra,* 57 Cal.App.3d 238, 240.) "[I]f a crime requires a particular mental state, the Legislature *cannot* deny a defendant the opportunity to prove he did not entertain that state." (*People v. Bobo* (1990) 229 Cal.App3d 1417, 1442, emphasis in original; see also *Martin v. Ohio* (1987) 480 U.S. 228, 233-234 [it would violate due process for trial court to instruct the jury to not to consider specific defense evidence in

determining if the state has proven its case beyond a reasonable doubt].) Due process also entitles a defendant to instruction on his theory of defense, including a theory that the prosecution has failed to prove criminal intent. (*Mathews v. United States, supra,* 485 U.S. 58, 63; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414.)

A state may define an element of a crime to render irrelevant certain mental state defense evidence (e.g., intoxication or diminished capacity). (*Montana v. Egelhoff* (1996) 518 U.S. 37, 73 (Souter, J., dissenting); *In re Christian S.* (1994) 7 Cal.4th 768, 775.) California's definition of the mental state element of malice, necessary for conviction for murder, does not renders duress evidence irrelevant. (Pen. Code, §§ 187, 188.) Express malice exists if an accused harbors a specific intent to kill. (Pen. Code, § 188.) Implied malice exists if the accused acts in conscious disregard to the danger his or her conduct poses to human life. (*Ibid.*) *Anderson* acknowledged that duress evidence may tend to negate proof of implied malice. (*Anderson, supra,* 28 Cal.4th 767, 780-781.) It is also recognized that duress may negate the specific intent to permanently deprive another of his or her property as necessary for a robbery conviction. (*People v. Graham, supra,* 57 Cal.App.3d 238, 239-240; *People v. Guerra* (1985) 40 Cal.3d 377, 385.) The definitions of specific intent to permanently deprive and specific intent to kill are not so different that one leaves room for duress to negate it but the other does not.

The Legislature has the power to define the elements of the crimes it chooses to punish. But once it does, it cannot prevent a defendant from presenting competent and relevant evidence tending to overcome the state's

proof of any such essential element. A criminal defendant has a fundamental right to an opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; *California v. Trombetta, supra,* 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Restriction of reliable and probative duress evidence to only non-murder offenses impermissibly threatens to lighten the state's burden to prove each element of an offense beyond a reasonable doubt in violation of due process. (*Montana v. Egelhoff, supra,* 518 U.S. 37, 64 (O'Connor, J., dissenting); *In re Winship* (1970) 397 U.S. 358, 364.)

Anderson limits duress to non-murder crimes to give effect to the Legislature's intent to preclude defendants accused of murder from being declared not guilty if they killed under duress. (*Anderson, supra,* 28 Cal.4th 767, 772, 777-778.) In other words, California has adopted its duress policy to improve its chances of winning convictions against certain defendants by restricting their ability to mount a successful mental state defense. "[A] State may not first determine the elements of the crime it wishes to punish, and then thwart the accused's defense by categorically disallowing the very evidence that would prove him innocent." (*Montana v. Egelhoff, supra,* 518 U.S. 37, 68 (O'Connor, J., dissenting).) Although California's approach stems from common law, history alone does not dictate what principles are fundamental enough to merit due process protection. It must be considered in conjunction with a defendant's "right to a fair opportunity to put forward his defense, in adversarial testing where the State must prove the elements of the offense beyond a reasonable doubt." (*Id.* at p. 71; see also *Washington v. Texas* (1967) 388 U.S. 14, 20-22 [invalidating rule precluding accomplice testimony for the

defense despite rule's firm roots in common law].)

Thus, appellant was entitled, as a matter of fundamental fairness, to an instruction on duress as a defense to the charged crime of murder.

E. The Denial of Instructions on Appellant's Theory of the Case Prejudiced Appellant.

This Court has not expressly determined the applicable standard of prejudice for the erroneous failure to instruct on a defense, i.e., whether such error is analyzed under California's "miscarriage of justice" test, as interpreted in *People v. Watson* (1956) 46 Cal.2d 818 or the federal "beyond a reasonable doubt" standard of *Chapman v. California, supra,* 386 U.S. 18. (See *People v. Salas* (2006) 37 Cal.4th 967, 984; *People v. Eid* (2010) 187 Cal.App.4th 859, 883.)

Because the instructional omission affected appellant's federal constitutional right to present a defense, the *Chapman* standard applies. (See § B.2, *ante*; *People v. Rogers* (2006) 39 Cal.4th 826, 868, fn. 16 [exception to *Watson* standard may exist "when the error deprives the defendant of the federal due process right to present a complete defense"].) The erroneous failure to instruct on a defense implicates the right to present a defense. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations.]" (*Mathews v. United States, supra,* 485 U.S. 58, 63.) "Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of

acquittal" or other favorable result. (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.)

Under *Chapman,* reversal is required unless the government proves the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) This standard presumes prejudice and permits the government to rebut it. (*People v. Roybal* (1998) 19 Cal.4th 481, 520.) For the government to discharge its weighty burden, it must show that "'the guilty verdict actually rendered in this trial was surely unattributable to the [instructional] error.'" (*People v. Flood* (1998) 18 Cal.4th 470, 515, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) It is insufficient for the government to demonstrate that a "hypothetical reasonable jury" would have resolved the question posed by the omitted instruction adversely to the defendant. (*Flood, supra,* at p. 514.)

Instructional error is prejudicial when the record affords a "reasonable or plausible basis" for finding that the error affected the verdict. (*People v. Flood, supra,* 18 Cal.4th 470, 505.) Considerations relevant to this determination include whether the "defendant effectively conceded [the] issue" and "the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions." (*Id.* at pp. 485, 504.) Additionally, it is appropriate to consider the instructions as a whole, the arguments of counsel and the verdict rendered. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) The overall strength of the evidence is also germane (*People v. Salas, supra,* 37 Cal.4th 967, 983-984), but *Chapman* itself cautions against "overemphasis" on the panacea of "overwhelming" evidence.

(*Chapman, supra,* 386 U.S. 18, 23).

Although the evidence was sufficient to support the verdicts, it could have also supported an outcome more favorable to appellant. As noted, jurors had cause to doubt that appellant wanted to rob McDade at gunpoint or that he wanted to kill him. (See Argument I, § C.5.a, *ante.*) The principal disputed issue was appellant's mental state (31RT 11249-11250), a matter which requires delicate assessment due to its intangible nature. An error that directly affects the key disputed issue of intent is especially likely to be found prejudicial. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1202-1203, 1206; cf., *People v. Hatchett* (1944) 63 Cal.App.2d 144, 151-152 [instructional error is particularly likely to be harmful where evidence requires delicate assessment of defendant's credibility].) This principle clearly applies to the omitted duress instructions which would have strongly assisted appellant's efforts to raise a reasonable doubt concerning his mental state.

The jurors did not reject the defense of duress under other, properly given instructions. None covered duress. The jurors would not have known that the law excuses otherwise criminal conduct when evidence raises a reasonable doubt about whether the defendant acted under duress. Jurors cannot be expected to divine an affirmative defense on which they are not instructed. (See *People v. Eid* (2010) 187 Cal.App.4th 859, 883 [jurors cannot guess at defense principles on which they were not instructed]; cf., *People v. Franco* (2009) 180 Cal.App.4th 713, 725 [the "jury cannot reasonably be expected to divine" that one of the theories on which it received instruction was legally incorrect].) This is particularly so since the prosecutor argued,

"[a]nd so what if the[Hodges] were [pressuring appellant]? That is not a defense...." (31RT 11347.)

Likewise, none of the instructions indicated that evidence of duress may be sufficient to raise a reasonable doubt concerning the mental states of specific intent to rob or deliberation and premeditation. Without the "salutary effect" of instructions providing "significant additional guidance" (*Taylor v. Kennedy* (1978) 436 U.S. 478, 484), some or all of the jurors may have believed that one mental state -- such as fear, pressure, or combination thereof – cannot preclude actual formation of another. The prosecutor's argument that the pressure appellant may have felt from the Hodges was "not a defense" would have added to this perception. (31RT 11347.)

Appellant did not concede lack of duress. To the contrary, defense counsel advanced a defense theory similar to it. Counsel argued that appellant committed the crimes in such fear of and under such pressure from the Hodges that he did not actually deliberate and premeditate or formulate the specific intent necessary for robbery, robbery felony-murder and the robbery felony-murder special circumstance. (31RT 11327, 11331; Argument I, § C.5.a, *ante*; *Anderson, supra,* 28 Cal.4th 767, 784.) This theory resembled duress because it sought to negate appellant's criminal intent due to the coercive influence on him of third parties. Although the jurors rejected the defense's efforts to raise reasonable doubt about appellant's mental state, this does not render harmless the trial court's failure to instruct on duress for three reasons.

First, the defense theory of fear and pressure went principally to the

subjective component of duress, not its objective component. Similar to the subjective and objective components of self-defense, the subjective and objective components of duress are related so that proof of one may bolster the persuasive effect of evidence of the other. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083 [the law of self-defense considers the defendant's subjective state of awareness as bearing on the reasonableness of his or her actions].) If jurors find that a reasonable person in the defendant's shoes would have concluded he must commit the offense or be killed, they are more likely to conclude that the defendant actually had such a belief and *vice versa.* In this way, the whole of the duress defense is necessarily greater than the sum of its parts. Counsel's argument touched on only one aspect of the duress defense out of its full context.

Second, when the duress defense is seen as a policy decision not to hold accountable a guilty defendant – one who commits a prohibited act *with* a criminal mental state -- there is no inconsistency between the jury's rejecting counsel's argument that appellant lacked the necessary mental state for first degree murder and its entertaining reasonable doubt about whether appellant acted under duress.

Third, counsel was forced to make his closing argument without concrete support in the court's instructions. Jurors see the court's legal instructions as "definitive and binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384; see also *People v. Matthews* (1994) 25 Cal.App.4th 89, 99 ["instruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel"].) When an attorney

is forced to argue without the benefit of supporting instructions, jurors are especially likely to mistrust his or her argument as the artful invention of an advocate attempting to persuade.[80] (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) It is all the more likely that appellant's jurors viewed counsel's argument with such skepticism because the prosecutor argued that counsel "doesn't care about a just verdict. He cares about the defense of his client...." (31RT 11341.) Since the trial court's instructional error may well have contributed to the jurors' rejection of counsel's defense theory, it would be inappropriate to rely on the verdict to deem the error inconsequential.

The jury found appellant guilty of robbery, first degree murder and the robbery felony-murder special circumstance. (3CT 673-675.) The verdicts do not shed light on whether the jurors also unanimously found deliberation and

---

[80] The nature of defense counsel's closing argument exemplifies why jurors give less weight to counsel's words than to a trial judges' and hence why counsel's argument cannot substitute for legal instructions from the court. Castro began by saying he was totally unprepared and his speech was "a disaster;" he also warned the jurors he might seem "discombobulated" because he was sleep deprived. (31RT 11241-11242.) He said he had trouble following his notes and determining where he was going. (31RT 11275.) Castro repeatedly referred to the victim's wife by the wrong name and later apologized for his mistake. (31RT 11262, 11277, 11288.) He also called McDade by the wrong name. (31RT 11332.) More than once, he had difficulty locating exhibits or visual aids to which he was referring. (31RT 11260, 11304-11305.) He asked others to help him find such materials in the midst of presenting his argument. (31RT 11311 [Castro asks court clerk to find an exhibit for him]; 31RT 11288, 11294-11295 [Castro has Holmes find materials for him].) Also, he explicitly acknowledged, "I'm losing my audience" when he asked the court to declare the evening recess on the early side. (31RT 11315; see also *id.* at 11322.) Unquestionably, counsel's words and actions stand in sharp contrast to the precise and authoritative manner in which the trial court addressed the jurors. (E.g., 15RT 6298-6299, 30RT

premeditation as a theory of first degree murder. (See 2CT 612 & 31RT 11123 [jurors instructed they need not unanimously agree on theory of first degree murder].) Thus, regardless of whether the court should have instructed on duress as a complete defense to murder (see § D, *ante*), appellant is entitled to relief due to the court's erroneous failure to instruct on it in connection with robbery, robbery felony-murder and the robbery felony-murder special circumstance. Therefore, appellant's convictions for robbery and murder and the true finding on the attached enhancements and special circumstance allegation must be vacated.

10867-10868, 31RT 11094-11096.)

VII.

THE ERRONEOUS ADMISSION OF EVIDENCE CONNECTING APPELLANT TO FIREARMS NOT USED IN ANY OF THE CHARGED OFFENSES VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION AND REQUIRES REVERSAL.

The prosecution and codefendant John Hodges elicited evidence connecting appellant to three firearms that could not have been used in the charged shooting: (1) a gun displayed to KFC employees sometime around Halloween of 1991, (2) a shotgun that appellant sold, and (3) a .32 caliber gun with which appellant had his picture taken. None of these guns was the alleged homicide weapon, a .38 revolver, People's Exhibit No. T-18A. The evidence connecting appellant to three firearms not used in the shooting was irrelevant and highly inflammatory. It blackened appellant's character by portraying him as a person who carries concealed firearms and surrounds himself with deadly weapons. It gave the prosecutor fuel for his speculative assertion that appellant sought to use one or more of these weapons to commit uncharged crimes. Even if marginally relevant, the probative value of the gun evidence was clearly outweighed by its potential for prejudice. Its admission violated appellant's right to a fundamentally fair trial, as guaranteed by the Fourteenth Amendment, and a reliable penalty determination, as guaranteed by the Eighth Amendment, and requires reversal.

A. Firearm Evidence

1. Homicide Weapon

The prosecution presented evidence linking appellant to a firearm

recovered from a dumpster as a result of information provided by Angela Littlejohn. (19RT 7540-7545, 28RT 10402-10405.) Littlejohn went to assist appellant and other young men after their car broke down south of Sacramento. (28RT 10390-10391, 10394; 31CCT 9254.) On the trip back, appellant boasted of shooting McDade in a way that made Littlejohn think he was "special" and mentally "slow." (28RT 10410, 10412, 10417, 10431; 31CCT 9269.) Appellant had a gun with him. (28RT 10398-10400.) Littlejohn took custody of it and eventually threw it in a dumpster. (28RT 10403, 10452.) She later led police to the dumpster, from which they recovered People's Exhibit No. T-18A. (19RT 7543-7545, 28RT 10403-10405).

People's Exhibit No. T-18A is a silver revolver with a dark handle. (29CCT 8664 [color photograph of Ex. T-18A].)

The prosecution's ballistics expert testified that McDade was shot with a .38 caliber firearm based on examination of the autopsy slug. (28RT 10148-10150, 29RT 10151, 10165.) People's Exhibit No. T-18A, fires .38 short bullets.[81] (28RT 10147-10148, 29RT 10153, 10155, 10161). The ballistics expert noted that the autopsy slug exhibited five lands and groves and People's Exhibit No. T-18A, when test-fired, produced bullets with the same general pattern. (28RT 10148-10151.) The expert could not say for sure that this was the gun used in the killing because the autopsy slug was badly damaged. (28RT 10150, 29RT 10151, 10153.)

---

[81] Although some witnesses referred to the gun as People's Exhibit No. T-18C (e.g., 19RT 7843, 28RT 10404), this was the wrapping, and the gun itself was People's Exhibit No. T-18A. (29RT 10161).

Although acknowledging this limitation to the ballistics expert's opinion (16RT 6543), the prosecutor maintained that People's Exhibit No. T-18A "is the murder weapon" based on how the gun was traced to appellant through Littlejohn. (31RT 11187 [prosecutor's closing argument]).

2. Post-Halloween Gun Display

The prosecution's evidence showed that Junell Rodriquez and Ruben Martinez were working together at the KFC drive-through window shortly after Halloween when appellant arrived. (16RT 6570, 6617.) He obtained some water and a bathroom token. (16RT 6570, 6617, 6754-6755.) When he came out of the bathroom, appellant pulled a gun out of his pants and said, "see what I got?" (16RT 6571, 6757.) Martinez asked appellant what he intended to do with it. Appellant said "whatever" and ran across the street to join some companions. (16RT 6726.)

Rodriquez described the firearm as a small handgun. (16RT 6595-6597, 6614.) She did not know guns well and found it hard to recall its details, such as its color or if it had a cylinder or instead used a "clip" or magazine. (16RT 6595-6599, 6628.) Revolvers store bullets in revolving cylinders whereas automatics store them in clips. (30RT 10793-10794.) Detective Lee interviewed Rodriquez on January 20, 1992. (23RT 8832.) Rodriquez told him the gun was a dark color and had a brown handle. (16RT 6625-6626.) When counsel for appellant showed Rodriquez People's Exhibit No. T-18A and asked, "[d]oes this look like the gun that you saw just after Halloween?" Rodriquez unequivocally answered "[n]o." (16RT 6598.) After further questioning, counsel again showed Rodriquez People's Exhibit No. T-18A and

asked, "[d]o you know if this is the gun or not?" (16RT 6599.) Again, Rodriquez replied in the negative.[82] (*Ibid.*)

Martinez described the gun appellant displayed as a black revolver with a dark handle. (16RT 6722-6723, 6728-6729.) As previously noted, People's Exhibit No. T-18A is silver, not black. (16RT 6729; 29CCT 8664 [color photograph of Ex. No. T-18A].) When the prosecutor showed Martinez People's Exhibit No. T-18A, Martinez would not identify it as the weapon he saw. (16RT 6724-6726.) At best, said Martinez, it was "that type of gun." (16RT 6724.)

3. Shotgun Sale

Counsel for John Hodges broadly asked Martinez if he knew of any other connection appellant had to firearms besides the gun he displayed around Halloween. (16RT 6759.) Martinez replied that he had heard appellant talk at KFC about selling a small shotgun. (16RT 6759-6760.)

4. .32 Caliber Firearm in Photograph

In his statement to Detective Lee (People's Exhibit Nos. T-51A [transcript] and T-51 [videotape]), appellant made two references to having had his picture taken with a .32 caliber firearm. Appellant stated: "I had a 32 automatic. The gun I took with the picture [sic]. I threw that away. That was the only gun I ever owned." (30CCT 8982.) The following exchange also

---

[82] Lee did not testify to the substance of Rodriquez's statements about the gun appellant displayed. (23RT 8832 et seq., 29RT 10737 et seq., 30RT 10793-10794.) Rather, he testified about her description of Goulding's gun. (30RT 10793-10794.)

took place: "Lee: But you said you had a 32 automatic? Powell: Yeah, ... recently. Lee: Okay. Powell: That's why I took a picture with it. Lee: Okay. Powell: And I said I threw that. I don't got that no more." (30CCT 8994.)

Before the videotape of appellant's statement to Lee was played for the jury, defense counsel objected to and requested redaction of appellant's references to the .32 caliber firearm. (23RT 8863-8864.) Counsel's main concern was that the references not open the door to previously excluded gang evidence. The picture appellant referred to showed appellant and William Akins throwing gang signs while pointing guns at each other.[83] (23RT 8863-8865; see 5RT 2116-2118, 15RT 6234-6235, 6242-6243 [rulings excluding gang evidence].) The prosecutor responded that he had no intention of introducing the photograph, which the trial court had already ruled was inadmissible. (23RT 8865-8866.)

The court overruled appellant's objection to appellant's references to possessing a .32 caliber firearm. It noted that the firearm could be the "weapon that witnesses have testified he had possession of earlier." (23RT 8864.) According to the court, the challenged evidence "doesn't infer gangs in any way;" it admitted appellant's ownership of yet another firearm, but it was not "irrelevant, prejudicial, or inadmissible." (23RT 8866.)

---

[83] The photograph was admitted at the Penalty Phase as People's Exhibit No. P-3. (35RT 12327; 45C3AT 13409 [color copy of photograph].) Appellant challenges its admission in Argument XXV, *post.*

Defense counsel voiced his understanding that the court's "continued ruling" is the prosecutor "cannot produce any testimony or evidence about that incident with William Akins and the guns and gangs and so forth." (23RT 8866.) Nevertheless, counsel still objected to the references to the .32 firearm: "I would still object to it, but I feel a little bit better about what's been stated." (*Ibid.*)

B. Additional Objections to the Gun Evidence Were Excused as Futile

Appellant objected to his references to Lee about possessing a .32 caliber firearm with which he had his picture taken, irrespective of its potential link to gang evidence. (23RT 8863-8866.) The trial court overruled the objection and observed that the evidence was relevant, not unduly prejudicial and admissible. (23RT 8866.)

Although appellant did not expressly object to the other gun evidence challenged here, the post-Halloween gun display and appellant's claim he sold a shotgun, objections to these additional items of gun evidence were excused as futile. (*People v. Hill, supra,* 17 Cal.4th 800, 820.) The unobjected-to gun evidence was of a very similar nature to the .32 caliber gun references to which appellant had unsuccessfully objected. (Compare *People v. Arias* (1996) 13 Cal.4th 92, 159-160 [trial court's overruling objections to unrelated evidence does not excuse failure to object to challenged evidence].) In overruling appellant's objection to his references to the .32 caliber firearm, the trial court made clear that it believed evidence linking appellant to firearms not used in the charged crimes was relevant, not unduly prejudicial and admissible. (23 RT 8866.) There is no reason to conclude that, had appellant made additional

objections, the trial court would have reached a different conclusion.

C. The Trial Court Erred in Admitting the Gun Evidence

Only relevant evidence is admissible. (Evid. Code, §350.) Evidence is relevant if it has a tendency in reason to prove or disprove a disputed, material fact. (Evid. Code, § 210.) It is impermissible to prove any fact through reasoning requiring an inference of a person's propensity to act in conformity with a particular character trait. (Evid. Code, § 1101(a).) Additionally, even relevant evidence is inadmissible if its probative value is substantially outweighed by its potential for undue prejudice or juror confusion. (Evid. Code, § 352.) Evidentiary rulings are admissible under the abuse of discretion standard. (*People v. Turner* (1984) 37 Cal.3d 302, 321.) Under these provisions, the trial court abused its discretion in admitting evidence connecting appellant to three firearms that could not have been the murder weapon.

1. Bad Character Evidence

Evidence connecting a defendant to a weapon that *could* have been used to commit the charged offense is relevant to show opportunity and hence identity. (*People v. Hamilton* (1985) 41 Cal.3d 408, 430, disapproved on other grounds in *People v. Hamilton* (1988) 45 Cal.3d 351, 356-357.) In contrast, evidence connecting the defendant to a weapon that *could not* have been used in the charged crimes is irrelevant and can be "highly prejudicial...." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) It tends to prove "not that [the defendant] committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577,

overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649; see also *Henderson, supra,* at pp. 359-360.) Consequently, evidence of the defendant's connection to weapons that could not be the instrumentality of the crime is inadmissible. (*Riser, supra,* at p. 577; *People v. Wong Ah Leong* (1893) 99 Cal. 440, 441-442 [where defendant is charged with committing assault with knife, it is prejudicial error to admit evidence that he was also armed with a pistol].)

In *People v. Riser, supra,* 47 Cal.2d 566, the Riser brothers were prosecuted for the robbery and murder of two café proprietors. The killings resulted from shots fired from a Smith and Wesson .38 special revolver. (*Id.* at pp. 572-573, 577.) The prosecution introduced evidence that various ammunition and firearms were found in a vehicle belonging to one of the defendants and, later, upon his directions, in a cesspool. These included not only .38 special shells but also .22 caliber shells, a .38 Colt revolver and a P38 automatic firearm. (*Id.* at p. 576.) For reasons not pertinent here, *Riser* ruled that the P38 was properly admitted. (*Id.* at pp. 578-579.) It found error, however, in admission of the .38 Colt revolver and .22 caliber shells. (*Id.* at p. 577.) *Riser* explained (*ibid.,* parallel citations omitted):

> The prosecution's own witness established that the bullets found at the scene of the crime had been fired from a Smith and Wesson .38 special revolver.... When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. ... When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show not that he committed the crime, but only that he is the sort

> of person who carries deadly weapons. (*People v. Riggins* [(1910)] 159 Cal. 113, 121; *People v. O'Brien* [(1900)] 130 Cal. 1, 5; *People v. Yee Fook Din* [(1895)] 106 Cal. 163, 165-167; *People v. Wong Ah Leong*[, *supra,*] 99 Cal. 440.)

The principles articulated in *Riser* remain valid. (E.g., *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047 [trial court's reluctance to admit gun that could not have been murder weapon was correct and consistent with *Riser*].)

The prosecution's expert testified that the bullet that killed McDade came from a .38 caliber firearm. (28RT 10148-10150, 29RT 10151, 10165.) The prosecution presented evidence linking appellant to People's Exhibit No. T-18A, a .38 caliber revolver recovered from a dumpster through Littlejohn. (19RT 7540-7545, 28RT 10402-10405.) Consequently, the prosecution maintained that People's Exhibit No. T-18A was the gun that killed McDade. (31RT 11187.)

None of the three firearms discussed above -- the gun appellant showed to Martinez and Rodriquez , the .32 caliber firearm appellant referred to in his statement to Lee and the shotgun appellant talked about selling – could have been the gun used in the homicide, People's Exhibit No. T-18A. People's Exhibit No. T-18A is of a different caliber than the gun appellant mentioned to Lee. It is a different color than the gun observed by Rodriquez and Martinez. When confronted with People's Exhibit No. T-18A, both witnesses testified that it was not the gun they saw. Additionally, the recovered firearm is not a shotgun and is therefore not the shotgun that appellant talked about selling.

Since none of the three weapons at issue here could have been used in the charged crimes, evidence connecting appellant to them was irrelevant and served simply to blacken his character by showing "only that [appellant] is the sort of person who carries deadly weapons." (*People v. Riser, supra,* 47 Cal.2d 566, 577.)

The trial court's articulated justification for admitting appellant's connection to the .32 caliber firearm, that it could have been the weapon that Martinez and Rodriquez saw (23RT 8864), fails to withstand analysis. Since McDade was not killed with a .32 caliber firearm, whether the KFC employees may have seen appellant with such a weapon was irrelevant. The Halloween incident did not warrant introduction of appellant's connection to yet another gun that could not have been the homicide weapon.

Nor was the challenged gun evidence admissible on the theory, articulated by the prosecutor in closing argument, that appellant had robbery on his mind at the time of the post-Halloween gun display because he was "headed down the criminal path." (32RT 11359.) The prosecutor conceded that appellant did not show the weapon in a threatening manner. (15RT 6310-6311.) To draw an inference from a person's non-threatening display of a weapon that he intends to commit a robbery rests not on logic, but on speculation. Speculative evidence is not relevant and, hence, it is inadmissible. (*People v. Babbitt* (1988) 45 Cal.3d 660, 682; Evid. Code, § 350.) Further, such a theory of relevance is also unacceptable because it required resort to impermissible propensity reasoning: because appellant is predisposed to crime, his display of a weapon was for a criminal purpose, and, thus, he had

robbery on his mind when he displayed the gun to KFC employees. (See Evid. Code, § 1101(a).) Smearing appellant's character as being criminally oriented was the real purpose for which the prosecution championed this evidence.

Admission of evidence which renders a defendant's trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. (*Dowling v. United States* (1990) 493 U.S. 342, 352; *People v. Partida* (2005) 37 Cal.4th 428, 439.) A due process violation occurs if erroneously admitted evidence is (1) irrelevant to the prosecution's case and (2) "of such quality as necessarily prevents a fair trial." (U.S. Const., amend. XIV; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; see also *Lisenba v. California* (1941) 314 U.S. 219, 236; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 887.)

The wrongful admission of evidence connecting appellant to the three guns not used in the killing violated due process. Such evidence was irrelevant. It did not allow the trier of fact to draw any permissible inference making a fact of consequence to the prosecution's case more or less probable. (*McKinney v. Rees, supra,* 993 F.2d 1378, 1380-1381.) Evidence which allows solely for an inference about the defendant's character in order to show his or her propensity to act in conformity therewith is not a permissible inference. (*Ibid.*; Evid. Code, § 1101(a).) As demonstrated, the challenged gun evidence allowed the jury to draw only negative inferences about appellant's character for propensity purposes. It did not make proof of any element essential to the prosecution's case more or less likely.

Evidence of appellant's propensity to possess and carry weapons not

used in the charged crime was also of a caliber to prevent a fair trial. Two Ninth Circuit decisions, *McKinney v. Rees, supra,* 993 F.2d 1378 and *Alcala v. Woodford, supra,* 334 F.3d 862, are instructive. Both found the erroneous introduction of irrelevant weapons evidence to violate due process. In *Alcala,* the prosecution theorized that a carving knife found near the victim's remains was the murder weapon because of blood on the knife and testimony that the body was "pretty cut up." (*Alcala, supra,* at p. 886.) To support this theory and link Alcala to the murder weapon, the prosecution introduced two complete, unused sets of kitchen knives seized from Alcala's home which were manufactured by the same company that manufactured the carving knife. (*Id.* at pp. 886-887.) The Ninth Circuit found that the seized knives were irrelevant: any inference that Alcala used the purported murder weapon was based on mere speculation that the seized knives were linked to the carving knife due to their common brand name. The Court further found that the admission of the two knife sets amounted to constitutional error whose prejudicial effect likely influenced the jury. The state's case rested on "strange coincidences" and the knife evidence fit neatly into that theme, which the prosecutor emphasized in his closing argument. The Ninth Circuit thus concluded that there was a reasonable probability that some jurors linked Alcala to the purported murder weapon based on the erroneously admitted evidence. (*Id.* at pp. 887-888.)

McKinney reached a similar conclusion in a murder prosecution where the victim's throat had been slit. Although various knives were found at the scene, none bore any sign of blood, and the murder weapon was never identified. The prosecution introduced evidence of the defendant's possession

of two knives, one which could have inflicted the deceased's injuries had the defendant possessed it at the time of the homicide, and another which could not because it was in police custody when the crime occurred. The trial court also admitted evidence that the defendant was proud of his knife collection, tended to arm himself with a concealed knife while wearing camouflage pants, and had scratched "Death is His" on his closet door. (*McKinney v. Rees, supra*, 993 F.2d 1378, 1381-82.) The Ninth Circuit found no error in the admission of the one knife which could have inflicted the injuries. It held that evidence of the other knife, which could not have done so, plus the other evidence of the inscription on defendant's door and defendant's arming himself while wearing camouflage pants, was irrelevant and impermissible propensity evidence. (*Id.* at pp. 1382-1384.)

McKinney further found that the erroneously admitted propensity evidence was "of such quality as necessarily prevents a fair trial." (*McKinney v. Rees, supra,* 993 F.2d 1378, 1384.) It "served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive." (*Id.* at p. 1385.)

Here, as in *Alcala* and *McKinney*, the irrelevant weapons evidence served only to inflame the jury's emotions and lead them to distrust appellant and more easily believe the evidence against him. (*Alcala, supra,* 334 F.3d 862, 888; *McKinney, supra*, 993 F.2d 1378, 1385.) The purpose of the unrelated gun evidence was to depict appellant as criminally oriented. According to the prosecutor, appellant was armed because he intended to

commit crimes. The prosecutor argued, "why does he have a gun? Because he's thinking, he's on the criminal, criminal path. ... He's a street kid, and he's thinking that this gun can get me some money. If he's thinking this gun can get me some money, he's thinking about doing an armed robbery." (32RT 11359; see also 31RT 11341-11342 [prosecutor contends that appellant "doesn't get that gun because he likes to go target-shooting out in the woods. He's got that gun because he's headed down the criminal path"]; 31RT 11162 [prosecutor refers to appellant's uncharged crime of carrying a concealed firearm around Halloween], 11186 [prosecutor argues appellant was thinking about robbing KFC as early as Halloween].)

The trial court's instructions did not ameliorate the harmful effect of the gun evidence. (See Argument XII, *post* [challenging CALJIC No. 2.50].) Over appellant's objection (30RT 11942-11945), the trial court instructed the jury pursuant to CALJIC No. 2.50 that evidence of appellant's uncharged misconduct could not be considered as proof of appellant's criminal predisposition but it could be used to show identity, intent, knowledge or that appellant "possessed the means that might have been useful or necessary for the commission of the crime charged." (2CT 580-581; 31RT 11110.) For jurors to draw from the irrelevant gun evidence the inferences that the instruction authorized, they had to first draw the exact, highly prejudicial inference condemned by the decisions discussed above – that appellant is the type of person who illegally arms himself with firearms. (Compare *Estelle v. McGuire* (1991) 502 U.S. 62, 74-75 [no reasonable likelihood that trial court's modified version of CALJIC 2.50 authorized jury to improperly consider prior acts as propensity evidence]; see also *People v. Garceau* (1993) 6 Cal.4th 140,

185-186, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [erroneous version of CALJIC No. 2.50, expressly inviting jurors to consider other crimes evidence as proof of defendant's bad character, has a "potentially devastating impact" on the defense].)

The prosecution's case substantially emphasized the irrelevant and prejudicial gun evidence. In *McKinney,* approximately 60 pages of reporter's transcript testimony were dedicated to issues surrounding the irrelevant knife evidence. (*McKinney, supra,* 993 F.2d 1378, 1386.) Here, approximately 55 pages of reporter's transcript and two pages of transcription of appellant's videotaped statement to Lee, which was played to the jury, addressed appellant's post-Halloween gun display, shotgun sale and photograph with the .32 caliber firearm. (16RT 6626-6628, 6570-6571, 6595-6599, 6608-6611, 6615-6619, 6625-6628, 6637, 6722-6726, 6728-6732, 6750-6751, 6753-6765, 6770-6771, 6773-6774, 30RT 10793, 10805; 30CCT 8982, 8984.) The prosecutor also primed the jury to hear the gun evidence in his opening statement (5RT 6356, 6369 [referring to possession of .32 caliber firearm], 6309-6311 [referring to post-Halloween gun display]) and emphasized it in his closing arguments. (31RT 11162, 11186, 11341-11342; 32RT 11359.)

Further, the wrongly admitted evidence connecting appellant to various firearms that could not have been used in the charged crimes cut deeply against appellant's mental state defense. As appellant has previously discussed in greater detail (see Argument I, § C.5, *ante*), defense counsel argued that appellant, who was immature and mentally "slow," did not approach McDade intending to rob and kill him but he ultimately did so out of fear of and

pressure from the Hodges brothers, who were older and more criminally sophisticated than appellant. According to counsel, appellant's mental state was so clouded by this fear and pressure from the Hodges that appellant did not form the culpable *mens rea* necessary for the offenses. (*Ibid.*) The wrongly admitted gun evidence, as interpreted by the prosecutor, portrayed appellant as someone fond of deadly weapons who had a character trait of arming himself for criminal purposes. It encouraged jurors to find that appellant approached McDade while armed for criminal purposes. (See 32RT 11353-11355 [prosecutor argues appellant's approaching McDade armed was inconsistent with the defense theory that appellant went up to McDade to discuss getting his job back].)

Other evidence, however, suggested that appellant did not approach McDade armed but that one or both Hodges brothers gave the gun to appellant, quite possibly at the crime scene, when they ordered him to victimize McDade. According to Eric Banks, who knew John Hodges and how he operated (31CCT 9138-9141, 9144-9145), John Hodges ordered appellant to kill and probably gave appellant the gun used in the robbery and murder. (31CCT 9146, 9155-9156; 25RT 9462-9463). John Hodges told Banks that "he was there" at the scene. (31CCT 9142.) Banks believed that John must have been present to ensure that appellant followed his order (31CCT 9155-9156, 9158) and because John wanted McDade killed so McDade would not identify him. (25RT 9462-9463). Similarly, according to Darryl Leisey, Terry Hodges stated that he gave appellant the gun used in the offenses (32CCT 9303-9304) and directed appellant to "[j]ust whack the motherfucker." (32CCT 9307, 9313). Terry was present for the robbery but claimed he returned to his car for

the homicide. (32CCT 9307-9308.) Defense counsel argued that Terry Hodges would not have left for the shooting since he sought to enforce his order. (31RT 11314-11315.) Terry, like John, wanted McDade killed so McDade would not identify him. (32CCT 9305.) The evidence that one or both Hodges supplied appellant with the gun, quite possibly at the crime scene in connection with their order that appellant victimize McDade, supported appellant's defense theory that he approached McDade with innocent intent and harmed him only due to fear and pressure from the Hodges. (See 31CCT 9016 [appellant tells Lee the Hodges made sure he was the one with the gun because "they wanted everything to be on me"].) The erroneously admitted evidence connecting appellant to numerous firearms unrelated to the charged crimes detracted from the defense theory that the Hodges were the real culprits who used appellant to carry out their wishes. It played into the prosecutor's theme that the Hodges did not dominate appellant, but he was the one "running this" and was "the leader." (31RT 11214, 11235.)

Thus, the trial court's erroneous admission of evidence linking appellant to three firearms not used in the shooting violated appellant's due process right to a fundamentally fair trial.

2. Collateral Impeachment

As noted, appellant told detective Lee that the .32 caliber gun with which he had his picture taken was the only gun he ever owned. (30CCT 8982.) Appellant made the remark during the first part of his interview, when he maintained one of his cohorts shot McDade, to show that he was not afraid to admit his connection to a firearm. (See generally, 30 CCT 8975-8982.) The

court and parties did not discuss the impeachment value of the gun evidence below. Regardless, the challenged gun evidence was not admissible to impeach appellant by contradicting his claim that the .32 caliber firearm was the only gun he ever owned. (*People v. Gilchrist* (1982) 133 Cal.App.3d 38, 44 [trial court's ruling will be upheld if it is correct for reasons other than those given by trial court].)

Although only relevant evidence is admissible, and relevant evidence includes evidence bearing on the credibility of a witness or hearsay declarant (Evid. Code, §§ 210, 350, 1202), not all impeachment evidence is automatically admissible. Admissibility depends on the Evidence Code 352 balancing process. Generally, Evidence Code section 352 disfavors introduction of evidence to impeach a witness on a collateral matter, i.e., a matter which is not independently admissible to prove or disprove a matter of consequence, aside from its impeachment value. (Witkin, 3 Cal. Evid. (4th ed. 2000) Presentation at Trial, §§ 341, 346, pp. 426, 431-433.)

In *People v. Lavergne* (1971) 4 Cal.3d 735, a robbery prosecution, this Court held that the trial court properly blocked the defendant's attempt to impeach a prosecution witness on a collateral matter. (*Id.* at pp. 738, 741-744.) Over the government's objection, the defendant was allowed to elicit from a confessed accomplice that the accomplice bought the car used in the robbery and the car was not stolen. The trial court, however, precluded the defendant from impeaching the accomplice by introducing evidence that the car was stolen, an uncharged crime. (*Id.* at pp. 741, 743.) *Lavergne* upheld the ruling as a proper application of Evidence Code section 352 because the "probative

value' of the evidence "was slight and the chance of prejudice and confusion" it posed was "substantial." (*Id.* at p. 744; see also *id.* at pp. 741-744.) The opinion observed that a party may not elicit evidence for the purpose of eliciting something to be contradicted. "This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*Id.* at p. 744.)

Here, whether appellant was connected to three firearms not used in the homicide, the .32 caliber gun mentioned in his statement to Lee, the gun displayed to KFC employees after Halloween and the shotgun he sold, pertained to a collateral matter. It was not independently relevant to proof of any essential element of the charged crimes. (See § C.1, *ante.*) As in *Lavergne,* under Evidence Code section 352, the prosecution could not legitimately introduce appellant's remark to Lee that the .32 caliber firearm was the only gun he ever owned just to contradict it by proving appellant's connection to various firearms. (See also *McKinney v. Rees, supra,* 993 F.3d 1378, 1382- 1384 & accompanying fns. [rejecting government's argument that bulk of various knife-related evidence was admissible to contradict defendant's testimony that he was "knife-free" at the time of the slaying].)

The admission of the gun evidence for impeachment violated appellant's right to due process as guaranteed by the Fourteenth Amendment. As previously demonstrated, evidence of appellant's connection to multiple firearms not used in the homicide was highly prejudicial. It portrayed appellant as someone who illegally carries and surrounds himself with deadly

weapons and invited the jury to draw impermissible inferences about appellant's criminal predisposition. (See § C.1, *ante.*) The erroneous admission of prejudicial evidence violates due process if it "remove[s] a reasonable doubt that would have existed ... without it." (*Collins v. Scully* (2d Cir. 1985) 755 F.2d 16, 19.) It must be "'crucial, critical, highly significant.'" (*Ibid.*, quoting *Nettles v. Wainwright* (5th Cir. 1982) 677 F.2d 410, 414-415; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [admission of relevant evidence may violate due process if it renders trial fundamentally unfair]; *Dunnigan v. Keane* (2nd Cir. 1998) 137 F.3d 117, 126-127 [applying due process analysis to admission of prejudicial evidence of witness's occupation as defendant's parole officer where such evidence had some relevance to witness's credibility].)

The theory of defense was that appellant, who was "slow" and younger than his actual age of 18 at the time of the crimes, acted not with the mental state necessary for robbery or first degree murder but out of fear of the Hodges brothers, who were older and much more criminally sophisticated. (See § C.1, *ante* and Argument I, § C.5, *ante.*) As discussed, the prosecutor relied on the gun evidence to shore up the state's case on the key disputed issue of appellant's mental state during the robbery and homicide. Introduction of the gun evidence therefore violated due process by undermining the reasonable doubt concerning appellant's mental state that would have existed without it.

D. Prejudice

Because the erroneous introduction of the gun evidence violated appellant's federal constitutional right to a fundamentally fair trial, reversal is

required unless the state proves the error harmless beyond a reasonable doubt. (*Chapman v. United States, supra,* 386 U.S. 18, 24.) The state cannot discharge its heavy burden. As shown, the evidence of appellant's mental state during the charged robbery and murder was subject to doubt. (See Argument I, § C.5 *ante.*) The prosecution used the wrongly admitted gun evidence to bolster its case on this key disputed issue, and the trial court's instructions did not prevent the jury from drawing impermissible inferences about appellant's character from this evidence. (See § C.1, *ante*; see also Argument XII, *post.*) The highly prejudicial evidence connecting appellant to three guns which were not used in the charged crimes could well have dispelled any juror doubts about appellant's guilt and tipped the scales in favor of conviction.

Accordingly, the judgment must be reversed.

VIII.

THE ERRONEOUS INTRODUCTION OF BAD CHARACTER EVIDENCE PERTAINING TO GANGS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL.

During the guilt phase, the prosecutor pushed whenever feasible to introduce evidence linking appellant and the Hodges brothers to gangs. Appellant objected to these efforts to portray him as a gangster. Because there was no gang angle to McDade's homicide, the trial court broadly excluded gang evidence. Its rulings, however, did not reign in the parties as hard as needed in order to preserve appellant's right to a fair trial and reliable penalty determination. (U.S. Const., amends. VIII & XIV.) Several items of evidence giving rise to an inference of appellant's gang involvement were presented to appellant's jury: (1) appellant's house name was "Scrooge" and street name was "Baby Hoove;" (2) appellant's associate, Brandon, was one of his "homies," and was also his "road dog;" (3) appellant's friend Roosevelt Coleman was a Crip; and (4) Schuyler's testimony that appellant was "Crippin" and a Crip based on how appellant dressed. The gang connotations of this evidence would have been apparent to appellant's jurors. The evidence was irrelevant or, even if marginally relevant, its potential for prejudice substantially outweighed its probative value. Accordingly, its erroneous introduction requires reversal.

A. Factual Background

Pretrial, appellant moved to preclude admission of any gang evidence relating to him or the Hodges brothers. (5RT 2116.) The prosecutor announced his intention to impeach appellant, if he testified, with appellant's

membership in the Crip gang, which the prosecutor characterized as conduct involving moral turpitude. (*Ibid.*) The trial court excluded the impeachment and ruled that gang evidence was irrelevant. (5RT 2117-2118.) It observed that the charged offenses were not gang related, and no gang enhancement had been alleged. (5RT 2116-2117.)

Subsequently, when discussing his anticipated opening statement, the prosecutor articulated his understanding of the court's ruling as "I can't bring in anything about [appellant's] gang affiliation." (14RT 6095; see also 15RT 6234-6235.) Nevertheless, the prosecutor sought to mention appellant's references to gangs in his statement to detective Lee (14RT 6108, 6111) and that appellant was expected to testify that he was a Crip and the Hodges brothers were Bloods. (15RT 6234-6235). The trial court again observed that "there is no claim that this crime had any gang motive or affiliation." (15RT 6235.) It broadly excluded all gang evidence. It agreed with attorney Sherriff's characterization of its ruling as "no mention of any ... alleged gang affiliation ... can be mentioned in this case at all." (15RT 6243.)

Subsequently, the trial court reiterated its ruling excluding gang evidence. (16RT 6791-6794, 6798, 17RT 6822-6823.) It agreed with characterizations of various counsel that there be "no mention of gangs" (16RT 6791-6792) and "no reference to gang[s]" (17RT 6822-6823) unless the matter was first litigated outside the jury's presence and the court found that the probative value of the evidence outweighed its potential for prejudice. (16RT 6799-6800, 17RT 6801, 6803, 6823).

Street Name and House Name

In his opening statement, the prosecutor stated that KFC employee Ruben Martinez would testify that appellant goes by two nicknames, "Scrooge" and "Baby Hoove." (15RT 6310.) The prosecutor sandwiched his reference to appellant's monikers between references to evidence of appellant's post-Halloween gun display at KFC (*ibid.*):

> Two and a half months prior to January 19th, 1992, Mr. Powell came by Kentucky Fried Chicken, and he had a gun. And Mr. Martinez, Ruben Martinez, will also testify that Mr. Powell goes by two nicknames: "Scrooge" is one nickname, and "Baby Hoove" was another nickname that he goes by. [¶] And that at the time ... [t]hat he came by two and a half months prior to January 19th with a gun; he was with two other people.

The prosecutor then continued to discuss evidence of the post-Halloween gun display. (15RT 6310-6311.)

The prosecutor again mentioned appellant's monikers later in his opening statement. He read, practically verbatim, appellant's statement to detective Lee (15RT 6346 et seq.), including the following (34CCT 8974):

> [LEE:] Okay, okay. Carl, do you go by any other names?
>
> [POWELL:] "Scrooge" and "Baby Hoove".
>
> [LEE:] And how did you get those names?
>
> [POWELL:] "Scrooge" was my house name. "Baby Hoove" was my street name.
>
> [LEE:] Baby Hoove? [¶] Hoove?
>
> [POWELL:] Yeah.

[LEE:] Did you get that when you were in L.A.?
[POWELL:] Yeah.

Subsequently, during the prosecution's case in chief, the prosecutor asked Martinez if he knew of appellant's nicknames. (16RT 6721.) Appellant objected on relevance grounds. (*Ibid.*) Initially, the court sustained the objection. (16RT 6721-6722.) Then it ascertained that the prosecutor sought to elicit the names for the "purpose ... detailed in your opening statement" and overruled the objection. (16RT 6722.) The prosecutor elicited from Martinez that appellant went by "Scrooge" and "Baby Hoove." (*Ibid.*) Immediately thereafter, the prosecutor examined Martinez about appellant's post-Halloween gun display. (16RT 6722 et seq.)

Appellant complained during the state's case that elicitation of his street names invited a very strong and prejudicial inference that he was involved in a street gang. (16RT 6792-6793.) The trial court reiterated its ruling that there be no mention of gangs unless the matter were first litigated outside the jury's presence and the court determined that the gang evidence's probative value outweighed its potential for prejudice. (16RT 6793-6794, 6799, 17RT 6800-6801, 6803, 6822.)

The prosecutor also attempted to inject appellant's alias into the fingerprint match evidence by pursuing admission of appellant's known print cards listing "Scrooge" as appellant's alias. (21RT 8050.) When appellant objected that the alias was prejudicial and irrelevant (21RT 8050-8051), the prosecutor replied that any prejudice was "very speculative" and "[t]here has

already been testimony ... that Mr. Powell's names are Scrooge and Baby Hoove." (*Ibid.*) Ultimately, the trial court ruled that the reference to "Scrooge" had to be redacted before admission of the print cards. (28RT 10333-10334.)

Appellant also objected to references in his videotaped statement to detective Lee (People's Exhibit No. T-51) concerning his "house name," "Scrooge," and "street name," "Baby Hoove." (23RT 8867.) Echoing his earlier points, counsel argued that "these jurors read newspapers and everything else. I don't think it takes too much to figure out the reason you have different names is for reasons such as gangs...." (*Ibid.*) The prosecutor maintained that having a street name does not make a person a gang member. (*Ibid.*) The trial court overruled appellant's objection. (*Ibid.*)

Appellant's videotaped statement to Lee was played for the jurors. (24RT 8893-8894.) It contained the following exchange (34CCT 8974):

> LEE: Okay. Okay, Carl, do you go by any other names?
>
> POWELL: Scrooge and Baby Hoove.
>
> LEE: And how'd you get those names?
>
> POWELL: Scrooge was my house name. Baby Hoove was my street name.
>
> LEE: Baby Hoove. H-O-O-V-E?
>
> POWELL: Yeah.
>
> LEE: Did you get that when you were in L.A.?
>
> POWELL: Yeah.

References to Associates as "Homies," "Road Dog" and "Crip"

Just after his unsuccessful objection, noted above, to his references to his monikers in his statement to Lee, appellant further objected to other references in the same statement characterizing his associates as his "homies" and "road dog." (23RT 8868 [objection]; 34CCT 8988 [references in statement to Lee].) The trial court tacitly overruled the objection by allowing the prosecutor to immediately present the statement with the challenged references still in it. (24RT 8893-8894.)

The objected to references arose when Lee questioned appellant about his trip to Los Angeles. Lee suggested that appellant's friend, Brandon, accompanied him. (34CCT 8988.) Appellant replied that he had not seen Brandon in some time. Lee said, "Really. I thought he was one of your homies." Appellant replied, "He's my road dog..." Lee repeated, "He's your road dog, huh?" and continued his questioning. (*Ibid.*)

Later, the focus of the interview returned to appellant's trip and how his gun wound up with Littlejohn. Lee elicited that appellant's friend, Roosevelt, drove him, but their car broke down and Littlejohn, who is Roosevelt's mother, came to help them. (34CCT 9021-9025.) Regarding Roosevelt, Lee asks, "Is he a Crip?" and appellant replied, "Yep." (34CCT 9023.) A bit further into the interview, Lee asked for Roosevelt's street name. When appellant hesitates, Lee said, "you know he's got a street name." Appellant replied that it is "Babysnake." (34CCT 9030.)

Schuyler's Description of Appellant as "Crippin'"

The prosecutor presented the testimony of Charlie Schuyler, a convicted felon with a considerable criminal record who had served three prison terms and who actively petitioned for leniency regarding one of his criminal cases in exchange for his testimony. (17RT 6974-6976, 7029-7030.) Although the prosecutor denied providing Schuyler with any benefits in that case, Schuyler obtained a highly favorable disposition (jail time plus probation instead of a state prison term). (17RT 7045-7048, 18RT 7113-7114.)

Schuyler testified that he saw appellant walking briskly near KFC, prior to the time of the shooting, while holding something resembling a bank bag. (17RT 6958-6966, 6968, 6973.) He also placed appellant, Terry Hodges and others together at a nearby liquor store a few hours earlier. (17RT 6970-6972.)

During appellant's cross examination of Schuyler concerning appellant's appearance, Schuyler told the court, "[m]aybe you should call a sidebar or something" because it would be a "mistake" for him to go further into the matter. (18RT 7110.) Schuyler reiterated the suggestion when Terry Hodges cross examined him about his observations at the liquor store. (18RT 7121.)

The court examined Schuyler outside the jury's presence. Schuyler related that he did not "want to put any gang-banging jacket on any of the defendants" before the jury. He related that his attention had been drawn to appellant because he had a "gang way of dressing" with his pants "dropped in the back." (18RT 7129-7131.) Schuyler started discussing the Crips, but the

court cut him off. (18RT 7130.) Neither the court, prosecutor nor counsel for Terry Hodges, who was in the middle of cross examining Schuyler, admonished him not to make any gang references.

When the jury returned, counsel for Terry Hodges resumed cross-examining Schuyler. (18RT 7165 et seq.) He elicited that when Schuyler observed appellant's group at the liquor store, he mainly noticed appellant's clothing, specifically his pants. (18RT 7169-7170.) Schuyler explained that he only know how to describe it as "crippin." (18RT 7170.) Appellant "was showing his butt," and this is how Schuyler knew to identify him as a Crip. (18RT 7170-7171.)

A recess was taken at the end of Schuyler's cross examination by Terry Hodges and before his redirect examination by the prosecutor. (18RT 7191-7192.) Counsel for John Hodges asked the court to admonish the jury not to consider Schuyler's gang references against his client, pointed out that John Hodges had brought a successful in limine motion to keep gang evidence from being used against him and suggested that the court consider imposing sanctions against Terry Hodges's counsel for disregarding the court's ban on gang evidence. (18RT 7194.) Appellant concurred and also argued that the jury be admonished not to consider the "characterization of CRIP'ing" and suggested that it be told that Schuyler's description of appellant's pants be considered only as relevant to evaluating Schuyler's identification of appellant. (18RT 7194-7195.) The prosecutor contended that he "should have the right to get into the issue of gangs as it applies in this case" now that Terry Hodges had opened the door to gang evidence. (18RT 7194.)

The court declined to admonish the jury. It said it would consider giving a limiting instruction at the end of the case. (18RT 7198-7199.)[84] It admonished Schuyler not to volunteer any further opinions about whether any particular clothing had gang connotations. (18RT 7199.)

On redirect, the prosecutor questioned Schuyler about whether he could have seen appellant wearing his pants very low if appellant had been wearing his jacket, which went down nearly to his knees. (18RT 7127 et seq.) Schuyler directly alluded to his testimony about "Crippin'" three times. Explaining his language about how appellant wore his pants, Schuyler stated, "I was trying to use that term because I don't want to use other terms" (18RT 7217); "we talked about the term I'm not supposed to bring up is why I say – 'Showing your butt'" (18RT 7218); and "I base it on knowledge of what that means and seeing it before, and what it indicated to me." (18RT 7220).

B. The Admissibility of the Challenged Evidence Has Been Preserved for Review.

The trial court wrongly allowed presentation of gang evidence in the form of appellant's: (1) monikers; (2) association with individuals referred to as his "homies" and his "road dog;" (3) association with a Crip with the streetname "Babysnake;" and (3) dressing, according to Schuyler, like a Crip. Appellant preserved review of the admissibility of this gang evidence on

---

[84] The matter was not discussed at the jury instruction conferences (30RT 10985-10987, 31RT 11058-11077, 11082-11094) and no limiting instruction on gang evidence was given at the end of the case. (2CT 553-599, 3CT 600-650; 31RT 11096-11132, 32RT 11364-11372).

grounds of relevance and that its potential for prejudice substantially outweighed its probative value.

To preserve for review a claim that certain evidence was erroneously admitted, a party must make a timely and specific objection to it. (Evid. Code, § 353(a).) This rule does not exalt form over substance. (*People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) What matters is that the trial court have a reasonable opportunity to rule on the merits of the objection before the evidence is introduced. (*Melendez v. Pliler* (9th Cir. 2002) 288 F.3d 1120, 1125 ["California courts construe broadly the sufficiency of objections that preserve appellate review"].) If the record shows that the trial court understood the nature of the objection, the claim has been preserved. (*People v. Scott* (1978) 21 Cal.3d 284, 290 ["In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented"]; *People v. Abbott* (1956) 47 Cal.2d 362, 372-373.)

Pretrial, appellant orally objected to evidence linking him or the Hodges to gangs. (5RT 2116.) Perhaps because the law concerning admission of gang evidence is well developed (see § C, *post*), appellant did not voice the specific grounds for his objection. (*Ibid.*) In broadly sustaining the objection, the trial court noted that gang evidence was irrelevant because it did not play a role in the charged crimes and no gang enhancement had been alleged. (5RT 2117-2118.) Thus, the record shows that the trial court understood appellant to have objected on grounds of relevance to the introduction of gang evidence.

The admissibility of gang evidence was again addressed in regards to gang references in Terry Hodges's January 23, 1992, statement to detective Pane.[85] (15RT 6208-6229.) These proceedings indicate that the court understood that appellant was objecting to admission of gang evidence under Evidence Code section 352 because its potential for prejudice substantially outweighed its probative value. The court itself noted that Terry Hodges's statement contained "references to gangs which need to be addressed." (15RT 6208.) In it, Terry stated that, on the night of the homicide, the brothers dropped appellant off before the shooting and parted ways with him because they were going to a Blood party and appellant was a Crip. (16RT 6209, 6211, 6216, 6219.) Appellant sought exclusion of these gang references.[86] (15RT 6217.) The prosecutor observed that the references "created a 352 issue." (15RT 6226.) The trial court readily understood this comment. (*Ibid.*)

That the court understood appellant to object to gang evidence as more prejudicial than probative is also supported by its hearing this very objection voiced by counsel for John Hodges. He stated, "John Hodges doesn't wish any gang references whatsoever, because ... it's prejudicial, and it's improper inferences. And it's a type of character evidence that [he] seems to be hanging

---

[85] Ultimately, this statement was not presented into evidence. (15RT 6227-6228, 6231.)

[86] Appellant's attorneys took inconsistent positions concerning the gang references in Terry Hodges's January 23rd statement. Mistaken about the night to which the statement referred, Castro stated that appellant waived objection to the statement's admission. (15RT 6213, 6215.) Holmes objected to its gang references. (15RT 6217.) The court treated Holmes's objection as the prevailing position. (15RT 6218.)

around gang members. And that would produce a disastrous effect...." (15RT 6219.) The trial court plainly understood that such evidence prejudiced John Hodges by showing his association with Bloods and inviting a negative inference that he, himself was a Blood. (15RT 6224.) There is every reason to conclude that the trial court similarly viewed appellant's objection to gang evidence.

Moreover, the trial court later explicitly stated that before any gang evidence could be introduced, its proponent would have to bring it to the court's attention outside the jury's presence so the court could determine that its potential for prejudice did not outweigh its probative value. (16RT 6799-6800, 6791-6792, 17RT 6801, 6803, 6822-6823.) Therefore, the trial court understood appellant's objection to gang evidence to be based on relevance and that its potential for prejudice outweighed its probative value. Thus, these claims have been preserved for review.

In addition to making a successful in limine motion to exclude gang evidence (5RT 2116-2118, 14RT 6095, 15RT 6234-6235, 6243), appellant also specifically objected when the prosecutor attempted to elicit his monikers (16RT 6721-6722) and his references in his statement to detective Lee to "homies" and "road dog." (23RT 8988). Although appellant did not press for a ruling on his objection to his references to "homies" and "road dog" (23RT 8868), the omission did not forfeit review of whether the references were properly admitted. (See *People v. Hayes* (1990) 52 Cal.3d 577, 619 [typically, failure to press for ruling on objection forfeits review of the objection].) The trial court tacitly overruled the objection by immediately allowing the

prosecutor to present the statement to Lee with these references included in it. (24RT 8893-8894.) Further, since the trial court had previously admitted Martinez's testimony about appellant's street names over appellant's objection (16RT 6721-6722), further efforts to press for a ruling are excused as futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432 [party shall be excused from making a futile objection].)

Additionally, appellant did not immediately object to Schuyler's testimony that appellant dressed like a member of the Crip gang (see 18RT 7170) or object to appellant's reference in his statement to Lee that Roosevelt Coleman was a Crip whose streetname was Babysnake. (See 23RT 8988.) Notwithstanding, appellant's challenge to these items is cognizable on appeal.

Appellant successfully moved in limine to exclude gang evidence relating to him or to the Hodges brothers. (5RT 2116-2118, 15RT 6243.) As explained above, the trial court understood the grounds advanced by the defense for excluding gang evidence to be relevance and that its prejudicial effect outweighed its probative value. Appellant's motion was directed to gang evidence, a particular, identifiable body of evidence. Also, it was made at a time when the trial court could determine its admissibility in its appropriate context. The trial court knew enough about the case to understand that gang matters had no bearing on how the crimes were committed. (5RT 2116-2117, 15RT 6235.) Thus, appellant's *in limine* motion preserved for review whether gang evidence was properly admitted. (*People v. Morris, supra,* 53 Cal.3d 152, 190.)

Having secured a favorable pretrial ruling excluding gang evidence, appellant requested a curative admonition when counsel for Terry Hodges elicited from Schuyler that appellant behaved like a Crip. (18RT 7194-7195.) The request preserved for review admission of Schuyler's testimony because it sought "some ... form of remedial action" to combat Schuyler's improper testimony. (*People v. Jennings* (1991) 53 Cal.3d 334, 375; see also *People v. Elliot* (2005) 37 Cal.4th 453, 481 [request for limiting instruction serves same purpose as contemporaneous objection to evidence].) The request was made during the first break in the proceedings after the challenged remarks and followed them by only 23 pages in the reporter's transcript. (18RT 7174, 7191, 7194.) It would have enabled the trial court to instruct the jurors, when the objectionable testimony was freshest in their minds, to disregard the Crip reference and consider Schuyler's testimony about how appellant wore his pants simply as bearing on Schuyler's ability to identify him. (*Ibid.*) The trial court declined to admonish the jury at that time. (18RT 7198-7199.) The key purpose of the forfeiture rule is to require parties to bring purported errors to the trial court's attention in a timely manner, so they may be promptly rectified. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) Since appellant's request for an admonition served this purpose, it would make no sense to bar review of his claim.

Appellant did not similarly request curative conduct by the court concerning his statement to detective Lee that his friend, Coleman, was a Crip with the streetname "Babysnake." (See 23RT 8868 [trial counsel objects to other portions of statement to Lee].) The lack of objection must be excused as futile. Since the trial court had failed to take any action to rectify Schuyler's

directly branding appellant a Crip, there is no cause to believe that it would have ruled differently about evidence associating appellant with a gang member. (*People v. Boyette, supra,* 29 Cal.4th 381, 432.)

Therefore, appellant has preserved for review his challenge to the admission of several items of evidence pertaining to gangs.

C. Gang Evidence is Highly Prejudicial and Must Be Excluded If Only Tangentially Relevant; Even if Directly Relevant, It Should Be Admitted Only After Careful Scrutiny.

It is well-recognized that evidence of a defendant's membership in a street gang carries substantial potential for prejudice. The public considers gangs a serious problem because it perceives gang members to engage in criminal and violent acts. (*People v. Champion* (1995) 9 Cal.4th 879, 922 ["gangs have been the subject of widespread publicity regarding their illegal and violent activities"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 905 ["gangs have received widespread media publicity for their purported criminal activities"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn. 17 ["because of the way in which gangs terrorize the community, the crimes they commit, and their prevalence in society the very mention of the term 'gangs' strikes fear in the hearts of most"]; *People v. Plasencia* (1985) 168 Cal.App.3d 546, 553 ["gang membership may have a significant number of unsavory connotations in present day society"]; *People v. Perez* (1981) 114 Cal.App.3d 470, 479 ["The word gang ... connotes opprobrious implications" and "takes on sinister meaning when it is associated with activities"]; see also *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1500 [gang expert testifies that gangs are

violent and gang members commit crimes to further their gang's goals].) Just three years before the charged crimes were committed in this case, the California Legislature enacted the Street Terrorism Enforcement and Prevention Act (The STEP Act) (Pen. Code §§ 186.20 et seq.) because it recognized that "'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to the public order and safety....' (§ 186.21.)" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

In light of the public's perception of gang members as violent criminals, evidence of a defendant's gang ties invites jurors to reason that the defendant is prone to criminal behavior and, therefore, committed the charged offenses. (*People v. Williams* (2009) 170 Cal.App.4th 587, 612 ["The danger in admitting gang evidence is that the jury will improperly infer that the defendant has a criminal disposition"]; *People v. Cardenas, supra,* 31 Cal.3d 897, 905 ["There was a real danger that the jury would improperly infer that appellant had a criminal disposition" based on evidence that he belonged to a gang and the common perception that gang members commit crimes].)

There is a long-standing rule barring evidence of a defendant's criminal disposition. Such evidence invites jurors to convict based not on proof of the defendant's guilt for the present charge but due to inferences concerning the defendant's bad character. (Evid. Code, § 1101(a); *People v. Holt* (1984) 37 Cal.3d 436, 450-451 [evidence of criminal propensity threatens to over

persuade jurors].)

Given "its highly inflammatory impact," this Court has "condemned the introduction of evidence of gang membership if only tangentially relevant." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez, supra,* 33 Cal.4th 1040, 1049, emphasis in original, citing *People v. Cardenas, supra,* 31 Cal.3d 897, 904-905.) Even if relevant to prove a key issue such as motive, intent or identity, gang evidence should be admitted only after careful scrutiny and if its potential for prejudice does not outweigh its probative value. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Champion, supra,* 9 Cal.4th 879, 922.) A number of decisions have reversed due to introduction of irrelevant or minimally probative gang evidence, particularly where such evidence was cumulative of other, less prejudicial evidence also presented. (E.g., *Cardenas, supra,* pp. 904-905; see *People v. Albarran, supra,* 149 Cal.App.4th 214, 225-232 [granting new trial]; *People v. Bojorquez,* (2002) 104 Cal.App.4th 335, 345 [reversing and collecting cases].)

D. The Gang Evidence Should Have Been Excluded Because Its Potential for Undue Prejudice Was High and Its Probative Value Was Non-Existent Or Weak.

The trial court correctly recognized that there was no gang angle to the charged crimes, no gang enhancement had been alleged and, therefore, gang evidence was irrelevant and inadmissible. (5RT 2116-2117, 15RT 6235.) It directed that if any party nevertheless sought to introduce gang evidence, it

should first litigate the matter outside the jury's presence so the court could determine if the probative value of the proffered evidence outweighed its potential for prejudice. (15RT 6243, 16RT 6799-6800, 17RT 6801, 6803, 6823.) The trial court's ruling was consistent with the rule that, due to its inflammatory nature, gang evidence should be excluded if only tangentially relevant. (*People v. Hernandez, supra,* 33 Cal.4th 1040, 1049; *People v. Cox, supra,* 53 Cal.3d 618, 660.) Notwithstanding, the trial court erroneously allowed several gang-related pieces of evidence to creep into the case. This was error.

The jury would have readily grasped the gang connotations of appellant's street names, Scrooge and Baby Hoove, and would have viewed them as indicative of appellant's gang membership. Gang members are known by their monikers or street names. (E.g., *People v. Staten* (2000) 24 Cal.4th 434, 444 [gang member's street name is often included in graffiti taking credit for a crime]; *People v. Gardeley* (1996) 14 Cal.4th 605, 611 [defendant, "a member of the Family Crip gang since 1983, ... was known by the moniker or street name of 'Trench'"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1087 ["Defendant, whose street name is Ase Kapone, was one of the leaders of the Van Ness Gangsters"], fn. omitted; *In re I.M.* (2005) 125 Cal.App.4th 1155, 1206 [Sureño 13 gang member has street name "Monstro"]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1469 [defendant had the street name of "Night Owl" when he was a member of the Market Street Gang].) An exchange between detective Lee and appellant also confirms that gang members go by street names. After ascertaining from appellant that his friend, Coleman, was a Crip, Lee asked for his street name. (34CCT 9023, 9030.) When appellant

hesitated, Lee said, "[y]ou know he's got a street name." (34CCT 9030.) This prompted appellant to reveal that it was "Babysnake." (*Ibid.*)

Appellant's monikers had no relevance to any legitimate issue. When the prosecutor sought to elicit them from Martinez, the trial court overruled appellant's relevance objection upon ascertaining from the prosecutor that they were relevant for the purposes outlined in his opening statement. (16RT 6721-6722.) Yet the prosecutor's opening statement did not lay any such groundwork. In it, the prosecutor stated that Martinez would testify that appellant displayed a handgun to him after Halloween and that appellant's nicknames were Scrooge and Baby Hoove. (15RT 6310-6311.) It is unclear how appellant's street names legitimately related to either the gun display or charged crimes. (See Argument VII, *ante* [challenging admissibility of gun display itself].) Subsequently, the trial court again overruled appellant's objection to reference to the street names in appellant's statement to detective Lee. Counsel argued that jurors were savvy enough to glean gang connotations from the names. (23RT 8867; 34CCT 8974.) Again, reference to the street names served no relevant purpose.

Instead, evidence of appellant's street names invited the jury to draw negative inferences concerning appellant's criminal character. Even without gang connotations, a defendant's use of aliases is unduly prejudicial because it is indicative of criminality. (*People v. Maroney* (1895) 109 Cal. 277, 280-281 [references to defendant's aliases prejudice him in the minds of the jurors]; *United States v. Beedle* (3rd Cir. 1972) 463 F.2d 721, 725 [where alias "served no useful end and could only prejudice" the defendant, it should have been

stricken and improper reference to it should have resulted in jury being admonished to disregard it].) The street name references were especially harmful because, in light of appellant's youth, lack of education, unemployment, and the strong media attention paid to gangs, jurors would have inferred from them that appellant was a gang member. (See *People v. Champion, supra,* 9 Cal.4th 879, 922 [acknowledging media attention paid to gangs]; *People v. Cardenas, supra,* 31 Cal.3d 897, 905 [same]; 30CCT 8973 [appellant did not graduate high school]; 31CCT 9010-9011, 9021-9028 [appellant was unemployed after losing KFC job].) Since they came in through Martinez, who immediately thereafter testified concerning appellant's gun display (16RT 6722 et seq.), they created an image of appellant as an armed gang member. The trial court erred in admitting the street name evidence.

The trial court likewise erred in permitting the introduction of those portions of appellant's statement to Lee which established that appellant associated with "homies" and called his friend, Brandon, his "road dog." (34CCT 8898.) These terms have clear gang connotations. The website, "Gangs or Us," sponsored by the law enforcement group, "PoliceOne.com," defines on its "gang slang" pages the term "homey," as "homie From the same neighborhood; a fellow gang member [sic]." Further, it defines "road dog" in turn as "Homie; partner; close friend."[87] These gang references served no purpose. Had they been redacted, detective Lee's efforts to establish who accompanied appellant on the trip to and from Los Angeles would have

---

[87] PoliceOne.com describes itself as the "one resource for police and law enforcement." (See http://www.policeone.com/, capitalization omitted.) It defines gang terms at http://www.gangsorus.com/slang.html.

retained their meaning. The gang references were gratuitous and unduly prejudicial.

Similarly, no legitimate point was served by in leaving in appellant's statement to Lee that Coleman was a Crip with street name "Babysnake." (34CCT 9023, 9030.) Although Lee may have needed to elicit this information to investigate the homicide, no proper purpose was served by letting the jury hear it. Jurors would have surmised that because appellant was closely associated with a Crip, appellant was also a Crip. (See 15RT 6224 [trial court acknowledges that jurors would infer that Hodges brothers were Bloods if jurors heard that they went to a Blood party].) Unquestionably, the gang status of appellant and his friends played no role in the charged crimes. Nor was appellant's association with Coleman or Coleman's role during the trip to Los Angeles and back in any dispute. (See e.g., 31CCT 9255-9261 [Littlejohn's statement to Thurston].) Evidence that appellant closely associated with a Crip was irrelevant and inflammatory.

The trial court also erred in denying appellant's request to direct the jury to disregard Schuyler's references to appellant's "gang involvement" and consider Schuyler's testimony about appellant's style of dress only in regards to his identification. (18RT 7170-7171, 7194-7196, 7198-7199.) Schuyler testified that his attention was drawn to appellant in the liquor store because, unlike anyone else in appellant's company, appellant wore his pants very low, exposing his butt. (18RT 7130 [outside jury's presence], 7169-7171 [on cross examination by Terry Hodges].) There was no need for Schuyler to further refer to appellant as "crippin" and "a Crip" to describe appellant's style of

dress. (18RT 7170-7171.) Schuyler noticed appellant because appellant wore his pants in a distinctive way, regardless of the gang connotations. (18RT 7130, 7169-7171.) Schuyler's Crip references simply explained why Schuyler noticed appellant, and they were, therefore, merely cumulative of the other evidence on this point.

The probative value of evidence is diminished if it is merely cumulative of other evidence. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [where prejudicial evidence is cumulative of other evidence and is offered to prove a point not reasonably in dispute, it will ordinarily be excluded]; *People v. Cardenas, supra,* 31 Cal.3d 897, 904 [evidence of defendant's and defense witness's common gang membership "was cumulative and added little to further the prosecutor's objective..."].) If gang evidence is merely cumulative of other evidence, its probative value is minimal and it should be excluded because of its serious potential for prejudice. (*Cardenas, supra,* at pp. 904-905.) No party has a "'right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.'" (*Id.* at p. 905, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.)

The trial court should have granted appellant's request that it promptly admonish the jury to disregard Schuyler's prejudicial references to appellant as a Crip. (18RT 7194-7195.) Where a party "brings out inadmissible collateral matters affecting the character or otherwise prejudicing the defendant before the jury," i.e., evidence objectionable on grounds of undue prejudice,"[i]t is necessary that the jury be promptly and clearly informed of the impropriety of considering these matters." (Witkin, 3 Cal. Evidence (4th ed. 2000)

Presentation at Trial, § 386, p. 478; but see *People v. Dennis* (1998) 17 Cal.4th 468, 533-534 [trial court ordinarily has discretion whether to give limiting instruction when evidence is offered for a limited purpose or at the close of the case].)[88] In refusing to admonish the jury promptly, the court failed to dispel the undue prejudice of Schuyler's branding appellant a gang member when the harmful impact of Schuyler's statement had just started to blossom in the jurors' minds. "... [T]he chance that the instructions will do any good is enhanced by offering the caution *while the jury has immediately before it* the question or evidence it is being told to disregard or limit." (*United States v. Cudlitz* (D.C. Cir. 1996) 72 F.3d 992, 1002, emphasis added.) The error paved the way for Schuyler to augment the harmful effect of his initial "crippin" and "Crip" references by later indirectly referring to appellant's gang status three times. (18RT 7217, 7218, 7220.) For example, Schuyler said, "we talked about the term I'm not supposed to bring up is why I say – 'Showing your butt.'" (18RT 7218.) The jurors were astute enough to deduce that the omitted term was "crippin" or "Crip."

E. The Prejudice

The erroneous introduction of unnecessary and inflammatory gang evidence exhibiting little or no probative value rendered appellant's trial

---

[88] It is of no moment that when it declined to admonish the jury concerning Schuyler's gang testimony it informed counsel that it would entertain a request for a limiting instruction to be given at the end of the case. (18RT 7198-7199.) Since Schuyler's testimony labeling appellant a gang member was *inadmissible* because it was more prejudicial than probative, its use could not be limited to a *legitimate* purpose. (Evid. Code, § 355, Law Revision Commission Comments; *People v. Boyer* (2006) 38 Cal.4th 412, 465 [in context of limiting instruction, evidence that is inadmissible for any purpose is distinguishable from evidence admissible for a limited purpose].)

fundamentally unfair, in violation of the Fourteenth Amendment right to due process and in violation of the Eighth Amendment right to a reliable penalty determination. (*McKinney v. Rees, supra,* 993 F.2d 1378, 1381, 1384-1385 [introduction of "emotionally charged" evidence serving only the impermissible purpose of proving defendant's bad character violates due process right to fair trial]; *Collins v. Scully* (2d Cir. 1985) 755 F.2d 16, 19 [introduction of prejudicial evidence, even if minimally relevant, violates due process when it removes reasonable doubt and plays significant role in case]; *People v. Falsetta* (1999) (1999) 21 Cal.4th 903, 917 [proper ruling under Evid. Code, § 352 protects defendant's right to a fair trial]; *People v. Albaran, supra,* 149 Cal.App.4th 214 230-232 [erroneous admission of gang evidence violates defendant's right to a fair trial].)

Jurors' perceptions of gangs as violent, criminal enterprises would have influenced them to see appellant as prone to violent crime and thus posing a danger to society. The wrongly admitted gang evidence severely prejudiced appellant's efforts to defend against the homicide and robbery charges, both of which involved violence. Appellant has demonstrated that whether he harbored the necessary intent during the homicide and robbery for a verdict of guilt for first degree murder with special circumstance was subject to dispute. (See Argument I, § C.5, *ante*.) The wrongly admitted gang evidence, which blackened appellant's character and made it difficult for jurors to identify with evidence in his favor, could well have tipped the scales in favor of the verdicts rendered.

IX.

APPELLANT'S STATEMENTS TO LITTLEJOHN THAT HE INTENDED TO COMMIT ROBBERY IN THE FUTURE SHOULD HAVE BEEN EXCLUDED AS MORE PREJUDICIAL THAN PROBATIVE.

Angela Littlejohn testified to appellant's incriminating statements and how she obtained his gun and turned it over to the authorities. (28RT 10385 et seq.) A videotape of her interview with Detective Thurston was also presented as a prior inconsistent statement. (29RT 10499-10501; see 31CCT 9253-9292 [People's Ex. No. T-60A, transcript of statement].) Appellant maintains that the portion of her interview relating appellant's stated desire to commit robbery in the future should have been excluded as more prejudicial than probative.

A. Background Facts

In pertinent part, Littlejohn told Thurston that appellant kept asking her for his gun back. (31CCT 9264-9266, 9273, 9276.) He said, "I need the gun, that gun will get me money" (31CCT 9273), and "I need that gun ... that's the only way I'm going to get the money..." (31CCT 9285). According to Littlejohn, appellant also "told me [what] he was going to do ... if he would have got the gun...." (31CCT 9266.) Littlejohn did not want to return it because she feared her son, Roosevelt Coleman, a friend of appellant's "might have said, well, hey, let's go. You know, money makes people's head swell up." (31CCT 9254-9255, 9266.)

Littlejohn explained that, in addition to appellant, appellant's friend,

"Doc," also kept calling her and asking for the gun. (31CCT 9265, 9267, 9276, 9285.) She did not want to give it to them because "you don't know what they're capable of doing." (31CCT 9267.) Also, Littlejohn stated that returning the gun to appellant "that's like me telling him to go out and do some murder because I know that's what they're going to do with it." (31CCT 9265.) Littlejohn feared that if she gave the gun to Doc, "my son might kick it with Doc and then they'd all be involved in a murder because I was stupid to give the gun to them." (31CCT 9285.)

Before Littlejohn's interview with Thurston was introduced, defense counsel moved to exclude the portions relating appellant's stated desire to use his gun to commit robbery in the future. (16RT 6788.) Counsel did not object to appellant's statements that he wanted his gun back from Littlejohn, just to those portions wherein appellant stated that he wanted it "so he could do more robberies" and "so he could make some ... money." (*Ibid.*) Counsel argued that the challenged statements were inadmissible under Evidence Code section 1101 because they were about possible future conduct, not evidence of actual conduct, and they were also inadmissible under Evidence Code section 352 because they had a "prejudicial effect." (15RT 6788-6790; see 28RT 10372.) The prosecutor responded that appellant's desire to obtain the gun "to do more robberies" tended to prove appellant used the gun to commit the charged robbery several days earlier. (16RT 6789.) The Hodges contended that appellant's statements were "relevant to show that [appellant's] state of mind was such that it was a crime spree. It was a continuing state of mind" and also to show appellant acted alone. (16RT 6790.)

The trial court ruled that the challenged statements were admissible as admissions because, "by saying he wanted the gun for more robberies implies that he committed an earlier robbery." (16RT 6791.) Also, the court found that the statements evidenced consciousness of guilt. (*Ibid.*) It ruled that Evidence Code section 1101(b), did not apply to the statements and thus had no bearing on their admissibility. (*Ibid.*)

Subsequently, just prior to Littlejohn's testimony, counsel asked the court to reconsider its ruling. He contended that, although the statements had some probative value concerning appellant's intent, they were "too prejudicial" under Evidence Code section 352. (28RT 10373.) The court reaffirmed its prior ruling. (28RT 10375.) It pointed out that appellant was still in flight when he made the statements. (28RT 10374.) It also found that they were probative of intent and the probative value outweighed their potential for prejudice. (*Ibid.*)

B. Argument

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice...." Evidence has potential for "undue prejudice" if it threatens to evoke an emotional bias against the defendant as an individual which lacks any legitimate bearing on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) This may occur, for example, where evidence creates a danger that jurors will misuse it as reflecting on the defendant's criminal pre-disposition (*Ibid.*; *People v. Cardenas, supra,* 31 Cal.3d 897, 904-905) or it evokes emotions that

may motivate jurors to punish the defendant. (E.g., *id.* at p. 907 [loathing of narcotics problem and narcotics users]; *People v. Albarran, supra,* 149 Cal.App.4th 214, 231, fn. 17 [fear of gangs]). A ruling admitting evidence over a section 352 objection is reviewed for abuse of discretion. (*People v. Karis, supra,* at p. 637.)

In *People v. Karis, supra,* 46 Cal.3d 612, the defendant challenged on hearsay and Evidence Code section 352 grounds admission of his statement, made three days before the charged rape-murder and rape-attempted-murder, that if he committed a crime, he would not hesitate to kill a witness to it. (*Id.* at p. 634.) This court found that the statement fell within the state of mind exception to the hearsay rule, Evidence Code section 1250, and tended to prove motive and intent. (*Id.* at pp. 636-638.) In so doing, it recognized that "a defendant's statement regarding possible future criminal conduct in a hypothetical situation has at least as great a potential for prejudice in suggesting a propensity to commit crime as evidence of other crimes," which is "highly prejudicial." (*Id.* at p. 636.) *Karis* cited to decisions addressing the admissibility of other crimes evidence under Evidence Code section 1101. (*Ibid.*) Further, it cautioned that a defendant's statement of future intent to commit a hypothetical crime should be admitted under Evidence Code sections 1250 and 352 only after having been "carefully examined." (*Ibid.*)

Karis's comparison of the type of statement at issue here with evidence of uncharged misconduct is instructive. Evidence a defendant committed uncharged misconduct is "inherently prejudicial." (*People v. Williams* (1988) 44 Cal.3d 883, 904.) It creates a danger that the jury will convict the defendant

not for his or her guilt for the charged crimes but because it believes the defendant is criminally predisposed. (*People v. Schader* (1969) 71 Cal.2d 761, 772.) As this Court has explained, generally, "[w]e exclude such evidence of other crimes not because it lacks probative value but because its prejudicial effect outweighs its probative value. We have thus reached the conclusion that the risk of convicting the innocent by the admission of evidence of other offenses is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (*Id.* at pp. 772-773, fns. omitted.) Evidence Code section 1101(a), codifies these principles by prohibiting admission of uncharged misconduct evidence to show the defendant's criminal propensity.

While uncharged misconduct evidence may be admitted for a non-propensity purpose such as to prove intent, motive or identity (Evid. Code, § 1101(b)), this is only after careful scrutiny establishes its clear probative value regarding an ultimate fact. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Additionally, since "'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value. If there is any doubt, the evidence should be excluded. [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 318, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260, brackets & italics in *Thompson.*)

Preliminarily, defense counsel, the court and the prosecutor mistakenly characterized appellant's challenged remarks to Littlejohn as indicating that appellant wanted his gun to do "more" robberies. (16RT 6788-6789, 6791.) Appellant's remarks did not use the word "more" or otherwise admit

commission of a past robbery. They focused solely on using the gun to obtain money in the future. (31CCT 9266, 9273, 9285.)

Nevertheless, appellant concedes that his statements had some probative value on the issue of his intent at the time of the charged robbery. They permitted the inference that appellant intended to use the gun to commit robbery in the future under unspecified circumstances. Appellant's post-offense intent to rob could theoretically relate back to his mental state at the time of the charged crime. (Evid. Code, § 1250; *People v. Hamilton* (1961) 55 Cal.2d 881, 894 [declarations of mental state at a particular time may be admissible to prove earlier mental state since "'[t]he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current.' [Citations]"].)

That the intended future robbery or robberies were only hypothetical, however, diminishes the statements' probative value on the issue of intent to rob. Since the future offenses never occurred, one can only speculate whether appellant would have actually formed the intent when it really counted. Jurors had cause to find that talk came cheaply to appellant, who was described as a "kidder," who frequently said "off the wall type things" and bragged to impress others about his toughness. (18RT 7286, 7288-7289; 31CCT 9261, 9263.) For example, although he told Littlejohn that he would not let the police arrest him without a fight (31CCT 9265), when police actually arrested him at the apartment of an acquaintance, they found him trying to hide by a closet door in a child's room. (19RT 7534, 7536-7537). Because appellant's statements of intent to rob did not coincide with acts constituting robbery, we

cannot gauge the depth of their sincerity. This made their probative value questionable.

The probative value of appellant's statements was also diminished by the circumstances under which they were made for two reasons. (*People v. Karis, supra,* 46 Cal.3d 612, 636-637 [circumstances under which statements are made must be carefully examined to determine if they detract from proof of defendant's claimed intent].) First, appellant made the statements around the same time that he was "bragging to ... girls" about his criminal conduct in order to impress them. (31CCT 9261, 9263.) This suggests that his stated desire to rob in the future was inflated by bravado.

Second, the statements were not "wholly independent" of the charged crime. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 405.) Once appellant was wanted for the crimes against McDade, he was past the point of no return even if he acted under duress or without the requisite mental state, as defense counsel argued. (See 31RT 11249-11250, 11327, 11330-11331, 11337-11338 [excerpts from counsel's closing argument].) As appellant told Detective Lee, the Hodges made sure appellant was the one with the gun because "they wanted everything to be on me...." (31CCT 9016.) His situation was desperate. Appellant's mother feared the police would "shoot [him] down like a dog." (30CCT 8987.) Appellant had to either turn himself in or live like an outlaw. Consequently, his stated intent to rob *after* these circumstances arose is not necessarily probative of his earlier intent, when circumstances were different. (Cf. *People v. Karis, supra,* 46 Cal.3d 612, 637 [statement of intent is not probative if circumstances suggest it is transitory].)

The statements Littlejohn related concerning appellant's intent to rob were also cumulative of other evidence on this point. Appellant admitted wanting to rob McDade prior to the crimes. (30CCT 8976, 31CCT 9015.) Banks also related that appellant took part in planning the robbery with John Hodges. (24RT 9018-9019.) Where challenged evidence is merely cumulative of other, properly admitted evidence, it is unnecessary to the prosecution's case and its probative value is limited. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 406; *People v. Williams, supra,* 44 Cal.3d 883, 907, fn. 7 ["[i]n order to meet their burden of proof the People must be permitted, *when necessary,* to introduce otherwise admissible evidence of uncharged crimes"], italics in original; *People v. Cardenas, supra,* 31 Cal.3d 897, 904.)

In contrast to the questionable probative value of appellant's challenged statements, the statements created substantial potential for prejudice. As counsel for John Hodges argued, they tended to show that appellant's involvement in the crimes against McDade was the beginning of a "crime spree" halted only by appellant's arrest. (16RT 6790.) Thus, they invited jurors to see appellant as a dangerous person predisposed to criminal conduct. The statements exhibited the same strong potential for prejudice inherent in other crimes evidence. (*People v. Karis, supra,* 46 Cal.3d 612, 636.) "Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice.... As Wigmore notes, admission of this evidence produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.'" (*People v. Thompson, supra,* 27 Cal.3d 303, 317-318.).

The manner in which challenged evidence may combine with other evidence before the jury may also contribute to its potential for prejudice. (E.g., *People v. Cardenas, supra,* 31 Cal.3d 897, 906 [prejudice of gang membership evidence offered to show witness bias was compounded by other evidence suggesting that the gang had been involved in criminal activities].) Here, the substantial potential for prejudice from appellant's statements that he desired to rob in the future was greatly exacerbated by Littlejohn's take on them. She declared, "I know kids" (31CCT 9270) and explained that she refused to return appellant's gun to him or Doc because she feared that her son would join them and the group would recklessly use it not only to rob but also to kill. Littlejohn said, "if I give [appellant] the gun, that's like me telling him to go out and do some murder because I know that's what they're going to do with it." (31CCT 9265.) Littlejohn also stated, "if I give Doc that gun, my son might kick it with Doc and then they'd all be involved in a murder...." (31CCT 9285.) Additionally, Littlejohn related that, since appellant told her why he wanted the gun, she feared her son might become involved and "suffer behind some stupid thought" because "money makes people's head swell up." (31CCT 9266; see also 28RT 10457-10457 [Littlejohn states that all the young men acted like 12 year-olds].)

Littlejohn's commentary portrayed appellant as a member of a group of reckless young, African-American males[89] predisposed to not only rob but also to kill under undetermined circumstances. Such an image no doubt triggered

---

[89] Appellant, "Man" and Coleman are all African-American teenagers. (See e.g., 34CCT 10069 [People's Ex. No. T-F1, photo of appellant]; 31CCT 9021-9022, 9258-9259; 23RT 8850; 28RT 10432-10433.)

the jurors' fears. Six of appellant's jurors stated during jury selection that they thought to varying degrees that racial minorities are more violent than people of the majority race. (47CT 13722-23 [Juror No. 1]; 47CT 13802 [Juror No. 3]; 47CT 13842 [Juror No. 4]; 48CT 14001 [Juror No. 8]; 48CT 14041-42 [Juror No. 9]; 48CT 14200-01; 8RT 2880-81 [Alternate No. 1].) Unquestionably, the manner in which appellant's statements combined with Littlejohn's gloss on them would have preyed on the jurors' fears of unchecked crime in their community.

Additionally, the potential for prejudice from appellant's challenged statements was heightened because there were gang connotations to the image of appellant and his confederates embarking on a reckless crime spree. Jurors heard that appellant's friend, Roosevelt Coleman, was a member of the Crip gang with the streetname "Babysnake" (31CCT 9023, 9030), appellant's monikers were "Baby Hoove" and "Scrooge" (30CCT 8974, 16RT 6722), appellant associated with "homies" and his "road dog" (31CCT 8988) and appellant dressed like a Crip. (18RT 7170-7171). Gang evidence preys on jurors' fears and is highly prejudicial. (*People v. Albarran, supra,* 149 Cal.App.4th 214, 231, fn. 17; see generally Argument VIII, *ante.*) Three of appellant's selected jurors blamed gangs as the cause of society's most significant crime problems. (47CT 13984 [Juror No. 8]; 48CT 14024 [Juror No. 9]; 48CT 14143 [Juror No. 12].)

In sum, the questionable probative value of appellant's stated intent to commit robbery in the future was substantially outweighed by its strong potential for prejudice. The trial court, therefore, erred in admitting appellant's

statements under Evidence Code section 352.

Appellant was prejudiced by the erroneous admission of his post-offense statements to Littlejohn that he wanted his gun back to commit robbery in the future. Typically, the erroneous admission of evidence is analyzed as state law error under California's miscarriage of justice test: reversal is required if there is a reasonable probability of a more favorable outcome in the absence of the error. (*People v. Watson, supra,* (1956) 46 Cal.2d 818, 836.) As noted, however, a post-offense statement of intent to commit a future crime is akin to uncharged misconduct evidence. Such evidence threatens to violate the federal constitutional guarantee of due process by lightening the state's burden of proof. (*People v. Garceau* (1993) 6 Cal.4th 140, 188, 209-210 [accepting, without deciding, that error in instruction on other crimes evidence lightens state's burden of proof beyond a reasonable doubt, in violation of the Fourteenth Amendment's guarantee of due process]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *In re Winship, supra,* 397 U.S. 358, 364.) Federal constitutional error must be analyzed for prejudice under the stringent *Chapman* standard: reversal is required unless the state proves the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Reversal is required under either standard. As demonstrated previously (see Argument I, § C.5, *ante*), the prosecution's case against appellant was subject to doubt. Appellant and the Hodges gave multiple accounts of what happened which differed in significant respects. The physical evidence was inconclusive concerning appellant's role, and there was no testimony by a

disinterested percipient witness. The prejudice from the erroneous introduction of appellant's statements that he sought to rob in the future was augmented by the prosecutor's multiple references to them in opening statement (15RT 6327), and closing argument. (31RT 11203, 11208, 11211-11212, 11216; 32RT 11356). Thus, the erroneous introduction of these highly prejudicial statements could well have tipped the scales in favor of the verdict rendered.

X.

ADMISSION OF AN IRRELEVANT AND UNDULY GRUESOME PHOTOGRAPH OF THE DECEDENT, PEOPLE'S EXHIBIT NO. T-4, REQUIRES REVERSAL.

A. Factual Background

Terry Hodges, joined by John Hodges, moved *in limine* to exclude crime scene and autopsy photos of the decedent under Evidence Code section 352 on the ground that their probative value was substantially outweighed by their potential for prejudice. (2CT 460-465 [*in limine* motion]; 15RT 6255 [John Hodges joins].) He argued that the cause of death, a single bullet wound to the left temple, was not in dispute, the photos were inflammatory and they presented no probative value beyond that of other evidence. (2CT 460-465.) John Hodges also asserted that autopsy photos were inadmissible unless they were both relevant and necessary to the coroner's opinion. (15RT 6257.)

The prosecution sought admission of a number of crime scene photos of the decedent. It contended that their potential for prejudice was not extreme and they were probative to demonstrate death by criminal agency, manner of killing, malice, premeditation and deliberation, corroborate medical testimony and refute that the defendant killed because the victim threatened him. (2CT 437-442; 15RT 6252-6253.)

The trial court preliminarily found that three crime scene photos, People's Exhibit Nos. T-1, T-2 and T-3, exhibited probative value outweighing

their potential for prejudice, and it found the opposite concerning No. T-4.[90] (15RT 6251-6254.) It explained that No. T-4 was "just a closer view" and "very duplicative" of No. T-3 (15RT 6252) and hence the prosecution could prove its points "through T-3 without the necessity of T-4." (15RT 6254). It told the prosecutor, "[y]ou could blow up T-4 to even a ... larger photograph of ... just the victim's head ... and it still wouldn't prove your point that much more than T-3 does." (*Ibid.*) The court indicated the prosecutor could show witnesses any photo so long as he did not display it to the jurors and deferred ruling on admissibility until after witness testimony. (15RT 6253-6254, 6256, 6258, 6260.)

Subsequently, the state presented the testimony of officer Chapman, who first discovered McDade dead, called for backup and secured the crime scene. (19RT 7477-7481, 7484) Chapman described viewing a "close range" gunshot wound to McDade's left temple. (19RT 7466-7467.) Over defense objection that the officer was not qualified to render an opinion, the court allowed the prosecutor to elicit that the wound appeared to have been inflicted from close range due to the presence of a powder burn ring around it. (19RT 7467-7468, 7472-7473.) Chapman attributed his understanding of powder burns to police academy training and "informal training" on the job, which he described as discussions with crime scene investigators and other unspecified experts (other than pathologists) in connection with having viewed 50 to 75 gunshot wounds. (19RT 7467, 7470-7471.) The prosecutor then showed Chapman People's Exhibit No. T-4 and elicited that the photo depicted the

---

[90] People's Exhibit Nos. T-1 to T-4 are located at 29CCT, pages 8643 to 8646.

powder burn better than did three other prosecution exhibits, including No. T-3. (19RT 7473-7474.)

At this juncture, the prosecutor moved for admission of People's Exhibit No. T-4. (19RT 7475.) Appellant and both codefendants objected. (*Ibid.*) The court tentatively ruled that No. T-4 was admissible, and it continued to defer its publication to the jury. (19RT 7475-7476, 7487-7488.)

On cross-examination, officer Chapman testified that the crime-scene photos were not pertinent to discharge of his duties. (19RT 7490-7491.)

The admissibility of People's Exhibit No. T-4 arose again outside the jury's presence during a break in witness testimony. The court stated that it was prepared to admit People's Exhibit No. T-4 because it showed the powder burn more clearly than did other photos, it was helpful to understanding officer Chapman's testimony, and its probative value outweighed its potential for prejudice. (19RT 7546-7547, 7549-7549.) The court contended that evidence tending to show that the shooting occurred from point blank range was relevant to lack of accident and whether the killing was committed with premeditation and deliberation and/or during a robbery. (19RT 7552-7553.) All three defendants asserted that the value of the photograph to the prosecution was in how it tended to inflame jurors by showing more blood than did the other photos. (19RT 7553-7556.) Counsel also contended that officer Chapman's chief purpose as a witness was to explain how he found the body and secured the crime scene, not in giving any opinion on powder burns, which he was not qualified to render and which would be covered, in any event, in detail by the

coroner's testimony. (19RT 7549-7554.) The court rejected the arguments. (19RT 7556.)

Subsequently, the prosecution examined detective Lee about his arrival at the crime scene. (23RT 8826, et seq.) Lee also testified that there were powder burns by the head wound caused by the firing of a gun at close range and confirmed that McDade appeared as shown in People's Exhibit No. T-4 (23RT 8828-8829.) Lee did not explain what background he had in understanding the significance of powder burns. The court continued to defer publication of the photo to the jurors. (23RT 8829-8830.)

The prosecution again utilized People's Exhibit No. T-4 during the testimony of coroner Gregory Schmuck, who rendered the opinion that McDade died from a single gunshot wound to the head fired from between several to six inches away. (27RT 9980, 9984, 9994-9995.) Doctor Schmunk based his opinion on the presence of gunpowder fouling (smoke) and tattooing (particles of gunpowder residue) around the wound. (27RT 9973-9980.) In addition to examining the body (27RT 9969-9970), he reviewed autopsy photos (People's Exhibit Nos. T-59A - T-59F) before finalizing his opinion.[91] (27RT 9996-9998). The doctor was unaware of People's Exhibit No. T-4 until testifying. (27RT 9996.) Although acknowledging that the photo exhibited powder burns "slightly more" than did the other photos of the decedent, the doctor considered it unnecessary to formulating his opinion. (27RT 9977, 9996, 9999.)

---

[91] People's Exhibit Nos. 59A to 59F are located at 31CCT 9248-9252.

Of the crime scene photos, the trial court admitted People's Exhibit No. T-4 (19RT 7556, 28RT 10524) and People's Exhibit Nos. T-1 to T-3. (17RT 6891, 28RT 10304). Further, it admitted two autopsy photos, People's Exhibit Nos. T-59B and T-59C. (28RT 10356.) The remaining autopsy photos were marked for identification only. (*Ibid.*) Powder burn is visible in People's Exhibit Nos. T-3 and 59B. (27RT 9978-9979, 28RT 10356.)

B. <u>The Issue Has Been Preserved for Review</u>

Appellant joined the Hodges brothers in objecting to admission of People' Exhibit No. T-4. (19RT 7475, 7555-7556.) Appellant's counsel asserted that the principle value of the exhibit to the prosecution was to inflame jurors because the photo displayed a vast amount of blood, more than in any other photo. (*Ibid.*) Appellant's objection coincided with relevance and Evidence Code section 352 objections and arguments by the Hodges brothers. (See, e.g., 2CT 460-465; 15RT 6259-6261, 19RT 7475, 7549-7550, 7553-7556.) Given this context, the trial court would have understood that appellant objected to the photograph based on relevance and Evidence Code section 352. (See *People v. Scott,* 21 Cal.3d 284, 290 [an objection is sufficient if the record shows the trial court understood it]; *People v. Ewoldt, supra,* 7 Cal.4th 380, 404-405 [assessment of the degree of relevance presented by challenged evidence is necessary to Evid. Code, § 352 balancing process].) The issue, therefore, has been preserved for review. (Evid. Code, § 353; *People v. Hawkins* (1995) 10 Cal.4th 920, 950 & fn 4, abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

///

C. The Error

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has no discretion to admit irrelevant evidence. (Evid. Code, § 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Evidence that is technically relevant must still be excluded under Evidence Code section 352 when "its probative value is substantially outweighed by the probability that its admission will .... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Rulings under Evidence Code section 352 are reviewable for abuse of discretion. (*People v. Turner* (1984) 37 Cal.3d 302, 321; *In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

People's Exhibit No. T-4 showed the "nature and placement of the fatal wounds," which is generally of consequence to the determination of a homicide prosecution. (*People v. Pride* (1992) 3 Cal.4th 195, 243; see also *People v. Price* (1991) 1 Cal.4th 324, 441.)

The exhibit's probative value on this point was severely diminished, however, because the exhibit was unnecessary to the state's case. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 405-406; *People v. Cardenas, supra,* 31 Cal.3d 897, 905.) As the trial court recognized (15RT 6252, 6254), People's Exhibit

Nos. T-3 and T-4 both showed the decedent slumped over in his car with a wound to his left temple surrounded by powder burn. (29CCT 8645.) Also, People's Exhibit No. T-59B, an autopsy photo of the decedent's head, showed the wound and surrounding powder burn. (31CCT 9248.) Both People's Exhibit Nos. T-3 and T-59B were admitted. (17RT 6891, 28RT 10356.)

The trial court ultimately accepted the state's position that People's Exhibit No. T-4 was not merely duplicative because it showed the powder burn more clearly than did the other photos. (19RT 7474, 7546.) This reasoning fails to withstand analysis in light of doctor Schmunk's testimony.

Of all the witnesses who testified concerning the powder burn, doctor Schmunk was unquestionably the most knowledgeable about its significance. Officer Chapman's expertise on powder burns consisted of some basic police academy training, viewing 50 to 75 gunshot wounds and informally obtaining information from crime scene technicians. (19RT 7467, 7470-7471.) Detective Lee did not state he had any expertise. In contrast, doctor Schmunk was a trained physician employed to determine the cause and manner of death, and he had performed approximately 2,000 autopsies. (27RT 9967-9969.) His expertise was reflected in his detailed testimony concerning two types of powder burns (smoke and stippling) and what they indicate about the range from which a projectile has been fired; moreover, the doctor had extensive medical training and engaged in continuing education on the topic. (27RT 9975-9976.)

---

[92] Counsel for the Hodges complained that the photographs of the decedent had been enlarged enough for jurors to see them when they were displayed to witnesses. (15RT 6255-6256.)

According to doctor Schmunk, People's Exhibit No. T-4 showed only "*slightly* more fouling around the wound than any of the other photographs." (27RT 9977, emphasis added.) Doctor Schmunk did not consider the difference between People's Exhibit No. T-4 and the other photos to be of consequence to his formulating the opinion that the projectile had been fired from several to six inches away. He had not seen No. T-4 before testifying or forming his opinion, and when he finally saw the exhibit, it did not affect his opinion. (27RT 9977, 9996, 9999.) Unquestionably, the *slight* clarification of the powder burn presented in People's Exhibit No. T-4 was not *necessary* to illustrate the basis for the coroner's opinion.

That the challenged exhibit may have helped illustrate the basis for officer Chapman's opinion regarding the closeness of the shot does not add any meaningful probative value to the exhibit. Officer Chapman's expertise on powder burns is vastly beneath doctor Schmunk's. Further, officer Chapman's testimony about the powder burn was tangential to his real significance as a witness. Chapman was the first person to discover McDade dead, and he helped secure the crime scene and called for backup help. (19RT 7477-7481, 7484; see also 15RT 6311 [prosecutor's description in opening statement of Chapman's significance].) "Slightly" shoring up a witness's tangential testimony, which is illustrated via other photographs, is not *necessary* to the state's case. The probative value of People's Exhibit No. T-4 was minimal at best.

On the other hand, People's Exhibit no. T-4 exhibited substantial

potential for prejudice. Evidence is "prejudicial" in the context of Evidence Code section 352 if it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value on the issues." (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.) As the defense argued, People's Exhibit No. T-4's key attribute was that it depicted a huge amount of blood on McDade's chest, more so than in any other exhibit. (19RT 7553-7556.) The vast outpouring of blood, a gruesome sight to the average person, threatened to evoke from jurors an outpouring of emotion concerning the suffering and waste of human life caused by the shooting. It also was likely to engender revulsion and outrage against the perpetrator of the violent act. McDade's shooting, however, was no more culpable because it resulted in greater, not lesser, blood loss. People's Exhibit No. T-4 created a "legitimate concern" of "produc[ing] a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crime[]." (*People v. Box* (2000) 23 Cal.4th 1153, 1201.)

"[P]hotographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime. . . ." (*People v. Chavez* (1958) 50 Cal.2d 778, 792.) Since the additional probative value of People's Exhibit No. T-4 was slender, at best, one may assume that its principal value was to inflame the jury. (*People v. Marsh* (1985) 175 Cal.App.3d, 987, 998; *People v. Burns* (1952) 109 Cal.App.2d 524, 541.) Where challenged evidence serves no legitimate purpose, its admission violates federal due process and requires application of the *Chapman* standard of prejudice from federal constitutional error. (*Chapman v. California, supra,* 386 U.S. 18, 24 [reversal is required unless the state can prove beyond a

reasonable doubt that the error did not contribute to the verdict]; *McKinney v. Rees, supra,* 993 F.2d 1378, 1384 [admission of highly prejudicial evidence which serves no legitimate purpose violates federal due process].)

D. The Prejudice

Appellant has already previously discussed why the prosecution's case against him was troubled, and he respectfully directs this Court to that portion of his brief. (See Argument I, § C.5, *ante.*)

XI.

APPELLANT'S ABSENCE FROM CRITICAL PROCEEDINGS PERTAINING TO WHETHER HE WOULD TESTIFY AND THE SUBSTANCE OF HIS TESTIMONY CONSTITUTES REVERSIBLE ERROR.

Appellant was absent from multiple proceedings pertaining to the key issue that dominated his trial – whether and for whom appellant would testify. In appellant's absence, defense counsel described appellant's anticipated testimony and assured everyone not only that appellant would testify, but that he would do so as a witness for the state, which was actively seeking to convict him of capital murder and sentence him to death. Conducting these proceedings in appellant's absence deprived him of his Sixth Amendment right to a fair trial, his Fifth and Fourteenth Amendment due process rights, his Eighth Amendment right to a reliable penalty determination, and his rights as guaranteed under article I, section 15 of the California Constitution.

A. Appellant Had a Statutory and Constitutional Right to Be Present at All Critical Stages of His Trial

A key principle of our criminal justice system is that, after an indictment has been brought, nothing shall be done in the absence of the prisoner. (*Lewis v. United States* (1882) 146 U.S. 370, 372; see also *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108.)

A criminal defendant has a federal constitutional right to be present at trial. While rooted largely in the Confrontation Clause of the Sixth Amendment, this right is also a component of the Due Process Clause of the Fifth and Fourteenth Amendments whenever the defendant's presence has a

reasonably substantial relation to the fullness of his opportunity to defend against the charge. (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107, overruled on other grounds by *Malloy v. Hogan* (1964) 378 U.S. 1.) The Due Process Clause guarantees a defendant "the right to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Snyder, supra,* at pp. 105-108; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) The California Constitution is in accord. (Cal. Const., Art. I, § 15; *People v. Douglas* (1990) 50 Cal.3d 468, 517, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

California Penal Code sections 977 and 1043 require that a capital defendant be present at all proceedings unless the defendant executes in open court a written waiver of his presence under section 977 or is remanded for disruptive behavior under section 1043. (*People v. Davis* (2005) 36 Cal.4th 510, 531.)

Although a capital defendant's waiver is permitted, "[t]he legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) A defendant's personal waiver of his constitutional right to be present at any critical stage of a capital trial also must be knowing, intelligent, and voluntary. (*People v. Robertson* (1989) 48 Cal.3d 18, 60-62; see also *Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 981.)

///

///

B. Appellant Did Not Validly Waive His Presence.

Appellant never disrupted the proceedings to warrant his removal and necessitate his absence. Nor did he execute in open court a written waiver of his right to be present at the proceedings at issue here. (*People v. Davis, supra,* 36 Cal.4th 510, 531; see 2CCT 369-370 [John Hodges's written waiver filed 3/18/94].)

In some of the instances challenged here, defense counsel stated he had no objection to appellant's absence or waived appellant's appearance. (2RT 1002, 6RT 2214.) Proceeding without appellant based on counsel's statements violated sections 977 and 1043, which mandate that, in a capital case, the defendant may only waive presence via a written waiver executed in open court. (*People v. Davis, supra,* 36 Cal.4th 510, 531 [counsel's oral statement that defendant desired to be absent did not validly waive defendant's presence under §§ 977 & 1043]; *People v. Edwards* (1991) 54 Cal.3d 787, 810 [requiring substantial compliance with section 977].)

The record also fails to reflect that counsel's waivers occurred with appellant's knowledge and understanding of their consequences. (*People v. Davis, supra,* 36 Cal.4th 510, 532.) Thus, "whatever attempt counsel made in appellant's absence and without his knowledge to waive this right [to be present] was without effect." (*Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 273 [reversal where defendant unaware of and therefore incapable of waiving his right to be present during replay of taped instructions to jury]; see also *Davis, supra,* at p. 532.)

///
///
///

C. Appellant Was Excluded from Trial Proceedings Where His Presence Had A Substantial Relation to His Opportunity to Defend.

Appellant was absent from several proceedings concerning the substance of his testimony, whether he would testify as a witness for the prosecution, and whether the prosecutor could mention his anticipated testimony in his opening statement. They occurred on April 18, 1994 (2RT 1001-1059), April 19, 1994 (2RT 1090-1111), May 17, 1994 (6RT 2247-2249), July 6, 1994 (14RT 5941-5979) and July 11, 1994 (14RT 6081-6082, 6095, 6107-6108).

Appellant was not present on April 18, 1994, when the prosecutor and counsel for all defendants outlined the factual and legal issues presented in the case. (2RT 1001-1002.) Defense attorney Castro, not only revealed appellant's defense, but he also asserted that appellant would waive his privilege against self-incrimination and testify under the extraordinarily unusual circumstance of being called as a state witness. These were startling revelations concerning appellant's basic rights which had tremendous repercussions for the remainder of the trial.

Castro told the court that appellant's position was antagonistic to the Hodges' because appellant maintained that the Hodges coerced him to shoot McDade. (2RT 1017-1020.) This defense theory was based in part on appellant's substantive testimony. (2RT 1020.) According to Castro, "[i]f my client is believed ... the Hodges brothers forced my client to kill...." (*Ibid.*) Further, Castro boldly proclaimed (2RT 1018-1019):

> ... [M]y client doesn't want to see the Hodges brothers get

> away – because he feels that they are responsible. So we have kind of an interesting three-way shooting match in this regard. My client, he says, hey, I'm willing to testify for the District Attorney if it makes ... sure that the Hodges brothers don't get away.

Castro asserted that appellant was not only "ready to testify whenever I tell him to" (2RT 1020; see also 1019), but he would allow the prosecutor to call him as a witness during his case in chief. (2RT 1021). Appellant "doesn't want the Hodges brothers to get loose from their part," said Castro. (2RT 1023.) This was news to the Hodges. (2RT 1021-1022, 1048.)

The prosecutor candidly admitted that his case against the Hodges was weak and would be strengthened considerably if appellant testified. (2RT 1021, 1029.) He continued that he believed appellant would testify because Castro had been "consistent" in his position and now sounded "pretty firm." (2RT 1022, 1041.) Despite appellant's claim of duress and availability to the prosecution, the prosecution continued to seek the death penalty against appellant. (2RT 1042.)

The topic of appellant's testifying also arose in his absence on April 19, 1994. Since there was no guarantee that appellant would testify, and whatever he decided would substantially affect the course of the trial, including the need for dual juries, the court proposed that appellant waive his privilege against self-incrimination and undergo a conditional examination. (2RT 1103-1107.) Castro, co-counsel Holmes and the prosecutor were open to the idea, which would mean that appellant's testimony was "locked in." (2RT 1106, 1108.) The idea was later abandoned. (2RT 1186-1187.)

Outside appellant's presence on May 17, 1994, the court asked defense counsel if it was necessary to question prospective jurors about their views concerning a non-testifying defendant. (6RT 2248-2249.) Castro replied this was unnecessary because appellant was going to testify. (6RT 2249.) After conferring with Holmes, Castro shifted gears and asked for the questioning. (6RT 2249.)

While appellant was absent on July 6, 1994, the court and counsel again discussed issues relating directly to the exercise of appellant's fundamental rights to testify or remain silent. They addressed whether the prosecutor could reference appellant's anticipated testimony and his extrajudicial statement to Detective Lee in his opening statement before both juries. (14RT 5944.) Due to the uncertainty of whether appellant would actually testify, the Hodges moved to preclude the prosecutor from referencing these matters. (14RT 5947, 5949.) The court ruled that the prosecutor could reference appellant's anticipated testimony, and if appellant remained silent, the remedy would be mistrial; at the same time, the court ruled that the prosecutor could not reference appellant's extrajudicial statements incriminating the Hodges (i.e., those in violation of *Aranda/Bruton.*) (14RT 5947-5948, 5950-5951, 5965-5966, 5975-5976.)

At this hearing, the Hodges requested discovery of any consideration provided by the state to appellant in exchange for his testimony because, according to Macias, appellant otherwise "gains nothing by testifying...." (14RT 5953.) Macias argued that the prosecutor's calling appellant as a witness had to be pursuant to an agreement, and it "changes the whole complexion of the trial." (14RT 5960.) Sherriff argued that the prosecutor

sought to use appellant's testimony about duress to convict appellant as well as the Hodges. (14RT 5963-5964.) Castro responded that appellant was receiving nothing from the prosecution. (14RT 5954-5956.) He emphasized that most of his discussions with the prosecutor concerning appellant's testimony had been in open court, and "I have made no secret about where I'm going with this thing." (14RT 5963-5964.) The court ordered disclosure of any consideration. (14RT 5954.)

Whether the prosecutor could reference appellant's anticipated testimony in his opening statement was again addressed in appellant's absence on July 11, 1994. (14RT 6081, 6095.) The prosecutor declared that since "Carl Powell is going to be testifying ... there are no *Aranda* issues" left, and the prosecutor should be allowed to mention in his opening statement both appellant's testimony and extrajudicial statement to detective Lee. (14RT 6095, 6108.)

As developed in more detail elsewhere, on July 12, 1994, the trial court accepted the prosecutor's argument and allowed him to detail both appellant's anticipated testimony and statement to Lee in his opening statement. (15RT 6266, 6270-6271, 6280-6281; see Argument I, § B.5, *ante*.) The prosecutor did so before both juries; he set forth appellant's duress claim in concrete detail (15RT 6343-6346) and read appellant's statement to Lee verbatim. (15RT 6346-6410). But contrary to the prosecutor's promise to the jurors, appellant did not testify at trial. (See 30RT 10820.) Due to the prosecutor's opening statement, the trial court granted the Hodges' mistrial motion, but it denied appellant's. (30RT 10837, 10840.)[93]

---

[93] Appellant does not challenge his absence from any proceedings described

Appellant's absence from the proceedings on April 18, April 19, May 17, July 6 and July 11, 1994, concerning the substance of his testimony, whether he would testify, whether he would do so for the prosecution and whether the prosecutor could describe appellant's expected testimony in his opening statement violated appellant's right to be personally present at his trial as guaranteed by the due process clause of the state and federal constitutions and by state statute. Whether a defendant will testify is always an important decision. (*Rock v. Arkansas, supra,* 483 U.S. 44, 52 ["the most important witness for the defense in many criminal cases is the defendant himself"]; *Brooks v. Tennessee, supra,* 406 U.S. 605, 612 ["Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"].) In appellant's case, this question and its ramifications dominated every aspect of appellant's trial.

The proceedings appellant missed directly affected how the issue of appellant's testifying played out. (See *Kentucky v. Stincer, supra,* 482 U.S. 730, 740 [witness competency hearing may well be a critical stage of trial because it "determines whether a key witness will testify"].) At them, Castro boldly proclaimed not only that appellant would testify but also revealed the expected content of that testimony -- that appellant acted under duress from the Hodges. (2RT 1020.) Castro went even further by firmly declaring that appellant would willingly give this testimony as a state witness, without any consideration, although the state sought to convict him of capital murder and put him to death. (2RT 1020-1021, 1042.) Although troubled by appellant's supposed willingness to testify without consideration for his opponent (2RT

---

in this paragraph.

1022), the trial court eventually acquiesced to the scenario after the prosecutor voiced a desire to use appellant's testimony to win convictions against all three defendants. (14RT 6095, 6108). Over the Hodges' strenuous objections that it was impossible to know whether appellant would testify until he actually took the stand (14RT 5947, 5949), the trial court momentarily abandoned the dual jury framework under which it had been operating. It allowed the prosecutor to detail in his opening statement to both juries appellant's anticipated testimony and his statement to detective Lee incriminating the Hodges under *Aranda-Bruton.* (14RT 5950, 15RT 6265-6266, 6280-6281.) The proceedings that appellant missed led directly to this defining moment at appellant's trial.

Appellant ultimately relied on his right to silence and did not testify. As he has argued, he was severely prejudiced by the prosecutor's giving the jury at the outset of trial a synopsis of his expected testimony which never materialized. (Argument I, § C.5, *ante.*) The natural and inevitable tendency of the disappointed jurors was to view the undelivered testimony as a sham and to use appellant's silence to draw an adverse inference against the defense. (*Anderson v. Butler, supra,* 858 F.2d 16; *Ouber v. Guarino, supra,* 293 F.3d 19.) The harm was especially great because the theory Castro argued to the jurors in the absence of appellant's testimony – that appellant's mental state was so clouded by fear of and pressure from the Hodges that appellant did not form the *mens rea* necessary for the crimes -- was closely related to the actual testimony the jurors had expected from appellant. (Argument I, § C.5, *ante.*)

Appellant had the right to be present at the challenged proceedings because they were critical to the outcome of his trial and his presence would

have contributed to their fairness. (*Kentucky v. Stincer, supra,* 482 U.S. 730, 745.) Castro told everyone – appellant's chief adversary, the prosecutor, and appellant's codefendants, whose interests were antagonistic to appellant's -- that appellant would testify he acted under duress from the Hodges. This was news to everyone. Because appellant's substantive testimony was revealed, the hearings bore a "substantial relationship to ... defendant's opportunity better to defend himself at trial...." (*Id.* at p. 746.)

Additionally, appellant had personal knowledge of "facts ... [which] could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination" of the issues presented. (*Kentucky v. Stincer, supra,* 482 U.S. 730, 747; see also *People v. Davis, supra,* 36 Cal.4th 510, 531 [defendant had statutory and constitutional right to be present at hearing settling contents of jailhouse tape, of which defendant had personal knowledge and which was a key piece of evidence against him].) Appellant knew better than anyone what his substantive testimony would be, whether he would exercise his right to testify or his right to remain silent and whether his decision would depend on whether the prosecution or the defense called him to the stand. Because he had knowledge of key information that bore directly on the issues discussed at these important hearings, he would have had an "active role to play" at them. (*Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, 899 [reversing due to defendant's exclusion from hearing on defense counsel's conflict of interest].)

Further, appellant "would have been able to 'influence the process' in a significant way had he been present" by exercising rights he personally held. (*Campbell v. Rice, supra,* 302 F.3d 892, 899, quoting *Hegler v. Borg* (9th Cir.

1995) 50 F.3d 1472, 1476.) The nature of appellant's anticipated testimony, which Castro learned no doubt through communications with appellant, was protected by the attorney-client privilege. Appellant could have directed counsel not to reveal it. "A client ordinarily has the privilege to refuse to disclose or to prevent another from disclosing, a confidential communication between the client and his lawyer. This privilege may be claimed either by the client or the attorney (Evid. Code, § 954), but it belongs to the client who alone may waive it (Evid. Code, §§ 953, 954, 955)." (*Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 98; *People v. Vargas* (1975) 53 Cal.App.3d 516, 527.) Appellant also had an unconditional right to either remain silent or testify on his own behalf, regardless of counsel's advice and even over counsel's objection. (*Rock v. Arkansas, supra,* 483 U.S. 44, 49-53.) Appellant could have informed the court or counsel that he did not know if he would testify or that he would not testify for the prosecution. Defense counsel did not have a unilateral right to decide these matters for appellant at the hearings appellant missed. Under the circumstance, one cannot dismiss appellant's presence as "useless, or the benefit but a shadow." (*Snyder v. Massachusetts, supra,* 291 U.S. 97, 106-107.) If present, appellant would not have been relegated to the role of a mere observer. He would have had the "power ... to give advice or suggestion or even to supersede his lawyers altogether...." (*Id.* at p. 106; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1307 [whether defendant could have done anything to influence counsel to adopt a different strategy affects if his presence was required].) Conducting these important hearings in appellant's absence violated appellant's right to due process.

D. Holding the Proceedings in Appellant's Absence Prejudiced Him.

When a defendant has been denied his Fourteenth Amendment Due Process right to be present at his criminal proceedings, the error is reviewed for prejudice under *Chapman v. California, supra,* 386 U.S. 18, 24: reversal is required unless the government can prove the error harmless beyond a reasonable doubt. (*Rushen v. Spain* (1983) 464 U.S. 114, 117-118, 120 (per curiam); *People v. Davis, supra,* 36 Cal.4th 510, 533.) It is the government's heavy burden to prove harmlessness, not the defendant's to prove harm. (*United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 129, fn. 10.)

The government cannot show beyond a reasonable doubt that appellant's presence would have made no difference at the hearings he missed. It cannot demonstrate to a near certitude that appellant would not have done or said anything to counsel or even the court itself to derail counsel's revelation of privileged client communication concerning appellant's substantive testimony or counsel's firm representation that appellant would testify and, indeed, do so for the prosecution. Because appellant had personal rights to assert in these respects, he had the ability to alter the course of the proceedings held in his absence which were crucial to how his case was tried in front of the jurors.

For the foregoing reasons, appellant's absence from numerous proceedings addressing his anticipated testimony, his asserted intention to testify, and his asserted willingness to testify for the prosecution, requires reversal of the guilt and penalty verdicts.

PEOPLE V. CARL DEVON POWELL
California Supreme Ct. No. S043520

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(b)(2)

I hereby certify that the foregoing brief contains 183,265 words, based on the computer word count, and uses a 13-point Times New Roman font. An application for leave to file an over-length brief is being filed simultaneously with this brief pursuant to California Rules of Court, rule 8.630(b)(5). (The record in this case was filed before January 1, 2008.)

DATED: April 1, 2011

Respectfully submitted,

NEOMA KENWOOD
KAT KOZIK

BY: Kat Kozik
KAT KOZIK

Attorneys for Appellant
CARL DEVON POWELL

PEOPLE V. CARL DEVON POWELL
California Supreme Ct. No. S043520

PROOF OF SERVICE

I am a citizen of the United States and a resident of Alameda County, California. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 2633, Berkeley, CA 94702.

On April 1, 2011, I served the attached **APPELLANT POWELL'S OPENING BRIEF** on the interested parties in said action by causing to be placed a true copy thereof, in a sealed envelope, with first-class postage thereon fully prepaid, in a United States Post Office Box, addressed as follows:

CARL DEVON POWELL
P.O. Box J-43000
San Quentin, CA 94974
[Appellant]

GARY B. WELLS
Attorney at Law
P.M.B. # 227
6737 N. Milburn Ave., Ste. 160
Fresno, California 93722-2143
[Habeas counsel]

CLERK OF THE SACRAMENTO
COUNTY SUPERIOR COURT
(For Delivery to the Hon. James I Morris)
720 Ninth Street, Room 101
Sacramento, CA 95814-1398

CALIFORNIA APPELLATE PROJECT
Attn: Pat Kern, Esq.
101 Second Street, Ste. 600
San Francisco, CA 94105

OFFICE OF THE CALIFORNIA
ATTORNEY GENERAL
Attn: Paul E. O'Connor
Post Office Box 944255
Sacramento, CA 94244-2550
[Respondent]

NEOMA KENWOOD
Attorney at Law
P.M.B. # 414
1563 Solano Avenue
Berkeley, CA 94707
[Appellate Counsel]

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 2011, at Berkeley, California.

Kat Kozik