No. S087533

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ASWAD POPS and BYRON WILSON, Defendants and Appellants.	

APPELLANT'S REPLY BRIEF

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

HONORABLE CURTIS B. RAPPE, JUDGE

MICHAEL J. HERSEK
State Public Defender

JOSEPH E. CHABOT
Bar No. 104810
Senior Deputy State Public Defender

1111 Broadway, Tenth Floor
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510)452-8712
Chabot@ospd.ca.gov

Attorneys for Appellant
BYRON WILSON

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

STATE RULES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

Michael J. Hersek
State Public Defender
Joseph E. Chabot
Bar No. 104810
Senior Deputy State Public Defender
1111 Broadway, Tenth Floor
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant
Byron Wilson

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ASWAD POPS and BYRON WILSON, Defendants and Appellants.	No. S087533 (Los Angeles County Superior Court No. BA164899)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant Byron Wilson replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Wilson does not reply to arguments that are adequately addressed in his opening brief. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Wilson (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

[1] "CT" means the Clerk's Transcript. "CTSupp" means the Supplemental Clerk's Transcript. "RT" means the Reporter's Transcript.

ARGUMENT

1.

THE TRIAL COURT DENIED WILSON DUE PROCESS WHEN IT ADMITTED UNRELIABLE EVIDENCE IDENTIFYING HIM AS THE DRIVER.

A. Admitting Evidence of Bowie's Identification of Wilson Was Prejudicial Error.

In his opening brief, Wilson demonstrated that he was denied due process when law enforcement showed an unduly suggestive photo array to Bowie, leading him to misidentify Wilson as the driver. (AOB 19.) Respondent disagrees. (RB 130.) In addition, respondent attempts to show that Bowie's identification was reliable regardless of any impermissible suggestiveness. (RB 133.) Respondent's arguments fail. Respondent also fails to meet the very heavy burden of showing that the erroneous admission of the considerable amount of evidence relating to Bowie's identification of Wilson did not contribute to the judgment against Wilson. (RB 134; *Chapman v. California* (1967) 386 U.S. 18, 24.)[2] Hence, the judgment should be reversed in it entirety.

1. There Was No Forfeiture.

Respondent claims that Wilson forfeited the issue on appeal by not

---

[2] Respondent addresses Wilson's and Pops's separate identification arguments in one omnibus response in the first argument ("I") of Respondent's Brief, beginning at page 111. Subsection B at pages 118-119 encompasses respondent's forfeiture argument against Wilson. Subsection F at pages 130-135 contains respondent's answer to Wilson's argument on the merits. And subsection G at pages 135-138 includes respondent's argument pertaining to Brown's identification of Wilson.

arguing in the trial court that the photo identification procedures used with Bowie to identify Wilson were impermissibly suggestive. (RB 118 ["the only argument advanced and ruled upon by the trial court was whether the manner in which detectives showed appellant Pops's photograph to Bowie was unnecessarily suggestive"].) Respondent's forfeiture claim fails.

Specifically, respondent asserts that Wilson forfeited the issue on appeal because he "never objected" to his photo lineup as "unduly suggestive due to alleged dissimilarities between him and the other five men pictured." (RB 118.) Respondent misstates Wilson's argument on appeal and misreads the record which shows that Wilson raised the objection below.

Respondent misstates Wilson's argument by limiting it to mere dissimilarities. As this Court has explained, "[t]he question is not whether there were differences between the lineup participants, but 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.'" (*People v. Avila* (2009) 46 Cal.4th 680, 698, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 367.) The opening brief showed that something in Wilson's photo, which Bowie described as a "smirk" (7RT 627), a "funny shaped mouth" (12RT 1598), and a "smirky grin on his face" (12RT 1647, 1648), caused Wilson to stand out from the others, compelling Bowie to select Wilson as the driver. (7RT 627 [Bowie testifying that he identified Wilson "[b]ecause of the smirk on his mouth"]; see also 12RT 1660-1661 [smirk in photo "made" Bowie identify Wilson].) Thus, Wilson argues in his opening brief not simply that Wilson's photo was dissimilar from the others. Rather, he argues that "Wilson stood out to Bowie and the identification procedure was unduly suggestive." (AOB 35.)

In addition, the record demonstrates that Wilson did not forfeit this argument on appeal. "'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. Clark* (2011) 52 Cal.4th 856, 966, quoting *People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Partida* (2005) 37 Cal.4th 428, 434 [requirement of specific objection "must be interpreted reasonably, not formalistically"].) As shown below, the record demonstrates that Wilson joined Pops's motion; Pops's brief cited the correct objection; the prosecutor acknowledged that the issue was the same for both defendants, and the trial court agreed; and consequently, the court understood the issue presented – whether the photo identification procedures used with Bowie to identify Wilson were unduly suggestive – thereby preserving the issue on appeal for Wilson.

Pops filed a "Request for Section 402 Evidence Code Hearing; and Points and Authorities." (3CT 712.) The filing asked for a "hearing to determine if impermissibly suggestive photographic identification procedures . . . were utilized; if so, to determine whether in court identifications derive from a source independent of these suggestive procedures." (*Ibid.*) Pops's request cited *Watkins v. Sowders* (1981) 449 U.S. 341, 349, for the proposition that "such determination, outside the presence of the jury, is advisable and in some situations could be constitutionally compelled." (3CT 712.) The request also cited *Simmons v. United States* (1968) 390 U.S. 377, 385-389, and *United States v. Wade* (1967) 388 U.S. 218, 241, as well as California appellate court decisions, which in turn cited decisions of the high court. For example, the request cited *People v. Enos* (1973) 34 Cal.App. 3d 25, 38, which cited *Neil v. Biggers* (1972) 409 U.S. 188, 195, 199. (3CT 713, 716, 717.) Finally, the

request expressly set forth the five *Biggers* factors (see *United States v. Wade*, *supra*, 388 U.S. at p. 241), which a court considers in determining whether the identification was reliable even though the identification procedures were suggestive. (3CT 714-715.)

The prosecution filed a response. (3CT 793.) Apparently anticipating that the 402 hearing would involve Bowie's identification of Wilson, the prosecution's filing addressed Bowie's three identifications of Wilson at the photo lineup, the live lineup, and the preliminary hearing. (3CT 793, 794.) The prosecution's response noted that Bowie testified he was "positive" of his identifications of Wilson. (3CT 794.) Moreover, the prosecutor's brief presented the issue before the court as follows: "'A determination as to whether a pretrial photographic identification procedure violated due process requires the court to first decide whether the identification procedure was impermissibly suggestive.'" (3CT 796, quoting *People v. Leung* (1992) 5 Cal.App.4th 482, 497.)

Bowie testified at the 402 hearing, with the prosecutor examining Bowie on direct. (7RT 579.) Consistent with his written response, the prosecutor demonstrated his understanding from the outset that the hearing involved Bowie's identification of Wilson. (7RT 580-581 [Bowie identifies Wilson].) Indeed, the prosecutor examined Bowie thoroughly on his photo identification of Wilson. (7RT 595-597.) And presumably because the prosecutor believed he had the burden at the hearing (7RT 576 [prosecutor expressing his understanding that he had the burden), he also questioned Bowie on those circumstances that might show reliability, including Bowie's claim that he was certain of his photo identification of Wilson. (7RT 600-603.)

After the prosecutor and Pops's counsel were finished with their

examinations, the court called on Wilson's counsel to cross-examine Bowie. (7RT 621.) As counsel was about to begin, the prosecutor interrupted and stated: "Well, your honor, I assume for the record, then, that defendant Wilson is joining in this motion. I have not received any points and authorities." (7RT 622.) The court responded: "I'm assuming that." (*Ibid.*) Wilson's counsel then stated for the record: "We join." (*Ibid.*)

The court followed by asking the prosecutor if the court's memory was correct, that the prosecutor "addressed it" in his papers. (7RT 622.) As indicated, the court's memory was correct. The prosecution's brief addressed Bowie's photo identification of Wilson, even quoting Bowie as spontaneously offering the reason Wilson stood out from the others – "'the shape of his mouth.'" (3CT 794.)

The prosecutor did not answer the court directly, replying instead, "The *issue* would be, I assume, *the same* for this defendant." (7RT 622, italics added.) The court agreed, remarking, "Okay. Go on." (*Ibid.*)

Wilson's counsel examined Bowie on his identification of Wilson, not his identification of Pops, thereby reflecting an apparent understanding that when the prosecutor assumed the issue would be the same for Wilson, the prosecutor meant the issue whether the identification procedures used with Bowie to identify *Wilson* were unduly suggestive. (7RT 622.) In his examination of Bowie, Wilson's counsel asked only seven questions, each about the photo identification procedure. Counsel focused on the most salient aspect of the photograph that caused Wilson to stand out – something that Bowie described as a "smirk."

> Q And when you identified Mr. Wilson in this photograph that was marked People's 13, you told the police you could identify him for what reason?

A Because of the smirk on his mouth.

Q The smirk on his mouth?

A Yeah.

Q And when you – when you noted that smirk on his mouth, did you look at the other photographs?

A Yes.

Q How long did you look at the photographs before you identified no. 2?

A I glanced at them. I knew the moment I saw the photograph that was the defendant right there. That was the person.

Q And did you look at the other photographs before you decided that no. 2 was the person who was the driver?

A I knew that was the person.

Q So you didn't look at the other photographs?

A No.

Q And when you first went to the police the day after this incident occurred, did you tell the police that you would be able to identify the driver by the smirk on his mouth?

A No, I didn't.

(7RT 627-628.)

"People's 13," referred to by the prosecutor in his examination of Bowie, is the sixpack of photographs that contains Wilson's photo, located in position "#2." (7RT 595-597; prelim. hrg. exh. 13; trial exh. 50.) As the prosecutor noted to the court, People's 13 had been previously marked at the preliminary hearing. (7RT 595; see also 7RT 588; 3CT 811.)

After testimony concluded and Pops's counsel began his argument, the court interjected and framed the issue as follows: "isn't the question

whether it's unduly and improperly suggestive." (7RT 651.) Once Pops's counsel completed his argument, which triggered a discussion with the court, the judge turned to Wilson's counsel, who "submitted." (7RT 652.) The court asked Wilson's counsel no questions. The prosecutor submitted as well. (7RT 652-653.) The court denied the motion, thereby making an implied finding that the police identification procedures, which used the sixpack of photographs marked as preliminary hearing exhibit 13 (and later trial exhibit 50) to identify Wilson, were not unduly suggestive. The court added that "there was nothing in the facts that were presented to me in this particular case to indicate that anything made it so." (7RT 653.) The court further added that there was no testimony suggesting that an officer emphasized to the witness "this is what the officer believed or wanted him to pick out." (*Ibid.*)

Significantly, the clerk's transcript includes two minute orders memorializing the court's ruling. One minute order is in Wilson's name, and one is in Pops's. Both simply deny the motion: "Defense motion, pursuant to Evidence Code section 402, is denied." (3CT 812 [*People v. Wilson*]; 3CT 810 [*People v. Pops*].)

In sum, Pops requested a hearing to determine if he was denied due process because impermissibly suggestive photographic identification procedures were utilized; the prosecutor filed a response anticipating that the hearing would include Bowie's photo identification of Wilson, not only his identification of Pops; the prosecutor examined Bowie on his identification of Wilson, using the sixpack of photographs marked as preliminary hearing exhibit 13 and containing Wilson's photo; the prosecutor and the court each assumed that Wilson joined Pops's motion, the court accurately recalling that the prosecutor addressed Bowie's photo

identification of Wilson in respondent's filing; Wilson's counsel expressly joined Pops's motion and examined Bowie on his photo identification of Wilson only; counsel immediately zeroed in on the distinctive feature of Wilson's photograph that made the identification procedure unduly suggestive -- Wilson's photo was the only one picturing a young, African-American male with a "smirk" on his mouth, which as Bowie testified, was the "reason" he identified Wilson as the driver; the prosecutor acknowledged that the issue was the same for both Pops and Wilson; and the court agreed, conclusively settling the matter by defining the same issue for each defendant – whether the identification procedures, which included the use of each defendant's photograph to identify Wilson and Pops respectively, were unduly suggestive.

As indicated, so long as "the court understood the issue presented," the issue is preserved for appeal. (*People v. Clark*, *supra*, 52 Cal.4th at p. 966.) The trial court understood the issue here. Therefore, the issue is preserved for this appeal.

Lastly, respondent makes another forfeiture claim, not in the forfeiture subsection of Argument I (RB 118), but in subsection F, where respondent addresses the merits of Wilson's argument. Respondent claims that Wilson failed to argue below that Bowie's identification of Wilson was unreliable, and therefore Wilson forfeited the claim. Respondent cites no authority for this forfeiture claim, for there is none. (RB 130-131.) Pops's written motion, which Wilson joined in (7RT 622), requested a hearing to determine whether the identification procedures were reliable if the court found them unduly suggestive. (3CT 712.) In addition, the motion set forth the five *Biggers* factors which a court considers to determine the question of reliability. (3CT 714-715.) Hence, Wilson's joinder was sufficient to

raise an unreliability objection. And because the trial court simply denied Wilson's motion, with the implied finding that the identification procedures were not unduly suggestive (7RT 653; 3CT 812), the court had no need to consider whether Bowie's identification of Wilson was reliable despite any undue suggestiveness. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942 [no need to consider reliability where court finds lineups not unduly suggestive]; *People v. Ochoa* (1998) 19 Cal.4th 353, 412 ["'[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends'"].) Thus, any unreliability argument would have been futile. No forfeiture occurred. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793 ["A litigant need not object, however, if doing so would be futile"].)

2. Bowie's Identification Procedures Were Unduly Suggestive.

Turning to the merits and purporting to conduct an "independent review" of Wilson's photo array, respondent claims that "nothing particularly remarkable" appears in the array, and nothing was unduly suggestive about it. (RB 132; see exh. 50 [Wilson's photo array].) To assert this is to blind oneself to Bowie's reality. Wilson's photo stood out to Bowie precisely because there was something particularly remarkable about it to Bowie – Wilson's "smirky grin." (12RT 1598.)

Respondent compares the five other photos in the array to Wilson's and reaches different conclusions from Wilson. (Compare RB 132-133 to AOB 25-26.) At the same time, respondent ignores Bowie's testimony, where he volunteered without any prompting that a prominent feature of Wilson's face made Wilson stand out to him, compelling Bowie to select Wilson as the driver. At the 402 hearing, Bowie called Wilson's distinctive

feature a "smirk on his mouth." (7RT 627.) At trial, Bowie testified that he told Detective Chavers the day after the shooting that the suspect had a "funny shaped mouth." (12RT 1598.) Also at trial, twice Bowie described it as "the smirky grin on his face." (12RT 1647, 1648.) Finally, and most important, Bowie was examined at trial about his identification of Wilson at the photo lineup. First, he was asked if he looked at the photographs of the five fillers. Bowie answered: "I looked at all the pictures but I identified that one right away." Then, this question and answer followed: "And what was it that made you identify that one?" Bowie replied: "That smirky grin." (12RT 1660-1661.)

Except for a passing reference to Wilson's mouth possibly being "somewhat different" (RB 132-133), respondent does not even mention the single distinctive feature that mattered most to Bowie and upon which Wilson's opening brief focuses. Nevertheless, Bowie's testimony could not be clearer. He chose the one African-American male in the sixpack with an unusual looking mouth, just as Bowie indicated he likely would when he told the police the day after the shooting that the driver had a "funny shaped mouth." (12RT 1598.) Hence, Wilson's photo stood out to Bowie, making Wilson's identification unduly suggestive and causing Bowie to identify Wilson as the driver. (See *United States v. Wade*, *supra*, 388 U.S. at p. 229 [suggestive identification procedures "can be created . . . unintentionally in many subtle ways"].) Moreover, as shown in the opening brief, the identification was unreliable under the totality of the circumstances. (AOB 36-48.)

Respondent counters Wilson's opening brief by offering two decisions as "instructive," first, *People v. Smith* (1980) 109 Cal.App.3d 476, 486, which involved a photograph of a defendant with a "bad eye," and

second, *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 943, which included a photo of a defendant with a "droopy eye." Beyond stating general principles, neither case is helpful to respondent. Furthermore, neither case included testimony, as here, where the eyewitness stated that he was compelled by a distinctive feature of the defendant's photographed face to identify him as a suspect. (12RT 1660-1661.)

Respondent tenders *Smith* in support of its argument that Wilson's photo was not unduly suggestive. Respondent writes that *Smith* "rejected a similar claim." (RB 131.) Respondent misreads *Smith*, which did not reject a suggestiveness claim at all. Instead, *Smith* "assum[ed] arguendo that the use of the photographs was unduly suggestive." (*People v. Smith*, *supra*, 109 Cal.App.3d at p. 487.) Nevertheless, respondent quotes *Smith's* dictum that it was "'questionable whether the mere fact that the defendant was the only person in the photographs with a bad eye was improperly suggestive, as it represents only one of many physical characteristics of a face which could be readily identifiable.'" (*Id.* at p. 131.) But unlike the witnesses in *Smith*, the witness here made it plain through repeated testimony that the identification procedures were unduly suggestive because Wilson was the only person in the photo array with a "smirk on his mouth" (7RT 627), a "funny shaped mouth" (12RT 1598), and a "smirky grin" (12RT 1647, 1648, 1660-1661). None of the *Smith* witnesses testified similarly.

The *Smith* court found that all three witnesses who identified the defendant in court did so "based upon their own knowledge of defendant and not upon the photographs." (*People v. Smith*, *supra*, 109 Cal.App.3d at p. 488.) In other words, the court found the identifications reliable under the facts of that case.

The first witness, the operator of a cleaning and clothing shop, had

known the defendant for months as a customer of the shop, and had seen him on many occasions before the defendant allegedly stole a purse from the shop. (*Id.* at p. 480.) The second witness, the operator's wife and owner of the purse, had considerable contact with the defendant on the day he allegedly walked out of the shop with her purse hidden underneath his jacket. She even saw him face-to-face and his profile as well, and "noted he had a bad eye." (*Ibid.*) And the third witness, apparently called by the prosecutor to defeat the defendant's alibi defense, testified that she had seen and talked to the defendant around the time he was purportedly elsewhere, thereby providing a strong rebuttal to defendant's alleged alibi. (*Id.* at pp. 481, 488.) Again none of the three witnesses testified that the defendant's bad eye made him or her identify the defendant. Thus, *Smith* is unlike this case.

As noted, respondent offers that *Gonzalez* is also instructive, but it too does not support respondent's argument because of two dispositive distinctions between *Gonzalez* and this case. First, nothing in the *Gonzalez* opinion suggests that any of the four men who identified the defendant was influenced by the defendant's eye in making an identification. (*People v. Gonzalez, supra*, 38 Cal.4th at pp. 938-939, 943-944.) Bowie, however, indicated that he was influenced by Wilson's distinctive mouth when he identified him. Bowie made only one comment, among several, about physical appearance when he identified Wilson at the photo lineup. He said, "I know the shape of his mouth." (7RT 597; 12RT 1548; exh. 59.) At trial, Bowie confirmed making that statement. On cross-examination Bowie was asked, "And one of the things you mentioned when you looked at the six-pack photographs was that you know the shape of the individual's mouth; is that right?" Bowie answered, "Yes." (12RT 1647.)

Bowie then went on to volunteer immediately, "from the smirky grin on his face." (*Ibid.*) Clearly, unlike the eyewitnesses in *Gonzalez*, Bowie said that in making his identification, he was influenced by a distinctive feature that stood out in the defendant's photograph, his mouth.[3]

And second, in *Gonzalez*, "none of the witnesses described the gunman as having a distinctive eye, so any distinctiveness in the photograph would not suggest the witness should select that photograph." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 943.) Here, in contrast, Bowie described the driver to Detective Chavers the day after the shooting as having a "funny shaped mouth." (12RT 1598.) Thus, from the outset, the police were aware that the driver possessed a distinctive facial characteristic which, if it also appeared in the suspect's photograph shown to Bowie, would suggest that he should select that photograph. Bowie's reliance on the distinctiveness in Wilson's photograph – the shape of his mouth – significantly distinguishes this case from *Gonzalez*.

Respondent disagrees with Wilson's reading of the record, despite Bowie's testimony at trial that the day after the shooting, he described the driver to Detective Chavers as "[s]hort guy, light, funny shaped mouth." (12RT 1598.) Instead, respondent weakly offers that the record "tends to suggest" that Bowie did not tell Detective Chavers that the driver had "an odd shaped mouth." (RB 133.) Respondent contends that Bowie first mentioned the shape of the driver's mouth a month later when he chose

---

[3] Bowie's complete statement at the photo lineup was as follows: "No. 2, he was the driver. He was the one with the Nine. It looks like the gun you have, indicating Detective Reynolds' gun, which is a Glock. *I know for sure that's him. I know the shape of his mouth.* That's the motherfucker. He was the driver." (7RT 597, italics added; 12RT 1647; exh. 59.)

Wilson's photo. (*Ibid.*)

Respondent's reading of the record ignores Bowie's "funny shaped mouth" testimony, and respondent submits the following instead: "On cross-examination, after attempting to have Bowie refresh his recollection with the detective's report, defense counsel asked the following: 'So on January 26th, 1998, you did not tell Detective Chavers that you could recall the shape of the driver's mouth? Bowie responded, 'I don't recall.'" (RB 133, citing 12RT 1648.)

Given that Bowie did not respond to defense counsel's offer to have his recollection refreshed, and he simply testified instead, it is unclear why respondent mentions defense counsel's attempt to refresh Bowie's memory. In any case, the record referred to by respondent provides as follows:

Q Would looking at a report that Detective Chavers wrote in reference to her interview of January 26 of you refresh your memory as to whether you told her about remembering the shape of the driver's mouth?

A I said that. I never doubted -- denied that I didn't say that. I said that I recognized him from that smirky grin on his face. That, I remember.

When something happens to you like that, you're going to remember something about the person so –

Q So on January 26th, 1998, you did not tell Detective Chavers that you could recall the shape of the driver's mouth?

A I don't recall.

(12RT 1648.)

Before this testimony, defense counsel examined Bowie on the contents of Detective Chavers's January 26 report. Counsel gave page 10

of the report to Bowie to read. (12RT 1596.) Bowie read the page and was asked to tell the jury the description of the *passenger* that he gave to Detective Chavers. Bowie so testified. (12RT 1596-1598.) Then counsel asked Bowie about the driver.

Q Okay. Now, do you recollect at this time how you described the driver?

A Short guy, light, funny shaped mouth.

Q Did you indicate to Detective Chavers that the driver was lighter than the passenger?

A Yes.

(12RT 1598.)

Bowie testified further that he told Detective Chavers the driver was a "male black" and "had a light complexion." Bowie did not recall if he told her that the driver had a thin build, or that he wore dark clothing. He guessed that the driver was 25 to 30 years old. (12RT 1598.)

Bowie's testimony is not entirely clear, but it is partly very clear. Bowie plainly told Detective Chavers that the driver had a "funny shaped face" (12RT 1598.) Later Bowie did *not* recall *not* telling Detective Chavers that he could recall the shape of the driver's mouth. (12RT 1648.) Combining these excerpts of Bowie's testimony means Bowie recollected describing the driver to Detective Chavers as having a funny shaped face, but he did not recall not telling her if he could recall the shape of his mouth. In other words, Bowie may have told Detective Chavers that he could recall the shape of the driver's mouth, which he described to her as funny shaped. In short, Bowie's testimony does not support respondent's reading of the record, while it supports Wilson's view that virtually from the beginning, the police were aware that the driver had a funny shaped mouth. As Bowie

testified, "When something happens to you like that, you're going to remember something about the person so – ." (12RT 1648.)

Respondent also relies on *Gonzalez* to speculate that, even if Wilson's mouth is somewhat different, "'it would be virtually impossible to find five others who had' a particularly unique facial feature 'and who also sufficiently resembled defendant in other respects.'" (RB 133, quoting *People v. Gonzalez, supra*, 38 Cal.4th at p. 934.) There is no evidence in the record to support respondent's conjecture. Certainly law enforcement said no such thing. That is, respondent provides no testimony or evidence from the police that, out of the thousands of photographs available to the Compton Police Department (17RT 2592, 2602 [Compton police conducted photo lineup), including mug shots and DMV photographs, even Internet photos, they were unable to find photographs of five light skinned African-American males with lips that resembled Wilson's. (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1244 [not unduly suggestive for detective to show witnesses photo lineup composed of photos taken from *DMV records*, including photo of defendant]; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1267 [detective "created a photo lineup using random photos from the *DMV database* with similar descriptions"]; *People v. Dolliver* (1986) 181 Cal.App.3d 49, 56-57 [photographic lineup made from *mug shots* not unduly suggestive]; *People v. Contreras* (1993) 17 Cal.App.4th 813, 820 [not improper to show witness photo lineup made from mug shots].)

Moreover, despite Bowie's notice to Detective Chavers that the driver had a "funny shaped mouth" (12RT 1598), the prosecution produced no evidence that the police made any effort to use computer software to alter the fillers' photographs to resemble Wilson's. (See *People v. Beckley*

(2010) 185 Cal.App.4th 509, 515 ["with the advent of computer software programs such as Adobe Photoshop 'it does not always take skill, experience, or even cognizance to alter a digital photo'"].) Eight years before Bowie looked at Wilson's photo array with the five fillers (7RT 597), the United States Department of Justice issued Eyewitness Evidence: A Guide for Law Enforcement ("DOJ Guide"), whose authors recommended: "When there is a limited/inadequate description of the perpetrator provided by the witness . . . fillers should resemble the suspect in significant features." (*Id.* at p. 29.) The authors also recommended "a suspect's distinctive features – scars, tattoos, etc. – should either be concealed or artificially added to all of the lineup fillers." (*Ibid.*; see *State v. Lawson* (2012) 352 Or. 724, 781 [291 P.3d 673, 707] [citing the DOJ Guide, among other authorities].)[4] The police could have used computer software to alter Wilson's photograph or the fillers' photographs so all lips, Wilson's distinctive feature, looked similar.[5]

---

[4] Wilson also cites the DOJ Guide in the opening brief. (AOB 33-34.) Immediately preceding A Message from the Attorney General, the DOJ Guide notes at p. ii: "Opinions or points of view expressed in this document represent a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice." The 34 authors who created the DOJ Guide included 23 representatives from law enforcement (police, sheriffs, prosecutors, and an investigator), 7 authors holding doctorates, 3 attorneys, and only 1 public defender. (See DOJ Guide at pp. v-vi.)

[5] Photoshop was first issued in February 1990, eight years before Bowie identified Wilson from the photo array. During the 1990s, Photoshop was widely available, with more than three million copies sold. (<http://graphicssoft.about.com/od/photoshop/ig/20-Years-of-Photoshop/Adobe-Photoshop-1-0.htm>; <http://www.nytimes.com/2015/02/19/technology/personaltech/photoshop-a

(continued...)

Furthermore, respondent's reliance on the "virtually impossible" quote from *Gonzalez* is misplaced. The quote actually originates from *People v. Carpenter*, *supra*, 15 Cal.4th 312, a case involving a suggestiveness claim arising from a live lineup, not as here, a photo lineup. In *Carpenter*, the gunman was described by witnesses as clean shaven, but the defendant started growing a beard six weeks before the physical lineup, apparently just after the shooting. The defendant claimed that the other participants in the lineup had thicker beards than his, making the lineup impermissibly suggestive. In response, the *Carpenter* Court observed, "it would be virtually impossible to find five others who had started growing their beards six weeks earlier and who also sufficiently resembled defendant in other respects." (*Id.* at p. 367.) This observation is sound under *Carpenter's* facts. It seems most unlikely that the police would have been able to find five men who resembled the defendant and who, like the defendant, had started growing a beard six weeks before the lineup.

But no such observation is appropriate here. Wilson's was a photo lineup, and the police should have had no difficulty finding photographs of five young men who resembled Wilson, including his lips, given the thousands of DMV photos and mug shots available to them. Or the police could have altered the photos so all looked similar.

The other cases cited by respondent are in line with Wilson's view. (See RB 131.) *People v. Wimberly* (1992) 5 Cal.App.4th 773 merely points

---

[5](...continued)
t-25-a-thriving-chameleon-adapts-to-an-instagram-world.html?_r=0>.) Adobe's website touts Photoshop as follows: "The world's most advanced image editing app lets you enhance, retouch, and manipulate photographs and other images in any way you can imagine." (<http://www.adobe.com/products/photoshop.h ml>.)

out that the participants in a lineup need not be "nearly identical." (*Id.* at p. 790.) Wilson does not claim otherwise. After all, a person who looks nearly identical to the suspect would likely be the suspect's twin. Including persons in a lineup nearly identical to a suspect would merely serve to confuse an eyewitness and would not fairly test the witness's ability to identify a suspect. Wilson submits that a photo array should be composed of persons who *resemble* the suspect but are not nearly identical in appearance to the suspect. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 117; DOJ Guide, *supra*, at p. 29, ¶ 2.)

Respondent next cites *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052, for the notion that a photographic lineup is not unconstitutional "simply" because a suspect's photograph is much more distinguishable from the others in the lineup. To illustrate, respondent offers examples of decisions in which appellate courts upheld the validity of identification procedures where the suspect wore clothing different from the others in the lineup (*People v. Johnson* (1992) 3 Cal.4th 1183, 1215-1218 [jail clothing]; *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222 [a red shirt]), or the suspect had the darkest skin color (*People v. Guillebeau* (1980) 107 Cal.App.3d 531, 556-557).

Respondent's offering is largely beside the point. The issue is always "whether anything causes the suspect to 'stand out' from the others in a way that would suggest the witness should select the suspect." (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.) If the suspect's photo is different from the fillers' photos, but that difference does not cause the suspect to stand out and the eyewitness to choose the suspect's photo, then the difference is insignificant. Thus, in *Johnson* the eyewitness did not realize that the suspect was wearing jail clothing in the photo that she

selected. (*People v. Johnson*, *supra*, 3 Cal.4th at pp. 1217-1218.) In *DeSantis*, the fact that during the photo lineup, the defendant wore a soiled red or orange shirt that bore no resemblance to the red jacket worn by the perpetrator, did not make the lineup unduly suggestive, particularly because the eyewitness did not even notice the shirt in the defendant's photo. (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222.) And in *Guillebeau*, the court held that a darker complexion "by itself" could not render an identification unduly suggestive; in other words, more was required. (*People v. Guillebeau*, *supra*, 107 Cal.App.3d at p. 557.) Wilson disputes none of this, and none is relevant to this case.

Here, Bowie testified that he told Detective Chavers the day after the shooting that the driver had a "funny shaped mouth." (12RT 1598.) Then later, when Bowie was shown the photo array containing Wilson's picture, Bowie chose Wilson's photo because of the shape of Wilson's mouth. When Bowie saw Wilson's picture at the photographic lineup, he explained why he chose Wilson: "I know for sure that's him. I know the shape of his mouth." (Trial exh. 59; trial exh. 50, #2 [prelim. hrg. exh. 13, #2].) None of the other photographs pictured a young African-American male with a funny shaped mouth and light skin (*ibid.*), the description of the suspect provided by Bowie to Detective Chavers (12RT 1598). Thus, the day after the shooting, the police had notice that the suspect was a young African-American male with light skin and a funny shaped mouth. Nevertheless, the police composed a photo array with only one person having a funny shaped mouth. Thus, it was inevitable that as soon as Bowie saw a sixpack containing only a single photo of a young African-American male with light skin and a funny shaped mouth, Bowie would pick that photo. And Bowie did.

Respondent's examples are therefore unavailing because in none of them did the eyewitness testify that the pictured differences made them choose each defendant. Here, however, Bowie testified exactly that – Wilson's smirk stood out to Bowie and made him choose Wilson. (7RT 597; 12RT 1548; 12RT 1648 ["I recognized him from that smirky grin on his face"].)

Accordingly, respondent fails to show that Wilson's photo did not stand out to Bowie in the array shown to him. As demonstrated here and in the opening brief, the photo array shown to Bowie was unduly suggestive to him because Wilson's distinctive mouth stood out to Bowie, causing him to select Bowie as the driver suspect. (*People v. Avila*, *supra*, 46 Cal.4th at p. 698.)

3. Bowie's Identification Was Not Reliable.

Even where identification procedures used by the police were unduly suggestive, evidence of the identification may be admissible, but only if the evidence was reliable under the totality of circumstances. (*Neil v. Biggers*, *supra*, 409 U.S. at p. 199; *People v. Kennedy* (2005) 36 Cal.4th 595, 610 [*Biggers* is "controlling authority"].) As demonstrated in the opening brief, Bowie's identification of Wilson was not reliable. (AOB 36- 54.) Hence, it was not admissible.

Respondent claims otherwise "for the exact same reasons discussed above." (RB 133.) Respondent does not indicate where those reasons can be found in its brief. Respondent's counter to Wilson's argument begins with an argumentative heading directed to "Appellant Wilson" on page 130, section F of Respondent's Brief. But between the heading and the "exact same reasons" assertion, respondent presents no rebuttal to Wilson's argument that Bowie's identification was not reliable. Earlier, however, in

respondent's argument directed against Pops's attack on Bowie's identification of Pops (see RB 121, section D, beginning with argumentative heading, "The Photographic Identification Procedure Used for Bowie in Which *Pops* Was Selected . . ." italics added), respondent claims that Wilson pointed a Glock pistol at Bowie. (RB 122.) Respondent further alleges: "[t]his encounter lasted for a *significant period of time* as Bowie stood *looking at appellants* while Dunn and Hurd arrived in their respective cars, parked, and each walked into the building. (12RT 1515-1516, 1556-1558, 1609-1610, 1636; 13RT 1728-1729; 17RT 2579-2582.) Bowie then had additional time *to observe appellants* as they got out of the car, grabbed him, and forced him into the building at gunpoint. (12RT 1516-1517, 1519-1520, 1580.) There were no issues of lighting conditions as Bowie saw appellants outside in broad daylight." (RB 123, italics added.) Lastly, on page 133 of Respondent's Brief, respondent asserts that Bowie had a "good opportunity to view both appellants for an extended period of time and in close proximity." (RB 133.)

This is the full extent of respondent's discussion of the first two *Biggers* factors, the opportunity of the witness to view the suspect, and the witness's degree of attention. (*Neil v. Biggers*, *supra*, 409 U.S. at p. 199.) Respondent's factual offering does not even distinguish between the time that Bowie looked at the *driver* and the time he looked at the *passenger*. Instead, respondent's argument proceeds as if Bowie looked at both simultaneously at all times, but common sense dictates against this view.

So does Bowie's testimony which respondent cites. According to respondent, Bowie testified that the passenger got out of the car "first" and grabbed Bowie "in the back of [his] collar." The passenger "put his gun

under [Bowie's] arm and used [him] as a shield." (RT 12RT 1516-1517.) Then the driver got out of the car and put his gun, a 9mm Glock, in Bowie's "back," and they marched him inside. (12RT 1517, 1580.) "They" told everyone to get down and not to move. Bowie complied. (12RT 1517.)

Thus, the testimony which respondent offers to show that Bowie observed the driver for an extended period of time, does not even show that Bowie observed the driver for any time at all. Rather, the testimony shows that Bowie had his back to the driver from the moment the driver got out of the car. In addition, this testimony says nothing about the driver's features – his eyes, his nose, his hair, his ears, his skin color, the size or shape of the driver's head, his age, his height, his clothing, his voice, or any facial feature whatsoever that an eyewitness would typically mention in describing what the witness relied on in identifying someone. Nor does respondent say anything about an item of clothing, so prominent that it did not escape the attention of the only other eyewitnesses, Christopher Williams and Anthony Brown, who both saw a cap sitting on top of the driver's head. (13RT 1765; 19RT 3071.)

The only thing Bowie associates with the driver is the driver's gun, a 9mm Glock. Bowie was able to describe the specific gun held by the driver, down to its caliber, but as reflected in respondent's record citations, Bowie was unable to describe the hand that held the gun, for example, the size of the hand or whether the driver wore a glove. Thus, Bowie's own testimony is strong evidence that he only paid attention to the driver's gun. As the opening brief notes, this is a common occurrence among gun assault victims, who focus on the gun and not on the gunman's face. (AOB 113.) As Bowie testified, "Once the guns was pulled on me, I froze." (12RT 1577.)

Respondent does not address the third *Biggers* factor, "the accuracy of the witness' prior description of the criminal." (*Neil v. Biggers*, *supra*, 409 U.S. at p. 199.) Respondent avoids this factor because it demonstrates best that Bowie never saw the driver face-to-face. A mere 11 days after the shooting, Bowie failed to provide any usable description of the driver to a sketch artist. (12RT 1599, 1601, 1647; 1CT 145, 188, 246.) The sketch artist testified that in his experience, an eyewitness is usually able to tell him about "some unusual aspect" of a suspect that the witness saw. (17RT 2556.) Bowie said nothing about the driver's mouth, suggesting he did not look at the driver's face, whether because he had his back to the driver or because he focused on the driver's gun, or both.

The fourth factor is "the level of certainty demonstrated by the witness at the confrontation." (*Neil v. Biggers*, *supra*, 409 U.S. at p. 199.) Respondent relies on Bowie's claim that he was certain of his identification of Wilson at the photo lineup (RB 133), despite the fact that only 18 days before the identification, 11 days after the shooting, Bowie was no help to the sketch artist in drawing the driver. (12RT 1659; 17RT 2556.)

The *Biggers* decision is 43 years old. Not surprisingly, considerable scientific progress has been made in the area of eyewitness identification since then. As Justice Sotomayor has noted, studies demonstrate that eyewitness confidence in assessing identifications "is a poor gauge of accuracy." (*Perry v. New Hampshire* (2012) 565 U.S. __ [132 S.Ct. 716, 739][dis. opn. of Sotomayor, J.] [citing studies].) Indeed, studies questioning its relevance to the reliability of eyewitness identification led one court to "observe that this *Biggers* factor (witness certainty), in particular, has come under withering attack as not relevant to the reliability analysis. While acknowledging that under current law an eyewitness's level

of certainty in his identification remains a relevant factor in assessing reliability, many courts question its usefulness in light of considerable research showing that an eyewitness's confidence and accuracy have little correlation." (*United States v. Greene* (4th Cir. 2012) 704 F.3d 298, 309, fn. 4, citing cases and studies.) In a groundbreaking decision, the New Jersey Supreme Court has concluded "that accuracy and confidence 'may not be related to one another at all.'" (*State v. Henderson* (2011) 208 N.J. 208, 236, citations omitted.)

Nevertheless, assuming the witness-certainty factor remains viable under the law, and assuming at the same time that Bowie's testimony was true, Bowie's certainty demonstrates minimal reliability at most.

But Bowie's testimony was not true. Given Bowie's criminal background and his other lies to the jury (see AOB 107-109), Bowie's attempt to convince the jury that he saw the driver's face by identifying Wilson should be rejected as not true. The testimony respondent presents shows Bowie's back to the driver and his focus on a gun instead of a face, as evidenced by his later failure to describe the driver to the sketch artist.

Though not necessary to a conclusion that Bowie was untruthful in his identification testimony, Bowie's identification of Wilson and his claimed certainty are further undermined by the suspicious circumstances attendant to the identification itself. Bowie testified under oath at the 402 hearing that the identification occurred at the police station. (7RT 595.) It did not. It happened at Bowie's apartment at 6301 South Atlantic, #32, Long Beach. (Exh. 59; 7RT 649; 1CT 168.) Having two detectives show up at a witness's apartment with a sixpack of photos has to be an irregular event, even for an experienced felon like Bowie. (Exh. 59; 7RT 649 [identification witnessed by Chavers and conducted by Reynolds].) It is

unlikely that Bowie forgot where the photo lineup occurred, but likely he chose to lie again while thinking that a court would frown upon an identification performed at his nearby apartment, given the police station was at 301 South Willowbrook Ave., Compton. (Exh. 59.)

Like the advances in research on eyewitness certainty, substantial progress has been made in understanding the unintended influence the police may have on a photo identification. "Research has shown that lineup administrators familiar with the suspect may leak that information 'by consciously or unconsciously communicating to witnesses which lineup member is the suspect.'" (*State v. Henderson*, *supra*, 208 N.J. at p. 248; *State v. Lawson*, *supra*, 352 Or. at pp. 741-742 [same]; DOJ Guide, *supra*, at p. 9 ["[I]nvestigators' unintentional cues (e.g., body language, tone of voice) may negatively impact the reliability of eyewitness evidence"].) For this reason, in its Report and Recommendations Regarding Eye Witness Identification Procedures, Recommendation No. 1, the California Commission on the Fair Administration of Justice advises that "the person displaying photos in a photo spread or operating a lineup [should not be] aware of the identity of the actual suspect."[6]

In the informal environment of Bowie's apartment, especially in contrast to a police station, either Detective Chavers or Detective Reynolds, or both, knowing the identity of the suspect (17RT 2603), may have unintentionally signaled to Bowie the suspect's identification. Thus, the identification may be unreliable for this additional reason. (*State v.*

---

[6] <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>

Henderson, supra, 208 N.J. at p. 248.)[7]

Even viewing Bowie's testimony in a forgiving light, his "absolutely positive," unquestioned certainty, with "no doubt whatsoever" that his identification was accurate (12RT 1519, 1520, 1571-1572, 1668, 1680), may have been a case of hyperbole, motivated by guilt that he sparked his friend's deaths by saving himself at their expense. (12RT 1531 ["I jumped up and ran"]; 12RT 1533 [and then "I heard the shots"].) Regardless, Bowie was mistaken in his identification of Wilson as the driver. (*State v. Henderson, supra*, 208 N.J. at p. 244 ["some mistaken eyewitnesses . . . exude supreme confidence in their identifications"].)

One final note on Bowie's purported certainty. According to respondent, "[t]he same facial feature of appellant Wilson's mouth that he asserts was so distinctive as to make the photographic array suggestive, would necessarily tend to make misidentification unlikely." (RB 134.) If a court were to accept respondent's point as valid, then it would put Wilson in an untenable bind, something like a Catch-22. Under respondent's approach, the state would be able to use the suggestiveness of the identification against the defendant. Perhaps the high court had this unfairness in mind when it did not include the distinctive feature that makes a suspect stand out as one of the five reliability factors under *Biggers*.

Nevertheless, the high court did not exclude it from a lower court's

---

[7] Although Detective Reynolds testified at trial on June 15, 1999, that he first showed the array with Wilson's photo to Bowie at the Compton Police Station on February 23, 1998 (17RT 2603), he actually showed it on that date to Bowie at Bowie's apartment, as Detective Reynolds's testimony at the 402 hearing on March 19, 1999 (7RT 649) shows, and more importantly as the photo array itself indicates (exh. 59 [showing location of identification at "6301 South Atlantic #32"]).

consideration entirely. It effectively comes into play under the third *Biggers* factor, "the accuracy of the witness' prior description of the criminal." (*Neil v. Biggers*, *supra*, 409 U.S. at p. 199.) An eyewitness, especially one like Bowie, who was adamant that he was able to identify the driver because, as Bowie said, "I know the shape of his mouth" (exh. 59), should be able to recall the distinctive feature of the suspect when providing the "prior description" of the suspect. The sketch artist said as much when he testified that in his experience, an eyewitness is usually able to tell him about "some unusual aspect" of a suspect that the witness saw. (17RT 2556.) Thus, if the driver had the unusual looking mouth that Bowie identified when he looked at Wilson's photo, then Bowie should have been able to describe it to the sketch artist. That he did not means that Wilson was not the driver.

Respondent submits that the fifth and final *Biggers* factor -- the length of time between the crime and the confrontation (*Neil v. Biggers*, *supra*, 409 U.S. at p. 200) -- favors reliability. (RB 134.) In arguing that this *Biggers* factor also supports a finding of reliability with respect to Bowie's identification of *Pops*, respondent cites *United States v. Rivera-Rivera* (1st Cir. 2009) 555 F.3d 277, 284-285, for the proposition "that six months between crime and in-court identification is 'de minimis compared to other cases.'" (RB 123.) The "other cases" that *Rivera-Rivera* mentions – *United States v. Henderson* (1st Cir.2003) 320 F.3d 92, 100, and *United States v. Watson* (1st Cir.1996) 76 F.3d 4, 6 – found the time between the offense and identification would have favored a finding of *unreliability* but for "the strength of the other factors" in *Henderson*, *supra*, 320 F.3d at p. 100, and the fact that "the other reliability criteria were sufficiently persuasive to overcome any unreliability engendered by the

delay" in *Watson, supra*, 76 F.3d at p. 6. As shown, the other *Biggers* factors do not favor respondent with respect to Bowie's identification of Wilson. Hence, *Rivera-Rivera's* rationale does not apply here.

Respondent makes no attempt to show that the research and common sense that Wilson offers in his opening brief are somehow in error. Wilson's authority and straightforward point, that people's memories decline sharply after an event and never improve, have special application here. (AOB 45.) Bowie provided the best example of a permanently faded memory when, only 11 days after the shooting, he was unable to describe the driver to the sketch artist in any detail. (12RT 1659; 17RT 2556.) By then, Bowie had even forgotten about the driver's mouth, assuming it was real. (*Ibid.*) Thus, Bowie had an extremely poor memory. The length of time between the shooting and the photo identification merely made it worse.

In sum, respondent fails to rebut the showing in the opening brief that Bowie did not have an adequate opportunity to view the driver; respondent essentially ignores the second *Biggers* factor regarding the witness's degree of attention; Bowie's prior description of the driver was virtually no description at all, it even failed to include an obvious sight, that the driver wore a cap, noticeable enough that the two other eyewitnesses testified exactly that; Bowie's exaggerated level of certainty suggests compensation for the opposite; and Bowie proved to have a poor memory with the passage of time.

Applying the *Biggers* factors demonstrates that Bowie's identification of Wilson as the driver was not reliable. Consequently, any "indicia of reliability" were not "strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances." (*Perry v. New*

Hampshire, supra, 565 U.S. __ [132 S.Ct. at p. 739].) The trial court erred in admitting evidence of Bowie's identification of Wilson as the driver.

4. The Court's Error Was Prejudicial.

Respondent claims that any error in admitting evidence of Bowie's identification of Wilson as the driver was harmless. (RB 134-135.) Not so. As shown in the opening brief, Bowie was the prosecution's star witness, and without his many identifications with their exaggerated certainty of Wilson as the driver, witnessed by Detective Reynolds, Wilson likely would have been acquitted. (AOB 55-73.)

The prosecutor did not simply have Bowie identify Wilson as the driver and let it go at that. Instead, beginning with his opening statement, the prosecutor told the jury that Bowie would identify Wilson as the driver. (12RT 1478.) Then the prosecutor called Bowie as his first witness, a trial's most important placement of a witness seeking to have the greatest impact. As promised, Bowie identified Wilson as the driver. In fact, Bowie asserted for the jury that there was not any doubt in his mind that Wilson was the driver. (12RT 1519.) One would think that this testimony would suffice to convey Bowie's conviction, but instead the prosecutor had Bowie ratchet up his certainty by telling the jury that he was "absolutely positive" that Wilson was the driver. (12RT 1520.)

The prosecutor examined Bowie about the photo lineup as well. Asked whether he was "positive" of his identification of the driver, previously identified by Bowie as Wilson, Bowie answered affirmatively. (12RT 1548.) The prosecutor followed that up by having Bowie tell the jury that he also identified Wilson at a live lineup. (12RT 1553.) Finally, on redirect the prosecutor elicited testimony from Bowie that he identified Wilson at the preliminary hearing, too. (12RT 1666.) In response to the

prosecutor's question whether Bowie was positive that Wilson was the driver, Bowie said he was "[a]bsolutely positive." (12RT 1668.) Immediately thereafter, the prosecutor questioned Bowie about his testimony at the 402 hearing. (12RT 1668.) Once again the prosecutor asked Bowie if he testified at the hearing that he was positive Wilson was the driver. And once again, Bowie answered: "Absolutely positive." (RT 1669.)

Thus, aside from the *nine* references to "Wilson" made by the prosecutor and Bowie when Bowie recounted the events at the carwash (12RT 1526, 1529 [twice], 1531 [twice], 1532, 1561, 1570, 1679), Bowie identified Wilson as the driver *seven* times, with four of those times Bowie either confirming he had no doubt or he was "absolutely positive" that Wilson was the driver.

The prosecutor also called Detective Reynolds, who corroborated that Bowie had identified Wilson at the photo and live lineups. (17RT 2602-2606, 2617, 2620.)

Later during his closing argument, the prosecutor emphasized to the jury that Bowie testified he was "absolutely positive" and there was "no doubt in his mind" that Wilson was the driver. (28RT 4506.)

Finally, the judge instructed the jury that, in determining the weight of Bowie's testimony identifying Wilson as the driver, the law required the jury to consider "the extent to which" Bowie was "certain" of his identification. (29RT 4763; CALJIC No. 2.92.)

In light of Bowie's oft-repeated testimony that he was "absolutely positive" that Wilson was the driver, Detective Reynolds's corroboration, the prosecutor's opening statement and closing argument asserting the absolute certainty of Bowie's identification, and the court's mandate that

the jury should consider the extent of Bowie's certainty, it is fair to say that the jury very likely concluded Wilson was the driver, and consequently that he was guilty of the crimes charged against him.

In the section of respondent's brief where respondent claims that any error in admitting evidence of *Pops's* identification was harmless (RB 124), respondent cites three cases: *Manson v. Brathwaite* (1977) 432 U.S. 98, 117; *Simmons v. United States* (1968) 390 U.S. 377, 384; and *People v. Gordon* (1990) 50 Cal.3d 1223, 1243-1244. None of these cases found error and therefore did not have occasion to consider the harmlessness of the admission of evidence of the defendant's identification. (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 117 ["We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution concerning a *post-Stovall* identification, and that those criteria are satisfactorily met and complied with here"]; *Simmons v. United States*, *supra*, 390 U.S. at p. 384 ["we conclude that petitioner Simmons' claim on this score must fail"]; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1242 ["we find no error in the court's ruling"].) Hence, these cases do not pertain to a *Chapman* harmless error analysis. (*People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [error in admission of pretrial identification evidence evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24]; *People v. Slutts* (1968) 259 Cal.App.2d 886, 892 [same].)

Next, respondent refers to "overwhelming evidence of appellants' guilty [sic], the jury instructions given as to witness identification, and the crossexamination [sic] of the witnesses on the subject discussed in subpart E, *ante*." The subject discussed in subpart E is the error in admitting evidence of *Pops's* identification, not Wilson's. (RB 135.) Respondent's

vague references are thus unavailing. In any case, as shown in the opening brief, absent Bowie's identification of Wilson, the prosecution's case was weak. (AOB 55-73.) And taking into account the instruction that required the jury to consider the certainty of Bowie's identifications of Wilson, merely serves to highlight just how impossible respondent's task is, in meeting *Chapman's* weighty burden "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Furthermore, it bears mentioning that the only other eyewitnesses to identify Wilson, Anthony Brown and Christopher Williams, provided the jurors with identifications that could have been readily rejected by them. If the jury concurred in respondent's view, then Brown's identification of Wilson "was essentially not an identification at all." (RB 135.) And Williams's identification was most problematic. Like Brown, who identified Malone as the driver 18 days after the shooting (19RT 3060, 3061 ["I think No. 1 [Malone] was the driver"]), Williams identified Malone as the driver the same day. (18RT 2732.) In so doing, Williams said: "The subject in photograph no. 1 [Malone] looks like the person who was wearing a black designer wave cap with the white writing on his head. *He's the person that was driving the black Honda.*" (18RT 2732, italics added.) Then, 29 days after the shooting, Williams was shown a photo of Wilson. Williams did not identify Wilson. (13RT 1772-1773; exh. 50, #2.) Instead, when looking at Wilson's photo, Williams said that Wilson did not "look like" the driver. (13RT 1773.) Williams then confessed a key point that respondent misses, "I really did not get a good look at him." (13RT 1774.)

Respondent tries to excuse Williams's identification of Malone by asserting that Wilson and Malone had remarkable similarities, without

saying what they are. (RB 126, fn. 73.) They do not have them, in any case, and no one at trial (including especially the prosecutor), said that they did. (Compare exh. 47, #1 [Malone] and exh. 50, #2 [Wilson].)

Thus, of the three eyewitnesses, Bowie was the only one who did not identify Malone as the driver, thus underscoring the importance of Bowie's identification to the state's case against Wilson.

To determine prejudice, the appropriate inquiry is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error" in admitting Bowie's identification of Wilson. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, original italics.) The verdicts against Wilson are surely not unattributable to the evidence regarding Bowie's identification of Wilson. The entire judgment must be reversed, else Bowie's misidentification leads to more tragedy. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

B. Admitting Evidence of Brown's Identification of Wilson Was Prejudicial Error.

Respondent claims that Wilson forfeited his right to argue on appeal that the trial court erred in admitting evidence of Brown's identification of Wilson. For the reasons stated in the opening brief, the argument is not forfeited. (AOB 22-23.) In addition, because respondent raises no factual dispute, this Court is in as good a position as the trial court to review the matter. Hence, this Court may find no forfeiture. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

With respect to Brown's identification of Wilson, respondent assumes for the sake of argument that the identification was suggestive to some degree because Brown saw Wilson in the courtroom before he later identified him. Respondent asserts, nevertheless, that Brown's

identification of Wilson was "sufficiently reliable to be considered by the jury." (RB 137.)

From there, it is difficult to follow respondent's argument. Respondent cites a single case (*People v. Alexander* (2010) 49 Cal.4th 846, 902), and that is for the proposition that a photo or live lineup could not have tainted later in-court testimony relating to identification where a witness does not identify a defendant in court. But *Alexander* does not apply here, first, because *Alexander* held that there was no unduly suggestive procedure under the facts of that case, and therefore the Court did not evaluate the reliability of the identification. (*Id.* at 903.) Here, respondent does not argue the identification procedure was not unduly suggestive, only instead that Brown's identification of Wilson was reliable.

Second, unlike *Alexander*, where the witness did not identify the defendant in court, Brown – deemed unavailable by the court – identified Wilson in court by virtue of his preliminary hearing testimony having been read to the jury. Although respondent comes close to claiming that Brown did not identify Wilson, respondent does not explicitly say so, as these quotes from Respondent's Brief reveal.

"Brown identified appellants at a live lineup on June 9, 1998." (RB 9.)

"Although Brown could not make a positive identification, he identified appellant Wilson as someone who most closely resembled the driver based on his light complexion." (RB 17.)

"Appellants Are Identified During Live Lineups By . . . Brown." (RB 42.)

"Brown picked out appellant Wilson due to his complexion which was closest to the suspect who drove away in Dunn's El Camino. He could

not be positive in his identification." (RB 43.)

Brown identified Wilson and, as shown below, his identification was brilliantly exploited by the prosecutor.

Third, *Biggers* supplies the five factors on which a court may rely to determine whether an identification is reliable, even though the confrontation procedure was suggestive. (*Neil v. Biggers*, *supra*, 409 U.S. at pp. 199-200.) Respondent makes no effort to apply those factors in respondent's favor. Instead, in the "Background" portion of its argument, respondent quotes Brown as stating, "I really didn't get a good look at him." (RB 136, citing 24RT 3977.) Respondent then concedes in its "Analysis" section that "Brown admittedly had but a fleeting glance of the suspect," and "Brown consistently was unable to identify appellant Wilson." (RB 137.) As shown in the opening brief, application of the *Biggers* factors demonstrates that Brown's identification of Wilson was not reliable. (AOB 53-54.) And again, respondent makes no effort to rebut this showing, but effectively confirms it instead. Hence, the court erred in admitting evidence of Brown's identification.

With respect to whether the court's error was not harmless beyond a reasonable doubt, the prosecutor was quite adroit in his use of Brown's identification, making sure it was anything but harmless. (AOB 55-73.) He presented the unseen witness, Anthony Brown, as the one man who was above reproach, because he was so honest in his identification of Wilson. The other witnesses to the shooting, Bowie and Williams, repeatedly lied and were convicted felons, Bowie having eight convictions alone. (AOB 59-62 [Williams]; 107-109 [Bowie].) The prosecutor was desperate for a witness who would corroborate their shaky identifications. Ironically, Brown was a strong eyewitness because his identification was so weak. He

could have overstated the strength of his identification, as Bowie did with his absolute certainty, but instead he appeared – via a transcript read to the jury – to bend over backwards to make sure that his testimony was fair and measured. Thus, the prosecutor implored the jury to believe Brown because he was so understated and honest. According to the prosecutor, Brown "picks No. 3," meaning Wilson, but because Brown qualified his identification by adding "I only viewed from behind and a quick view of the face but best fits the description" of the driver, the prosecutor vouched, "that's a man that's trying to be as honest as he possibly can. He does not want to point the finger at anybody unless he is positive." (28RT 4498-4499.)

Merely by picking Wilson and telling the jury that the driver had light skin, Brown endorsed the identifications of Wilson by both Bowie and Williams. Although Brown's endorsement was minimally factual, he still picked Wilson, as the prosecutor explained. Thus, it could have been enough for a juror who was wavering on accepting the truthfulness of obvious liars, as Bowie and Williams proved to be. Although Brown's testimony was not enough to prove guilt beyond a reasonable doubt, he provided indirect harm to Wilson by buttressing the identifications by Bowie and Williams. For this reason and the reasons stated in the opening brief (AOB 55-58), admitting evidence relating to Brown's identification of Wilson contributed to the judgment against Wilson. And respondent has not shown otherwise. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Admitting evidence of Brown's identification of Wilson was prejudicial error, warranting reversal.

//

//

2.

THE TRIAL COURT VIOLATED WILSON'S RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM WHEN IT ADMITTED THE PRELIMINARY HEARING TESTIMONY OF ABSENT EYEWITNESS ANTHONY BROWN.

A. Anthony Brown's Preliminary Hearing Testimony Should Not Have Been Admitted at Trial Because He Was Not "Unavailable," as that Term Was Meant by the Framers at the Time the Sixth Amendment Was Adopted; Wilson Has Not Forfeited His Arguments.

Wilson explains in his opening brief that Brown's preliminary hearing testimony should not have been admitted because Brown was not an "unavailable" witness under the Sixth Amendment. (AOB 77-78.) Respondent answers in a footnote that the "Court need not reach appellant Wilson's claim since common law, well-before [*sic*] the Sixth Amendment was adopted, permitted the introduction of statements of a witness whose absence was caused by the wrongdoing of the accused." (RB 159, fn. 86.) Brown's absence was not caused by Wilson's wrongdoing or anyone acting on Wilson's behalf.[8]

---

[8] By making a forfeiture-by-wrongdoing argument in a footnote, respondent fails to comply with rules 8.204(a)(1)(B) and 8.630(a) of the California Rules of Court, which require that each point in a capital brief must be stated under a separate heading or subheading summarizing the point. Therefore, respondent forfeits the argument. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 209 [points not raised under separate heading in appellate brief need not be considered]; *California Ass'n of Sanitation Agencies v. State Water Resources Control Bd.* (2012) 208 Cal.App.4th 1438, 1454 [contention raised in footnote may be disregarded].) In any case, as shown in the text,

(continued...)

After the court found that the prosecution acted with due diligence in trying to secure Brown's presence at trial (19RT 2955-2957), defendants asserted a second ground for excluding Brown's preliminary hearing testimony. They argued that they had been deprived of a sufficient opportunity to cross-examine Brown at the preliminary hearing. (19RT 2958.) Brown's name had been kept from the defense until late in the afternoon the day before he testified. If defendants had received Brown's name a reasonable time before the preliminary hearing, they likely would have been able to examine him about his prior felony conviction, his probation, and his knowledge of marijuana being sold at the carwash. (19RT 2959-2962.) The defense also argued that a preliminary hearing transcript is no substitute for confronting a witness in front of the jury. Finally, defendants urged that there should be a "per se" rule preventing the prosecution from relying on a preliminary hearing transcript at trial if the prosecutor chooses to keep secret the witness's name. (*Ibid.*)

The court overruled defendants' objection. (19RT 2968.)

Now, citing *Giles v. California* (2008) 554 U.S. 353, 368, respondent argues that "implicit in the court's ruling was appellant Pops's wrongdoing. Appellant Pops has therefore forfeited any claim of lack of confrontation as his wrongful actions caused Brown to be unavailable at trial." (RB 160.) Elsewhere, respondent writes: "Appellants, and especially Pops, are foreclosed from complaining about any alleged infirmities in their ability to confront Brown as his absence from trial was caused by their own wrongdoing." (RB 158.) Respondent's heading phrases the point this way:

---

[8](...continued)
Wilson responds to the argument on the merits out of an abundance of caution.

"Any Claims of Shortcomings In Confrontation Arising From Brown's Failure to Appear for Trial Are Forfeited by Appellants' Own Wrongdoings." (*Ibid.*) Lastly, respondent claims that *Giles* is authority for a defendant forfeiting "any claim relating to complaints of lack of confrontation at trial." (*Ibid.*)[9]

Respondent's argument, however phrased, lacks support in the facts and the law.

First, Pops's alleged wrongdoing as a basis for denying appellants' objections was not implicit in the court's ruling. In overruling the defendants' "objection on *those* grounds" (19RT 2968, italics added), the court detailed what *those* grounds were, and it gave no indication that its ruling was related in any way to Pops's alleged wrongdoing. The court specifically rejected each argument defendants raised, including arguments relating to Brown's felony conviction and probation. (19RT 2965, 2967.) And the court explained that the issue was not whether the preliminary hearing transcript was an adequate substitute for confronting the witness at trial. (19RT 2966.) The court also found that whether Brown was aware of marijuana being sold at the carwash was a collateral issue in this case. (19RT 2968.) Finally, the court dismissed the "per se" argument. (*Ibid.*) These are the only grounds the court mentioned in overruling defendants' objection, and the court implied no other.

Second, contrary to respondent's claim, there was *no evidence* that

---

[9] If respondent intended to claim that appellants forfeited their rights to argue they were not provided an adequate opportunity to cross-examine Brown at the preliminary hearing because they learned his name too late, respondent could have simply said so. Instead respondent argues that *Giles* is authority for forfeiting "any claim relating" to a lack of confrontation. (RB 158.) But, as shown in the text, *Giles*'s holding was much narrower.

Pops, Wilson, or anyone acting on their behalf engaged in any wrongdoing, let alone wrongdoing that caused Brown's unavailability at trial. The prosecutor twice represented that Batts told Brown he was calling on behalf of Pops and Wilson (6RT 554 [Prosecutor: "Tracy Batts is telling him that he's calling on behalf of the defendants and he better not testify"]; 7RT 654 [Prosecutor: "Batts telling him that he's calling on behalf of the defendants and that he better not testify"]). And according to respondent, "Detective Reynolds *testified extensively* regarding the intimidating calls Brown received from inmate Batts *on appellants' behalf* telling him not to testify." (RB 160, italics added.) Respondent cites five pages of the record purporting to reflect Reynolds's extensive testimony showing that Batts called on behalf of the defendants: 19RT 2946-2950. But these pages do not support the claims by either the prosecutor or respondent.

The prosecutor asked Detective Reynolds ten questions about Batts's phone calls to Brown. The questions and Reynolds's answers cover less than two pages, not the extensive testimony that respondent claims. (19RT 2947-2948; RB 160.) The prosecutor asked Reynolds only a single question about what Brown told Reynolds that Batts had said to him: "And what has Anthony Brown told you that Tracey Batts has said to him?" Brown responded: "He said that he should not go to court and testify." (19RT 2947.) This is all the evidence in the record of Batts's alleged threats against Brown. As Brown's testimony shows, Batts did not even mention Pops or Wilson by name, or refer to them in any other manner. Batts merely told Brown not to go to court and testify. Batts could have been calling on his own behalf given that he had a murder case pending against

him.[10]

Third, in essence respondent claims that *Giles* is authority for holding that a defendant forfeits *any* argument relating to confrontation where the defendant engages in wrongdoing that prevents the witness from testifying. *Giles* does not so broadly hold. The issue in *Giles* was "whether a defendant forfeits his Sixth Amendment *right to confront a witness against him* when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial." (*Giles v. California*, *supra*, 554 U.S. at p. 355, italics added.) The high court held that forfeiture occurs under these circumstances, but "only when the defendant engaged in conduct designed to prevent the witness from testifying." (*Id.* at p. 359.)

"An appellate decision is authority only for the points actually involved and decided." (*People v. Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7 [rejecting defendant's contention that under *Giles*, a defendant impliedly waives his right of presence by voluntarily absenting himself from trial].) Under *Giles*, a defendant's intentional wrongdoing forfeits the defendant's right to cross-examine the witness at trial, and that is all a defendant forfeits. *Giles* did not address the extremely broad point for which respondent cites it as authority, that a defendant forfeits *any* argument relating to confrontation at trial, which conceivably would include Wilson's contentions here, that the prosecution did not exercise due diligence in securing Brown's presence at trial, and Brown was not "unavailable" as that

---

[10] In any case, even if Reynolds's testimony amounted to an assertion of fact that Batts told Brown he was calling on behalf of Pops, then Reynolds's testimony would have been hearsay to this extent. But when the defense raised a hearsay objection to the question that elicited this testimony, the court overruled the objection. (19RT 2947.) The court's ruling would have been error under respondent's view of the testimony.

term was defined when the Sixth Amendment was adopted. Hence, *Giles* provides no authority for respondent's forfeiture-by-wrongdoing proposition.

Fourth, even if the forfeiture-by-wrongdoing doctrine could have been raised below, the prosecution did not raise it and the court did not rule on it. Hence, respondent forfeits the argument.

Respondent refers to "Pops's intimidation of witnesses," which respondent says the prosecutor emphasized in response to appellants' confrontation objection to the admission of Brown's preliminary hearing testimony. (RB 160.) The prosecutor did not refer to Pops's intimidation of witnesses in response to a confrontation objection. Read in context, it is clear that where the prosecutor states, "when a defendant decides to become involved in that kind of conduct, clearly, he loses some privileges, and one of the privileges that [Pops] lost in this case was the right to have the names of the witnesses until they testified" (19RT 2963), the prosecutor was responding to defendants' complaint that "the witness names were kept from us prior to the preliminary hearing." (19RT 2959.) The prosecutor was simply explaining why the defense was not given Brown's name in advance. He was not making some veiled argument about Pops forfeiting his confrontation claims.

Fifth, given that forfeiture by wrongdoing is an equitable doctrine (*Crawford v. Washington* (2004) 541 U.S. 36, 62), it should be subject to equitable defenses, which Wilson did not have an opportunity to raise below because respondent did not assert the equitable doctrine. If respondent had raised the doctrine below, Wilson could have argued, for example, that Pops's alleged wrongdoing was easily remedied by Brown's acceptance of an offer of protective custody from the prosecution, which

the prosecution should have made. In addition, Wilson could have asked the court to consider whether Batts's phone calls were the real reason Brown chose to avoid testifying. According to Reynolds's testimony, Brown told him that he was not "exactly threatened but he felt intimidated by the manner in which Tracey Batts told him not to go to court." (19RT 2947.)

In sum, respondent's belated forfeiture-by-wrongdoing argument is unavailing. It should be rejected as forfeited and on the merits.

B. Brown's Preliminary Hearing Testimony Was Inadmissible Because the Prosecution Failed to Exercise Due Diligence in Attempting to Secure Brown's Presence at Wilson's Trial.

In his opening brief, Wilson proposes reasonable efforts the prosecution should have made in order to secure Anthony Brown's presence at trial: offer Brown protective custody; obtain a material witness bond or detain Brown if he was unable to post the security; put Brown under surveillance for 17 hours from the time Brown was served the trial subpoena to the time he violated it by failing to appear in court, request a body attachment, and arrest Brown; competently follow leads to locate Brown and bring him to court to testify. Two additional reasonable efforts the prosecution should have made include electronic monitoring of Brown in lieu of surveillance, or taking a videotaped examination for the jury to view. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1078; see *People v. Jurado* (2006) 38 Cal.4th 72, 113 [conditional examination of prosecution witness is permitted in capital case where witness's life is in jeopardy].) As shown below, respondent's answers to Wilson's proposals are inadequate and demonstrate that the prosecution failed to satisfy the due diligence requirement by making all reasonable efforts to procure Brown's presence

at trial. (*People v. Bunyard* (2009) 45 Cal.4th 836, 853 ["the purpose of the due diligence requirement is to ensure that the prosecution has made *all reasonable efforts* to procure the presence of the witness before the defendant is denied the opportunity to confront him," italics added].)

Protective Custody

Respondent does not directly address Wilson's protective custody proposal. Instead, respondent seems to suggest that the prosecutor was not required to take adequate preventative measures to keep Brown from disappearing. According to respondent, although "Brown was somewhat of an important percipient witness, he was not crucial." (RB 155.) And "the prosecution is not required, absent knowledge of a "*substantial risk* that this important witness would flee," to "take adequate preventative measures" to stop the witness from disappearing. [Citations.]'" (RB 153, quoting *People v. Wilson* (2005) 36 Cal.4th 309, 340, italics added by respondent.]

Wilson questions whether a witness must be important and subject to a substantial risk of fleeing before the prosecution should offer *protective custody*. In any event, Brown would qualify under the test proposed by respondent.

The evidence shows that the prosecution knew as early as March 5, 1999, that Brown, a convicted felon several times over, was a critical witness with a substantial risk of fleeing. (19RT 3009-3010; 2CTSupp 339.) On that date, the prosecutor informed the court that Brown had received threatening phone calls from Tracy Batts telling Brown, "on behalf of the defendants [that] he better not testify." Consequently, Brown reportedly told Detective Reynolds that he would have to be "dragged into court." (6RT 554.) Respondent acknowledges that Brown was "terrified," according to his ex-girlfriend. (RB 154; 19RT 2946.) Nevertheless, the

prosecutor was certain he could "get [Brown] served and brought in here." (6RT 555.) Two weeks later on March 19, 1999, the prosecutor informed the court that Detective Reynolds had been unsuccessful in finding Brown that week. The prosecutor added that the prior weekend, an eyewitness in the retrial of Batts's murder case had been "brutally murdered." (7RT 654.) The prosecutor explained that Batts had a reputation as "an extremely dangerous person" and that it would take "some time" to get Brown into court. (*Ibid.*; RB 145 [agreeing that Brown's life was threatened, which Brown took seriously].)

Thus, contrary to respondent's assertion that "it was not until May 21, 1999, or shortly thereafter" that Brown was actively avoiding court and Detective Reynolds (RB 153), Brown was clearly avoiding both by March 5, 1999.

One of three eyewitnesses to the Super Bowl Day shooting, Brown was a critical witness, as suggested by the fact that he testified at the preliminary hearing. (2CTSuppII 323.) At trial the prosecutor argued to the jury that Brown picked Wilson at a live lineup, as the driver of a car present at the shooting. (28RT 4498.) "[E]yewitness testimony has a profound impact on juries." (*Moss v. Hofbauer* (6th Cir. 2002) 286 F.3d 851, 874.) And as an eyewitness, Brown was crucial to the prosecution's case. The prosecutor emphasized to the jury that in his view, Brown was "trying to be as honest as he possibly can" (28RT 4499) when he testified that "[t]he light-complected guy [Wilson] would probably best fit the description" of the driver, and when on his identification form from the live lineup, Brown "picks No. 3, Mr. Wilson, but he adds I only viewed from behind and a quick view of the face but best fits the description of lineup No. 6" (28RT 4498). (*People v. Cromer* (2001) 24 Cal.4th 889, 904

[importance of witness's testimony is due diligence factor]; *Cook v. McKune* (10th Cir. 2003) 323 F.3d 825, 835 ["more crucial the witness, the greater the effort required to secure his attendance"].) By stressing Brown's purported honesty, the prosecutor could rely on Brown's testimony alone to convince the jury of the defendants' guilt, in the event the jury rejected the veracity of the other two eyewitnesses to the shooting, Randy Bowie and Christopher Williams, a strong possibility given their demonstrated dishonesty. (See AOB 107-116 [Bowie]; 116-122 [Williams].)

Moreover, Brown was a critical witness because he could potentially exonerate Wilson. Eighteen days after the shooting, Brown identified Gerron Malone as Pops's accomplice. (Exhs. 47, 53; 19RT 3058-3061; 25RT 4109.) Twelve days later, Brown was shown a photograph of Wilson, but he did not identify Wilson as a suspect. (24RT 3971, 3976-3977.) It was not until 135 days after the shooting that, according to the prosecutor, Brown picked Wilson as the driver (13RT 1725; 18RT 2679; 28RT 4498), but this was only after Brown saw Wilson in court where he appeared as a defendant in this case (18RT 2679-2680; 19RT 3077-3078, 3087-3088; 2CT 535). Brown was a crucial witness whom the jury needed to hear, particularly with respect to his explanations for identifying Malone soon after the shooting, but not Wilson shortly thereafter.

Thus, because Brown was an important witness with a substantial risk of disappearing, the prosecutor should have taken adequate preventative measures to keep Brown from defeating Wilson's constitutional right to confront him before the jury. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 340.)

Beginning March 5, 1999, Detective Reynolds was in contact with Brown by telephone. (6RT 554.) Respondent counts at least six phone

calls between Brown and Reynolds throughout the time the search for Brown occurred. (RB 155.) But not once did the prosecution take the reasonable measure to ensure Brown's safety by offering him protective custody. The failure to do so is evidence of an absence of good faith.

Material Witness Bond

Respondent claims that Wilson suggests the prosecution should have sought a material witness bond as early as March 5, 1999, over 100 days before the trial. According to respondent, any such suggestion is unsupportable by the facts and the law because Brown's detention would have been unconstitutionally prolonged. (RB 152 ["To obtain [*sic*] a material witness for months would certainly be unconstitutional"].)

First, as Wilson repeatedly argues in his opening brief, the prosecution failed to demonstrate good faith because it did not seek a material witness *bond* from Brown. (See, e.g., AOB 95 ["due diligence would have been seeking a material witness bond"]; 97 ["requiring a material witness bond of Anthony Brown was fully warranted in this case"].) Wilson does not argue that the prosecution should have simply sought Brown's *detention.*

Second, respondent misreads Wilson's argument with respect to timing. Wilson does not suggest that respondent should have sought a bond as early as March 5, 1999. Rather, Wilson merely states: "As of at least March 5, 1999 – over 100 days prior to trial – the prosecution knew that Brown had been threatened with harm if he testified and that Brown had told Reynolds that he would not testify unless he was 'dragged into court.'" (AOB 94.) Then, on March 19, 1999, the prosecutor became aware that Brown had refused to attend the suppression hearing on that date, despite the prosecutor's assurance on March 5, 1999, that "I know we can get him

served and brought in here." (6RT 555.) Therefore, Wilson argues in his opening brief: "The latest logical time to have sought a material witness bond would have been on May 20, 1999." (AOB 96.) Thus, Wilson suggests a possible date of May 20, 1999, not March 5, 1999. But even if the prosecutor *had* sought a bond as early as March 5, 1999, Wilson and Pops would have had the option of not waiving their speedy trial rights if necessary to meet any objections Brown might have had to the length of any detention, assuming he was detained. (6RT 564 [defendants waive speedy trial on March 5, 1999; court sets trial for May 24, 1999].)

Third, respondent cites *Graver v. Jesus B.* (1977) 75 Cal.App.3d 444, 451-452, and *Dres v. Campoy* (9th Cir. 1986) 784 F.2d 996, 1000, in support of the unconstitutional-detention claim. (*Jesus B.* is a juvenile case; its correct citation is *In re Jesus B.* (1977) 75 Cal.App.3d 444.) In *In re Francisco M.* (2001) 86 Cal.App.4th 1061, the court noted *Jesus B.'s* "passing" comment, which respondent relies on, expressing "grave doubt" that an alien witness could be held for 18 days in light of the California Constitution's prohibition against the unreasonable detention of witnesses. *Francisco M.* found *Jesus B.*'s comment not particularly helpful nor authoritative since the *Jesus B.* "court was not deciding whether the continued incarceration of a witness was unconstitutional, but simply whether fundamental fairness required the prosecution to seek a witness's detention." (*Id.* at p. 1075.) *Dres v. Campoy*, *supra*, 784 F.2d 996, on the other hand, relied on a second comment from *Jesus B*, that holding a witness for two months would be unconstitutional. (*Dres v. Campoy*, *supra*, 784 F.2d at p. 1000.) But like *Jesus B.'s* grave-doubt comment, this remark was dictum given that the issue of a witness's purported unconstitutional detention was not before the *Jesus B.* court. Finally,

Francisco M. applied California's constitutional provision against the unreasonable detention of witnesses and declined to order the release of two material witnesses, including one who had already been held for over two months. (*In re Francisco M.*, *supra*, 86 Cal.App.4th at pp. 1065, 1080; see also *People v. Roldan* (2012) 205 Cal.App.4th 969, 981 ["courts have sanctioned the months-long detention of a material witness when they possess vital information about the alleged offenses," citing *Francisco M.*.) Although *Francisco M.* is authority for holding a material witness for over two months, it is doubtful Wilson would have requested that Brown be detained this long, assuming Brown did not post a material witness bond. Brown was too important a witness to risk losing his live testimony, and as noted, Wilson and Pops could have exercised their speedy trial rights to ensure the jury heard that testimony.

Fourth, the prosecutor obtained an order for a material witness bond from Larry Barnes, which Barnes failed to post. Consequently, Barnes was remanded to custody on November 6, 1998, over six months before trial. (3RT 266, 269; 3CT 621-622.) Respondent characterizes as "appropriate" the material witness bond that the prosecutor requested from Barnes. (RB 157.) Thus, applying respondent's understanding, it would have been appropriate, and presumably not unconstitutional, for the prosecutor to request a material witness bond from Brown, even before March 1999.

Fifth, the overarching question here is whether the prosecution acted in good faith and with due diligence. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74.) If the prosecutor had refused to seek a material witness bond from Brown on the ground that his detention might be unconstitutionally prolonged, while at the same time the prosecutor requested a bond from Barnes, whose detention might have been much longer, then the

prosecutor's inconsistent treatment of these two witnesses would have been more evidence of the prosecutor's lack of good faith with respect to securing Brown's presence at trial.

Citing pages 85-86 of the opening brief, respondent claims that Wilson "insinuates that the prosecutor had some nefarious intention all along to use Brown's preliminary hearing testimony because the prosecutor obtained a material witness bond for Barnes, but not Brown." (RB 157.) Although the prosecutor may have had a nefarious intention all along, the two pages respondent cites do not support respondent's claim. Rather Wilson merely argues that the prosecutor treated Brown differently from Barnes because Brown was the only reluctant witness who testified previously, so the prosecutor had prior testimony that he could present to the jury. As the Tenth and Third Circuits recognize, a good measure of reasonableness is to require the prosecution to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available. (*Cook v. McKune*, *supra*, 323 F.3d at pp. 835-836; *McCandless v. Vaughn* (3d Cir. 1999) 172 F.3d 255, 266-269.) Failing to seek a material witness bond from Brown, who testified previously, while seeking a bond from Barnes, who did not testify previously, shows that the prosecution did not make this reasonable effort to secure Brown's presence at trial.

Although respondent tries to distinguish Barnes from Brown by arguing that the importance of Barnes's testimony and his refusal to obey subpoenas made a material witness bond appropriate, there is no just reason why the prosecutor should not have requested a bond for each witness.

In short, to show good faith the prosecution should have sought a material witness bond from Brown, and respondent has not demonstrated

otherwise.

Surveillance, Body Attachment, and Arrest

Respondent concedes that before Brown violated the subpoena to appear in court on May 21, 1999, he failed to appear in court twice (RB 151), on March 5, 1999, and March 19, 1999, when he was expected to testify at the hearing on defendants' motions to suppress his identifications of both. (6RT 554-555; 7RT 653-655.) Respondent claims that Brown was not subpoenaed but was merely "asked" to be in court on those two occasions. Although respondent states this understanding is based in part on the "prosecutor's representations to the court" (RB 151), respondent does not cite to the record where those representations can be found. On the other hand, the prosecutor represented to the court on March 5, 1999, "I know we can get [Brown] *served* and brought in here. Whether I can do it by next Friday, I will certainly do my best." (6RT 555, italics added.)

On March 19, 1999, the prosecutor informed the court that Detective Reynolds had tried to find Brown but had not yet located him. (7RT 654.) Nevertheless, three times the prosecutor assured the court that ultimately Brown would appear in court, "it's just going to take some time." (7RT 654-655.) Thus, assuming respondent is correct, that Brown was merely asked to come to court on March 5 and March 19, and was not subpoenaed yet, then based on the prosecutor's representations that Brown would eventually be served, Reynolds must have searched for Brown for over two months, beginning on about March 5, 1999, before he was finally successful in serving Brown with a subpoena at 3:25 p.m. on May 20, 1999, to appear in court at 8:30 a.m. the next morning, 17 hours later. But Brown "REFUSED" the subpoena. (23CT 938.) Once Brown failed to appear – whether he was subpoenaed or merely asked to appear – efforts

should have begun to ensure his appearance in court.

Respondent claims that Wilson speculates Brown wrote "REFUSED" on his subpoena. (RB 152, fn. 84; see also RB 145, fn. 80.) It does not matter who *wrote* the word, whether Brown, Detective Reynolds, or the prosecutor who signed the subpoena. Rather, the word's appearance on Brown's subpoena is a plain indication that Brown intended not to appear in court, despite the subpoena's command otherwise. Furthermore, the prosecutor's failure to acknowledge the word's existence on the subpoena shows a lack of good faith. As Reynolds testified, he did not bring the original subpoena to court, but only brought a copy (19RT 2941), making it somewhat difficult to read REFUSED on the subpoena. In addition, Brown either signed his name over REFUSED, or someone wrote the word over Brown's signature (23CT 938), thereby obscuring REFUSED and making it even more difficult to read the word. In light of the fact that the prosecutor failed to bring to the court's attention that someone wrote REFUSED on the subpoena, a reasonable inference is that the prosecutor hoped defense counsel would not notice the word – and they did not as they did not mention it – because it is clear evidence that Brown had no intention of appearing in court from the moment he was served with the subpoena. As the trial court found, since May 20 when Brown was served with the trial subpoena, he was "clearly . . . on the run, making active efforts to avoid the officer." (19RT 2956.)

Given that Brown had avoided being served with a subpoena for over two months, and he had declared that he would have to be dragged into court because he feared for his life, then Reynolds should have anticipated that Brown would violate the subpoena. Therefore, once he served Brown, Reynolds should have kept Brown under surveillance for

the 17 hours that it would have taken to learn whether Brown would appear in court. When Brown failed to appear, the prosecutor should have requested a body attachment, while Brown remained under Reynolds's surveillance.

Respondent represents, however, that "at the time Detective Reynolds served the subpoena, he had received assurances from Brown that he would appear as ordered." (RB 152, fn. 84.) Respondent offers no citation to the record for this claim. And a close reading of Brown's testimony offers no support for the claim. Indeed, nowhere is there testimony in the record that Reynolds received assurances from Brown that he would appear. (19RT 2940-2954.) In any case, according to the prosecutor, Brown's life was threatened if he testified, and Brown responded by declaring he would not appear unless he was dragged into court. (6RT 554.) Twice before May 21, 1999, Brown failed to appear in court, though according to respondent, he was asked to appear. (RB 151.) Brown "REFUSED" the subpoena when he was served on May 20, 1999. (23CT 938.) The competence of the prosecution's efforts to locate the absent witness is an "important factor" in measuring good faith and due diligence. (*People v. Herrera* (2010) 49 Cal.4th 613, 630.) Assuming Detective Reynolds received assurances from Brown, a felon with multiple convictions (19RT 3009-3010; 2CTSupp 339), that he would appear, it would have demonstrated a lack of competence, good faith and due diligence for Reynolds to rely on them.

Respondent next refers to the prosecutor's representation to the court on June 7, 1999, that Brown was "put on call" (RB 145, citing 12RT 1686), implying that Brown did not have to show up in court on May 21, 1999. Brown was not put on call, as both the subpoena and Reynolds's

testimony show. The subpoena has two boxes where "ON CALL" or "BE IN COURT" may be checked. (23CT 938.) The former was not checked, while the latter was. (*Ibid.*) The subpoena also instructs Brown: "YOU ARE TO APPEAR AT: Time: 8:30 a.m. Date: 5-21-99." Moreover, Reynolds testified, "like I said, on May 20th, 1999, I served him with a subpoena *to appear in court* on May 21st, 1999." (19RT 2942, italics added.) Later, Reynolds was asked under oath, "And the date on the subpoena for him to make his *appearance* was what date?" Reynolds answered: "I served him with the subpoena on the 20th of May and he was to *appear* the following day on the 21st." (19RT 2951, italics added.) Reynolds also testified that because Brown did not appear in court on May 21, 1999, Reynolds went looking for him "[a]fter court." (19RT 2942.) Reynolds would have no reason to look for Brown when he failed to appear in court if Brown were merely put on call.

According to respondent, Wilson suggests in his opening brief that the prosecutor had little interest in securing Brown's attendance at trial because Brown "'was the only one of theses [*sic*] witnesses who testified at the preliminary hearing.' (Wilson AOB 5.)." (Respondent's intended citation is to AOB 85, not AOB 5.) (RB 157.) Respondent states that Wilson's "assertion is incorrect as both Bowie and Williams testified at the preliminary hearing." (*Ibid.*) Respondent misreads Wilson's assertion. Wilson's reference to "these witnesses" refers to "Reluctant Prosecution Witnesses" (AOB 85), as the subheading indicates, and the sentence that follows the subheading shows as well: "The prosecution knew during the preparatory stages for appellant's trial that it was dealing with witnesses who were demonstrating a great reluctance to testify." (AOB 85.) Bowie and Williams, whom Wilson does not even mention in the Reluctant

Prosecution Witnesses subsection, were not "reluctant witnesses." Indeed, they both testified at the preliminary hearing because, like Brown, they were *eyewitnesses*. (1CT 118-271 [Bowie]; 2CTSuppII 323-401 [Brown]; 2CTSuppII 403-479 [Williams].) The reluctant witnesses to which Wilson refers are Larry Barnes (AOB 85 ["One of these reluctant witnesses was Larry Barnes"]) and "witness number one" (AOB 86). As respondent notes in criticizing Pops for a purported mistake, witness number one was Eric Thornton. (RB 144, fn. 79.) Thus, Wilson's opening brief refers to Barnes and Thornton as reluctant witnesses, neither testified at the preliminary hearing so the prosecutor did not have prior testimony from either, the prosecutor initiated material witness bond proceedings for both, and the prosecutor did not seek a bond from Brown because Brown testified previously. Wilson's assertion is not incorrect.

Like the trial court, respondent minimizes Brown's fear by alluding to those not uncommon circumstances where witnesses to violent crimes are fearful and reluctant to testify. (RB 152, citing 19RT 2956.) Respondent quotes from *People v. Hovey* (1988) 44 Cal.3d 543, 564, where this Court declined to impose an obligation on the prosecution to keep periodic tabs on "every material witness." *Hovey* also questioned what effective and reasonable controls could be imposed on a witness who plans to disappear, "long before a trial date is set." (*Id.* at p. 564.)

Hovey's concerns have no application here. Wilson did not ask for periodic tabs on *every* material witness. Nor did he request that controls be imposed on Brown *long before* a trial was set. Rather, the Compton Police Department should have kept a single witness under surveillance for 17 hours until he failed to appear at trial the next day, when the prosecutor could have obtained a body attachment, which the police could have then

executed.

The prosecutor's practice in this case was to request a body attachment immediately when a subpoenaed witness – except for Anthony Brown – failed to appear in court. In fact, *four times* the prosecutor requested a bench warrant as soon as possible when a subpoenaed witness failed to appear. (3RT 214; 4RT 289, 292; 8RT 918.) But even though, as respondent concedes, the prosecution had grounds to arrest Brown on May 21, 1999 (RB 151), the prosecution failed to immediately request a body attachment for Brown when he failed to appear in court on that date. Instead, the prosecutor needlessly delayed until June 7, 1999 – *17 days after Brown violated his subpoena* – to seek a body attachment for Brown. (12RT 1687.) Not only did the prosecutor wait those 17 days, he failed to request a body attachment for Brown on seven different dates when he was personally in court in this case from May 21, 1999 through June 3, 1999. (8RT 745, 832; 9RT 944, 1036, 1077; 10RT 1108; 11RT 1297.)

Timeliness is a factor in determining due diligence. (*People v. Cromer, supra*, 24 Cal.4th at p. 904.) Clearly, the prosecutor was not timely in requesting a body attachment for Brown. Moreover, by failing to request a body attachment for Brown as soon as possible, while requesting them immediately for other subpoenaed witnesses who failed to appear, the prosecutor lacked good faith in pursuing Brown. (*Ohio v. Roberts, supra,* 448 U.S. at p. 74.)

Leads Not Competently Explored

Detective Reynolds testified that he searched for Brown over a period of 26 days, from May 21, 1999, when Brown failed to appear, until June 16, 1999, the day before the due diligence hearing. (19RT 2940-2948.) According to respondent, Reynolds undertook "comprehensive

actions" in that he went to Melvin Hoard's shop seven times, to Brown's last known address four times, and another location one time but no one was present. (RB 155.) Respondent acknowledges that this final place, important enough to search for Brown there, was a location "where Brown was thought to frequent." (RB 155.) Nevertheless, Reynolds never bothered to go back even once when he found no one there. (19RT 2947.) This does not meet the standard of competence required by this court. (*People v. Herrera*, *supra*, 49 Cal.4th at p. 630.)

Furthermore, during the 26 days that Reynolds said he searched for Brown, Reynolds only spoke to *three* people other than Brown: Melvin Hoard, who told Reynolds that he had not seen or heard from Brown (19RT 2947); Brown's ex-girlfriend, who said that Brown "ha[d] not lived there for approximately two or three months since the murders happened" (19RT 2946); and their next door neighbor, who had not seen Brown for at least two months (19RT 2944, 2947, 2952-2953.) Thus, in almost four weeks, Reynolds searched nowhere else, spoke to no one else, and learned nothing else. Compare Reynolds's lackadaisical efforts to those of another detective during a *two-day* period in *People v. Wilson*, *supra*, 36 Cal.4th 309, "including visiting [the witness's] last known address, attempting to locate his known associates, and checking police, county, and state records with the 15 different names [he] had used." (*Id.* at p. 341.)

Nevertheless, respondent insists that all leads as to Brown's possible whereabouts were "competently explored." (RB 155.) Not so.

The most obvious lead not competently pursued was Brown's family, even though the case law establishes that attempting to question known family members is a common, critical step. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 67 [inspector contacted witness's family]; *People v.*

Bunyard, supra, 45 Cal.4th at p. 855 [sheriff's officers attempted to contact witness's brother and sister]; *People v. Hovey, supra*, 44 Cal.3d at p. 562 [unsuccessful attempts to locate or call witness's parents and in-laws]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1297 [investigator repeatedly went to home of witness's mother]; *People v. Jackson* (1980) 28 Cal.3d 264, 312 [police officers and their investigators actively sought two witnesses by interviewing relatives].)

Almost from the beginning, the prosecution and Detective Reynolds were aware that Brown's brother played an important role in this case. Indeed, Reynolds was in the courtroom when Brown revealed during the preliminary hearing that the first phone call he made after the shooting was not to the police or 911, it was to his brother. (19RT 2940-2941, 3002; 2CTSuppII 334, 335, 372; see RB 146.) Brown phoned his brother to tell him what had happened and to ask him what Brown should do next. Brown's brother advised him to return to the carwash, advice which Brown followed. (19RT 3003.)

Thus, given Brown's reliance on his brother in a time of crisis, Brown likely turned to his brother when he went into hiding. It was even possible that Brown stayed with his brother to be safe. Contacting Brown's brother was such an obvious lead to explore, if only to learn what Brown told his brother in the phone call right after the shooting, it was as if the police were intentionally avoiding any contact with him lest they inadvertently find Brown. Failing to attempt to interview Brown's brother and any other member of Brown's family was negligent at best. Moreover, it is the strongest evidence that the prosecution was not diligent in securing Brown's presence in court. (*People v. Bunyard, supra*, 45 Cal.4th at p. 853.)

Contrary to respondent's view, the prosecution failed to competently explore other obvious leads as well. As shown in the opening brief, the prosecution failed to check numerous leads, including the DMV (Brown drove a car to the carwash); Brown's probation officer (Brown was on probation); the telephone company (Brown used a cell phone to call Reynolds); the address provided by Brown on his witness admonition form (it was not his ex-girlfriend's address); Brown's aliases (Fat Tone and Anthony Green); local hospitals (Brown's life had been threatened, an eyewitness in Batts's case had been killed, and Brown had not been seen since he was served with the subpoena); Hoard (for any employee information provided by Brown, such as next of kin); and Brown's co-conspirator (Brown had a felony conviction for conspiracy to commit fraud). (AOB 90-91, 100-102.) These leads were not shots in the dark. They were based on information readily available to the prosecution. And the prosecution failed to follow every one of them.

Conclusion

Due diligence demands perseverance and competence, especially when searching for a witness who does not want to be found. And though required to make all reasonable efforts to procure Brown's presence at trial if it wanted to deprive Wilson of his constitutional right to confront Brown, the prosecution made almost none. (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 853.) Thus, the trial court erred by admitting Brown's testimony after incorrectly finding that the prosecution exercised due diligence in trying to secure Brown's presence at trial.[11]

---

[11] Wilson questions whether Brown's life was actually in jeopardy. According to Brown's story, the threats to his life came from a person

(continued...)

C. The Erroneous Admission of Brown's Preliminary Hearing Testimony Identifying Wilson Was Not Harmless Beyond a Reasonable Doubt in Light of the Inherent Power of Eyewitness Testimony and the Otherwise Unreliable and Weak Evidence Tying Wilson to the Shooting.

Respondent claims that any error in admitting Brown's preliminary hearing testimony was not prejudicial. Specifically, respondent claims that Brown's testimony was cumulative of Bowie's and Williams's testimony "for the most part," but respondent does not enlighten the court and Wilson as to the meaning of "the most part." (RB 165.) In any event, the opening brief demonstrates that the error in admitting Brown's testimony was not harmless beyond a reasonable doubt. (AOB 105-124.) Moreover, Brown's testimony was not cumulative because the jury could have rejected Bowie's and Williams's testimony entirely because of the lies they told to the jurors and their felony records. (AOB 107-109 [Bowie]; AOB 59-62 [Williams].)

The Hoard and Potter not guilty verdicts for attempted robbery also show that the jury doubted Bowie's testimony that while displaying guns, the defendants marched Bowie into the carwash, and demanded money and "the shit" from Hoard, Potter, and everyone else, because otherwise the jury

---

[11](...continued)
accused of murder and housed in jail. (7RT 653-655.) As Brown's ex-girlfriend told Detective Reynolds, the calls from jail were collect, as would be expected. (19RT 2946.) And according to the prosecutor, Brown received multiple phone calls from Batts. (6RT 554.) After the first call from Batts, it is doubtful that Brown would have continued to accept collect calls from an accused murderer who threatened Brown's life. Therefore, it is dubious whether Brown received any threatening calls at all. Nevertheless, regardless of his motivation, Brown did all he could to avoid testifying before the jury. Consequently, the prosecution should have responded by making all reasonable efforts to make sure that Brown testified.

would have returned guilty verdicts. (12RT 1514, 1517-1519, 1533; 28RT 4502; 5CT 1145, 1146.)

And even if jurors did not reject Bowie's and Williams's testimony completely, individual jurors could have strongly doubted their identifications of Wilson and therefore relied on Brown's identification to overcome any doubts. Williams identified Gerron Malone as the driver 18 days after the shooting (18RT 2732), said Wilson did not look like the driver 29 days after the shooting (13RT 1773-1774), and conceded, "I really did not get a good look at him" (13RT 1774). Bowie was unable to provide the sketch artist with a description of the driver 11 days after the shooting, and even failed to see that the driver was wearing a cap. (1CT 145, 188, 246; 17RT 2556; 13RT 1765; 19RT 3071.) Moreover, a question from the jury reflected at least one juror's lack of confidence in Bowie's identification testimony. Although Bowie testified that he had "no doubt" and was "absolutely positive" that Wilson was the driver (12RT 1519-1520), the jury asked to have Williams's testimony read back to determine whether Williams identified Wilson, an unnecessary request if Bowie's identification were believed. (30RT 4842-4843.)

For Wilson, the most important factual issue in this case was the identity of the driver. And its resolution depended in part on the credibility of two eyewitnesses who had none. Brown's testimony was critical to the jury's determination of that issue because the identifications of the driver provided by Bowie and Williams were rife with problems. The prosecutor understood this and made brilliant use of Brown's identification. He did so by emphasizing how understated, honest, and accurate it was. The prosecutor argued to the jury as follows: "And when you look at [Brown's] I.D. form from the live lineup . . ., what does he put on it? [¶] *He picks no.*

3, Mr. Wilson, but he adds I only viewed from behind and a quick view of the face but *best fits the description* . . . ." (28RT 4498, italics added.) Later the prosecution read to the jury that Brown had testified as follows: "I can't positively identify that person today. He then points [at Wilson]. The light complected guy would probably *best fit the description* but I only seen him from the rear view and glanced at the front view." (28RT 4500, italics added.) The prosecutor concluded: "So, again, the evidence clearly shows that . . . Anthony Brown had an opportunity to see what [he told you he] saw." (28RT 4501.) Thus, according to the prosecutor, "[t]hat's a man that's trying to be as honest as he possibly can. He does not want to point the finger at anybody unless he is positive." (28RT 4499.)

Two untrustworthy eyewitnesses – Williams and Bowie – identified Wilson as the driver. Under the circumstances of this case, the prosecution needed Brown's erroneously admitted third identification, which proved not to be cumulative. Hence, respondent has failed to meet the burden "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) Reversal is required because "'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" (*Ibid.*, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.)

//

//

3.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON UNPREMEDITATED SECOND DEGREE MURDER BECAUSE SUBSTANTIAL EVIDENCE QUESTIONED WHETHER FIRST DEGREE FELONY MURDER WAS COMMITTED, AND IT SHOWED THAT THE LESSER OFFENSE WAS COMMITTED INSTEAD.

In *People v. Breverman* (1998) 19 Cal.4th 142, 154, this Court affirmed that a trial court must instruct a jury on its own initiative on all lesser included offenses that find substantial support in the evidence. At the same time, a court has no obligation to instruct on a lesser offense where there is no substantial support. (*Ibid.*) Wilson established in his opening brief that the trial court erred by failing to instruct the jury on unpremeditated second degree murder. (AOB 127.) Respondent disagrees. (RB 213.)

Preliminarily, it should be noted that respondent claims the information "did not charge first degree premeditated murder." (RB 214, fn. 108.) But as shown in the opening brief (AOB 131), this Court has held that an information which alleges, as here, murder in violation of section 187, is sufficient to charge both premeditated malice murder and felony murder, first and second degree. (*People v. Harris* (2008) 43 Cal.4th 1269, 1295 ["an information charging murder in the terms of section 187 is "'sufficient to charge murder in any degree'"].) And in *People v. Hughes* (2002) 27 Cal.4th 287, 369, the Court held that "an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely," thus implicitly rejecting the argument that felony murder and murder with malice are separate crimes

that must be pleaded separately. Respondent presents no argument that the Court should reconsider these oft-stated views.

Furthermore, the original and amended information both alleged that "the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by [defendants] who did *unlawfully, and with malice aforethought murder* . . . a human being." (2CT 386-389; 4CT1033-1036, italics added.) As respondent points out, "malice is an element of second degree murder but not of first degree felony murder." (RB 214.) Thus, even though the information also alleged felony-murder-robbery and felony-murder-burglary special circumstances (2CT 388-389; 4CT 1036-1037), it is evident that under the accusatory pleading test, unpremeditated second degree murder is a lesser included offense of murder *as specifically charged* in the information, which alleged that defendants killed in the course of a robbery and burglary, and they did so unlawfully and maliciously. (*People v. Banks* (2014) 59 Cal.4th 1113, 1160 [trial court erred in capital case in failing to instruct jury on second degree murder, a lesser included offense of felony murder under accusatory pleading test].)

From the outset then, the prosecution had the option of proceeding on a premeditated-malice-murder or a felony-murder theory or both. And although respondent asserts that "[n]o evidence that the homicides were anything but felony-murder were presented," and therefore, "appellants were on notice that the prosecution was proceeding *solely* on a felony-murder theory" (RB 215, fn. 108, italics added), the prosecutor did not provide notice of a single theory until a discussion on jury instructions, when he answered, "That's correct," to the trial court's question, "You're only going on the felony-murder theory?" (25RT 4292.) Hence, unpremeditated second degree murder is a lesser included offense of the

crime of murder charged in the information. And given that a trial court's instructional duties under the *accusatory pleading test* are based on the allegations in the information (*People v. Banks*, *supra*, 59 Cal.4th at p. 1160), the evidence presented at trial is irrelevant to that specific issue, i.e., application of the accusatory pleading test. In any case, contrary to respondent's claim, the prosecutor presented evidence of second degree murder to the jury, as shown in the opening brief (AOB 145-150).

Respondent's principal claim is that the court had no obligation to instruct the jury on unpremeditated second degree murder because "there was absolutely no evidence to support a second degree murder instruction." (RB 213.) Moreover, according to respondent, "[t]he evidence exclusively demonstrated that each of the murders occurred during the commission of robbery or burglary, a circumstance that in itself establishes the offenses as first degree murders under the felony-murder doctrine." (RB 215.)

Respondent's argument relies almost entirely on the testimony of Randy Bowie. In doing so, respondent fails to respond directly to the point of emphasis in Wilson's opening brief, that a reasonable juror, and hence a reasonable jury, could have rejected Bowie's testimony completely, because Bowie was a convicted felon several times over and he lied repeatedly to the jury concerning material matter. (AOB 107-109, 137-138; *People v. Breverman*, *supra*, 19 Cal.4th at p. 164 [jury could reasonably disbelieve defendant's statement that he did not shoot with intent to kill and conclude that he killed intentionally]; *People v. Barton* (1995) 12 Cal.4th 186, 202 [jury could reasonably discount defendant's testimony that the gun discharged accidentally and conclude that defendant shot with intent to kill].)

On top of that, the tale that Bowie told was tall indeed. A reasonable

juror could dismiss as fanciful Bowie's story that even though the perpetrators held two guns on him, neither Jessie Dunn nor Charles Hurd noticed that anything was awry as Dunn and Hurd walked within inches of Bowie and the car in which the perpetrators sat. (12RT 1515-1516 [Bowie: Jessie Dunn "walked right past me inside"]; 1515, 1528-1529 [passenger raised gun and pointed it at Bowie]; 1637-1638 [with guns on Bowie, Jessie Dunn walked right past him inside]; 1642-1643 [Bowie was standing at "phone booth [which] is actually – a right at the door"].) Furthermore, a reasonable juror could have rejected as implausible Bowie's yarn that he was able to get up from the ground and run to safety without drawing a single shot. (12RT 1529-1531, 1649.) A reasonable juror might ask whether Bowie was allowed to leave and did not escape, especially in light of the fact that four others were shot.

Indeed, a reasonable jury did reject Bowie's testimony. The Hoard and Potter not guilty verdicts for attempted robbery show that the jury did not believe Bowie's pivotal testimony that while displaying guns, the defendants marched Bowie into the carwash, and demanded money and "the shit" from Hoard, Potter, and everyone present, because otherwise the jury would have returned guilty verdicts. (12RT 1514, 1517-1519, 1533; 28RT 4502; 5CT 1145, 1146.)

A reasonable juror could question why Bowie delayed 24 hours before talking to the police, even though Bowie drove back to the carwash within hours of the shooting and saw that police were there. (12RT 1560-1561.) A reasonable juror might conclude that a true victim, especially one who was also a witness to the shooting of four friends and who professed worry about them, would want to describe the perpetrators to the police immediately in order to assist in their capture. (12RT 1532, 1533, 1539,

1556, 1575, 1581, 1583, 1626, 1655, 1661, 1665 [repeated references by Bowie that the victims were his "friends"].) Bowie's reaction to what happened at the carwash suggested that he had something to hide. In any event, his was not the reaction of the typical victim. At bottom, a juror could be reasonably suspicious of Bowie's testimony and believe that there was more to Bowie's story than the one he told in court.

Given Bowie's multiple-felony criminal history, his repeated lies to the jury, his inherently suspicious testimony, and his peculiar conduct after the shooting, a reasonable jury could have doubted Bowie's entire story. Thus, in answering whether a reasonable jury could have concluded that unpremeditated second degree murder was committed, instead of first degree felony murder, an appropriate analysis starts with the premise that Bowie's testimony was removed from any consideration whatsoever.

Apart from Bowie's testimony, respondent merely relies on the testimony of Christopher Williams, that the perpetrators told him they were "looking for some sounds" (RB 215), testimony that is irrelevant to a choice between unpremeditated second degree murder and first degree felony murder, especially if respondent is correct that the perpetrators gave no indication to Williams that they were there to buy marijuana for a Super Bowl party (*ibid.*).

The only other testimony offered by respondent relates to the manner in which the victims were shot. According to respondent, the "four victims" were shot "in the back of their heads, indicating that they were lying on the floor when the shots were fired." (RB 216.) Respondent's proposition that the victims were lying on the floor is clear speculation that has no support in the evidence. Indeed, even the record citations provided by respondent do not support respondent's conclusion. (*Ibid.*, citing 14RT

1996, 1998, 2002-2003, 2006-2007, 2011-2013, 2078-2082, 2090-2092.) Instead, respondent's own expert testified that *he could not tell* if any victim was shot while lying on the floor. (14RT 1996, 2091 [medical examiner could not opine if Charles Hurd was lying on the ground when he was shot]; 14RT 2090, 2104 [medical examiner could not tell if Jessie Dunn was lying on the floor when he was shot]; 14RT 2099 [medical examiner could not give opinion as to relative positions of victims and shooters when victims were shot].) And although the medical examiner testified that Mr. Potter's wound was consistent with somebody standing over him and shooting down as he lay on the ground (14RT 2099), he also testified that it could be inconsistent with that conclusion. (14RT 2100.) Thus, no substantial evidence supports respondent's claim that the victims were lying down when they were shot.

And although respondent claims that "[i]t is quite clear that appellants entered the carwash building with an intent to commit robbery" (RB 216), absent Bowie's testimony, there is no evidence of a robbery of anything inside the carwash (Jessie Dunn's El Camino was taken from the parking lot), especially given the prosecutor's concessions that he could not point to any property that was taken from inside the carwash. (27RT 4447-4448.)[12]

---

[12] In a footnote in another argument, respondent claims that Charles Hurd's jewelry and money were "stolen." (RB 206, fn. 106, citing 25RT 4112-4113.) This claim is based on the testimony of Mr. Hurd's girlfriend, who was twice convicted of perjury and who admitted that she was unaware of which rings Mr. Hurd wore when he was with his wife at her house. (25RT 4115-4117.) Moreover, the prosecutor apparently found her testimony so unreliable that he conceded to the jury, "I can't show you that any piece of property was taken from Mr. Hurd." (27RT 4447.)

Because a jury could reasonably disbelieve Bowie's testimony (*People v. Breverman*, *supra*, 19 Cal.4th at p. 164; *People v. Barton*, *supra*, 12 Cal.4th at p. 202) and find irrelevant the additional evidence that respondent offers, for the reasons stated here and in the opening brief, the evidence raised a question as to whether felony murder was committed, and it supported instructions on unpremeditated second degree murder. (AOB 132-150.)

Next, respondent claims that Wilson's reliance on *Beck v. Alabama* (1980) 447 U.S. 625 is misplaced. (RB 216.) Respondent quotes excerpts from decisions of this Court – *People v. Taylor* (2010) 48 Cal.4th 574, 625 and *People v. Prince* (2007) 40 Cal.4th 1179, 1269 – that addressed *Beck's* applicability in California. Respondent concludes that Wilson offers no compelling reason for the Court to reconsider its prior interpretations of *Beck*. (RB 217-218.) Because respondent does not analyze the quoted excerpts in the context of this case, except to say that *Taylor* is similar (*People v. Taylor*, *supra*, 48 Cal.4th at p. 625), Wilson assumes that all points raised by the excerpts apply here.

As shown here and in the opening brief, respondent and this Court misconstrue *Beck*. (AOB 151-173.) Contrary to respondent's apparent view, the trial court denied Wilson due process under *Beck* because it did not instruct the jury on the lesser included offense of unpremeditated second degree murder, which as shown above, was supported by the evidence. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637, 642.)

Recently in *People v. Banks*, *supra*, 59 Cal.4th 1113, this Court affirmed its prior holdings concerning *Beck*, stating that "[a]fter *Hopkins v. Reeves* (1998) 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76, we have repeatedly rejected *Beck* claims in light of the differences between

California's death penalty scheme and the Alabama scheme at issue in *Beck*." (*Id.* at pp. 1161-1162.) As shown in Wilson's lengthy analysis of *Reeves* in the opening brief, unrebutted by respondent, this Court misreads the high court's opinion. (AOB 175-182.) And a more recent decision than *Reeves* by the United States Supreme Court confirms Wilson's view of *Beck*, while implicitly rejecting this Court's *Beck* holdings.

In *Bobby v. Mitts* (2011) 563 U.S. ___ [131 S.Ct. 1762, 179 L.Ed.2d 819], a per curiam decision on a petition for a writ of certiorari to the Sixth Circuit, an Ohio state jury convicted the defendant of two counts of aggravated murder and two counts of attempted murder. The question for the Supreme Court was whether certain penalty phase instructions violated clearly established federal law as determined in *Beck v. Alabama*, *supra*, 447 U.S. 625. The instructions required the jury to choose from two possible life sentences if the jury did not recommend death, because it did not find that the aggravating circumstances outweighed the mitigating factors. On appeal of a habeas petition denial, the Sixth Circuit had concluded that the instructions were contrary to *Beck* under the Antiterrorism and Effective Death Penalty Act of 1996. The Supreme Court held that the jury instructions were "surely not invalid" under *Beck*. (*Bobby v. Mitts*, *supra*, 131 S.Ct. at p. 1765.)

Mitts first stated *Beck's* holding in its essential terms: "we held that the death penalty may not be imposed 'when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.'" (*Bobby v. Mitts*, *supra*, 131 S.Ct. at p. 1763, quoting *Beck v. Alabama*, *supra*, 447 U.S. at p. 627.) *Mitts* then explained that a scheme which does not allow a jury to return a verdict on a lesser included offense supported by the evidence

"intolerably enhances the 'risk of an unwarranted conviction' because 'it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.'" (*Id.* at pp. 1764-1765, quoting *Beck* at p. 638.) "'[F]orcing the jury to choose between conviction on the capital offense and acquittal,'" the only two options that had been available to the *Beck* jury, "'may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished,' even when there is 'some doubt with respect to an element' of the capital offense." (*Id.* at p. 1764, quoting *Beck* at p. 632, brackets by *Mitts*.) Due to the danger that any doubts would be resolved by the jury in favor of conviction, *Beck* had concluded that the lack of an instruction on a lesser included offense violated due process. (*Id.* at p. 1764, citing *Beck* at p. 638.)

In determining that the jury instructions before it did not contravene *Beck*, *Mitts* emphasized that "[t]he concern addressed in *Beck* was 'the risk of an unwarranted *conviction*" created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing." (*Bobby v. Mitts*, *supra*, 131 S.Ct. at p. 1764, quoting *Beck*, 447 U.S. at p. 637, italics added by *Mitts*.) In contrast, the *Mitts* Court recognized, the question before it "concern[ed] the penalty phase, not the guilt phase, and we have already concluded that the logic of *Beck* is not directly applicable to penalty phase proceedings." (*Ibid.*) The Court recalled that in *California v. Ramos* (1983) 463 U.S. 992, it had "noted the 'fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the

life/death choice at the penalty phase.'" (*Ibid.*, quoting *Ramos* at p. 1007.) "In light of that critical distinction," *Mitts* stated, *Ramos* had "observed that "the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty." (*Mitts*, 131 S.Ct. at pp. 1764-1765, quoting *Ramos* at p. 1009.)

Thus, *Mitts* reaffirmed that *Beck* is concerned with the *risk* of an unwarranted *guilt conviction*. Because of the danger that a jury would choose guilt instead of innocence in a capital case, when these were the only two options available to the jury, due process is violated unless instructions on a lesser included offense supported by the evidence are provided to the jury. Moreover, *Beck* is not directly applicable or directly translatable to the penalty phase. Therefore, because the jury in this case was only given the options of guilt or innocence on the first degree murder charges, the trial court violated *Beck* and its progeny by not permitting the jury to consider a third option supported by the evidence, unpremeditated second degree murder.

Respondent disagrees and quotes *People v. Taylor*, *supra*, 48 Ca1.4th at p. 625, that "the trial court gave the jury the noncapital third option of convicting defendant of first degree felony murder but finding not true the special circumstance allegations that made him death eligible." Respondent also quotes *People v. Prince*, *supra*, 40 Cal.4th at p. 1269: "Nor under our state law can the absence of a lesser included offense instruction force the jury into a choice between acquittal and a murder conviction that *necessarily* would lead to the death penalty; even after finding true an alleged special circumstance, a California jury may elect to sentence the defendant to life in prison without the possibility of parole."

(RB 217, italics added.)

Lastly, respondent mentions that Alabama law prohibited lesser included offense instructions in capital cases, while permitting them in noncapital cases. (RB 217, fn. 109.) As to this final point, Wilson anticipated its mention and analyzed the issue sufficiently in the opening brief. (AOB 168-172.) Furthermore, *Mitts* gave no hint of the Court's intention to limit *Beck's* principles to states other than Alabama, with its unique prohibition.

By quoting *Taylor* and *Prince*, respondent seems to suggest that decisions made by the jury *after* it has already been forced to decide between the two options of guilt or innocence somehow satisfy *Beck*. But plainly, *Mitts* demonstrates with repeated mention, that what matters under *Beck* is the *conviction* for the crime, not whether the crime was accompanied by a special circumstance, for example, whether the victim was a peace officer or a judge, or whether the defendant had a prior first degree murder conviction (Pen. Code, § 190.2, subds. (a)(2), (7), (12)), or whether, as here, first degree felony murder was committed during the commission of a felony (see, e.g., 5CT 1129 [burglary murder special circumstance]). Nor does *Beck* directly concern a decision made by the jury, *after* it has already decided the conviction, to impose life or death subsequent to hearing evidence in a penalty phase proceeding. These are not conviction options, and they arise *after* the jury has been forced to decide between guilt and innocence, too late to satisfy *Beck*.

As the jury's first degree murder verdicts and the jury instructions show, the jury reached the murder convictions before it decided the special circumstance allegations and before it decided to impose life or death. For example, the jury returned the following verdict on the first degree murder

charge in the death of Charles Hurd:

> We the jury, *having found* the defendant BYRON PAUL WILSON *guilty of the crime* of first degree murder of Charles Hurd, *further find the special circumstance* allegation that the defendant BYRON PAUL WILSON committed the murder of Charles Hurd while the defendant BYRON PAUL WILSON was engaged in the commission of the crime of BURGLARY, within the meaning of Penal Code section 190.2(a) (17), to be true.

(5CT 1129, italics added.)

The court had instructed the jury: "*if you find* a defendant in this case *guilty of murder* of the first degree, *you must then determine* if one or more of the following *special circumstances* are true or not true: murder in the commission of a robbery, murder in the commission of a burglary and multiple murder." (29RT 4772, italics added.) Thus, as required by California law (Pen. Code, § 190.4, subd. (a)), the jury decided the conviction – *Beck's* concern as *Mitts* underscored – before it determined the truth of a special circumstance allegation. At the point of determining the existence of the special circumstances, *Beck* had already been violated because the jury was not a given a third option of whether to convict the defendant of a lesser included offense.

Furthermore, a belated special circumstance and an even later decision on the question of penalty are not acceptable substitutes, as *Beck* itself shows. There the state argued what respondent essentially seems to urge, that the absence of a lesser included offense option caused no harm. The *Beck* jury was instructed that it may refuse to return any verdict in a doubtful case, thus causing a mistrial. After a mistrial, the prosecutor could

choose to reindict on the capital offense or on a noncapital lesser included offense. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 643-644.)

The high court was not persuaded that the mistrial option was an adequate substitute for lesser included offense instructions. The Court noted that instructions on a lesser included offense "provide a *necessary* . . . measure of protection for the defendant." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 645, italics added.) Moreover, invoking the mistrial option in a case in which the jury agrees that the defendant is guilty of some offense, though not the offense charged, would require the jurors to violate their oaths to acquit in a proper case. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 644.)

Here, too, respondent's apparent suggestion that the jury could have voted for first degree murder, without finding true a special circumstance allegation, means that the jurors would have violated their oaths to acquit where the prosecution failed to prove beyond a reasonable doubt every element of first degree murder. As the Court rightly observed, "juries should not be expected to make such lawless choices." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 644.) Nor should the state advocate that jurors violate their oaths, as the jurors in this case would surely have done if they believed that the prosecutor had failed to prove all the elements of first degree felony murder, but they nonetheless convicted Wilson of the charge rather than acquit him, because they believed he was guilty of a serious crime, though not first degree murder.

Moreover, respondent's suggestion is implausible. After finding that Wilson was guilty of multiple first degree murders, it is highly unreasonable to expect that jurors would violate their oaths, and in light of the four first degree murder verdicts, answer *not* true the special circumstance allegation

that Wilson "was found guilty of more than one offense of murder in the first degree" (5CT 1139 [multiple-murder special-circumstance verdict]; 29RT 4775 [CALJIC 8.81.3: "to find the special circumstance referred to in these instructions as multiple murder convictions is true it must be proved that a defendant has in this case been convicted of at least two counts of murder in the first degree"].) In addition, the only theory of first degree murder instructed here was first degree felony murder. (29RT 4767 [CALJIC No. 8.21].) It is impossible to believe that the jury would fail to find the felony murder special circumstances after it returned four first degree felony murder convictions. (See, e.g., 5CT 1129 [Hurd felony-murder special-circumstance verdict].)

The state's second argument in *Beck* was that, even if a defendant was wrongly convicted, the judge had the ultimate sentencing power, thus ensuring that the defendant would not be improperly sentenced to death. The Supreme Court was "not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a 'third option.' If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 645.)

Respondent's apparent suggestion – that jurors who convicted a defendant of four first degree murders with special circumstances could be counted on not to sentence the defendant to death after they violated their oaths to acquit – is wildly speculative at best. As in *Beck*, if a properly instructed jury would find the defendant guilty of the noncapital offense of second degree murder, then the jury would not have the opportunity to impose the death sentence. Moreover, here, the jurors heard compelling

victim impact testimony. Charles Hurd's sister testified about the impact of his death on their close family, including their 86-year-old grandmother and his five children, ranging from age 3 to 12 (31RT 5077-5080). The risk is too great that a jury which heard this emotionally gripping testimony would vote for death, even a jury that had "some doubt" all elements of first degree murder had been proven. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 627.)

Moreover, as indicated, respondent's suggestion is based on a quote from *Prince*, which says in part that "under our state law [,] the absence of a lesser included offense instruction [cannot] force the jury into a choice between acquittal and a murder conviction that *necessarily* would lead to the death penalty." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1269, italics added.) But *Beck* was not concerned with the absence of an instruction necessarily leading to the death penalty. This is too narrow a view, which adds a qualification to *Beck's* express concern that "forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts *in favor of conviction*." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 637, italics added.) Thus, once again, *Beck* was about the risk of an unwarranted conviction. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 637; *Mitts*, 131 S.Ct. at p. 1763.) It was not about a conviction inevitably leading to imposition of the death penalty. *Prince's* qualification is unsupported by the plain language of *Beck*, affirmed by *Mitts*.

Finally, in addressing the *Beck* claim in *People v. Banks*, *supra*, 59 Cal.4th 1113, Justice Liu cites six precedents of this Court and notes that the Court has repeatedly rejected *Beck* claims due to the differences between California's death penalty scheme and Alabama's scheme in *Beck*.

(*Id.* at pp. 1161-1162.) All six decisions are discussed here (*People v. Taylor*, *supra*, 48 Cal.4th at p. 625, and *People v. Prince*, *supra*, 40 Cal.4th at pp. 1268-1269) or in the opening brief (AOB 151-173; *People v. Rundle* (2008) 43 Cal.4th 76, 143; *People v. Wilson* (2008) 43 Cal.4th 1, 17-18; *People v. Valdez* (2004) 32 Cal.4th 73, 118-119; *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn. 15). As these discussions reveal, this Court has repeatedly misapplied *Beck*. Moreover, all of the precedents cited in *Banks* address *Beck* in conclusory fashion, some more than others. (Compare *People v. Rundle*, *supra*, 43 Cal.4th at p. 143 [addressing *Beck* claim in six paragraphs] and *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15 [addressing *Beck* claim in footnote].) Wilson therefore requests that this Court reconsider its prior rulings and hold, as *Beck* commands, that the trial court should have provided the jury a third option of instructions on a lesser included offense, specifically unpremeditated second degree murder.

Respondent claims that any instructional error in this regard was harmless, as tested for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 218.) In support, respondent cites *People v. Breverman*, *supra*, 19 Cal.4th at p. 165 and *People v. Joiner* (2000) 84 Cal.App.4th 946, 972. (RB 218.) But as these cases expressly noted, *Watson* is the standard "in a noncapital case," and neither *Breverman* nor *Joiner* is a capital case. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165; *People v. Joiner*, *supra*, 84 Cal.App.4th at p. 972.) This is a capital case, and as shown in the opening brief, *Watson* does not apply. (See AOB 175; cf. *People v. Banks*, *supra*, 59 Cal.4th at p. 1161 [applying *Watson* to capital case while finding *Beck* unavailing].) Regardless of the test applied, the court's error in failing to instruct the jury on unpremeditated second degree murder is reversible. (AOB 173-198.)

Accordingly, for the reasons stated here and in the opening brief, the judgment should be reversed in its entirety.

//

//

4.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE OF THE ALLEGED DUNN ROBBERY.

Substantial evidence was presented to the jury that the intent to take Jessie Dunn's car was formed after the assault. This raised a question whether Dunn was robbed of his car. A reasonable jury could have concluded that theft was committed instead. Nevertheless, the trial court failed to instruct the jury on its own on theft as a lesser included offense of robbery. This was prejudicial error. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)

Respondent answers that Wilson's "claim lacks merit because substantial evidence supports the finding that appellants went to the carwash with an intent to commit robbery." (RB 218.) This is the wrong test. Respondent cites the test for deciding whether evidence is legally sufficient to sustain a verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see *Jackson v. Virginia* (1979) 443 U.S. 307, 391.) "An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense." (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) In other words, "[a] trial court has a sua sponte duty to 'giv[e] instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Eid* (2014) 59 Cal.4th 650, 656, quoting *People v. Breverman*, *supra*, 19 Cal.4th at p.

154.) Applying the wrong test leads respondent to the wrong conclusion.

Preliminarily it should be noted that, although respondent claims that "substantial evidence" defeats Wilson's argument, respondent does not provide a single citation to the record. Thus, this Court and Wilson are left to search the record on the assumption that respondent would not refer to substantial evidence if that evidence did not appear in the record.

Respondent repeatedly argues that appellants went to the carwash to commit robbery or robberies. (RB 218 ["appellants went to the carwash with an intent to commit robbery"]; 219 ["appellants went to the carwash with an intent to commit robberies"]; *ibid.* ["appellants had formed intents to commit robberies at the carwash before entering the building'].) Note that respondent does not claim that appellants went to the carwash to take Dunn's car. Next, according to respondent, appellants "entered the building" and "demanded to know where the money and 'shit' were kept." (RB 219.) Respondent claims here that demanding money and marijuana "shows appellants intended to take anything of value from the victims." (*Ibid.*) Clearly it does not. Moreover, it contradicts what respondent writes in Argument IX: "A reasonable inference from this statement was that they were there to steal marijuana (i.e., the "shit") and the money." (RB 205.) Intending to take marijuana and money from inside the building is not an indication of an intent to take a car sitting outside the building, far from it. To this extent, respondent's interpretation of the evidence in this argument is unreasonable.

Respondent also alleges that appellants "saw Dunn drive his El Camino equipped with the special chrome plated IROC rims into the parking lot and park" and "appellants had already noticed the IROC rims and intended to take them by force." (RB 219.) Respondent claims further

that "appellants saw the car had chrome rims as they waited outside." (RB 219-220.) As noted, respondent points to no substantial evidence in the record that would support these assumptions, for there is none.

Finally, respondent disputes Wilson's interpretation of the facts.

First, respondent claims that the inference it draws is "more reasonable" than the one that Wilson draws. (RB 219.) Thus, respondent agrees at least that Wilson's inference is reasonable, that the perpetrators chose to facilitate their escape by taking two cars. Indeed it is eminently reasonable and self-evidently logical that escaping in two cars increases the chances that at least one of the perpetrators will escape successfully. It is simple math, along the lines of divide and conquer. It is reasonable to infer that law enforcement devoted a finite number of police cars in immediately searching for the perpetrators. (See AOB 200 [anticipating a significant police response].) By using two cars to escape, the perpetrators reduced by half the likelihood that both would be found.

Second, respondent writes that "there is no evidence appellants made any plans to take cars to facilitate the escape." (RB 219.) This is true. If the perpetrators had made plans, then that would be evidence of an intent to take a car. That no plans were made supports the inference that it was a spur-of-the-moment, unplanned, unpremeditated idea to take the car, in other words, an after-acquired intent, which requires giving the jury theft instructions.

Third, respondent offers that taking Dunn's distinctive El Camino with the chrome IROC rims increased the chance of capture. (RB 219.) The evidence suggests otherwise. The perpetrators successfully escaped after all. And there is no evidence that an El Camino with chrome IROC rims is distinctive in any case. The shooting occurred in the City of

Compton in Los Angeles County. It is doubtful that Dunn's El Camino was especially noticeable, given Los Angeles's car culture and abundance of cars, or that it increased the likelihood of capture. And there is no reason for the perpetrators to think that it would.

Fourth, respondent argues that switching the IROC rims onto the Camaro and burning the El Camino confirms that the intent to take the El Camino arose before entering the carwash building. (RB 219.) Simply put, this is illogical.

Lastly, respondent argues that there is no substantial evidence of theft. (RB 220.) On the contrary, as shown here and in the opening brief (AOB 199-201), because the perpetrators expressed an interest solely in money and "shit" before the assault, and provided no similar expression of an intent to take the El Camino before or during the assault, "a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) Hence, the court erred by failing to instruct on the lesser included offense of theft.

//

//

5.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE HURD ROBBERY VERDICT.

Wilson demonstrated in his opening brief that the trial court erred in failing to grant his motion for a judgment of acquittal on the Charles Hurd robbery charge. (AOB 202.) The trial court denied Wilson's motion while concluding that the jury "could find a robbery of the people connected to the business based on the narcotics." (26RT 4342.) As the prosecutor conceded, however, no property was taken from Hurd. (AOB 202-203.) And because Hurd was not an employee or otherwise connected to the marijuana business, he could not be robbed of any property taken from that business. (AOB 203.) Therefore, the evidence was insufficient to support the Hurd robbery verdict. (AOB 202.)

Respondent disagrees. (RB 203.) Respondent interprets the evidence presented by the prosecutor as follows: Hurd was a co-owner of the carwash, Wheels 'N Stuff; "a substantial portion of the business was devoted to the selling of marijuana" (RB 205); Hurd personally sold marijuana at Wheels 'N Stuff (RB 207); and marijuana was taken from the business while Hurd was on duty during the alleged robbery (RB 207).[13]

In an effort to circumvent the prosecutor's concession that no property was taken from Hurd (27RT 4447), which would include property

---

[13] Respondent claims that Wilson avers Hurd was a co-owner of the carwash. (RB 207.) Respondent misinterprets Wilson's account of Williams's testimony. (AOB 203.) Although Hurd was in the carwash business with Williams, Hurd did not work for Williams and was not his partner. Hurd had his own clientele and washed his own customer's cars. (11RT 1508; 13RT 1700, 1710, 1785.)

belonging to Wheels 'N Stuff if Hurd owned the business as respondent claims, respondent relies on the holding of *People v. Scott* (2009) 45 Cal.4th 743, 746, 748, 756-758: all employees on duty during a robbery have constructive possession of their employer's property, and thus may be separate victims of a robbery of the employer's business, assuming the other elements of robbery are met as to each employee. (RB 207.) Because robbers "are likely to regard all employees as potential sources of resistance" (*id.* at p. 755; RB 207), and "as a co-owner of the business, Hurd was likely an even stronger source of resistance than a mere employee" (RB 207), respondent argues that Hurd had constructive possession of the business's marijuana while he was on duty during the alleged robbery (RB 208). Therefore, under respondent's view, Hurd was a robbery victim. (*Ibid.*)

Respondent's conclusion is based on a misunderstanding of the theory of constructive possession. An owner like Hurd is obviously not an employee and thus does not have constructive possession of the business's property.

"It has been settled law for nearly a century that an essential element of the crime of robbery is that property be taken from the possession of the victim." (*People v. Nguyen* (2000) 24 Cal.4th 756, 762.) "[T]he theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims." (*Id.* at p. 762.) Thus, Penal Code section 211 "limits victims of robbery to those persons in either actual or constructive possession of the property taken." (*Id.* at p. 764.)

Employees are custodians of the business's property for the benefit of the owner/employer. (*People v. Scott*, *supra*, 45 Cal.4th at p. 754.) All employees on duty during a robbery are deemed to have constructive

possession of the employer/owner's property because of the "special relationship" between the employee and the employer who owns the property: "any employee has, by virtue of his or her employment relationship with the employer, some implied authority, when on duty, to act on the employer's behalf to protect the employer's property when it is threatened during a robbery." (*Ibid.*) Because of this special relationship, an employee is a robbery victim where business property is taken when the employee is on duty. Therefore, "the prosecution may meet its burden of proving the element of possession by establishing that the alleged victim, from whose immediate presence the property was taken by force or fear, was *an employee of the property owner* and was on duty when the robbery took place." (*People v. Scott*, *supra*, 45 Cal.4th at p. 756, italics added.)

Plainly an employer or property owner does not have a special relationship with himself or herself. Thus, the policy that underpins expanding the theory of constructive possession to employees has no application to employers, so it is illogical to argue, as respondent does, that an employer has constructive possession of the employer's own business property.

Respondent's reliance on an employee as a "potential source of resistance" is also misplaced. (RB 207.) The passage from *Scott* that respondent cites explains in part why the Legislature intended that all on-duty *employees* have constructive possession of the employer's property during a robbery. "[S]uch a rule is consistent with the culpability level of the offender and the harm done by his or her criminal conduct." (*People v. Scott*, *supra*, 45 Cal.4th at p. 755.) Employees are victims under Penal Code section 211 because "employees generally feel an implicit obligation to protect their employer's property" and are likely targets of threats and

force during a business robbery. (*Ibid.*)

In any event, respondent fails to point to substantial evidence that any marijuana was taken. Respondent writes that "the amount of marijuana pictured in the exhibits appears to be far less than what Williams indicated was present at the shop before the shootings. (13RT 1737-1739, 1742-1743, 1848; Peo. Exhs. 7A, 7B, 8A, 8B; Def. Exhs. A2, A4.)" (RB 206.) This is untrue. As shown below, Williams had no idea how much marijuana was at the shop just before the shootings. Moreover, the most he ever saw at the shop was equal to "the amount of marijuana pictured in the exhibits," to which respondent refers. (RB 206.)

Although Williams speculated that "maybe" (13RT 1740) there "could" have been as much as a pound of marijuana at the carwash on the day of the shooting – "Who knows," he testified (13RT 1803) – he also acknowledged that, other than the bag of marijuana he took with him just before the shooting, he did not see any marijuana at the carwash that day (13RT 1746). And just as significant, he "never knew how much weed was there on any particular day" (13RT 1747), which of course would include the day of the shooting. Williams further testified that "the largest amount" of marijuana he ever saw at the carwash at any one time was "probably something around that amount" shown in exhibit 7A, the exhibit that respondent refers to, and the total amount that remained at the carwash after the shooting. (13RT 1738, 1802-1803 ["that bag you just showed me on the pictures"].) Thus, contrary to respondent's representation, the amount of marijuana pictured in the exhibits appears to be equal to the same amount that Williams ever saw at the carwash at any one time.

In addition, Anthony Brown saw both perpetrators leave the carwash, one in the El Camino and the other walking out of the carwash shop; Brown

said nothing about the perpetrators carrying away any loot. (19RT 2987-2991, 2993-2997.) In short, no marijuana was taken.

It is unclear whether respondent argues that money was stolen. Respondent certainly does not explicitly say that any money was taken. Respondent writes that "[i]t *appears* that no money was found by the police after the shootings either inside the building or on the victims." (RB 206, italics added.) But respondent cites to nowhere in the record that supports this assertion. Respondent merely cites to testimony by Christopher Williams and a sheriff's photographer, neither of whom testified about money not having been found (see RB 206, citing 13RT 1737-1739, 1742-1743, 1848), evidence that should have been easily presented if the police looked for and found no money. Respondent also claims that "victims' pockets had been searched" (RB 206), but respondent does not say that Hurd's pockets were searched. In any event, there is no substantial evidence that money was taken.

Furthermore, respondent's view of the evidence is completely at odds with that of the person who presented the evidence to the jury – the prosecutor. Nowhere in the prosecutor's argument to the jury did he say that marijuana or anything else was taken. Nor did he say that Charles Hurd, a murder victim, sold marijuana. (27RT 4425-28RT 4510; 29RT 4673-4723.)[14]

---

[14] Respondent claims in a footnote: "Although not relevant in the context of the section 1118.1 motion, it was later learned during the prosecution's rebuttal case that money and jewelry were stolen from Hurd." (RB 206, fn. 106, citing 25RT 4112-4113.) No money or jewelry were stolen from Mr. Hurd, though the jury might have been as confused as respondent on this score, which might explain why the jury reached its robbery verdict. Respondent's claim is based on the testimony of Mr.

(continued...)

Lastly, respondent submits that in the event the evidence of a completed robbery is lacking, then this Court may reduce the conviction to attempted robbery. (RB 208.) Respondent is mistaken. And the authority that respondent cites – two statutes and two cases – do not support a reduction to attempted robbery.

The cases respondent cites (RB 208) do not address the issue of whether on appeal, a court may reduce a judgment to an attempted crime where the trial court erred in failing to enter a judgment of acquittal. Respondent offers *People v. Reed* (2006) 38 Ca1.4th 1224, 1227, which held that the accusatory pleading test for lesser included offenses does not apply in deciding whether multiple convictions were allowable for a single course of conduct. (*Id.* at p. 1229.) Respondent also cites *People v. Bailey* (2012) 54 Cal.4th 740, 748. Although there the Court "granted review to determine whether, after finding insufficient evidence to support a conviction for escape from state prison, an appellate court may reduce the conviction to attempt to escape," this Court held that attempt to escape is not a lesser included offense of escape. (*Id.* at p. 744.) Therefore, it did not answer a similar question to the one presented here.

In addition, respondent cites Penal Code sections 1181, subdivision (6) and 1260 (RB 208), but as shown next, these are not the statutes that specifically govern the question here. Suffice to say that those statutes

---

[14](...continued)
Hurd's girlfriend, who was twice convicted of perjury and who admitted that she was unaware of which rings Mr. Hurd wore when he was with his wife at her house. (25RT 4115-4117.) The prosecutor apparently found her testimony so unreliable that he conceded to the jurors that he could not show them any piece of property that was taken from Mr. Hurd. (2RT 4447.)

pertain to the situation where a defendant seeks a new trial and the appellate court reduces the degree of the crime in lieu of granting a new trial. (*People v. Navarro* (2007) 40 Cal.4th 668, 679 ["From the beginning, section 1181, subdivision 6, and later section 1260, have been understood to provide courts a mechanism for correcting the jury's error in 'fix[ing] the degree of the crime'"].) Here, Wilson seeks the acquittal that should have been granted by the trial court.

Wilson moved for an acquittal under Penal Code section 1118.1. As this argument demonstrates, the trial court erred in failing to grant Wilson's motion. Had it granted the motion, as it should have, the ruling would have been final, because a judgment of acquittal under Penal Code section 1118.1 is non-appealable. (Pen. Code, § 1118.2 ["A judgment of acquittal entered pursuant to the provisions of Section 1118 or 1118.1 shall not be appealable and is a bar to any other prosecution for the same offense"].) Therefore, jeopardy would have attached. (*Ibid.*; Pen. Code, § 1023 [acquittal "is a bar to another prosecution for the offense charged in such accusatory pleading, or for an *attempt* to commit the same," italics added]; *People v. McDonald* (1984) 37 Cal.3d 351, 377-378 [acquittal on robbery charge bars any further prosecution for attempted robbery].)

Jeopardy should attach now, and respondent should not get a second bite of the apple by reducing the verdict to attempted robbery. (See *People v. McElroy* (1989) 208 Cal.App.3d 1415, 1424 [trial court may not unqualifiedly acquit defendant of robbery and subsequently modify its ruling to reinstate liability for lesser included offense of attempted robbery].)

> In ruling on an 1118.1 motion for judgment of acquittal, the court evaluates the evidence in the light most

> favorable to the prosecution. . . . This test is the same as that used by appellate courts in deciding whether evidence is legally sufficient to sustain a verdict. The grant of a judgment of acquittal under section 1118.1 bars "any other prosecution for the same offense." (§ 1118.2.) Because the prosecution had a full opportunity to prove the facts necessary for a conviction but failed to do so, double jeopardy bars a second bite at the apple.

(*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132-133, case citations and footnote omitted; cf. *McDaniel v. Brown* (2010) 558 U.S. 120, 131 ["Because reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars a retrial"]; *People v. Santamaria* (1994) 8 Cal.4th 903, 911 [same].)

When the prosecutor argued in opposition to Wilson's motion for acquittal, he had the opportunity to reduce the charge to attempted robbery. When the court asked him to respond to the defense argument, the prosecutor stated that "all of the evidence that was presented clearly shows sufficient evidence for the jury to make determinations as to the crime of *attempted* robbery as to count[] five [Hurd]." (26RT 4342, italics added.) The prosecutor did not argue that there had been a completed robbery. Then, after the defense argued that "it would be incumbent upon the People to produce evidence that some marijuana was actually taken and the circumstantial evidence doesn't really support that some was, indeed, taken" (26RT 4344), the prosecutor did not argue that marijuana was taken, and he certainly did not produce any evidence that some marijuana was actually taken. Indeed, he simply responded, "Judge, I'll submit it." (26RT 4348.)

"[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." (*Arizona v. Washington* (1978) 434 U.S. 497, 505.) The prosecutor had his one opportunity on the Hurd robbery charge. Accordingly, judgment of acquittal in favor of Wilson should be entered.

//

//

6.

THE TRIAL COURT ERRED PREJUDICIALLY IN ADMITTING A LIST OF NAMES AND FOUR DRAWINGS, WHICH WERE UNAUTHENTICATED AND CONSTITUTED INADMISSIBLE INFLAMMATORY HEARSAY.

A. The List and the Drawings Were Not Properly Authenticated.

Wilson explains in his opening brief that the trial court erred by admitting a list of names and four drawings that were not properly authenticated as to Wilson. (AOB 213-219.) Respondent, however, while citing *People v. Olguin* (1994) 31 Cal.App.4th 1355 and *People v. Gibson* (2001) 90 Cal.App.4th 371, argues that these writings were authenticated based on their location, the contents of the tablet in which the writings were found, and other circumstantial evidence. (RB 177.) Neither decision supports respondent's claim. Instead, they illustrate in plain terms what is most lacking in this case. Whereas the writings in *Olguin* and *Gibson* were the creation of each respective defendant, respondent has never claimed, let alone demonstrated with evidence, that Wilson created the list of names or the drawings. Furthermore, respondent points to no evidence that would allow a finding of authentication as to Wilson.

In *Olguin*, the appellate court found that handwritten lyrics of two songs found in the defendant's home were adequately authenticated as to the defendant because "[b]oth the content and location of these papers identified them as the work of [the defendant]." (*People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1372-1373.) One song referred to its composer as "Vamp," the defendant's gang moniker, while the second song purported to

be composed by "Franky," a nickname derived from the defendant's first name, Francisco. In addition, the lyrics included references to the defendant's gang and his job as a disk jockey. In light of this evidence, the song lyrics were adequately authenticated as the work of the defendant. (*Id.* at p. 1373.) Thus, the sole reason the appellate court affirmed the lower court's finding of authentication was because the court was able to identify – through content and location – that the author of the lyrics was the defendant.

Similarly, in *Gibson*, the prosecution produced evidence that the defendant was the author of the subject writings. There, the police seized two manuscripts from the defendant's residences, one from the defendant's hotel room and another from her home. Each manuscript was written in the first person, and each described operating a prostitution enterprise. The Court of Appeal reviewed the manuscripts and found "clear references to the author being 'Sasha,' one of appellant's aliases." (*People v. Gibson*, *supra*, 90 Cal.App.4th at p. 383.) As "no evidence showed that these items belonged to anyone else," the court concluded that this evidence showed the manuscripts were properly authenticated. (*Ibid.*)

Here, respondent concedes that Wilson did not create the list and the drawings: "No evidence was adduced that either appellant was responsible for the material." (RB 180.) The evidence supports respondent's concession. The list of 22 apparent nicknames included those of Wilson and Pops. Respondent points out that Wilson's nickname, Bird, appears twice in the tablet and is the third name in the list. (RB 177.)[15] Although

---

[15] A similar but not identical list of names to the one on 4CT 846 appears on 4CT 838.

respondent makes this observation, respondent fails to offer any significance for the name's appearances as they might relate to authentication, because there is none. What is significant is that Wilson's nickname does not appear in the tablet in any manner that might suggest that Bird was the author or artist. In the list of 22 nicknames, "Bird" does not stand out, making it indistinguishable from the other 21 names. (4CT 833.) The second time Wilson's nickname appears in the tablet, it accompanies four references to "money, power, respect," but it would be sheer speculation as to what this means. (4CT 833.)

Unlike *Olguin* and *Gibson*, where there are references that the defendant in each case was the creator – Vamp and Franky in the former and Sasha in the latter – no such references exist here, if only because at least 22 nicknames, not merely one, appear in the tablet. In addition, there are no indications in the pages of the tablet that are similar to the defendants' job references in *Olguin* and *Gibson*, respectively a disk jockey and a madam. The writings in *Olguin* and *Gibson* provide strong evidence who created the writings involved. Here, it is anyone's guess who created the contents of the tablet.[16]

Thus, the single factor that caused the appellate courts in *Olguin* and

---

[16] The only signature that appears in the tablet is that of Everett Rivers, found at the top of 4CT 845. Pops's trial counsel explained to the court that he interviewed Rivers, who acknowledged "partially making some of the lists" and a drawing. (8RT 715; see also 8RT 714, 730, 824.) If the prosecutor thought that Wilson wrote the list, or anything else in the tablet, he could have obtained a handwriting exemplar from Wilson, but there is no evidence that he even tried, a fair indication that the prosecutor knew that Wilson did not write the list. (*People v. Clark* (1993) 5 Cal.4th 950, 1003 [defendant's refusal to provide handwriting exemplar is evidence of consciousness of guilt].)

Gibson to affirm authentication in those cases is absent in this case. Vamp, also known as Franky, wrote the song lyrics in *Olguin*, and Sasha wrote the two manuscripts in *Gibson*. Bird did not write the list or draw the sketches in this case. Here, the writings were not properly authenticated as to Wilson.

With respect to location, the prosecutor argued that the apartment "was more of a gang hangout, crash pad type of location, rather than a residence where Mr. Wilson just lived by himself." (8RT 717, 1465 [Court: apartment where tablet found is "a gang location according to the evidence the people proffered"].) Thus, based on location alone, it would be illogical to infer that Wilson was aware of the tablet's existence in the apartment, even less so of its contents.

More important, the evidence produced by the prosecutor shows that the tablet was likely brought into the apartment by a woman who sat at the kitchen table, where the tablet lay when it was seized by the police. As Tanesha Martin testified, the tablet was not in the apartment for the two years preceding February 1998 when she moved out. (8RT 792.) Nor was the tablet in the apartment when she last visited there the weekend before the tablet was seized on March 5, 1998. (8RT 788; 15RT 2122.) The only evidence of the tablet's existence in the apartment was when it was seized itself, a time that coincides with the woman's appearance in the apartment.

Long Beach police officer Richard Conant testified that he took part in searching the apartment on March 5, 1998. (15RT 2122.) When he entered the apartment, there were three people present – Wilson, Aziz Harris, and a woman, whose name the officer did not recall. (*Ibid.*; 15RT 2150.) Officer Conant testified that when he entered the apartment, Wilson was lying on a couch in the living room. (15RT 2147, 2163 [Detective

Branscomb describing apartment as studio with "a kitchen, a living room, a bathroom and a fairly large closet"].) Notably, the woman sat at the kitchen table where officers found the tablet. (15RT 2162, 2170.) The testimony of another police officer who participated in the search, Detective Branscomb, confirmed what Conant told the jury. The prosecutor asked the detective about the woman in the apartment: "Was there a woman that was seated somewhere in the apartment at the time that you arrived?" Detective Branscomb answered, "Yes." Next he was questioned, "can you tell us where the woman was seated, sir?" Detective Branscomb responded, "She was in the kitchen, at the kitchen table." (15RT 2161-2162.) Also asked where he first saw the tablet in the apartment, Detective Branscomb responded, "That was located on the kitchen table in the kitchen where the female subject was being detained when we arrived." (15RT 2170.)

Based on the evidence, the tablet first appeared in the apartment the same day it was seized. Its appearance occurred at the same time the unnamed woman appeared in the apartment. Given that she sat closest to the tablet, likely within arm's length of it, it is reasonable to infer that she controlled the tablet and unreasonable to infer that Wilson did so. Thus, although the tablet was found in Martin's apartment where Wilson was staying after Martin moved out, any significance of this fact for purposes of authentication was negated by other facts – the apartment was a crash pad, the tablet first appeared in the apartment at about the same time it was seized, and it was discovered resting on the kitchen table where the woman sat. Based on location alone, there is no reason to believe that Wilson was the owner of the tablet or had any control over it. On the contrary, the evidence pointed to the woman sitting at the kitchen table as the likely person with control over the tablet, particularly since the only evidence of

the tablet's existence in the apartment coincided with the woman's appearance in the apartment. Thus, unlike in *Olguin* and *Gibson* where there was substantial evidence that the writings belonged to the defendant in each case and no evidence that they belonged to anyone else (*People v. Gibson*, *supra*, 90 Cal.App.4th at p. 383), here there was evidence that the tablet belonged to someone else and virtually no evidence that it belonged to Wilson. Accordingly, Wilson's lack-of-authentication objection to admitting the list and the drawings should have been sustained.

B. The List of Names and the Drawings Were Inadmissible Hearsay and Consistently Exploited by the Prosecutor for Nonhearsay Purposes to Inflame the Jury.

Beginning at page 178 of its brief, respondent argues that the list and the drawings were properly admitted as nonhearsay, as stated by the court, "for the limited purpose of connecting the defendant [Pops] to the location involved and associating him with the co-defendant [Wilson]." (12RT 1464; see also 14RT 1899 [Court: "I ruled that the list and the drawings could come in as to the connection to the apartment and the relationship between the defendants"].) The court would later add confusion to its ruling by stating that "the list . . . serve[d] as circumstantial evidence of the relationship between the defendants and these other people" (14RT 1900-1901), without indicating who those other people were. Respondent cites to 10 pages of the record in proposing that the "other people" referred to by the court were Barnes and Harris. (RB 173, citing "14RT 1897-1907.") In any event, respondent fails to adequately rebut Wilson's showing in his opening brief that the list and the drawings were inadmissible hearsay, which the prosecutor repeatedly exploited for the substantive, inflammatory hearsay purpose of showing that the

defendants' relationship was based on membership in a violent street gang that glorified weapons and violence. (AOB 219-234.)

Preliminarily, it should not go unmentioned that respondent acknowledges the court admitted *four* drawings and the list. (RB 173-174, describing exhs. 68-A through 68-E.) Nevertheless, respondent only addresses whether the list and *three* drawings were nonhearsay. (RB 181.)Respondent fails to answer the charge that exhibit 68-A is hearsay, probably because it is. Respondent describes the drawing as a "Tech Nine semi-automatic that is being fired" alongside "the barrel of a shotgun." (RB 173.) The drawing is not circumstantial evidence that Pops had a connection to the apartment or the men had a connection to each other. But it did serve the purpose of inflaming and misleading the jury given that, according to respondent, it pictures the kind of gun, a Tech Nine, which the prosecutor told the jury time and again was used by Pops in the shootings. (27RT 4442, 4445; 28RT 4490, 4499, 4501, 4509; 29RT 4692, 4699.) The court plainly erred by admitting this inflammatory hearsay.

Exhibit 68-E is a drawing of an arm with the initials, Y.M.O. The gun is emitting fire. Given what appears to be the rapid ejection of cartridges shown in the drawing, the gun is probably a semi-automatic. Respondent claims that it is nonhearsay because, along with the list of names (exh. 68-B), it "helped established [sic] Barnes's knowledge of appellants' relationship." (RB 181.) Respondent argues further, "[t]his evidence too constituted circumstantial evidence of Barnes's personal knowledge that they were all members of the Young Mafia Organization or 'YMO'." (RB 181.)

During his trial testimony, Barnes was shown exhibit 68-E. There was no evidence that Barnes had any knowledge of the drawing or its

creation. Barnes's testimony consisted of telling the jury what the drawing looked like to him, and what Y.M.O. meant to him. Barnes testified the initials stood for the Young Mafia Organization, a group that he, Wilson, Pops, and Harris belonged to. The parties stipulated that Pops had the same initials tattooed on his arms. (14RT 1961-1964.)

Respondent offers that the gun shooting bullets and fire in exhibit 68-E looks like a "Tech-Nine," again the weapon the prosecutor said Pops used during the Super Bowl shooting. (RB 174.) And according to respondent, exhibit 68-E was "clearly an homage to Pops." (RB 182-183.) If the drawing was clearly an homage to Pops, then the jury probably interpreted it as such. Thus, exhibit 68-E was inflammatory hearsay evidence, speculative at best and lacking in foundation, that was intended not only to convey fear and loathing of Pops to the jury, but also to convey that he glorified his prior use of the same weapon during the shooting in this case. Contrary to respondent's view of exhibits 68-B and 68-E, a list of names and a single drawing do not constitute circumstantial evidence of Barnes's personal knowledge that "they" were all members of Y.M.O. Thus, the court erred in admitting them.

Finally, citing three decisions – *People v. Williams* (1992) 3 Cal.App.4th 1535, 1538-1540; *People v. Goodall* (1982) 131 Cal.App.3d 129, 139-140, 143; and *People v. Rushing* (1989) 209 Cal.App.3d 618, 622 – respondent claims that when combined, the two drawings of Pops (exhs. 68-C, 68-D), the drawing of the Y.M.O. arm (exh. 68-E), and the list (exh. 68-B), are circumstantial nonhearsay evidence of Pops's connection to the apartment and Wilson. (RB 181-182.) Two of the cases cited by respondent – *Goodall* and *Rushing* – show otherwise. The third case – *Williams* – is simply irrelevant.

In *Williams*, the issue was whether documentary evidence was admissible to prove residence or occupancy. Three documents seized from an apartment – a fishing license and two checks payable to the defendant – bore the defendant's name and address. The trial court found that the documents were inadmissible hearsay because they were offered for the truth of the matter asserted therein, that the defendant lived at the apartment, as shown by the address on the license and on the checks. (*People v. Williams*, *supra*, 3 Cal.App.4th at pp. 1540-1541.) The appellate court, however, concluded that the documents were admissible nonhearsay evidence. The court reasoned that if the document is the type of personal property that is more likely to be found in the residence of the person named in the document than in the residence of any other person, then that fact, coupled with the name the document bears, is circumstantial evidence that the person named in the document resides in the place where the document was found. A fishing license in the defendant's name and two checks payable to the defendant were more likely to be found in the defendant's residence than in the residence of any other person. Hence, the documents were circumstantial nonhearsay evidence that a person with the same name as the defendant lived where the documents were found. (*Id.* at pp. 1542-1543.)

Here, unlike in *Williams*, the documentary evidence was not introduced as circumstantial evidence to show where Wilson or Pops lived. Hence, *Williams* does not aid respondent.

Neither do *Goodall* and *Rushing*. In *Goodall*, the defendant was convicted of the manufacture of PCP and possessing certain chemicals with the intent to manufacture PCP. Documents bearing her name (an unsigned lease, a rent receipt, an eviction summons, a moving receipt signed with her

name, and her driver's license) and other items reasonably identifiable as belonging to her (including numerous photographs of her and her husband) were found at a residence, which one expert said was a PCP lab. The appellate court held that the documents and the other items were properly admitted as nonhearsay. The court reasoned that the jury could infer the documents would not have been located in the master bedroom, with the driver's license kept in a safe in the master bedroom, unless the defendant had either some dominion and control over the residence, or a presence sufficient to give her an awareness of what was going on in the residence and a familiarity with PCP. (*People v. Goodall*, *supra*, 131 Cal.App.3d at p. 143.)

Rushing involved the unlawful possession of a controlled substance. (*People v. Rushing*, *supra*, 209 Cal.App.3d 621-622.) There, the reviewing court held that "important personal papers" containing the defendant's name and signature (court documents), found both in a desk drawer in the same bedroom where cocaine was located and also on a dresser in the room where the defendant was sleeping, were circumstantial evidence of the defendant's right to exercise dominion and control over the apartment. The court reasoned that, because the defendant had access to "private areas" of the apartment, that is, "rooms generally considered the domain of persons with possessory rights," and he left important personal papers in these locations, this was sufficient evidence for the jury to reasonably infer that the defendant had the right to exercise dominion and control over the apartment where the cocaine was found. (*Id.* at p. 622.)

Respondent submits that the legal principles expressed in *Goodall* and *Rushing* govern this case. (RB 181-182.) If so, then in order for the list and the three drawings to be circumstantial evidence that could be used

against Wilson and Pops, the documents would have to be akin to important personal papers belonging to Wilson or Pops and located in private areas. But the list and the drawings were self-evidently unimportant papers, nothing like the important court documents in *Rushing* or the eviction summons and driver's license in *Goodall.* Moreover, located on a table in the kitchen out in the open, the list and the drawings were not found in private areas. Under *Goodall* and *Rushing*, the items were not circumstantial nonhearsay that could be admitted against Wilson and Pops.

In arguing that the list of names is nonhearsay, respondent does not suggest that the list should be considered by itself. Instead, respondent argues that the list is nonhearsay as long as it is considered together with drawings. (RB 181.) But as shown, even when the list is analyzed in this context, it is not admissible nonhearsay. Furthermore, standing alone it is inflammatory hearsay, which the prosecutor did his best to exploit, especially when Barnes testified.

At the top of the list are the words, "lil NIGGAS." From the outset, because the list was found in an apartment where Wilson was staying, connecting it to Wilson was meant to offend. The list has two columns of names. On the left side of the page are 22 nicknames. A second column of five nicknames has the letters, "NXT GEN," at the top, likely meaning Next Generation. The five nicknames all begin with the letters, "lil." A starred asterisk stands for "all the niggaz locked up." A gun icon stands for "disciplinary action." A dollar sign ($) stands for "niggaz with lique potential." And finally, a house icon stands for "home welcoming." (Exh. 68-B; 4CT 846.)

The exhibit is intended to inflame and strike fear. Frightening enough is the thought of 22 men loose in society and committed to

violence, and in the context of this case if the prosecution is to be believed, to murder and robbery. Even more frightening, as the exhibit communicated, is the thought that the Young Mafia Organization was enlisting into its ranks the next generation, so young in years that the five recruits were each called "lil."

Over numerous objections by defense counsel, the court permitted the prosecutor to examine Barnes about the list and the drawings, even though he had no knowledge of their creation and the court had previously ruled multiple times that the list and the drawings were nonhearsay. The prosecutor began by asking Barnes to tell the jury where Pops's name appeared on the list. The court overruled Pops's relevance objection. Barnes answered that Pops was number one and Wilson was number three. (13RT 1867-1868.)[17]

Employing the time-honored convention of saving major emotional points for the end of an argument to the jury – this way jurors would be sure not to forget the important message advanced – the prosecutor capitalized on Barnes's improper hearsay testimony by arguing to the jury – also improper – that Barnes's testimony about the list could be used for its truth. The prosecutor first reminded the jury of the drawing of the tattoo, Pops's tattoo, and the Tech-Nine.

> We have various drawings. And you will see the one drawing, ladies and gentlemen, of an arm firing a weapon

---

[17] Eventually, because the court had previously ruled on the motion in limine regarding the list and the drawings, the court extracted a stipulation from the parties that contemporaneous objections need not be made to them as the evidence came in. The prosecutor also noted his understanding that the defense had an ongoing objection to the items that were part of the tablet. All agreed. (14RT 1895-1897.)

> that looks very similar to a Tech Nine. Bullets are coming out of it, casings are coming out of it. That means that the casings are coming out where they're supposed to. And what does the arm say? It's got a tattoo Y.M.O., Young Mafia Organization. Mr. Pops has a tattoo, stipulated to, in the same location as is shown in that particular diagram, 68-E in evidence. Think about that, ladies and gentlemen.

(28RT 4509.) The prosecutor then finished by telling the jury that in order to acquit Pops and Wilson, they would have to "completely and totally disregard" the "gang list," with Pops in his number one position and Wilson in his number three position. (28RT 4510.)

Thus, although the list and the drawings were ostensibly admitted to show a connection between Pops and Wilson, Pops and the apartment, and between others, the prosecutor used the exhibits for an impermissible hearsay purpose. He used the exhibits to persuade the jury that Pops and Wilson were the leaders of a gang, a gang that emulated the most notorious gangsters in American history.

C. Conclusion

Accordingly, as set forth here and in the opening brief, the trial court erred prejudicially in admitting the list and the drawings. The judgment should be reversed in its entirety.

//

//

7.

JUROR NO. 9 COMMITTED PREJUDICIAL MISCONDUCT BY INTENTIONALLY CONCEALING DURING TRIAL HER PRIOR EXPERIENCE AS A DEATH PENALTY JUROR, THOUGH SHE REMEMBERED IT DURING TRIAL AND HAD BEEN ASKED TO DISCLOSE IT DURING VOIR DIRE.

Wilson demonstrated in his opening brief that Juror No. 9 breached her duty to disclose her prior jury service when she remembered it during Wilson's trial. Juror No. 9's breach constituted intentional concealment, which implied that she was biased against Wilson. Consequently, Juror No. 9 committed misconduct, and a new trial is warranted. (AOB 251-264.)

Respondent does not address Wilson's principal argument, that Juror No. 9's failure to disclose her prior jury service *when she recalled it during trial* constituted intentional concealment. (AOB 251 ["Juror No. 9 Committed Misconduct by Intentionally Concealing Her Prior Service on a Capital Jury *When She Remembered It During Trial*," italics added].) Instead, respondent answers Wilson and Pops in the same argument and proceeds as if they both argued that Juror No. 9 intentionally concealed her prior service on a capital jury by failing to include it as one of her juror experiences on her questionnaire. (RB 270-273; see Pops AOB 301 ["Juror No. 9 Deliberately Withheld Prior Death Penalty Trial Juror Service In Her Questionnaire and on Voir Dire"].) By failing to address Wilson's argument, respondent forfeits any belated response. (*People v. Barragan* (2004) 32 Cal.4th 236, 254, fn. 5 [declining to address People's argument raised for first time in brief].) Nevertheless, out of an abundance of

caution, Wilson will reply to claims by respondent regarding "appellants," which might apply to portions of Wilson's argument.

Respondent claims that the record shows Juror No. 9 did not intentionally conceal her previous jury experience on her questionnaire. (RB 272.) Although the trial court found that Juror No. 9 did not intentionally conceal her prior service when she answered her questionnaire, the court made no similar finding with respect to Juror No. 9's duty to disclose her prior service when she remembered it during trial. That is, the court did not find that Juror No. 9 did not intentionally conceal her prior service when she recalled it during trial. Instead, the court found that Juror No. 9 was under no duty to disclose the information that she recollected during trial. (40RT 6436 [Court: "nobody told her, you know, if some time during the course of the trial you think of something you forgot on voir dire, bring it up"].) The court, however, was mistaken. As shown in the opening brief, the questionnaire imposed on Juror No. 9 the duty to correct her inaccurate questionnaire answers if she realized during trial that she made a material mistake in answering it. And even if the questionnaire did not expressly inform Juror No. 9 to correct any material omissions that came to her during trial, as an officer of the court, she had the duty to disclose the information to the court when she remembered it during trial. (AOB 252-258.)

Whether Juror No. 9 actively concealed her prior jury experience when it came to her during trial, or she failed to disclose it, Juror No. 9 intentionally concealed her prior service, as shown below. Wilson's trial counsel explained it to the court: "when she realized in the middle of trial that she had previously sat on a murder and death penalty trial and she didn't come forward with that, that turned it into an intentional

concealment under the law, not in a pejorative sense, not in the sense she's a liar by any means, but if it initially started out as inadvertence, it turned into advertence when she realized that she had misstated material facts during voir dire." (39RT 6384-6385.)

A finding of intentional concealment is especially appropriate here. As the trial court declared, Wilson had no way of discovering that Juror No. 9 had served previously on a capital jury, except from Juror No. 9 herself. The jury commissioner's records did not cover the period when Juror No. 9 sat. (40RT 6434-6435; see 6CT 1519.) Because of Juror No. 9's exclusive possession of the information, she had a heightened duty to disclose it to Wilson, akin to a party in an intentional concealment action who has sole knowledge of material facts and knows such facts are not known to or discoverable by the other party. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346-347; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 796, pp. 1151-1152 [tort law recognizes that a party having exclusive knowledge of material information may have a duty to disclose that information to the other party even in the absence of a fiduciary relationship].) In addition, under the Restatement Second of Contracts, a person's non-disclosure is equivalent to an intentional misrepresentation where the party knows that disclosure is necessary to prevent a previous assertion from being a misrepresentation. (*Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 749-750.) These principles should apply here due to Juror No. 9's exclusive knowledge.

Respondent claims that a prospective juror's prior service in a murder case did not suggest any bias and was not a significant factor during voir dire. (RB 272.) Voir dire shows otherwise.

Immediately preceding defense counsel's examination of Juror No.

9, counsel questioned Juror No. 12, who was an alternate on a capital jury previously, just like Juror No. 9. (10RT 1150-1152; 6CT 1624.) Defense counsel used a joint peremptory challenge to remove Juror No. 12, just as they would have removed Juror No. 9 if she had disclosed her prior jury service. (10RT 1240, 1242.) Given that Juror No. 12 had a profile similar to Juror No. 9, defense counsel's joint peremptory challenge of Juror No. 12 is salient evidence that the defense viewed someone like Juror No. 9 as biased.

Additional peremptory challenges demonstrated that a prospective juror's prior service in a murder case was a significant factor to the defense. Counsel questioned those prospective jurors who had served on a jury in a homicide case as to whether the death penalty was involved in each case. One juror who served on two homicide cases was so questioned and was struck by the defense. (10RT 1160-1161; 11RT 1298; 6CT 1642, 1625.) Juror No. 3480 revealed that he, too, had been a juror on a murder case. Pops's counsel excused him. (11RT 1358; 6CT1625.) Juror No. 9677 revealed that he had been a juror in a murder case. (7CT 1655.) The defense used a joint peremptory challenge to remove him. (11RT 1301; 6CT 1625.) Juror No. 7980 was a juror in a case involving a drive-by shooting. (7CT 1664.) He was questioned whether the shooting involved a homicide. (10RT 1263.) It did not, and he served on the jury. (10RT 1264; 6CT 1626; 22CT 5773.) Finally, Juror No. 0467 revealed that he had served in a murder case. (7CT 1669.) He was questioned whether it involved the death penalty. It did not, and he served in this case. (10RT 1138; 22CT 5773.)

The fair and obvious inference is that Wilson would have used a peremptory challenge to strike Juror No. 9 from the jury if she had

disclosed her prior jury service. Because she did not, a biased juror sat on Wilson's jury.

Respondent cites to portions of the record which, respondent maintains, are contrary to any suggestion that Juror No. 9 intentionally concealed her prior service. Respondent misreads the import of these record cites. For example, that Juror No. 9 may have given indications in her juror questionnaire that she "did not particularly want to be" a juror (RB 272) has no bearing on whether she intentionally concealed her prior experience. Although respondent offers this as contradicting any notion that Juror No. 9 would intentionally conceal her prior jury experience, respondent fails to connect the dots, for there is no connection. Respondent merely assumes that having reservations about becoming a juror is inconsistent with having a bias towards Wilson, but possessing both thoughts are not mutually exclusive. In addition, Juror No. 9's bias against Wilson may also co-exist with unfavorable opinions about and experiences with law enforcement. Her bias would not prevent her from having doubts about police misconduct. Yet respondent insists that the cited record references show that Juror No. 9 was "clearly" not a juror who intentionally concealed a bias in the hope of becoming a juror in this case. (RB 272.) On the contrary, Juror No. 9's failure to disclose her prior service – first on her questionnaire when she was asked about it, then during voir dire when she was repeatedly reminded of it, and then finally during trial when she was confronted with her thoughts about it – is the strongest evidence that Juror No. 9 intentionally concealed her previous jury experience, and nothing respondent points to in the record shows otherwise.

Respondent urges as well that Juror No. 9's "inadvertent omission"

of her prior jury experience from her juror questionnaire did not suggest any bias against Wilson. (RB 272-273.) In support, respondent cites *In re Hamilton* (1999) 20 Cal.4th 273, 299-301. But *Hamilton* indicates that Juror No. 9's omission did indeed suggest bias. One issue in *Hamilton* was whether the juror inadvertently or intentionally concealed material information during voir dire, consisting of a conversation she had with her neighbor. The referee found the omission was inadvertent, and this Court concluded ample evidence supported the finding, including that the juror's voir dire answers suggested a good faith effort to remember and disclose the information. "[T]he juror's good faith when answering voir dire questions is the most significant indicator that there was no bias." (*Id.* at p. 300.)

Juror No. 9 made no such similar good faith effort that would support a finding that she had no bias. Instead, Juror No. 9's own testimony provides evidence that she did not make a good faith effort when answering questions about her previous jury experience. The trial court asked Juror No. 9 when she first remembered being a juror in the prior death penalty case. Juror No. 9 responded: "Let's see. I don't know exactly when. I can't pinpoint time frame. It was not at the time that I filled out the jury questionnaire *because it was lengthy. I was trying to get through it.* I just didn't recall it at that time. It could have been months into it or weeks into it and I can't really say when." (39RT 6342, italics added.) Thus, even though time and again the questionnaire instructed prospective jurors – with underscoring and bold lettering – that they were required to provide complete answers to all questions under penalty of perjury (7CT 1838, 1860), and even though the court instructed them verbally not to rush but to take their time in filling out the questionnaires

(9RT 978), Juror No. 9's testimony shows that she did not act in good faith. Instead it shows that she did not devote the required effort to the lengthy questionnaire but rushed through it, not taking the time she swore she would take.

In *Hamilton*, another reason the Court found the prospective juror did not intend to hide the conversation with the neighbor was because she acknowledged at all stages that the conversation took place. A comparable act of good faith by Juror No. 9 would have been if she told the court during the trial that she remembered she had served on a capital jury once before. But instead of disclosing this information, which would have allowed the court to substitute an alternate juror for Juror No. 9, she kept the information to herself.

In addition, respondent claims that Juror No. 9's prior jury experience did not suggest any bias against Wilson. (RB 272-273.) Wilson's trial counsel addressed this question below. (39RT 6387-6391.) He feared that Juror No. 9 would compare Wilson's level of wrongdoing with the capital defendant in her earlier case. If Wilson seemed more culpable to Juror No. 9 than the previous defendant, and she held the view that the earlier defendant deserved death, then it was a foregone conclusion that Juror No. 9 would vote for death in this case. (*Ibid.*) This is prejudgment in the purest form.

That Juror No. 9 was an alternate who was not seated as a deliberating juror in her first case did not eliminate her bias because even as an alternate, Juror No. 9 likely reached an opinion as to whether the first capital defendant should die. As the trial court commented in another context, even though jurors are instructed not to form an opinion outside jury deliberations, they might think about the case over the weekend, for

example, and be prepared to vote on the resumption of deliberations. (40RT 6438-6440.) Similarly, although alternate jurors may not sit on the jury that ultimately decides a defendant's fate, human nature is such that an alternate will likely form an opinion as to how the juror would vote if circumstances eventually called for it.

Another concern about Juror No. 9's bias was that, having gone through the process once before, Juror No. 9 might have developed a more relaxed view about voting for death. It is a matter of conventional thought that undertaking a challenging task is simply not as difficult the second time. No capital defense lawyer could suffer a juror who would find it easier to impose death because she had done it once before.

Defense counsel's fear was likely realized in this case. During Wilson's trial, Juror No. 9 thought about her prior experience as a juror in a capital murder trial. (39RT 6342.) She did not say what triggered the memory, nor did Juror No. 9 reveal the depth of her thinking, or its frequency during Wilson's trial. But it is fair to say that something about Wilson's trial made her recall the previous trial. And that something may very well have related to Juror No. 9's thoughts of Wilson's culpability in comparison to the previous defendant's blameworthiness.

Respondent submits that Juror No. 9's lack of intentional concealment is supported by the fact that "she gave considerable thought to her answers, and attempted to provide full and complete responses." (RB 273.) But this, too, is contradicted both by Juror No. 9's own testimony and her failure to provide a complete answer regarding her prior jury experience. As stated, Juror No. 9 testified that she found the questionnaire lengthy and was just trying to get through it. (39RT 6342.) This was Juror No. 9's explanation for failing to provide a complete answer to the question

calling for all her jury experience. The evidence is that Juror No. 9 did not provide a thoughtful and complete answer in this instance. Thus, not only does Juror No. 9's testimony and answer show the opposite to what respondent urges, it supports a contrary inference, that is, that Juror No. 9 intentionally concealed her prior service.

Furthermore, a 35-year-old who gives considerable thought to her answers and attempts to provide complete responses does not forget the first time she sat in a courtroom as a juror and witnessed a murder trial where, according to Juror No. 9, the state sought to kill the defendant. As an alternate, Juror No. 9 was exposed to preliminary remarks by a judge; jury selection; an opening statement by the prosecutor; an opening statement by defense counsel; unforgettable evidence of a dead body, or perhaps even more unforgettable due to its uniqueness, evidence that the body could not be found; evidence that the victim was killed, brutally violent or not; evidence that the defendant was responsible in some fashion for the killing, anywhere from shooter to aider and abettor; closing argument by the prosecutor; closing argument by defense counsel; and jury instructions. No reasonable person who gives considerable thought to her answers would forget this experience. Indeed, it would be no surprise if the average juror suffered from unforgettable post-traumatic stress, as one prospective juror suggested. (10RT 1150-1152.) Given how lacking in thought and thoroughness Juror No. 9 actually was in failing to complete her questionnaire, it is more probable that she intentionally chose not to inform the court of her prior jury experience when she recalled it during Wilson's trial.

Respondent relies heavily on the court's finding that Juror No. 9 was credible when she said she forgot to mention her prior death penalty jury

service on the court's questionnaire. (RB 270.) The court issued its ruling denying Wilson's motion for a new trial on April 7, 2000. (40RT 6438.) The court made its credibility finding as follows: "I did find her credible, and I think I said so the day that she was here, and found that she had honestly failed to give the answer and I think there are a number of reasons." (40RT 6434.) The court then explained the basis for its credibility finding, including that the court was not clear that her prior experience was on a death penalty case (40RT 6434); assuming it was a capital case, Juror No. 9 sat as an alternate, especially 15 or 16 years ago, so "I certainly can easily see her forgetting that" (40RT 6435); and Juror No. 9's demeanor (40RT 6436), "so I do find that Juror No. 9 honestly forgot and that's the reason why she didn't put it on here" (40RT 6437).

Nevertheless, and this cannot be emphasized enough, the court did *not* find Juror No. 9 credible when the court asked her and she answered these two final questions: "When it came back to you during the presentation of evidence, did you have in mind at that time that you had been asked about that on the questionnaire?" Juror No. 9 responded: "I didn't even remember it or recall every question that was on the questionnaire." "Did you think that -- when you did recall it during the presentation of evidence, did you think that that was something you should report to the court or you just didn't think about it?" She answered: "I just really honestly didn't think about it." (39RT 6343.) Instead of finding Juror No. 9's responses credible, the court disposed of the issue by finding that Juror No. 9 did not need to inform the court when she remembered her prior experience during Wilson's trial, because no one told her to speak up. (40RT 6436.)

Although respondent may offer that the court's credibility finding

included the last two answers, respondent would be mistaken. The court's finding was limited to whether Juror No. 9 spoke the truth when she explained why she did not answer the questionnaire accurately and completely. Furthermore, the court's credibility finding was not universal. Were it so, then the court would have found Juror No. 9 credible when she flatly testified, "I served as an alternate in a death penalty case." (39RT 6338.) But the court did not believe Juror No. 9 when she said unequivocally that she served on a capital jury. Instead, the court rejected Juror No. 9's testimony because it was unable to confirm the matter with the jury commissioner. (40RT 6435.) In addition Juror No. 9 told defense counsel that the prior trial was in a murder case with a juvenile defendant. (40RT 6434.) Although the issue was important not only to Juror No. 9's credibility, but also to her bias against Wilson, the court did not ask Juror No. 9 a single question about her description of the case to defense counsel. Had the court questioned Juror No. 9 about it when she appeared in court on March 24, 2000, the court might have learned that since speaking with defense counsel two months earlier, Juror No. 9 had grown certain that the previous case was capital. (39RT 6335, 6337; 6CT 1519 [Juror No. 9 speaking by phone to defense counsel on January 25, 2000].)

Moreover, Juror No. 9 was not in a courtroom when she spoke by phone to defense counsel. She did not take an oath to tell the truth under penalty of perjury. She was not feet away from a judge who sat on an elevated bench when she talked to defense counsel. But she was in a courtroom mere feet from a judge who questioned Juror No. 9 under oath and she testified that she sat previously as a juror in a capital case. The court was wrong to allow *an unsworn telephone call* two months earlier to overcome the *sworn in-court testimony* of a witness the court otherwise

found "very credible." (39RT 6384.)

Finally, the court's credibility finding was undermined by the fact that it failed to mention Juror No. 9's testimony blaming her faulty memory on the length of the questionnaire, and her effort to get through it. (39RT 6342, italics added.) Thus, if Juror No. 9 testified that she had simply forgotten about her prior service after making a conscientious effort to answer the question, then a failed memory would be the reason, according to such testimony, that she did not accurately answer her questionnaire. But that is not what she said. Her testimony suggests that one reason she failed to answer the questionnaire correctly is because the questionnaire was long, and she was rushing through it. Her testimony further suggests that she knew she had not fully answered the question, even though she signed her name under penalty of perjury indicating her answers were "true and correct, and complete." (7CT 1860.)

Thus, the court's credibility finding is tainted. But in any case, it does not include any finding that Juror No. 9 simply forgot to tell the court of her prior service when she remembered it during trial. On the contrary, Juror No. 9 had a duty to tell the court what she recalled, and she chose not to do so.

It is one thing for Juror No. 9 to make an inadvertent mistake when filling out her questionnaire (assuming this is the case), it is quite another for her to do so a second time when she remembered during trial that she had been through this experience once before. Consequently, as shown here and in the opening brief, Juror No. 9 committed misconduct by intentionally concealing during trial her prior experience as a death penalty juror, even though she remembered it during trial and had been asked to disclose it on her questionnaire.

Juror No. 9's concealment raises a presumption of prejudice, which remains unrebutted by respondent. (*In re Boyette* (2013) 56 Cal.4th 866, 889.) That is, respondent fails to establish there is no substantial likelihood Juror No. 9 was actually biased against Wilson. (*Id.* at p. 890.) As noted, Juror No. 9 did not act in good faith by rushing through a questionnaire that she found lengthy. That she blamed the length of the questionnaire for her inability to remember her prior jury service is an indication that she knew she was *not* answering the questionnaire fully when she answered it. And as trial counsel feared, Juror No. 9 thought about her prior service on a capital jury when she sat as a juror in this case. Thus, there is a substantial likelihood that Juror No. 9's vote was influenced by her exposure to the prior capital case. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) Put differently, Juror No. 9's concealment, both during voir dire and trial, evidences bias. (*In re Boyette*, *supra*, 56 Cal.4th at p. 890.) Accordingly, the judgment must be reversed. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.)

//

//

8.

THE TRIAL COURT'S FAILURE TO ADEQUATELY INQUIRE INTO MULTIPLE INSTANCES OF JUROR MISCONDUCT REQUIRES A REMAND FOR A FULL EVIDENTIARY HEARING ON WILSON'S MOTION FOR A NEW TRIAL.

In the second part of argument No. XXIII, respondent fails to rebut the showing in Wilson's opening brief (AOB 265-293) of a strong possibility that prejudicial juror misconduct had occurred, and that further inquiry was necessary to resolve material, disputed issues of fact. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415; *People v. Cox* (1991) 53 Cal.3d 618, 697.) Respondent especially fails to undermine Wilson's argument that Juror No. 1's testimony was critical to protecting Wilson's constitutional right to a fair trial. The trial court needed to hear from Juror No. 1 and other jurors in order to resolve the important issues in dispute, discussed below and in the opening brief.

According to respondent, defense counsel's declaration recounting Juror No.1's unsworn statements did not provide authority for the court to order Juror No. 1's appearance in court, because the declaration was not probative evidence of juror misconduct. In support, respondent cites *People v. Cox*, *supra*, 53 Cal.3d at p. 697. (RB 279.) *Cox* is no authority for respondent's proposition.

In *Cox*, the defendant moved for a new trial based on the claim that the jury considered evidence not received in the course of the defendant's trial. In support, the defendant merely *offered* to provide an unsworn juror's declaration and an investigator's hearsay declaration. The trial court

denied the motion, and this Court affirmed for lack of evidentiary support, while noting that "[u]nder the circumstances, the court did not abuse its discretion in according *little*, if any, credence to assertions the declarant was unwilling to verify." (*People v. Cox*, *supra*, 53 Cal.3d at p. 697, italics added.) Thus, this Court did not categorically reject a trial court's favorable consideration to an unsworn declaration in ruling on a motion for a new trial.

Here, the defense submitted defense counsel's declaration recounting Juror No. 1's statements, not in support of a motion for a new trial, but in support of a motion for a continuance of the hearing on the motion for new trial. (6CT 1561-1562.) Asking a judge to grant a new trial based on the offer of a hearsay declaration submitted for its truth is one thing; asking the judge to order a continuance based on a declaration that contains purported hearsay is quite another.

But more to the point, defense counsel's declaration setting forth Juror No. 1's statements is not hearsay because it was not offered for the truth of the matter asserted, as in the case where a declaration is submitted in support of a motion for new trial. The declaration was offered to inform the court of defense counsel's investigation and to convince the court that a continuance was necessary to allow the defense time "to bring Juror #1 into court to testify regarding the contents of the purported declaration." (6CT 1564.)

The declaration was also offered ultimately to persuade the court "'that an evidentiary hearing [was] necessary to resolve material, disputed issues of fact.'" (*People v. Cox*, *supra*, 53 Cal.3d at p. 697, quoting *People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 415-416; 6CT 1561, 1564.) In *People v. Hedgecock*, *supra*, 51 Cal.3d 395, this Court "held that 'it is

within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of *allegations* of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [Footnote omitted.].'" (*People v. Cox*, *supra*, 53 Cal.3d at p. 697, quoting *Hedgecock* at p. 419, italics added.) In *Cox*, "the trial court was confronted not with conflicting evidence but *one juror* disinclined, for whatever reason, to aver under penalty of perjury statements she assertedly had made to a defense investigator." (*Id.* at p. 698, italics added.) *Cox*, however, "decline[d] to extend the holding in *Hedgecock* to situations in which the defendant *merely* seeks to place unsworn statements under oath by calling upon reluctant jurors to reiterate those statements from the witness stand." (*Id.* at 698, italics added.)

Unlike in *Cox*, Juror No. 1 in Wilson's trial was not simply a single juror who, for whatever reason, refused to sign a declaration. Nor did the defendants call her merely to repeat unsworn statements from the witness stand. As authorized by *Hedgecock* and *Cox*, defendants desired Juror No. 1's testimony to assist the court in resolving material, disputed issues of fact. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 415-416; *People v. Cox*, *supra*, 53 Cal.3d at p. 697.)

For example, an important issue was whether Juror No. 12 complied with the court's instruction to "decide the case for yourself" in determining the appropriate penalty. (29RT 4799-4800.) One juror provided testimony that suggested Juror No. 12 violated his duty to follow the law. Juror No. 7 testified that he recalled Juror No. 12 admitting before the verdict that whichever way the vote went, he would not hold out. Juror No. 7 "pretty much" understood Juror No. 12 to say that he would go whichever way the majority went. (37RT 6111-6112.) Juror No. 12 confirmed Juror No. 7's

testimony when No. 12 told the court, "I said that if I were the only hold-out I would go with the death penalty, rather than be alone, if it came out eleven to one." (39RT 6269.) But having just testified that he would violate the law rather than hold firm to his view, Juror No. 12 then allowed himself to be led by the court when he responded "No" to the court's virtual instruction, "You're not saying you just went along with the others?" (39RT 6269.)

Against this one-sided examination, it was vital that the court hear from Juror No. 1 and any other jurors subpoenaed by the defense to decide the material, disputed issue of fact, whether Juror No. 12 violated his promise to decide the penalty for himself, as evidenced by the statements he made to the other jurors. Juror No. 1's testimony would be helpful because Juror No. 1 told counsel for Wilson and counsel for Pops that "Juror #12 said that he could vote for life or death. He was comfortable with either one. If everyone voted for death, he would be comfortable with that. If everyone voted for life, he would be comfortable with that." (6CT 1562.)

Another important, disputed issue was whether a juror or jurors violated the court's instruction – delivered to the jury in writing and verbally – "you may *not consider for any reason whatsoever* the . . . the monetary cost to the State of . . . maintaining a prisoner for life." (6CT 1394, italics added; 36RT 5963.) This instruction could not be clearer, nor could it be stronger. The wording, "any reason whatsoever," was likely chosen to quash any thoughts by the jury that cost was an appropriate consideration. It is well known that portions of the public, believing that a swift execution is more cost effective, have long resented the assumed heavy burden on taxpayers caused by life sentences, particularly during periods when a poor economy allows schools to go unsupported and

infrastructure to crumble. The cost of maintaining a prisoner for life is a hot-button issue that demands the kind of jury instruction the court used below in order to make clear – in no uncertain terms – that jurors must ignore any conflicting, even if reasonable, feelings they may have on the subject.

Notwithstanding the clarity of the court's instruction, Juror No. 1 informed defense counsel that a fellow juror declared, "why should they (Pops and Wilson) sit in jail (LWOP) while we pay for it." (6CT 1562.) Despite the obviously defiant tone of the rant, the court dismissed it as merely a "passing comment[]." (39RT 6372.)

This was not a passing comment, though it should not go unmentioned that respondent cites no authority for the proposition that a statement – otherwise constituting juror misconduct – somehow becomes something less so long as it can be characterized as passing. Whether whispered or shouted, cryptic or extended, a comment that violates the law is nonetheless misconduct. Moreover, the statement was a blunt challenge to the court's authority, and it bordered on contempt in light of the court's plain instruction. Even if no other jurors took the insolent juror's bait by responding to it, the protest reflected the speaker's potential intention to consider cost. The only reason a juror makes this statement is to express angry disagreement with the court's instruction. Consider the argumentative quality of the assertion, disguised as an inquiry. It suggests that the speaker does not see spending the rest of one's life in prison as punishment. Instead, the speaker envisions the defendants getting a free ride – siting around all day. Furthermore, the speaker personalizes the statement by stressing that "we" the jurors, not merely the State, pay for it. It was a signal to the others that the speaker was not going to follow the

law, and the speaker was looking for the like-minded to join. The court should have found, consistent with the appellate court's holding in *People v. Johnson* (2013) 222 Cal.App.4th 486, that making the statement was itself, "an overt act of misconduct." (*Id.* at p. 495 [during deliberations jurors violated court's instruction not to discuss defendant's failure to testify when they "raised the question if he is innocent why he didn't take the stand to defend himself"].) But failing that, the trial court should have allowed defendants to subpoena Juror No. 1 and other jurors to identify which juror committed the misconduct and to show that it went beyond a passing comment.

Finally, Juror No. 1 had more to say, and other jurors probably did as well, in light of the evidence of widespread misconduct in this case. The court should have permitted defense counsel to subpoena Juror No. 1 to relate to the court what he told defense counsel about Juror No. 6's statements regarding the Atlanta shootings news coverage. (1CT 1562.) Juror No. 1's testimony would have helped the court resolve the material, disputed issue of fact concerning Juror No. 6's misconduct in viewing news reports from the Internet, television, and the newspaper about the horrific shootings in Atlanta on July 29, 1999, the Thursday before the Monday penalty verdict, when Juror No. 6 changed her vote from life to death for Wilson. (*Ibid.*)

In *In re Boyette* (2013) 56 Cal.4th 866, cited by respondent (RB 277), jurors considered extraneous matter, a movie about life in prison, in order to obtain assistance in reaching the penalty verdict in a capital case. Specifically, they sought to educate themselves about the realities of prison life. Viewing the movie contravened the court's instruction to decide all questions of fact from the evidence received in the trial and not from

elsewhere. (*Id.* at p. 892.) *Boyette* emphasized "that a jury's verdict 'must be based upon the evidence developed at the trial,' [which] goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Id.* at 890, quoting *People v. Nesler* (1997) 16 Cal.4th 561, 578-579.) Thus, the jurors committed "clear misconduct." (*Id.* at p. 892.)

Here, too, the court instructed the jury to determine the facts from the evidence received during the trial. (6CT 1384.) It also instructed the jurors to take into account in reaching a penalty verdict, "[o]nly those factors which are applicable on the evidence adduced at trial." (6CT 1392.) Finally, the court required the jury to "take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" (6CT 1395), and only return a judgment of death if each was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1396). But, in violation of the court's instructions, Juror No. 6 used what she learned from her reading about the Atlanta shootings to change her vote from life to death for Wilson.

Just before Juror No. 6 took the stand at a hearing called to investigate her comments during deliberations (37RT 6077), Juror No. 7 testified that when the jurors returned from a three-day weekend on Monday, August 2, 1999, they immediately voted unanimously for death for both defendants. The jurors then remained in the jury room to talk about "why they changed and what influenced you over the weekend to change your mind." (37RT 6104.) Before the intervening weekend, the vote had been 9-3 on Wilson. (37RT 6102-6103.)

Juror No. 7 testified that Juror No. 6 explained to the other jurors

why she changed her vote over the weekend. (37RT 6105.) She said "something to the effect of I saw the Atlanta shooting over the weekend, and upon seeing that shooting, I thought to myself those guys did a horrible thing and they will probably get the death penalty, and then I think she said she thought to herself, well, I'm on a case where honestly in her mind -- I think she said in my mind I knew these guys deserved the death penalty but I didn't want to give it to them, and once she saw that it kind of brought it to life for her that, okay, I think I need to go ahead and do what I know was the right thing to do but she really didn't want to do." (37RT 6105-6106.) She said "the Atlanta shooting influenced her as far as changed her mind as far as thinking that they deserved the death penalty and . . . [it] made her take a closer look at the case that she was on." (37RT 6106.)

Juror No. 7 also testified that while he and Juror No. 6 waited outside the courtroom to testify, Juror No. 6 asked him if he knew why they were there. He responded that someone told him the newspaper reported the hearing was about them and the Atlanta shooting. (37RT 6125.) Asked if Juror No. 6 and Juror No. 7 discussed the Atlanta shooting in any additional way, Juror No. 7 said, "we did discuss *the statement*." (37RT 6126, italics added.) Defense counsel responded, "The statement?" Juror No. 7 replied, "Yeah, her statement." (37RT 6126, italics added.) Juror No. 7 also asked Juror No. 6 if she recalled the statement that she had made, and apparently without questioning Juror No. 7 what he meant by "the statement," Juror No. 6 said that she did recall making the statement. (37RT 6127.) Juror No. 7 did not elaborate.

When it was her turn to testify, Juror No. 6 did all she could to avoid any discussion about *her statement*. Although she had just asked Juror No. 7 if he knew why they were there, and he said the Atlanta shooting, Juror

No. 6 answered "No, not really," when the court asked her if she and Juror No. 7 had discussed "what the hearing was about" while they waited to testify. (37RT 6153.) She then said that she had asked Juror No. 7 if he knew what the hearing was about, but he said no. (37RT 6153.) The court nonetheless pursued the matter. Because Juror No. 7 told the court that he had informed Juror No. 6 about the newspaper article, the court asked her if Juror No. 7 had mentioned it to her. Juror No. 6 continued to resist any mention of Atlanta or her statement by responding that Juror No. 7 merely said there had been something in the news about it. Thus, Juror No. 6 did not answer that Juror No. 7 told her the newspaper reported the hearing had to do with the Atlanta shooting, Juror No. 7, and Juror No. 6. (37RT 6153; see 37RT 6125.) And then, even when the court asked Juror No. 6 to put in her own words what caused her to bring up the Atlanta matter to the other jurors after a verdict was reached, she said, "I don't – I don't remember." (37RT 6153.) Minutes before, however, she had acknowledged her "statement" to Juror No. 7, presumably which were her own words. (37RT 6126.)

Juror No. 6 further testified that she explained to the other jurors why she had changed her vote, but she did not remember what she told them. The court asked her if "there was any discussion by you about something having to do with the Atlanta murders?" (37RT 6141.) Although Juror No. 6 had just admitted to Juror No. 7 that she recalled her "statement" to the other jurors, Juror No. 6 answered the court, "On that day? No, I don't think so." (*Ibid.*) In response to additional questioning by the court, Juror No. 6 testified that there was a discussion about the Atlanta shootings "at some point but I don't remember what day that was." (37RT 6142.) She stated that she had said something to the other jurors about the

Atlanta shootings, "that I remember hearing something about it on the news and about how somebody can just go in there and just, you know, kill innocent people, that had nothing to do with what he was feeling. Something to that effect. I'm not sure quite what my words were." (37RT 6142.) She did not think she said anything about it affecting the way she viewed this case. "I think it was more like -- you know, you come in and you start talking about other things not related to the case and I think that was just one of the conversations. I don't know if that was wrong but it was just a general conversation." (*Ibid.*)

Juror No. 6 testified that she learned about the Atlanta shootings from news reports on the Internet beginning on Thursday, July 29, 1999. (37RT 6142-6144, 6156-6157.) When asked about how much coverage of the Atlanta shootings she saw on the Internet, Juror No. 6 responded, "I read as much as was available there." (37RT 6151.) On the Internet she saw still pictures and maps of the different sites involved in the shootings. (37RT 6143.) She also saw some news reports on television before the weekend. (37RT 6143, 6152, 6157-6158.) On the news, "a lot of people were talking about it." (37RT 6152.)

When asked how news of the Atlanta shootings impacted her emotionally, Juror No. 6 said, "Well, I'm a very emotional person so, I guess, anything that's – every time that something like that happens, I guess, I get, you know – I think about it and I guess I sometimes tend to dwell on it a little bit. I do. I think about it. I think it's kind of sad that these things happen." (37RT 6144.) When she came in Monday to vote she was, "of course," still thinking about it, but "there wasn't an impact." (37RT 6144-6145.)

Clearly, Juror No. 6 was not forthcoming. Given her responses and

the hurdle that Evidence Code section 1150 presents a defendant challenging a verdict, other jurors, including Juror No. 1, should have been called to testify about what Juror No. 6 told them. This was no fishing expedition.

Thus, if the court allowed Juror No. 1 to testify about Juror No. 6, presumably he would have told the court what he told defense counsel. According to Juror No. 1, at the end of the week before the Monday when jurors reached unanimous death verdicts, Juror No. 6 was voting for life for Wilson. (6CT 1562.) Jurors asked Juror No. 6 "why she had changed from life to death as to both defendants." (*Ibid.*) Juror No. 6 "indicated that the Atlanta shootings made her realize that she had to put her personal beliefs aside." (*Ibid.*) Juror No. 6 told the other jurors "that she became emotional over Atlanta because of the loss the families of the deceased individuals must have felt." (*Ibid.*) The Atlanta shootings "caused her to realize that she was feeling sympathy for the loss that the families of Pops and Wilson would feel if she voted for death." (*Ibid.*)

Although not crystal clear, which is why more testimony is necessary from other jurors, the weight of the evidence is that Juror No. 6 voted for life for Wilson when the jurors broke for the long weekend, the same day the Atlanta shootings occurred. Juror No. 6 made considerable effort to learn as much as she could about the shootings over the weekend. She dwelled on it. At some point she must have realized that what she was learning was having a profound effect on her thinking with regards to the appropriate penalty for Wilson. There is no evidence that she ceased her pursuit of all news reports about the shootings. Immediately on returning to the jury room on Monday, the jurors voted, and Juror No. 6 voted for death for Wilson.

This Court has "warned against the reading of any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty." (*People v. Pinholster* (1992) 1 Cal.4th 865, 924, quoting *People v. McCoy* (1886) 71 Cal. 395, 397, internal quotation marks omitted.) Juror No. 6's self-induced, repeated exposure to the Atlanta shootings is an example of reading material related to the subject matter of the trial -- a brutal, multiple killing -- that would likely influence a juror. Indeed, there are strong indications the articles did influence her verdict. At the very least, Juror No. 6 violated the court's instructions to decide the penalty from the evidence received during the trial. Juror No. 6 committed misconduct.

And there was a strong possibility that Juror No. 6's misconduct was prejudicial, thereby warranting further inquiry by the trial court. (*People v. Cox*, *supra*, 53 Cal.3d at p. 698.) When juror misconduct involves the receipt of information from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578.) "Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Id.* at pp. 578-579.)

Boyette applied *Nesler's* second test for prejudice. The Court asked: "did the jurors here improperly acquire information that, *under the circumstances of this particular case*, rendered them biased against petitioner?" (*In re Boyette*, *supra*, 56 Cal.4th at p. 893, original italics.)

The Court considered various factors that apply here.

Boyette asked whether jurors' testimony suggested that the movie made a strong impression on the jurors who saw it, as would be expected if it motivated their votes. Despite the portion of her testimony that she was still thinking about the news coverage, but there was not an impact (37RT 6144-6145), Juror No. 6's testimony on the whole shows that the news coverage had a strong impression on her, enough so that it would be expected to motivate her vote, especially because she was so emotional and tended to dwell on this sort of news. (37RT 6142, 6144.)

According to both Juror No. 6 and Juror No. 7, Juror No. 6 mentioned the coverage of the Atlanta shootings to all 11 other jurors immediately after they reached their unanimous verdicts. This fact demonstrates its importance to Juror No. 6 and is evidence of its having a "transformative effect" on her. (*In re Boyette*, *supra*, 56 Cal.4th at p. 895.)

The Atlanta shootings involved the mass murders of at least nine people. (See Special Exhs. A1-A6 [media coverage of Atlanta shootings].) The timing of Juror No. 6's exposure to the mass murder reports was critical. The jurors broke on a Thursday, with Juror No. 6 voting life for Wilson. The same day the shootings occurred. Over the next four days, news reports would be expected to be their most inflammatory. Immediately on her return to the jury room, Juror No. 6 voted for death. The timing and sequence of events is one of the strongest indicators of the direct relationship between the reports and Juror No. 6's vote.

Therefore, the persuasive effect on Juror No. 6 of viewing the news reports was maximal. A causal relationship between the reports and her vote is established. Thus far, the prosecution has failed to rebut the prejudicial impact of Juror No. 6's misconduct.

Respondent's own brief demonstrates that disputed issues need to be resolved with respect to Juror No. 6. According to respondent, only a general conversation about the Atlanta shootings occurred, "not related to th[is] case," and then only the day after the incident. (RB 275, citing 37RT 6142.) Juror No. 6 was not emotionally impacted by the shootings when she voted for death. (RB 275.) She did not compare this case to the Atlanta shootings. (RB 275, 276.) Any mention of the Atlanta shootings did not occur in front of the entire jury. (RB 276.) And finally, "there was absolutely no evidence that Juror No.6, or any other juror, utilized the extraneous information about the Atlanta shootings in reaching a decision. *[E]ven if Juror No.9 considered the Atlanta shootings,* it was only in the context of causing her to take a closer look at the evidence in this case and to actually weigh the factors outlined in the court's instructions." (RB 277, italics added.) Respondent references all these *disputed facts* as important to defeating any argument that Juror No. 6 committed prejudicial juror misconduct. As such, they support further inquiry by the trial court to resolve them.

Accordingly, the trial court's failure to adequately inquire into multiple instances of juror misconduct requires a remand for a full evidentiary hearing on Wilson's motion for a new trial.[18]

---

[18] Respondent comments that Wilson tacitly recognizes the other assertions of juror misconduct raised below were insufficient to grant a new trial. (RB 273.) Not so. Appellate counsel anticipates that habeas counsel will undertake additional inquiry to show misconduct warranting a new trial.

9.

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

In opposing Wilson's argument that six guilt phase jury instructions (CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.83) impermissibly reduced the prosecution's burden of proof and thereby deprived Wilson of his constitutional right to due process, among other rights (AOB 294), respondent contends that the argument should be rejected both on the merits and as forfeited. Wilson addressed respondent's merits argument in his opening brief and therefore offers nothing additional here. Below Wilson addresses respondent's ill-conceived forfeiture claim.

According to respondent, Wilson forfeited his argument because he did not object or request any modifications to the six instructions in the trial court. In support, respondent cites *People v. Virgil* (2011) 51 Cal.4th 1210, 1260. *Virgil*, however, does not apply here. Instead, Penal Code section 1259 controls, and because it does, there was no forfeiture.

In *Virgil*, the defendant argued on appeal that the trial court's motive instruction (CALJIC No. 2.51), a correct statement of law, combined with the prosecutor's jury argument, could have confused jurors into believing that the instruction did not require them to find intent to convict the defendant of robbery or to find the robbery special circumstance allegation true. Citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 504, *Virgil* held that the defendant's failure to object to the instruction at trial forfeited the claim on appeal. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.) *Hillhouse* had relied on the well-established rule that a party forfeits on appeal any claim

that an instruction, otherwise a correct statement of law, was too general or incomplete, and therefore needed clarification, without first seeking such clarification in the trial court. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503.)

Wilson's challenge to each of the six jury instructions, "however, is that [each] instruction is not 'correct in law,' and that it violated his right to due process of law; [each] claim therefore is not of the type that must be preserved by objection. (§ 1259 ['The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.']; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7, 76 Cal.Rptr.2d 180, 957 P.2d 869.)." (*People v. Smithey* (1999) 20 Cal.4th 936, 976 fn. 7.)

And respondent does not argue otherwise. That is, respondent does not explain how Wilson's asserted due process violation is correct in law and does not affect his substantial rights. Hence, Wilson has not forfeited his arguments on appeal. (*People v. Contreras* (2013) 58 Cal.4th 123, 161-162 [CALJIC Nos. 2.01, 2.21.2, 2.22, 8.83] see also *People v. Sattiewhite* (2014) 59 Cal.4th 446, 474 [rejecting claim that giving of motive instruction (CALJIC No. 2.51) reduced prosecutor's burden of proof after assuming it affected defendant's substantial rights].)

//

//

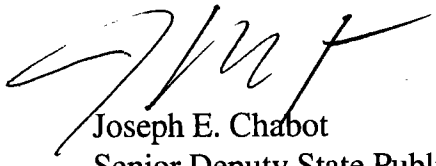
CONCLUSION

For the reasons stated here and in the opening brief, the judgment must be reversed in its entirety.

Dated: March 30, 2015

Respectfully submitted,

Michael J. Hersek
State Public Defender



Joseph E. Chabot
Senior Deputy State Public Defender

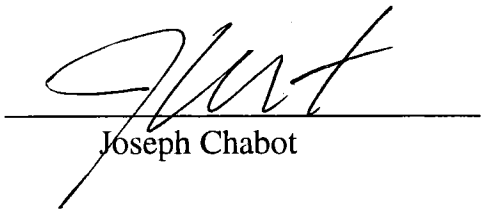
Attorneys for Appellant
Byron Wilson

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(B)(2))

I, Joseph Chabot, am the Senior Deputy State Public Defender assigned to represent appellant, Byron Wilson, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 39,063 words in length excluding the tables and certificates.

Dated: March 30, 2015



Joseph Chabot

DECLARATION OF SERVICE

Re: *People v. Aswad Pops & Byron Wilson* No. BA164899
Cal Supreme No. S087533

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in envelopes addressed respectively as follows:

Byron Wilson, P-76622
CSP-SQ
4EB10
San Quentin, CA 94974

Doug Wilson
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013

Tina Sandidge
Habeas Corpus Resource Center
303 Second Street, Ste. 400 South
San Francisco, CA 94107

Eric Multhaup
20 Sunnyside Ave., Suite A
Mill Valley, CA 94941

Marilee Marshall
523 W. Sixth St., Suite 1109
Los Angeles, CA 90014

Capital Appeals Clerk
Foltz Criminal Justice Center
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Ctr.
210 West Temple Street, Rm. M-3
Los Angeles, CA 90012

Each envelope was then, on March 30, 2015, sealed and deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Dated: March 30, 2015

Kecia Bailey