IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	Cal. Sup. Ct. No. S138474
)	
Plaintiff and Respondent,)	San Diego County
)	Superior Court No. SCE230405
vs.)	
Eric Anderson)	
)	
Defendant and Appellant.)	
)	

Automatic Appeal From The Judgment Of The Superior Court Of The State Of California, In And For The County Of San Diego,
The Honorable Lantz Lewis, Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In his appeal, appellant argues numerous errors at the guilt and penalty phase of his trial, asking that the convictions and judgment of death be reversed. In response, the Attorney General agrees that the sealed record be reviewed as to appellant's *Pitchess* motion. Respondent also agrees that the trial court erred in imposing sentence for the serious felony prior and prison prior based on the same prior conviction. Respondent contends there was no other error and the judgment should be affirmed.

This reply brief addresses only points raised in respondent's brief that require further discussion. As such, any omission of argument pertaining to issues discussed more fully in appellant's opening brief and disputed in respondent's brief should not be interpreted as appellant's concession of the issue.

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SEVERANCE OF THE TRIAL

A. Introduction

Appellant Anderson did not receive a fair trial. He was forced to go to trial with co-defendant Lee, who sometimes visited at Brucker's home because he was friends with Brucker's son. (15 RT 2382, 2384-85.) Lee knew Brucker was the owner of Cajon Speedway. Hoping to profit from his knowledge of a safe containing cash in the Brucker house (15 RT 2386-87, 2402), Lee tried to shop around his knowledge, asking for part of the proceeds of the crime. First he raised this idea with Huhn and his girlfriend Peretti, and then later raised the same idea

with Handshoe and Paulson. (16 RT 2523-25; 22 RT 3766-68, 3772, 3774; 17 RT 2866, 2868.) Eventually Huhn and Handshoe robbed the specific house proposed by Lee. (22 RT 3751-53, 3757-58.) Brucker was killed in the process and then implicated appellant, who has consistently insisted that he had nothing to do with the incident. (17 RT 2823-25.) Despite all of this evidence, the trial court acquitted Lee of conspiracy just before sending the case to the jury. (26 RT 4598.)

Respondent argues was no error in denying the request for severance because co-defendant Lee's defense was not antagonistic to appellant's defense, and there was sufficient independent evidence proving appellant murdered Brucker. Lee's defense was that he was not an aider and abettor or coconspirator to the crimes. (Respondent's Brief ("RB") at pp. 28, 33.) In its argument, respondent appears unable to distinguish the case appellant relies on, *People v. Massie* (1967) 66 Cal.2d 899 (Appellant's Opening Brief ("AOB") at pp. 40-41) and ignores the federal due process claim completely.

B. Co-Defendant Lee's Defense Was Antagonistic To Appellant's Defense

Appellant's defense was that he was not present during the crime and played no part in the conspiracy to murder or in the murder of Brucker. The trial court's dismissal of the conspiracy charge against Lee before the case was sent to the jury effectively removed part of the prosecution's case-in-chief and likely confused the jury regarding a substantial part of appellant's defense theory.

Throughout the trial, Lee's defense counsel was antagonistic to appellant. In opening statements, Lee's attorney talked about several aggravating facts. For example, counsel stated:

> [t]hey were under-educated, jobless, and supporting their meth habits or meth addiction with things other than normal jobs. Enter into this world,

around the beginning of April, Eric Anderson. Eric Anderson, who was older and a man who had a gun and who had a plan. He was significantly older, you will learn, than these lost boys. But he was no Peter Pan. He was more like a Pied Piper, and he met their needs -- Eric had their needs in mind, but he had different needs, and you will learn throughout this trial that he had also darker connections ...

...You will also learn, on that fateful morning, before Steven Brucker lost his life, of threats that were made. Let me get this exactly right, because it's coming in verbatim. "We're going to do this, right, boys?" "We're going to do this, right, boys?" Those are the words of Eric Anderson to Apollo Huhn and the younger Handshoe. You will also learn of threats made to Valerie Peretti and her unborn child. Remember, Valerie Peretti was there at that meeting, at all times during those April 14th meetings, and Handshoe and Huhn through the course of this. Cross-examination is also evidence, and you will hear at any of the meetings, at any of the times, there was no talk of Randy Lee being anywhere near. You will learn that he was not part of Handshoe's trailer tribe, this group of people that met there; that Eric Anderson, the evidence shows, didn't even know Randy Lee, had never talked to him. You will learn that he was not mentioned, only robbers, "only the people that go get a cut of this," nothing about percentage. And, finally, you will learn that he was not threatened, the only one not threatened that day. Handshoe was threatened, Huhn was threatened, Valerie Peretti was threatened, but Eric Anderson had no words for Randy Lee, for obvious reasons. (15 RT 2338, 2340-41.)

Appellant's renewed objections were overruled:

Mr. Bradley: I want to protect the record. With what we just heard, as we have raised to your Honor previously, it's our contention that Mr. Roake's strategy violates Mr. Anderson's rights under the 6th, 8th, and 14th Amendments to a fair trial and a reliable penalty determination. It's clear from what the court's heard, Mr. Roake is being more than a second prosecutor. He's arguing things beyond what Mr. McAllister is even comfortable ethically in arguing. He's arguing things that are not going to be admitted by the People in their case, and, I would suggest, things that are inadmissible, no matter who offers them. His reference to "darker connections," I think we know what he's talking about, and there is absolutely no evidence of any sort, as we've heard previously and as we've argued to the court. I think based on this, it's obvious that this case does need to be severed in order to protect Mr. Anderson's rights.

The Court: Thank you. You've made your record. We're in recess. (15 RT 2349-50)

After the recess, counsel for Huhn raised further more specific objections:

Focusing on Valerie Peretti for just a moment. Mr. McAllister, in his opening statements to the Huhn jury, as well as to the opening statement in the Anderson jury, made a point of arguing the age difference between Valerie Peretti and my client. And he called her a 14-year-old at one point, 14 or 15, 21-year-old. And essentially, your Honor, that is bad character evidence, and I would ask that -- I mean, it is evidence that shows some negative character evidence that's actually potentially a criminal offense, and its emphasis has no business in this trial. He has not been charged with

that, and it's improper disposition evidence, and I would ask the court to limit any testimony about that to simply asking Ms. Peretti how old she is, when her birthday is, and leave it at that. That's my request in respect to that, and I would ask that it not be argued any more to the jury. (15 RT 2463-64)

The trial court agreed with counsel. (15 RT 2464)

However, Lee's counsel argued:

Mr. Roake: There is no more intense love, some believe, than puppy love, and our whole approach is the intense bias and loyalty that she had to Apollo Huhn to the point that she would offer up someone else when she was caught in a lie. It is central, it is helpful to Mr. Lee's defense, and does no harm to Ms. Peretti, who comes as they see her.

The Court: And, Mr. Roake, don't misconstrue what I'm trying to do here when I balance Ms. Rosenfeld's, what I consider to be a reasonable request, against your need to represent Mr. Lee. I'm not talking about the relationship in terms of how close it was. I'm not talking about the dynamics of the relationship in terms of whether there was some persuasion, coercion, whatever may have happened. You may inquire. I'm simply saying highlighting the age discrepancy for that purpose alone, we've got enough of it. We can establish the age. If you want to establish that it's puppy love, if you want to establish that she is under the aura of someone, that's your right in terms of asking relevant questions on cross-examination.

Mr. Roake: Thank you, your honor. I understand that puppy love by its very nature deals with age, okay? So there's a gap here of four to five years between them, and that's my position.

The Court: And I don't think we can hide that fact in terms of the age difference, but I think what Ms. Rosenfeld is aiming at is it appeared from her viewpoint that the suggestion that there was some perversion here -- and if the questions go to trying to establish a character of sexual perversion or something of that nature, I will intervene without being prompted.

Mr. Roake: Your honor, I'm so sorry. I don't mean that. I'm talking about a Svengali-like approach that often happens between someone in his relatively December years and someone her age.

Ms. Rosenfeld: And, your honor, for the record, I object to even that type of characterization. And, just for the record, once again, it brings out the reason why we should have separate trials, and I would once again make a motion for a severance from all defendants, not just my jury, but a separate trial.

The Court: That objection request is noted and denied. (15 RT 2466-68.)

During closing arguments, Lee's counsel again mentioned Anderson's age. He referred to him as "someone who had had experience, someone who roomed with a cellee in prison and roomed with that same person in Poway, someone who was

aware of ways to get wealth quickly." (29 RT 4145-46.) Counsel also focused on the reason Brucker's house was hit: "Because they had hit the house next door the day before. . . The why of how Eric Anderson knew about this place, well, he just looked at the house next door. Handshoe told us why he was there. This is a theory that's untied to any evidence." (29 RT 5143.) This point was crucial to Lee because it was either Lee who identified the house as a target or appellant. Not both. The trial court's withdrawal of the conspiracy charge against Lee ultimately undermined the reasonable doubt sought by appellant that was based on Lee being the one who identified the house, the one who made the offers to share information, and the one who offered to look after Handshoe's family and put money on his books following his arrest. (22 RT 3787-88; 23 RT 3934.)

C. The Trial Court Erred In Denying The Motion To Sever

Citing *People v. Turner* (1984) 37 Cal. 3d 302, overruled on other grounds in *People v. Anderson* (1987) 43 Cal. 3d 1104, respondent asserts that the reviewing court decides whether the trial court abused its discretion in its ruling on a motion to sever based on circumstances known to the trial court at the time of the ruling. (*Id.* at p. 312; RB at p. 31.) Yet, the Court in *People v. Turner, supra,* 37 Cal.3d 302 also stated that circumstances after a ruling on the issue are relevant for the reviewing court in determining if error occurred: "After trial, of course, the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 313.)

Here, severance should have been granted once the opening statements were made. The trial court's failure to do so implicated appellant's constitutional rights to due process, a fair trial and reliable guilt determination. (*Beck v. Alabama*

(1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

D. The Error Was Prejudicial

On the issue of prejudice, respondent says there was none under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] or the standard followed in *People v. Massie, supra,* 66 Cal.2d 899 whether there is a reasonable probability the defendant would have obtained a more favorable result absent the error. (*Id.* at pp. 922-23.) (RB at pp. 35-41.) Citing to the testimony of the teenage witnesses, Northcutt, and evidence appellant drove a Bronco, respondent asserts Lee's defense did not include introducing evidence implicating appellant. (RB at pp. 36-37.) Appellant disagrees. Lee's defense relied on the jury believing appellant, not Lee, was the key player in the crimes. His counsel argued to the jury that Lee had no part in the crimes and appellant was the one who led the others there. He need not have presented affirmative evidence to make the point. (29 RT 5158.) Also, there was no substantial evidence independent of Lee implicating appellant in the crimes.

This point aside, the trial court's denial of the motion to sever altered appellant's defense from the very beginning, forcing appellant's defense counsel to accommodate a defendant whose defense was at odds with appellant's. As counsel pointed out to the trial court, appellant's interests were "very much divergent" and this was clear with respect to counsel for Mr. Lee. "He's told everyone that he's the second prosecutor, and he's - you know, I don't know whether he's intentionally throwing a monkey wrench into Mr. Anderson's defense, but in the process of representing his client, he's doing just that." (9 RT 1600.)

Respondent also says that having multiple prosecutors does not support a finding of prejudice; a trial is not unfair "merely because a codefendant's counsel chooses not to attack the credibility of certain aspects of the prosecution's case that are incriminating of the defendant." (RB at p. 40.) Yet, in this case it was not just multiple prosecutors. The jury ended up likely discounting evidence that was important to appellant's defense. In this respect, after the trial court denied the motion to sever, the jury heard all the evidence about the conspiracy. Then, at the close of evidence, the trial court removed the conspiracy charge against Lee from the jury's consideration. Throughout the trial, the jury had been evaluating the evidence in light of the charges and the law as they were instructed. When the trial court ultimately withdrew the charge, jurors were not to speculate why. The result was a confusing overlap between the charge withdrawn and appellant's defense theory and jurors likely believing the evidence was not relevant to appellant's defense. The consequence was an unfair trial for appellant, violating his federal and state constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

Respondent also cites to *United States v. Balter* (3rd Cir. 1996) 91 F.3d 427, arguing that the second prosecutor theory cannot be the sole grounds for reversal. Respondent says that appellant has not identified any evidence elicited on cross-examination by Lee or Huhn's attorneys that would have been inadmissible against him at a separate trial. (RB at p. 40.) Appellant disagrees. In *United States v. Balter*, *supra*, 91 F.3d 427, the appellate court rejected the defendant's argument of prejudice based on a second prosecutor theory. The defendant argued he was prejudiced because the court excluded evidence rebutting certain prosecution evidence. The appellate court found the defendant had agreed to the

testimony and therefore there was no prejudice. (*Id.* at p. 434.) No such agreement exists here.

Respondent also cites to *People v. Jackson* (1996) 13 Cal. 4th 1164 (RB at p. 40) where the defendant had argued prejudice resulted from co-defendant's counsel serving as second prosecutor. (*Id.* at p. 1208.) But in that case, it was undisputed that both defendants were involved. (*Id.* at p. 1209.) In this case, appellant has always insisted that he had nothing whatsoever to do with the incident where Brucker was killed.

There was also prejudice at the penalty phase of the trial, a reasonable possibility that the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, appellant told the jury to give him the death penalty. (35 RT 5623.) That demand combined with a guilt phase trial with appellant pointed to as the mastermind of the crimes by not just the prosecutor but also Lee and Huhn, supporting as they did the testimony of Peretti and Handshoe, and the jury allowed to consider this in the penalty phase (CALJIC No. 8.85; 8 CT 1642), there was minimal, if any chance, the jury would have chosen a penalty less than death. Given also Handshoe's plea deal with the prosecution and the jury finding Lee not guilty of murder (33 RT 5430), jurors likely sought to punish appellant for the crimes to reflect his increased culpability. The risk that the jurors did not engage in an individual punishment assessment cannot be allowed in a capital case where the Eighth Amendment demands a heightened need for reliability in the determination that death is the appropriate punishment. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [105 S. Ct. 2633, 86 L. Ed. 2d 231]; see *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [98 S. Ct. 2954, 57 L. Ed. 2d 973].) The result was an unfair and unreliable penalty determination as well. (*Beck v. Alabama* (1980) 447

U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 17.)

In short, respondent's argument should be rejected. The trial court erred and the error was not harmless at the guilt and penalty phases of the trial. The judgment should be reversed.

II. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SEVERANCE OF COUNTS

For this issue, citing *People v. Lucky* (1988) 45 Cal.3d 259, respondent argues there was no error because joinder was authorized under Penal Code section 954. The burglaries helped prove appellant's intent for the charged crimes. They would have been admissible in a separate trial of the murder and conspiracy charges. (RB at pp. 44-46.) Appellant disagrees.

The prosecution would gain little from a joint trial other than the prejudicial effect of other-crimes evidence which could not otherwise be admitted. There were not enough commonalities for the burglaries to be admissible in separate trials. The use of a Bronco was the only similar factor; but, there were thousands of Broncos registered in the area at the time. That appellant drove one did not prove him to be a perpetrator. (27 RT 4843-44, 4851-52.) Also, the danger existed that the jury would aggregate all of the evidence, though presented separately, and convict appellant of the murder and conspiracy offenses based on all of it. The jury would likely conclude because appellant appeared to be predisposed towards committing crimes, he likely committed the murder and conspiracy too. The only real way the burglaries helped the jury decide if appellant was a perpetrator was if jurors used it as evidence of criminal propensity.

In *People v. Lucky*, *supra,* 45 Cal.3d 259, the Court rejected the argument that joinder of separate robbery offenses was improper. According to the Court, the

robbery and attempted robbery charges set forth in the information belonged to the same class of crimes. (*Id.* at p. 276.) Further common was the intent to feloniously obtain property and the circumstances of the crimes, "the armed robber, usually joined by an accomplice, victimized small businesses which were managed by few employees, sold specialized merchandise, and were located in the same geographical area. In both jewelry store incidents, the robber had carried a gold chain into the store, apparently on the pretext of attempting to sell it." (*Id.*)

By contrast, here, there were no commonalities in the circumstances of the crimes other than the sighting of a Bronco. The crimes were committed at different times and places. Several months spanned one of the burglaries and the murder. Also, the crimes occurred in different locations, although close to each other, and reflected different conduct by the perpetrator. The Dolan and Bell burglaries did not involve an assault, murder, occupied building or conspiracy. As to the Bronco sighting (19 RT 3196-97), as set forth above and in appellant's opening brief, there were over 2000 similar Broncos in the area. Witnesses seeing a Bronco did not mean it was appellant's Bronco. (AOB at p. 50.) Yet, even assuming appellant was the driver of the Bronco, this did not mean appellant also committed the current crimes. (Compare *People v. Bean* (1988) 46 Cal.3d 919, 937-38 [Court held factors of crimes did not establish unique modus operandi; although both sets of crimes occurred in same neighborhood, involved similar conduct by defendant and had a motive of theft, there were differences between them].)[1]

As to prejudice, respondent says any error was harmless because the evidence relating to the burglary charges was independently strong. Further, nothing from the consolidation resulted in an unfair trial for appellant. (RB at pp. 51-52.) Appellant disagrees. The evidence was not overwhelming against appellant. (AOB

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[1] Appellant cites to *Williams v. Superior Court* (1984) 36 Cal.3d 441 and *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129. (AOB at pp. 47-48.) Respondent does not address these cases.

at pp. 53-54.) Also, the burglary offenses showed appellant as a seasoned criminal. This most likely encouraged jurors to believe he was inclined to commit crimes and the likely perpetrator in the crimes against Brucker. There also was prejudice at the penalty phase of the trial, a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Nothing precluded the jury from relying on evidence from the guilt phase in the penalty phase. (CALJIC No. 8.85; 8 CT 1642.) Hearing testimony of appellant's burglary offenses, evidence that portrayed him as an experienced criminal, and testimony that described him as the mastermind of the current crimes, it was unlikely the jury would have decided on a less severe penalty. Jurors likely thought that because appellant had committed other crimes on top of murder and conspiracy, he should be punished to the maximum extent to reflect his greater criminal conduct. The result was an unfair and unreliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, respondent is wrong. The trial court erred in not severing the burglary counts. The error violated appellant's constitutional rights to due process, a fair trial, and to a fair and reliable guilt and penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15, 17.) The judgment should be reversed.

III. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S MOTION TO EXCLUDE EVIDENCE OF APPELLANT'S UNCHARGED BAD ACTS, INCLUDING ITEMS FOUND IN HIS POSSESSION THAT IMPLICATED HIM IN CRIMINAL ACTIVITY, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

In arguing there was no error in the trial court's ruling, respondent says there was sufficient evidence from which a jury could reasonably infer appellant's flight and attempts to escape from jail were related to the Brucker shooting, e.g., the flier offering a reward for information, appellant's threats to Handshoe, Huhn and Northcutt, and appellant's flight using his roommate's truck. That there were other reasons why appellant left town pertains to the weight, not the admissibility of the evidence. (RB at pp. 55-56.) Further, appellant did not have to introduce evidence he would be facing a life sentence as a third-striker to offer an alternative explanation for his conduct; evidence he was fleeing because of a parole violation provided ample foundation. (RB at p. 57.) Appellant disagrees.

Evidence of appellant's flight was not relevant to the Brucker shooting because the evidence did not show appellant left town because of the crimes. He did not flee right after the crimes or even a week later. Testimony disclosed he showed up for work the next day. (27 RT 4718, 4720, 4722, 4725.) When he eventually left the county, appellant told Hause he was leaving because of a parole violation, not because of the Brucker shooting. (21 RT 3581-82; 6 RT 1031-33.)

As to appellant's attempts to escape from custody, respondent tries to explain the relevance to the Brucker shooting by stating the following:

> "The details surrounding Anderson's flight from California and his plans to escape from the Haney [sic] County jail were essential to convey to the jury the nature and extent of the effort Anderson was investing, or planning to

invest, in his attempt to avoid arrest, and to permit the jury to assess the value of the evidence on the issue of consciousness of guilt." (RB at p. 58.)

Contrary to this assertion, the evidence was not relevant. Respondent cannot say how escaping from custody on an unrelated charge would help appellant avoid arrest for the Brucker shooting. This did not help the jury decide whether appellant was a perpetrator unless using it to prove criminal propensity.

On this issue, respondent says this case is like *People v. Remiro* (1979) 89 Cal.App.3d 809 where the court rejected an argument that evidence of an attempted escape should have been excluded as unduly inflammatory. (RB at p. 58.) Appellant disagrees. In *People v. Remiro, supra,* 89 Cal.App.3d 809, the defendants were in custody for murder and attempted murder. Prior to trial on the charges, they tried to escape. (*Id.* at pp. 815-16, 845.) By contrast, appellant was in custody in another state on charges not related to the current crime when contemplating an attempt to escape from jail. There was no relevance of that evidence to consciousness of guilt for Brucker's shooting.

As to respondent's claim that it would not have been necessary for appellant to present evidence of his criminal history to rebut the evidence, evidence of a parole violation as well as the Bell and Dolan burglaries would suffice (RB at p. 57), respondent is wrong. Being on parole was not nearly as compelling an explanation for fleeing the county as facing a life sentence for a future criminal offense.

On the issue of prejudice, respondent argues any error was harmless under the standard for reversal set forth in *People v. Watson* (1956) 46 Cal.2d 818. The case against appellant was strong. Among other things, Peretti and Paulson testified about appellant discussing plans to rob the owner of El Cajon Speedway, a Bronco like appellant's was seen leaving Brucker's house about the time of the crime, and Handshoe's testimony implicated appellant in the shooting. (RB at pp. 59-60.) Also, appellant's trial was not unfair. Appellant disagrees.

The trial court's error violated appellant's constitutional right to a fair trial. Therefore, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (*Id.* at pp. 24-26.) That said, the error was prejudicial. The evidence was highly inflammatory and likely biased the jury against appellant. Making the prejudice worse was the lack of a convincing case against appellant. The witnesses respondent claims gave testimony that constituted overwhelming evidence against appellant were teenage witnesses who lacked any credibility. Peretti was an accomplice, drug user and provided inconsistent testimony. Her father ended up with reward money and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668; AOB at p. 65.) Handshoe was a drug user, admitted guilt for the crime, and tried to get the best deal he could from the prosecution. Paulson was mentally unstable and a drug addict. (22 RT 3801-06, 3809, 3811-15; 17 RT 2906-09; AOB at p. 65.) Also, there were over 2000 Broncos in the area as of the date of the crimes with model years of 1985 through 1995. That appellant drove one did not mean he was a perpetrator. (AOB at p. 65.)

Respondent says appellant has forfeited arguing prejudice at the penalty stage of the trial because he did not ask for a limiting instruction for jurors to disregard the evidence. (RB at p. 62.) Appellant disagrees. Jurors were instructed they could consider evidence presented at the guilt phase of the trial in determining the penalty. There would have been no basis for a limiting instruction proposed by respondent. (CALJIC No. 8.85; 8 CT 1642.) In a case respondent cites for this point, *People v. Quartermain* (1997) 16 Cal. 4th 600; RB at p. 62), the defendant asked that jurors consider all the evidence at the guilt phase of the trial. (*Id.,* at p. 630.) By contrast, here, appellant's trial counsel did not request that the jury consider this evidence.

Respondent also says there was no prejudice anyway at the penalty phase of the trial because the prosecutor presented evidence of appellant's prior violent crimes to the jury. Respondent misses the point. The evidence of appellant fleeing and trying to use violence against innocent people to orchestrate an escape made him look exceptionally deserving of the maximum penalty. This resulted in an unfair and unreliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, the evidence of appellant's flight and escape plans was irrelevant to the issue of consciousness of guilt for the Brucker shooting and extremely prejudicial. The trial court erred in admitting it, violating appellant's constitutional rights to due process, a fair trial and fair and reliable guilt determination. (*Beck, supra*, 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Further, the error was prejudicial at both the guilt and penalty phases of the trial. (*Beck, supra*, 447 U.S. 625, 637-638; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.) The judgment should be reversed.

IV. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S MOTION TO PRECLUDE HANDSHOE'S TESTIMONY, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent argues that there was no error because Handshoe's plea agreement only required that he testify truthfully. Therefore, it was not unduly coercive. (RB at p. 63.) Respondent says that because Handshoe confirmed his prior statement was truthful and promised to testify truthfully in the future, this "supports the logical expectation of consistency between the two, but only because both are represented to be rooted in truth, which is nonmalleable." (RB at p. 67.)

Respondent's argument misinterprets the plea agreement's terms that Handshoe tell the truth in accordance with his prior statement made during his April 11, 2005 statement. Handshoe confirmed in the agreement that his statement to the police on April 11, 2005 was true. He also promised in the agreement to tell the truth when testifying for the prosecution. (43 CT 9008-09.) He testified that before he took the plea bargain, he had to agree the statement he provided on April 11th was a true statement. (22 RT 3807.) Handshoe in essence promised that his testimony was not to differ from what he said on April 11, 2005 in his statement or else the benefits to him from the agreement would be lost and he would subject to a prosecution for perjury. These terms of the plea agreement make this case similar to *People v. Medina* (1974) 41 Cal.App.3d 438 where the language used provided that the "witness not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers on May 10. . . otherwise this order of immunity will be void and of no effect." (*Id.* at pp. 442, 450.) The same can be said for *People v. Green* (1951) 102 Cal. App.2d 831 where an accomplice was induced to testify by the promise that he would be granted immunity from prosecution if his testimony at the preliminary hearing resulted in the defendant being held to answer. The conviction that resulted from the accomplice's later and inconsistent trial testimony was reversed because of the use of tainted testimony. (*Id.* at pp. 833-35, 838-39.) Here, as in *People v. Medina, supra,* 41 Cal.App.3d 438 and *People v. Green, supra,* 102 Cal. App.2d 831, Handshoe was compelled to testify to conform to his prior statement, tainted by his self-interest. His plea agreement was contingent on him testifying in conformity with his statement made during plea negotiations which statement stood as the sole measure for the "truth." The agreement was unduly coercive and undermined the fairness of appellant's trial. (Contrast *People v. Homick* (2012) 55 Cal. 4th 816, 862-63 [Court rejected defendant's argument that witness testimony

constituted *Medina* error; "Dominguez's plea agreement did not require he testify in conformity with his statement to police, but only that he testify in a "truthful and honest and accurate" manner."].)

Respondent also argues even if the agreement of Handshoe's was unduly coercive, the admission of his testimony did not violate appellant's due process rights. Handshoe's testimony was not the focus point of the prosecution's case. It was cumulative of Peretti's testimony. Also, other evidence showed appellant was guilty. (RB at p. 69.) Respondent points to the evidence that witnesses saw a Bronco like appellant's Bronco, appellant threatened Northcutt and changed his appearance after the murder, and left town in a car other than the Bronco. (RB at p. 70.) In so arguing, respondent ignores Handshoe's testimony being the only evidence the prosecution had that put appellant at the crime scene with a gun. (22 RT 3755-59, 3761-62.) This evidence alone could have been enough to persuade jurors to convict appellant. (Compare *People v. Medina, supra,* 41 Cal.App.3d 438, 456 [court found tainted evidence was the only evidence conceivably influencing the jury to reach a guilty verdict].) Further, as set forth in appellant's prior argument, among other deficiencies, Peretti and Paulson were unreliable teenage witnesses and because there were over 2000 older Broncos in the area during the time of the crime, that appellant drove one did not prove he was a perpetrator. (AOB at pp. 76-77.)

On the issue of prejudice, respondent says there was none because Handshoe's testimony was cumulative of other evidence. Respondent claims there was substantial evidence independent of Handshoe's testimony proving appellant was who murdered Brucker, e.g., witnesses seeing a Bronco near the Brucker home and Brucker's description of the killer's hair color, matching the color of wig appellant was wearing when he left the mobile home for Brucker's house. For the same reasons, the error was harmless as to the penalty verdict. The record supported the inference appellant was the leader for the others as well as shooter. (RB at pp. 71-72.) Appellant disagrees.

Again, Handshoe's testimony was the only testimony the prosecution had that put appellant directly at the crime scene. (22 RT 3755-59, 3761-62.) Jurors could have relied on this evidence to support a decision to convict. Further, the prosecution's teenage witnesses were not credible. Peretti used drugs, was an accomplice and provided inconsistent testimony. Her father obtained the reward money for the information on the case. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2684, 2598, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Paulson was a drug addict with a criminal history. (17 RT 2906-09.) The jury appeared unsure about the testimony of Peretti and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67; *People v. Markus* (1978) 82 Cal.App.3d 477, 480, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027.) Evidence showed appellant's Bronco was a common model of car. (27 RT 4843-44, 4851-52.) When shown a photo of a Bronco that was not appellant's Bronco, Vangorkum said it was the car he saw on the day of the shooting. He said he would "place money on it." (24 RT 4313-14; AOB at pp. 76-77.)

Also, the error was prejudicial at the penalty stage of the trial. Handshoe's testimony was what the prosecution relied on to prove appellant was guilty. The

jury was allowed to consider evidence presented at the guilt phase in the penalty stage. (CALJIC No. 8.85; 8 CT 1642.) Testimony from Handshoe about appellant's role in the crimes likely persuaded jurors to decide he was the most culpable defendant and therefore should be punished to the maximum extent. The error undermined appellant's right to a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, the trial court erred in admitting Handshoe's testimony. As tainted testimony, its admission violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Additionally, the error was prejudicial at the guilt and penalty phases of the trial, undermining appellant's constitutional right to a reliable penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. 1, §§ 7, 15, 17.) The judgment should be reversed.

V. THE TRIAL COURT PREJUDICIALLY ERRED IN EXCLUDING APPELLANT'S EVIDENCE ESTABLISHING THAT CO-DEFENDANTS HUHN AND HANDSHOE HAD READY ACCESS TO DISGUISES AND GUNS POSSESSED BY DENSFORD, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

For this issue, respondent asserts there was no error. There was a lengthy time gap and no uniqueness about the gun, disguises and vehicles to which Densford had access. (RB at pp. 74-75.) Appellant disagrees.

The passage of time since Finch made her observations should have gone to the weight of the evidence, not its relevance. In *People v. Babbitt* (1988) 45 Cal.3d

660, this Court stated that Evidence Code section 352 must yield to the defendant's constitutional right to present a defense, and that "the principle applies . . to relevant and material evidence." (*Id.* at p. 684.) The United States Supreme Court stated in *Washington v. Texas* (1967) 388 U.S. 14 [87 S.Ct. 1920, 18 L. Ed. 2d 1019]:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.... an accused ... has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Id.* at p. 19.)

In *People v. Hall* (1986) 41 Cal.3d 826, California's seminal authority on the admission of third-party culpability evidence, this Court held that evidence of third party culpability is admissible if it is "capable of raising a reasonable doubt of defendant's guilt." A defendant need not make a preliminary showing of "substantial probability" of third-party guilt. (*Id.* at p. 833.) It is enough if direct or circumstantial evidence link the third person to the actual perpetration of the crime. (*Id.*) For purposes of Evidence Code section 352, the evidence should be treated like any other evidence. If relevant, it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. (*Id.* at p. 834; *People v. Geier* (2007) 41 Cal.4th 555, 581.) In short, where the defendant proffers direct or circumstantial evidence linking the third person to the actual perpetration of the crime, the third party evidence must be admitted. Moreover, in considering the admissibility of third party culpability evidence, the strength of the evidence inculpating the charged defendant may not be a court's sole consideration; rather, the focus should be on whether the proffered evidence sufficiently connects the third party to the crime. (*Holmes v.*

South Carolina (2006) 547 U.S. 319, 327, 329-331[126 S. Ct. 1727, 164 L. Ed. 2d 503].)

Here, Huhn and Handshoe were already directly connected to the case. The testimony concerning the gun being displayed to Huhn and Handshoe as well as the bags of disguises present at the Densford residence was all relevant to the question of who was wearing a disguise on the day of the shooting and who supplied the disguises. The existence of the disguises and the fact of the gun demonstration, in a place where appellant was never shown to be present, would have raised a reasonable doubt as to appellant's role, if any, in the shooting, especially combined with other evidence. The evidence supported the inference that appellant was not the perpetrator supplying the guns and disguises. The trial court erred in its ruling, violating appellant's constitutional rights to due process, a fair trial, to present a defense, and to a fair and reliable guilt determination. (*Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738]; *Chambers, supra,* 410 U.S. 284, 298-302 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. I, §§ 7, 15.)

As to prejudice, respondent says the reversal standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] is not applicable because appellant was not entirely precluded from presenting a defense and therefore no federal constitutional right was violated. Under *People v. Watson* (1956) 46 Cal.2d 818, any error was harmless because the trial court was justified in excluding the evidence due to its lack of probative value. Also, the prosecution had a strong case against appellant. (RB at pp. 75-76.) Respondent is incorrect.

The excluded evidence supported appellant's defense he was not a perpetrator. As implicating appellant's constitutional right to due process and to present a defense, the error is of federal constitutional dimension. The reversible error test

set forth in in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (*People v. Taylor* (1980) 112 Cal. App.3d 348, 366.)

In any respect, under either standard, the judgment should be reversed. Contrary to what respondent asserts, the evidence was not speculative or irrelevant. It was important evidence for appellant's defense because it provided a source for the Bronco, disguises and guns used in the Brucker shooting. The testimony would have disclosed that Densford was a good friend of Handshoe and Huhn, and his home was a common meeting area for that group. Densford had access to different types of vehicles. Finch saw Densford with Huhn and Handshoe showing off a large caliber pistol. When Handshoe and Huhn visited Densford's house, they had access to guns, disguises, and vehicles. (26 RT 4614-16.) This evidence alone could have raised reasonable doubt with the jury.

In sum, the trial court erred and the error was prejudicial at the guilt and penalty phase of the trial. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, § 7, 15, 17.) The judgment should be reversed.

VI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO TEST A PRIMARY WITNESS FOR THE PROSECUTION, PERETTI, TO DETERMINE IF SHE WAS UNDER THE INFLUENCE OF DRUGS WHILE TESTIFYING BASED ON HER DEMEANOR IN COURT, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO CONFRONT ADVERSE WITNESSES, TO PRESENT A DEFENSE, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent says counsel's suspicion was insufficient to establish probable cause to believe Peretti was testifying under the influence of drugs. Respondent cites to *People v. Dunkel* (1977) 71 Cal. App. 3d 928 to suggest that an

experienced police officer's opinion is required to establish probable cause. (RB at p. 79.) Respondent is wrong.

In *People v. Melton* (1988) 44 Cal.3d 713, after stating the probable cause requirement for court ordered intrusions beneath the body's surface, this Court discussed what the showing was in that case - counsel's suspicions and the court and prosecutor's observations. This Court did not decide that only a police officer's opinion could establish probable cause. (*Id.* at p. 738.) In any regard, at issue here was not Peretti's arrest for drug use. It was counsel's ability to fully cross-examine her credibility.

As for the showing made in this case in support of the defense's request, it was more than enough to establish probable cause. Although Peretti claimed to have stopped using methamphetamine as of January 3, 2003, she was still smoking marijuana after that date. (16 RT 2570-71.) Ritterbush testified that in late 2002 and early 2003 Peretti used methamphetamine and marijuana. (26 RT 4551-53.) During Peretti's testimony, defense counsel told the trial court that Peretti was constantly leaning, locking her jaw, and scratching herself, and it was likely she was under the influence. (16 RT 2546.) What counsel described appeared to be none other than signs of current drug use. (16 RT 2546, 2559, 2570-71, 2706; 26 RT 4551-53.) The trial court did not say that Peretti did not look under the influence. No other explanation was offered for her behavior.

In short, the trial court erred and the error violated appellant's constitutional rights to confront adverse witnesses and due process, a fair trial, to present a defense, as well as to a fair and reliable guilt determination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S.Ct. 1105, 39 L.Ed.2d 347]; *People v. Lucas* (1995) 12 Cal.4th 415, 464; *Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, VI, XIV; Cal. Const., Art. I, §§ 7, 15.)

As to whether the error was prejudicial, respondent says it was not because there was no showing Peretti was under the influence. Further, she lacked credibility anyway based on her admission that she lied to the police and her parents. Also, other evidence supported her testimony. (RB at p. 80.) Appellant disagrees.

There was no proof Peretti was under the influence because counsel was not allowed to obtain a blood test on her drug use and present that to the jury. As to her testimony, the prosecution relied on it to prove appellant was guilty. Defense counsel would have been able to more fully attack this testimony as not credible had the trial court not so limited the cross-examination. Also, the corroboration of her testimony came from other teenage witnesses who had credibility problems of their own. (AOB at pp. 89-90.) As to the penalty phase of the trial, because the jury was allowed to consider evidence presented in the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642), the exclusion of the evidence precluded the jury from using it to reject her testimony. So, the error was not harmless at either the guilt or penalty phases. (AOB at p. 91.) The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, § 7, 15, 17.)

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING THE PROSECUTION'S REQUEST TO HAVE THE JURY VIEW AND LISTEN TO APPELLANT'S BRONCO TWO YEARS AFTER THE SHOOTING, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent argues that the conditions under which the jury heard the Bronco, being different than on the day of the murder, only affected the weight of the evidence, not its admissibility. (RB at p. 85.) Respondent also says the cases

appellant relies on, *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-66; *People v. Vaiza* (1966) 244 Cal.App.2d 121, 126-27, are not on point because in those cases, the issue was the party's offer of demonstrative evidence to convey to the jury the lighting conditions that existed at the time and place of the crime. By contrast, here, the prosecution offered the sound of the Bronco "that was not merely demonstrative of the surrounding conditions. Instead, the evidence was a characteristic of a car actually seized in the course of the investigation." (RB at pp. 86-87.) Appellant disagrees.

The prosecution sought to have the jury see and listen to the Bronco to show that it was the same Bronco appellant was driving during the time of the crime. Yet, demonstrative evidence is admissible only when the party seeking to introduce the evidence shows not only it is relevant, but also its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar, and the evidence will not confuse or mislead the jury but instead assist jurors in determining the facts. (*People v. Jones* (2011) 51 Cal.4th 346, 375.) Here, the evidence was inadmissible because it was misleading. The Bronco's condition and the circumstances at the trial as compared to during the crime were not similar. The Bronco had been sitting outside, unprotected and exposed for two years. For the trial, the prosecutor had the Bronco put on a tow truck, elevated, on a metal base, near buildings and idling, conditions not remotely similar to those existing at the time witnesses allegedly saw it, i.e., traveling at speed. (21 RT 3592-94; 22 RT 3673, 3680-82.) (Compare *People v. Boyd, supra,* 222 Cal.App.3d 541, 566 and *People v. Vaiza, supra,* 244 Cal.App.2d 121, 127 [conditions not the same as during the time of the crime; thus, the foundational requirements were not met]; AOB at pp. 96-97.)

So, contrary to what respondent says, the trial court erred in allowing the demonstration, violating appellant's constitutional rights to due process, a fair

trial, and fair and reliable guilt determination. (*Bruton, supra,* 391 U.S. 123, 131, fn. 6; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; *People v. Delarco* (1983) 142 Cal.App.3d 294, 305-06; *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-66; *People v. Vaiza* (1966) 244 Cal.App.2d 121, 126-27; *Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

On the issue of prejudice, respondent says no federal constitutional rights were implicated and any error was harmless under *People v. Watson, supra,* 46 Cal.2d 818. Respondent says there was overwhelming evidence of appellant's identification as a perpetrator. Vangorkum testified that the Bronco in Exhibit 20 showed the same one he saw the day of the murder, and Peretti and Handshoe identified appellant as involved in the murder. (RB at p. 88.) Appellant disagrees.

As the trial court's error violated appellant's constitutional right to a fair trial, the *Chapman, supra,* 386 U.S. 18 standard for reversal applies. That said, the error was prejudicial under either standard. The evidence was damaging for appellant's case. To prove appellant was a perpetrator, the prosecution relied on jurors believing the Bronco witnesses saw was appellant's Bronco. Hearing the sound of the Bronco during the demonstration, made louder by the hole in the muffler, surrounding buildings, idling and placement on the truck, jurors were likely to have believed that the prosecution witnesses testifying about a Bronco saw appellant's Bronco.

Further, contrary to what respondent says, the prosecution did not have an overwhelming case against appellant. Vangorkum was shown a photo of a Bronco that was not appellant's Bronco and Vangorkum thought that was the car he saw the day of the shooting. (24 RT 4313-14.) Appellant did not own a unique car; there were over 2000 older model Broncos in the area registered as of the time of the crime. Additionally, the main witnesses against appellant, Handshoe, Paulson and Peretti, were not credible witnesses. (AOB at pp. 98-99.)

There was also prejudice at the penalty phase of the trial. The jury was allowed to consider evidence presented at the guilt phase of the trial in the penalty phase. (CALJIC No. 8.85; 8 CT 1642.) Evidence supporting the inference the Bronco witnesses heard was indeed appellant's Bronco, jurors would have been hard-pressed to believe appellant was not a perpetrator. Rejecting his defense and concluding he was not only a perpetrator but the one who shot Brucker, jurors likely thought he deserved the maximum penalty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

VIII. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTION TO IMPEACH JAMES STEVENS WITH HIS PRIOR FELONY CONVICTIONS, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent argues there was no error because the prior convictions were relevant to Stevens' credibility and admissible. Stevens had not remained law abiding and therefore the prior convictions were not too remote. Respondent says that *People v. Pitts* (1990) 223 Cal.App.3d 1547 is not relevant because the court in that case did not decide that not applying a presumptive 10 year-period for remoteness constituted an abuse of discretion. (RB at pp. 91-93.) Appellant disagrees. The trial court erred, and the error violated appellant's constitutional right to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

Stevens' prior offenses were old, some decades old. Also, respondent cannot explain why the prosecution needed all of them to inform jurors that Stevens had a

criminal history. Although there is no limit on the number of prior convictions used to impeach a witness' credibility (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 927), the jury already had testimony disclosing Stevens had been in prison and this is where he met appellant. (27 RT 4747.) What respondent fails to acknowledge is that under Evidence Code section 352, the trial court had the discretion to exclude the priors based on the prejudice outweighing any probative value. (*People v. Castro* (1985) 38 Cal.3d 301, 312-13; *People v. Clark* (2011) 52 Cal.4th 856, 931.) Even the more recent offense, the robbery prior, was of minimal value. (*People v. Fries* (1979) 24 Cal.3d 222, 229, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301[convictions for theft offenses, e.g., robbery and burglary, are somewhat less relevant on the issue of credibility than are crimes such as perjury and hence are entitled to less weight].)

Respondent also argues that there was no prejudice to appellant from the evidence because the priors at issue were not appellant's priors and therefore no risk existed of jurors having an emotional bias against him. Also, the prejudice as set forth in Evidence Code section 352 does not mean prejudice naturally flowing from relevant evidence. (RB at p. 95.) Appellant disagrees. The priors made Stevens look like a long-time criminal. As appellant had associated with Stevens for several years, Stevens' criminal history reflected badly on appellant. Jurors likely believed that if appellant associated with criminals, he probably was one too.

As for prejudice, respondent says any error was harmless because there was strong evidence of appellant's guilt and it was not the sort of evidence that would bear on penalty. Also, the priors were not appellant's anyway. (RB at pp. 95-96.) Appellant disagrees.

Stevens was not an inconsequential witness for the defense. He testified about appellant's whereabouts on April 14th, appellant's demeanor that day, Stevens' use

of the Bronco, and appellant's physical appearance. (E.g., 27 RT 4751-53, 4762-63, 4769, 4773.) Stevens also testified that he was never in a room with appellant while coverage of Brucker's homicide was aired on the television and appellant purportedly told someone to "shut the fuck up." (27 RT 4763; 24 RT 4169-70.) Given the issue in the case was whether appellant was a perpetrator, appellant's defense depended on the jury believing Stevens. Hearing Stevens was convicted of all these crimes, jurors were unlikely to believe anything he had to say.

Also, as set forth in appellant's prior arguments, the evidence was not overwhelming against him. The three main witnesses for the prosecution, Handshoe, Peretti and Paulson, were not reliable or credible. The jury asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus, supra,* 82 Cal.App.3d 477, 480.) Also, over 2000 older model Broncos were registered in the area at the time of the crimes. (AOB at pp. 105-06.) That appellant drove one was not dispositive. As to the penalty phase, the jury was allowed to consider the evidence presented in the guilt phase of the trial in the penalty part of it. (CALJIC No. 8.85; 8 CT 1642.) Evidence minimizing the believability of appellant's witness, making appellant's defense less credible, gave the jury a reason to reject his defense and conclude the prosecution proved its case. Believing appellant was the most culpable defendant, jurors likely concluded he should be punished to the maximum extent possible. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, the trial court erred in admitting evidence of Stevens' priors. They had minimal value in assessing his credibility and any such value was outweighed by

the prejudice from their admission. The error was prejudicial at the guilt and penalty phase of the trial. The judgment should be reversed.

IX. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING INVESTIGATOR BAKER'S TESTIMONY THAT TRAVIS NORTHCUTT SAID APPELLANT PREDICTED SOMETHING BIG WOULD HAPPEN INVOLVING A SAFE, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent says that appellant forfeited his claim by not properly objecting at trial and that there was no error anyway because a hearsay exception applied to both levels of hearsay. Respondent justifies its position by claiming Northcutt's out of court statements were inconsistent with his trial testimony. (RB at pp. 99-105.)[2] Appellant disagrees.

The reason for the rule requiring an objection based on specific grounds is to allow the trial judge to consider the evidence, allow an additional foundation, modify the offer of proof or take other steps to avoid a reversal.

> "The objection requirement is necessary in criminal cases because a contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal. . . The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission

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[2] Respondent says that: "the record suggests that the parties agreed in the trial court that such statements [appellant's statements to Northcutt] would fall within the exception to the hearsay rule found at Evidence Code section 1220." (RB at p. 101.) While this may be so as to Huhn and Lee, appellant's trial counsel did not voice her agreement, instead saying that she did not want to "open the door to anything." (20 RT 3432-33.)

to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." (*People v. Partida* (2005) 37 Cal. 4th 428, 434, citation omitted.)

Here, counsel's objection allowed the court to make a ruling on the grounds now raised on appeal. When counsel objected to the prosecution's inquiry as leading, the court stated: "And my ruling is that there is the foundation for prior inconsistent statement." (24 RT 4169.) As the trial court considered the evidence, decided the foundation was adequate and made a record on the specific ground, the issue was not forfeited. This case is unlike *People v. Williams* (2008) 43 Cal. 4th 584, cited by respondent. (RB at p. 100.) In that case, the defendant claimed on appeal he lacked an adequate opportunity to cross-examine Dustin at the preliminary hearing because the prosecutor failed to disclose to the defense prior to the preliminary hearing the agreement of the prosecution to pay Dustin's living expenses. This Court found the issue forfeited because the defendant had conceded that the cross-examination had been thorough, did not argue Dustin's testimony should be excluded because there had been a secret or implied immunity agreement, and the trial court did not hold a hearing on a failure to disclose or delay in discovery. (*Id.* at pp. 619-20.)

This argument notwithstanding, an appellate court is generally not prohibited from reaching a question not properly preserved for review. (*See Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 722, overruled on other grounds in *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164.)

As to the merits of the issue, without discussing cases appellant has relied on, *People v. Lew* (1968) 68 Cal.2d 774, 778-80, *People v. Parks* (1971) 4 Cal.3d 955, 960; *People v. Sam* (1969) 71 Cal.2d 194, 209-10 (AOB at pp. 110, 112-13), respondent says Northcutt's responses were evasive. Therefore, their inconsistency

was implied and the prior statements were admissible. (RB at p. 102.) Respondent points to statements of Northcutt, claiming that it never happened, to support its assertion. (RB at pp. 102-03.) Respondent is wrong. Respondent ignores Northcutt's many statements that he did not remember. (E.g., 20 RT 3506, 3510.) There was nothing to indicate Northcutt's lapse of memory was untrue. Northcutt's testimony that respondent claims indicated evasiveness (RB at pp. 104-05) still answered the questions. As to Northcutt's later responses that "that would have never happened" and "it never happened" (20 RT 3521) when asked the same question, these still were not inconsistent statements. The prosecution had asked the question multiple times and Northcutt provided the same response, i.e., that he did not remember. His subsequent response, that it never happened, was not at odds with his prior responses when reviewed in context.

Also, a point respondent does not address, is that the statement was not trustworthy. There was no corroboration and Northcutt was not credible. He appeared to have an adversarial relationship with appellant and was not cooperative in the police investigation. Specifically, he was angry at appellant for giving him bad tattoos and did not get along with him. (24 RT 4182; 20 RT 3515.) When Baker contacted him in April of 2005, Northcutt did not want to talk to him. (20 RT 3519.) Further, Northcutt was under the influence each time he spoke with Baker. (20 RT 3519.)

In short, the trial court erred in allowing into evidence Investigator Baker's testimony on Northcutt's statement. The trial court's error violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, § 7, 15.)

On the question of prejudice, respondent says under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818, the error was not prejudicial. The case

against appellant was "multi-faceted," and evidence of Northcutt's statements was cumulative of more compelling evidence showing appellant participated in the crimes. (RB at pp. 106-07.) Appellant disagrees.

The trial court's error violated appellant's constitutional right to a fair trial. Therefore, the standard for reversal set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. That said, the evidence was not minor. If believed, jurors may have concluded appellant played a major role in the crimes, that he was not simply a participant. Also, it was not as if the prosecution had an airtight case against appellant. The prosecution had to rely on the testimony of teenagers who each had their own credibility issues. As for the Bronco appellant drove, there were so many similar ones registered in the area at the time of the crime, appellant having one did not mean he was involved in the crimes. Also, Vangorkum identified a car as the one he saw the day of the shooting. But, it was not appellant's Bronco. (24 RT 4313-14; AOB at pp. 115-16.) In short, the error was prejudicial at the guilt stage of the trial.

As to the penalty part of the case, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Evidence showing appellant as a participant in the planning of the crimes may well have persuaded the jury that appellant was not only a perpetrator, but played the primary role in committing the crimes, thus deserving of the maximum penalty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

X. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTION TO ELICIT TESTIMONY DISCLOSING WHEN APPELLANT WAS IDENTIFIED AS A SUSPECT IN THE BRUCKER SHOOTING, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO CONFRONT ADVERSE WITNESSES, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent argues that there were two assertions of fact in the challenged testimony: a) the assertion that law enforcement received a tip on April 17, 2003; and b) appellant was involved in the murder of Brucker. (RB at p. 110.) Respondent says the testimony was not hearsay evidence because it was offered not to prove appellant committed the murder but only to show he was a suspect. Respondent concedes that jurors would have had to regard the April 17th date as true to ascertain the timing of the investigation. Respondent further asserts that if defense counsel had been concerned that Goldberg was testifying based on what he had been told by others instead of personal knowledge, counsel could have asked him about it on cross-examination. (RB at pp. 110-11.) Respondent is wrong.

The designation of appellant as a suspect did not come from Goldberg personally but from information received by him. Respondent would be speculating to say Goldberg had personal knowledge. Even if Goldberg personally suspected appellant was involved, he still was disclosing through his testimony the opinions of non-testifying witnesses that appellant was considered a suspect. Also, the testimony was offered for nothing other than its truth, to inform the jury that three days after the shooting, appellant was thought to be a suspect in the murder of Brucker. In allowing the detective's response into evidence, the trial court erred, violating appellant's constitutional rights to due process, a fair trial, and to confront adverse witnesses. The error also undermined appellant's constitutional

right to a fair and reliable guilt determination. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54 [124 S.Ct. 1354, 1369, 158 L.Ed.2d 177]; *Bruton, supra,* 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. 1, §§ 7, 15.)

On the issue of prejudice, respondent says there was none under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818. Respondent says the evidence was relevant to rebut evidence introduced by the defense that supported the inference appellant left town to avoid a parole violation, not because of the Brucker shooting. (RB at p. 111.) Yet, respondent also says the evidence was unimportant in proving appellant's guilt and determining the proper penalty. (RB at p. 112.) Appellant disagrees.

Contrary to respondent's claim, the trial court's error in admitting testimonial hearsay evidence is of federal constitutional dimension, implicating as it does a appellant's fundamental rights. Therefore, the reversible error test set forth in *Chapman, supra,* 386 U.S. 18 applies. That said, under that standard or the reversal standard set forth in *People v. Watson, supra,* 46 Cal.2d 818, the trial court's error was prejudicial. The evidence was damaging to appellant's case. The jury may well have used it to conclude appellant left San Diego because of the shooting. This made him look like the perpetrator fleeing the consequences of the crimes. Further, as set forth in appellant's prior arguments, the prosecution did not have an overwhelming case against him. The young teenage witnesses were not reliable and that appellant drove a Bronco did not point to him as the perpetrator. (AOB at pp. 121-22.) Also, there was prejudice at the penalty phase of the trial. Evidence linking appellant's flight to the instant crimes likely persuaded jurors that appellant was a perpetrator and because he, unlike the others, tried to flee the county, could have been the most culpable of the defendants. Therefore, he should

be punished to the maximum extent. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XI. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S EVIDENTIARY ERRORS MANDATES THAT THE JUDGMENT BE REVERSED

Respondent says because no evidentiary error occurred, there was no prejudice. Further, even if there was error, it was harmless, individually or cumulatively. (RB at pp. 112-13.) Appellant disagrees. As set forth in his opening brief, the errors combined substantially diminished appellant's credibility and his defense. He was portrayed as an exceptionally violent person whose criminal history showed he was predisposed to commit the current crime. Additionally, the trial court's preclusion of important evidence to support appellant's defense and evidentiary rulings against him had the effect of improperly supporting the prosecution's case and reducing the credibility of appellant's defense. Further, the prosecution's case against appellant was not convincing. Among other things, it stood on the testimony of three young witnesses who lacked credibility and were not believable. Jurors initially were not convinced by their testimony; they asked for readbacks of it during deliberations. (7 CT 1464, 1466-67.) (AOB at pp. 124-25.) So, the combined effect of the errors was prejudicial. (*People v. Ortiz* (1962) 200 Cal.App.2d 250, 259; *People v. Williams* (1971) 22 Cal.App.3d 34, 40.) There also was cumulative prejudice in the penalty stage. (*People v. Hamilton, supra,* 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The errors resulted in eliminating any credibility appellant had. Jurors were unlikely to have seriously considered his defense and probably thought that appellant deserved to be punished with the most severe sentence. The errors undermined appellant's right

to a fair and reliable penalty determination. The guilt and penalty judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XII. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY WITH CALJIC NO. 3.19, THAT IT MUST DECIDE IF PROSECUTION WITNESSES PERETTI AND PAULSON WERE ACCOMPLICES, INSTEAD OF INSTRUCTING THAT THE WITNESSES WERE ACCOMPLICES AS A MATTER OF LAW, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent argues that Peretti and Paulson were at Handshoe's mobile home because they wanted to use drugs and be with their friend, not because they were accomplices. They were not present during the crimes and there was no evidence they shared the same intent as the perpetrators or provided encouragement. (RB at p. 113.) Respondent is wrong.

The presence of Peretti and Paulson during the many discussions held prior to the crimes supports the conclusion that they were involved in planning them. During those times, details were discussed about carrying out the crimes. The only reasonable inference was that they were involved on some level. (E.g., 16 RT 2500-02, 2523-30; 17 RT 2865.) That they were not at the crime scene is not dispositive. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; *People v. Jehl* (1957) 150 Cal.App.2d 665, 668; AOB at p. 130.)

On this issue, respondent says the case appellant cites, *People v. Medina* (1974) 41 Cal.App.3d 438, is not applicable because "it does not state the proposition for which Anderson cites it, and does not even address the issue of accomplice instructions." (RB at p. 117.) Respondent is wrong. In *People v. Medina, supra,* 41

Cal.App.4 438, the defendants had argued that the witnesses were accomplices. The court made a specific finding that the witnesses were accomplices despite the existence of inconsistent versions of what occurred. (*Id.* at pp. 443-44, 450.) Similarly, here, despite their sometimes inconsistent testimony, the evidence supported the finding Peretti and Paulson were accomplices as a matter of law. They were present for so many of the planning meetings, and Peretti was with the others just before and after the shooting. (17 RT 2865-66, 2868-73; 16 RT 2500, 2516, 2646-47, 2583, 2586, 2653.) In any event, a point not addressed by respondent, a request for an instruction on accomplices that is favorable to the defense, accomplice as a matter of law, should not be refused simply because the prosecutor claims that the accomplice status is in dispute. If there is no dispute from the inferences drawn from the evidence, the court should instruct the jury that a witness is an accomplice as a matter of law. (*People v. Williams* (2008) 43 Cal. 4th 584, 636; AOB at p. 131.)

In short, the trial court should have instructed the jury they were accomplices as a matter of law. (*People v. Southwell* (1915) 28 Cal.App. 430, 433 The error undermined appellant's constitutional right to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

As to prejudice, respondent argues any error was harmless because there was ample evidence of corroboration. There was evidence of appellant being seen at Handshoe's trailer beginning in January of 2003, a Bronco like appellant's exited Brucker's driveway on the day of the shooting, and appellant wore a hairpiece and drove a Bronco. Also, appellant told Northcutt something big would happen involving a safe. Respondent additionally refers to testimony of appellant's statement he was leaving San Diego for a parole violation, was driving the white truck because his Bronco was known to others, and said to Northcutt that he would

be next if he said anything. Further, appellant shaved his mustache after the shooting and there were phone calls between appellant's cell phone and Handshoe's mobile home on the day of the crime. (RB at pp. 118-19.) Appellant disagrees. The error was not harmless.

Sufficient corroborating evidence was lacking. There were no testifying eyewitnesses to the shooting. Because so many similar Broncos were registered in the area, appellant possessing a Bronco did not prove he was involved in the crimes. (27 RT 4843-44, 4851-52.) The teenage witnesses could not serve as corroborating evidence. (CALJIC No. 3.13; 8 CT 1614.) The cell phone records did not prove a murder occurred. Appellant leaving the area more than a week after the shooting occurred also did not prove he committed a crime, especially since the evidence showed he was avoiding a parole violation. Northcutt could not specify when he heard appellant say something big would happen involving a safe. (24 RT 4183.) Northcutt also said that maybe he made that up, that appellant did not say this. (24 RT 4190.) He said the hairpiece he saw appellant wear was brown, not salt and pepper colored as described by Peretti. (24 RT 4184; 16 RT 2509-10, 2519.)

In sum, the error was prejudicial. The judgment on Counts I and II should be reversed. Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Instructions permitting the jury to dispense with the corroboration requirement for accomplices allowed them to rely on testimony that likely persuaded jurors to decide appellant was the most culpable of all the defendants and deserved the maximum punishment. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980)

447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XIII. IF THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT PERETTI AND PAULSON WERE ACCOMPLICES AS A MATTER OF LAW, THE EVIDENCE WAS INSUFFICIENT TO CORROBORATE THEIR TESTIMONY IMPLICATING APPELLANT IN THE MURDER AND CONSPIRACY

Respondent says that for the reasons asserted in its prior argument, the evidence sufficiently corroborated the testimony of Peretti and Paulson. Thus, even if the trial court erred in failing to instruct the jury they were accomplices as a matter of law, the error is harmless. (RB at p. 119.) Appellant disagrees.

There was no evidence outside of accomplice testimony implicating appellant in the commission of the murder and conspiracy. All it did was show the circumstances of the offense. (Compare (*People v. Martinez* (1982)132 Cal.App.3d 119, 132-33 [court found no evidence which, absent Heath's testimony, connected Martinez to the commission of the robberies of which he was convicted; although certain testimony by officers corroborated Heath's testimony, it did nothing more than show the commission of the offense or its circumstances]; AOB at pp. 136-38.) As insufficient evidence corroborated the accomplice testimony implicating appellant as a perpetrator, the judgment on Counts I and II should be reversed and appellant cannot be retried. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *Burks v. U.S.* (1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 57 L.Ed.2d 1] [Court held "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, ..."]; *DuBois v. Lockhart* (8th Cir. 1988) 859 F.2d 1314, 1318.)

XIV. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY ON ACCESSORIES, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

Respondent says there was no error because the instruction on accessory liability was necessary to show the jury that Peretti could be liable as an accessory instead of an accomplice. Respondent says the theory that she was an accessory was "plausible" because substantial evidence supported the conclusion she did not aid and abet the crimes. She went to Handshoe's mobile home that day with the intent of going out with Huhn, not to commit a robbery. She told Huhn she did not want him to go. She stayed behind while the others left to do the crimes. (RB at p. 123.) Respondent is wrong.

Peretti's conduct did not constitute evidence of accessory status. They showed she was an accomplice. She was present during the discussions about carrying out the crime. (16 RT 2500, 2516, 2523-30, 2646-47.) That she was not at the crime scene did not mean she was not an accomplice. An aider and abettor need not be present during the crimes if advising or encouraging their commission. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; *People v. Jehl* (1957) 150 Cal.App.2d 665, 668.) Although lies to the police when made with the requisite knowledge and intent will constitute the aid or concealment contemplated by Penal Code section 32, a passive failure to reveal a crime, refusal to give information, or the denial of knowledge motivated by self-interest does not constitute the crime of being an accessory. (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 836; Pen. Code, § 32.) Here, Peretti was motivated solely by her self-interest when she failed to tell about Huhn's involvement. (16 RT 2583, 2586, 2646-47; AOB at pp. 140-41.) This did not make her an accessory.

Respondent argues any error was harmless because the jury was instructed that some instructions may not apply. Also, the instruction itself was not inherently prejudicial to appellant. (RB at pp. 124-25.) Appellant disagrees. Due to the lack of instruction directing the jury to find Peretti an accomplice as a matter of law, jurors may well have found Peretti an accessory. Jurors could have thought that since she knew what Huhn did and did not disclose his involvement in the crimes to the police, she was an accessory. (16 RT 2645, 2647.) This being so, her testimony need not be treated any different than the other witnesses' testimony; there was no need to find corroborating evidence before using it to find appellant guilty. Yet, without the option to find her an accessory, jurors could have found her an accomplice and ultimately not relied on her testimony because of the lack of corroborating evidence. (See CALJIC 3.11; 8 CT 1613.) (AOB at pp. 141-42.)

There was also prejudice in the penalty phase of the trial. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Instructions that made it more likely the jury would decide Peretti was not an accomplice could have resulted in the jury using her testimony to find appellant guilty, there being no corroboration requirement. Given her testimony pointed to appellant as the major participant in the crimes, jurors would have been inclined to seek a penalty of death to reflect his increased culpability. The erroneous ruling violated appellant's constitutional right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XV. THE TRIAL COURT PREJUDICIALLY ERRED IN ITS RESPONSE TO THE JURY'S QUESTION AS TO WHETHER JURORS COULD CONSIDER A WITNESS'S DEMEANOR IN THE COURTHOUSE IN DETERMINING THE CREDIBILITY OF THAT WITNESS AND DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY ON THE SUBJECT THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

On this issue, respondent says only one juror questioned Peretti's behavior. Further, the standard of review in deciding if error occurred is whether in light of the instructions there is a reasonable likelihood that the jury misunderstood the applicable law. (RB at p. 129; citing *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

First, contrary to respondent's assertion, more than one juror saw Peretti's odd behavior; at least three observed her. Counsel for Lee asked how many jurors were present when this was observed. The juror responded two others from the jury panel. (16 RT 2720-21.) Also, respondent fails to acknowledge that a court's response will not suffice if it is inadequate to answer the question on a matter not fairly resolved by the court's instructions. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251; *U.S. v. Southwell* (9th Cir. 2005) 432 F.3d 1050, 1052-53.) (AOB at p. 147.) Here, the trial court's response was not adequate because it failed to allow the jurors to consider Peretti's demeanor while she was in the courthouse in determining her credibility. (16 RT 2719; 17 RT 2736-37.) (RB at p. 130.) Respondent says that the jury should not be allowed to assess the credibility of a witness while not testifying. (RB at p. 131.) Yet, respondent does not explain how assessing a witness' demeanor in the courthouse is different than the jurors paying attention in the courtroom or discussing during deliberations a juror's observations in the courtroom about whether a witness looked credible or not. Moreover, jurors' observations in open court are subject to qualification by the other jurors. Having been instructed that they could consider a variety of factors in determining the

witness's credibility, including the witness's demeanor while testifying (CALJIC No. 2.20; 8 CT 1594-95), the trial court at minimum should have informed the jury it could consider a witness's conduct in the courtroom. Jurors then could have used Peretti's attempts to make eye contact with jurors in assessing her credibility. (AOB at p. 148.) Respondent cites to *Turner v. Louisiana* (1965) 379 U.S. 466 [85 S. Ct. 546, 13 L. Ed. 2d 424] in asserting that trial by jury implies that the evidence developed against a defendant shall come from the witness stand. (RB at p. 131.) However, in that case, the Court reversed because of the conduct of two prosecution witnesses, deputy sheriffs. They were in close and continual association with the jurors and had "freely mingled and conversed" with them. (*Id.* at pp. 469, 473-74.) At issue was not a witness's demeanor as in this case, but the deputies' association and friendship with the jurors that translated into the jurors placing confidence in them as trial witnesses, thereby determining the defendant's fate. (*Id.* at p. 474.)

Respondent also argues that the trial court's instruction that the jury could consider the demeanor and manner of the witnesses while testifying was good enough to communicate to jurors that they could consider a witness' demeanor while inside the courtroom. (RB at p. 130.) Respondent is wrong. The instruction limited the jurors to assessing demeanor only while the witness was actually testifying. (29 RT 5037.)

In short, the trial court's failure to respond appropriately to the jury question constituted error and implicated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*People v. Frye* (1998) 18 Cal.4th 894, 1007; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 575; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

On the issue of prejudice, respondent says there was none because the court's response directed the jury to consider only the facts from the evidence received at trial. Further, defense counsel did tell the jury about Peretti's demeanor while testifying. Her demeanor was insignificant anyway in determining her credibility since there was evidence of her lying to the detectives and the police. (RB at p. 132.) Appellant disagrees. The error was prejudicial.

Because of the trial court's response informing jurors that they could not consider demeanor except while the witness was actually testifying, jurors could not use Peretti's behavior off the witness stand in determining her credibility. As CALJIC No. 1.00 instructed jurors to follow the law as the trial court stated it to them, the jury likely followed the trial court's direction instead of broadly interpreting the instruction that the jury could consider a variety of nonexclusive factors in assessing a witness' credibility. If the trial court had properly instructed jurors on the point, they may well have followed defense counsel's lead and disregarded Peretti's testimony, finding it not credible because her strange demeanor suggested a lack of credibility. This was important since the prosecution's case depended on Peretti's testimony. She was the only witness who testified of appellant's involvement prior to the group departing for Brucker's residence. (AOB at p. 149.) Also, because she admittedly lied about various things prior to testifying, this made it more likely jurors would have ultimately rejected her testimony. (AOB at p. 150.)

There was also prejudice at the penalty phase of the trial. There, the jury was allowed to consider evidence presented in the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) With the trial court giving an inadequate response to the jury's question on whether jurors could rely on Peretti's demeanor in the courthouse in assessing her credibility, jurors were likely to use her testimony to find appellant guilty and decide he should be punished to the maximum extent to reflect his greater role in

the crimes. The erroneous ruling violated appellant's constitutional right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XVI. APPELLANT'S CONVICTION SHOULD BE REVERSED BASED ON PROSECUTORIAL MISCONDUCT; THE MISCONDUCT IMPLICATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

In his opening brief, appellant argues the prosecutor committed misconduct on several occasions: vouching for his witnesses, misstating the evidence, stating facts not in evidence, and argumentative questioning. Respondent argues there was no misconduct and as to the vouching, there was nothing improper about what the prosecutor said. His statement simply was his opinion that the evidence proved appellant was responsible for Brucker's murder. He did not suggest to the jury that jurors should credit his opinion on inside information. (RB at p. 139.) Respondent says the cases appellant relies on, *People v. Cotton* (1959) 169 Cal.App.2d 1 and *People v. Adams* (1960) 182 Cal.App.2d 27, are not helpful because in those cases, unlike here, the prosecutor expressed his personal belief on the reliability of a witness or pledged support for the veracity of the two witnesses' testimony. (RB at pp. 139-40.) Appellant disagrees.

No different than the prosecutors in *People v. Cotton, supra,* 169 Cal.App.2d 1 and *People v. Adams, supra,* 182 Cal.App.2d 27 who pledged their support as prosecutors behind their witnesses, the prosecutor in this case did the same. He communicated to the jury what he personally thought about the evidence, and in so doing, put his government office behind his opinion. Although not specifically stating he had inside information, the comment nonetheless "tended to improperly imply to the jury that the deputy district attorney possessed information as to

[their] character and credibility in addition to the evidence adduced during the trial bearing upon [their] reliability as a witness." (*People v. Perez, supra,* 58 Cal.2d at p. 246.) Respondent fails to acknowledge that:

> "[a] prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." (*U.S. v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053.)

On the misstatements of the evidence and stating facts that were not in evidence, respondent attempts to justify what the prosecutor said by the following assertion: "Anderson's contention may be superficially appealing based on the words used by the prosecutor. However, when placed in context of the broader argument the prosecutor was making, Anderson's contention loses its force." (RB at p. 140.) Respondent refers to the prosecutor's comments arguing the evidence was sufficient to prove Lee acted as an aider and abettor. (RB at p. 140.) Respondent misses the mark.

The prosecutor argued to the jury that Handshoe would benefit from his plea agreement regardless of what he testified to. Yet, Handshoe was required under the agreement to testify in accordance with his prior free talk statement. (43 CT 9008-09.) Respondent nonetheless says that viewed in context, the prosecutor's comment pointed out "correctly, that Handshoe could not secure a better sentence by giving the prosecution what he knows they want to hear." (RB at p. 141.) But, the plea deal was conditioned on Handshoe telling the truth, i.e., according to his April 11, 2005 statement. There was nothing to suggest he could still reap the benefits of the agreement if his testimony was not according to what the prosecution believed his story would be, his version of events on April 11, 2005. (22 RT 3803-09.) Respondent further tries to explain the comment by stating the

jury could just look at the plea agreement and interpret the prosecutor's comment correctly. (RB at p. 142.) This is incorrect. The existence of an exhibit on the subject cannot justify prosecutorial misconduct. (*Ricketts v. Adamson* (1987) 483 U.S. 1, 8 [defendant's breach of the plea agreement to which parties had agreed removed the double jeopardy bar to prosecution on the first-degree murder charge].)

As to the argumentative questions, respondent says that the prosecutor was just trying to elicit from Stevens that he was biased in favor of appellant and willing to lie to help him. This was relevant to Stevens' credibility and a proper subject for cross-examination. In making its argument, respondent does not address cases appellant relies on, *People v. Ellis* (1966) 65 Cal.2d 529, 539-40; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1235-36; *People v. Carrera* (1989) 49 Cal.3d 291, 318-19 (AOB at p. 159-60). (RB at pp. 142-43.) Appellant disagrees. When a prosecutor's questions are designed not to elicit information but to provoke argument, the questions are argumentative and improper. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.) Here, the prosecutor's questions tried to engage Stevens in argument even after the trial court told the prosecutor not to ask any more oath questions. (27 RT 4806.) This constituted misconduct.

In short, the prosecutor committed misconduct by providing jurors with his personal opinion of the strength of the evidence, misstating the evidence, stating facts not in evidence and argumentative questioning. The misconduct violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

On the question of prejudice, respondent asserts that there was none. The prosecutor's comment about believing with his heart appellant was responsible for Brucker's death was unimportant in context of the rest of the evidence. The same

could be said for the questions to Stevens. As for the misstatement about the plea agreement, the jury had the agreement itself to read and the court admonished the jury that the prosecutor was only stating his opinion about it. (RB at p. 143.) Appellant disagrees.

After hearing the prosecutor say he believed appellant was responsible, jurors were likely persuaded that the evidence must be enough to prove appellant was guilty and Handshoe was telling the truth. "[J]uries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247, abrogated on other grounds in *People v. Green* (1980) 27 Cal.3d 1; *People v. Duvernay* (1941) 43 Cal.App.2d 823, 828.) As to the prosecutor's misstatement about the plea agreement, the trial court's admonition did not diminish its effect. By not telling the jury the prosecutor was inaccurately representing the agreement's terms, the trial court conveyed that the prosecutor was correct in his rendition and the exhibit proved that. The trial court stated: "Ladies and Gentlemen, you will have a copy of the agreement that was reached with Mr. Handshoe. I'm going to allow Mr. McAllister to argue his viewpoint on what that means." (30 RT 5296.) With respect to the argumentative questioning, contrary to what respondent says, Stevens was not unimportant to appellant's case. He was a necessary witness for appellant. He supported the defense that appellant was not a perpetrator and was elsewhere during the crimes. By the prosecutor using the perjury description, the impression was that Stevens willfully lied under oath, committing a felony. (*People v. Ellis* (1966) 65 Cal.2d 529, 539-40.) Hearing the prosecutor's questions, jurors were likely to have dismissed Stevens' testimony as untruthful.

In sum, the prosecutor's misconduct was prejudicial and the judgment of guilt should be reversed. There was also was prejudice at the penalty phase of the trial.

(*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.) There, the jury could consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) The prosecutorial misconduct likely strongly influenced the jurors' interpretation of the evidence and resulted in the jury not only finding appellant guilty but also deciding he should have the maximum penalty. The misconduct violated appellant's constitutional right to a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XVII. THE TRIAL COURT ERRED IN FAILING TO SEAL THE VERDICT IN HUHN'S CASE OR ISSUING A GAG ORDER, AND THEREAFTER NOT CONDUCTING AN INQUIRY INTO WHETHER THE IMPARTIALITY OF ANY OF APPELLANT'S JURORS WAS COMPROMISED BY THE PUBLICITY OF HUHN'S VERDICT; REVERSAL IS REQUIRED

Appellant argued in his opening brief that the failure to either seal the Huhn jury verdict or inquire as to whether appellant's jury had read about Huhn's verdict during their deliberations was error and that error denied appellant a fair and unbiased jury trial. Respondent argues there was no error because the trial court did take precautions to prevent the jury from hearing of the Huhn jury verdict. Also, there was no authority for the trial court to seal the verdict and no evidence any juror was aware of the verdict. Citing *NBC Subsidiary v. Superior Court* (1999) 20 Cal.4th 1178, respondent argues that before transcripts are ordered sealed or court proceedings closed, among other things, a trial court must find an overriding interest supporting the sealing or closure, a substantial probability the interest will be prejudiced if there is no sealing or closure, and no less restrictive means exist. Also, jurors are presumed to follow the instructions; these are considered a presumptively reasonable alternative to closing a hearing and the

presumption can only be overcome in exceptional circumstances. (RB at pp. 148-50.) Appellant disagrees; there was error.

In *NBC Subsidiary, supra,* 20 Cal.4th 1178, the issue did not involve the sealing of a verdict for a co-defendant in a criminal case. The case was a civil one involving figures in the entertainment industry. At issue was whether the trial court erred in ordering the media and the public excluded from the courtroom when the jury was not present and in delaying disclosure of transcripts of the closed hearings until after the trial. (*Id.* at p. 1181.) By contrast, in a criminal case like this one, the trial court must decide at the threshold whether the media accounts of the case are actually prejudicial, whether the jurors were probably exposed to the publicity, and whether they would be sufficiently influenced by the instructions alone to disregard the publicity. (*U.S. v. Aragon* (5th Cir. 1992) 962 F.2d 439, 443.) As to the likelihood that the prejudicial accounts reached the jury, the most important factors are the prominence of the media coverage itself and the measures taken by the court to minimize the probability of jury exposure. (*U.S. v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1558.)

Respondent says the two federal cases relied on by appellant, *U.S. v. Aragon* (5th Cir. 1992) 962 F.2d 439 and *U.S. v. Bermea* (5th Cir. 1994) 30 F.3d 1539, are "inapposite because they involved the application of federal criminal procedure – not a constitutional rule – to find that the district court should have inquired of the jurors about media publicity." (RB at p. 151.) To the contrary, even this Court in *NBC Subsidiary Inc., supra*, 20 Cal. 4th 1178 cites these cases in concluding that trial courts must do more than tell the jury not to pay attention to media accounts:

> "Reviewing courts have stressed the need for trial courts to do more than merely instruct the jury to 'disregard' or 'pay no attention to' media accounts of the case, and instead have encouraged the giving of instructions that specifically direct the jury not to read or listen to media accounts of the

case. (*U.S. v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1559 (*Bermea*); *United States v. Harrelson* (5th Cir. 1985) 754 F.2d 1153, 1163 (*Harrelson*).) The court in *Bermea* also stressed the need for frequent formal admonitions and instructions (*Bermea, supra*, 30 F.3d at p. 1559) and, like the court in *Harrelson,* suggested that trial judges regularly should poll the sitting jury to inquire whether any member has been exposed to media coverage concerning the case. (*Bermea, supra*, at p. 1559; *Harrelson, supra*, 754 F.2d at pp. 1163-1164; see also *U.S. v. Aragon* (5th Cir. 1992) 962 F.2d 439, 445-446 [trial court should make "daily pointed inquiry whether the jury knew or had heard anything relating to the case other than the evidence presented at trial"]; cf. Pen. Code, § 1122 [admonitions to jury]; Code Civ. Proc., § 611 [same].)" (*NBC Subsidiary Inc., supra*, 20 Cal. 4th 1178, 1224, fn. 50.)

Respondent also says that based on *People v. Martinez* (2010) 47 Cal.4th 911 that no information was presented to the trial court to trigger its duty to inquire into possible juror misconduct. Thus, the trial court was not required to do an investigation. (RB at pp. 150-51.) This is not so. Articles were published that described appellant in demeaning terms and referenced Huhn's defense which was that he was scared to death of appellant, appellant was a "maniac with a gun." (33 RT 5418, 5422; Pros. Ex. Nos. 52, 53.) Further, this case is unlike *People v. Martinez, supra,* 47 Cal.4th 911 where this Court found no hearing was required. In that case, Juror No. 12 had contact with the district attorney investigator Barnes. The investigator had called the juvenile hall to try and locate the defendant's disciplinary reports and spoke with Juror No. 12. She told Barnes that he needed a court order and admitted to Barnes that she was a juror on the defendant's case, and jokingly asked if she could get off the jury. (*Id.* at pp. 940-41.) In concluding a

hearing was unnecessary, this Court found that the mere fact that Barnes contacted Juror No. 12 does not, by itself, constitute good cause that cast doubt on her ability to serve as a juror. Barnes did not give Juror No. 12 any additional information about the defendant's case and the contact was inadvertent. (*Id.* at p. 942.)

By contrast, here, the articles disclosed additional information about appellant's case that was extremely inflammatory towards appellant and was of the type to have prejudiced the jurors reading them. They referred to appellant in demeaning terms and referenced Huhn's defense which was that he was scared to death of appellant. (33 RT 5422.)

Respondent says the case appellant cites, *People v. Cummings* (1993) 4 Cal.4th 1233 (AOB at p. 168), can be distinguished because in that case, unlike here, there was no information given to the trial court to the effect that a juror had read an article about the trial. Thus, the trial court had no duty to hold a hearing to ascertain the potential impact of the misconduct. (RB at p. 151.) Respondent misses the point. A trial court must initially decide if jurors were probably exposed to the publicity and if the instructions alone were sufficient so that jurors disregarded the publicity. (*U.S. v. Aragon, supra,* 962 F.3d at p. 443.) For instance in *People v. Hernandez* (1988) 47 Cal. 3d 315, cited by the Court in *People v. Cummins, supra,* 4 Cal.4th 1233 the Court found reversal was not required due to a news article about the defendant being charged with another crime. The trial court properly conducted a hearing into whether and to what extent the jury as a whole may have been affected and whether there was good cause to discharge any of the jurors. There, the news article appeared on the front page discussing an allegation that the defendant was to be charged with a new double murder. Concerned that some juror or alternate juror may have seen this article, the trial court questioned each of the jurors individually on whether any of them had heard or read anything about the defendant after returning the verdict of guilt. Four

jurors admitted being aware of the article, one reading it in its entirety. Three of these jurors were replaced. The one remaining knew no more than that something had been in the news. (*Id.* at pp. 337-38; *People v. Cummings, supra,* 4 Cal.4th 1233, 1331-32, citations omitted ["Even if inadvertent, it is misconduct for a sitting juror to read a newspaper article relating to the trial. If that occurs the trial court should conduct a hearing into whether and to what extent the jury as a whole may have been affected and whether there was good cause to discharge any of the jurors."].)

In any event, respondent also cannot explain how it can be assumed without at least a preliminary inquiry that no jurors read the article. In *People v. Aragon, supra,* 962 F.2d 439, the appellate court addressed this point. In that case, on the morning of the commencement of trial, the jury having already been empaneled, counsel for the defendants requested that the court conduct additional voir dire to ascertain whether any juror had read or heard of the article. Despite the highly prejudicial nature of the publicity involved, the trial court denied the defense counsel's request for a poll. (*Id.* at p. 442.) The government contended that the article was not highly prejudicial to the defendants and that the district court's cautionary instructions to the jury negated the possibility that the publicity reached the jury. (*Id.* at p. 444.) According to the appellate court, the article was prejudicial. It showed the defendant as a drug dealer with a prior criminal history. Also, the article was not published in an obscure manner. The jurors were not sequestered and were merely told to avoid reading about or listening to media reports concerning the case itself; they were not barred from reading newspapers in general. The instructions did not obviate the court's need for inquiry. Additionally, "[i]n the absence of a poll, it is impossible to determine whether the jurors were actually exposed to the article. We would have to speculate to

conclude that no juror saw or heard the account, and thus, that the appellants were not unduly prejudiced." (*Id.* at pp.442, 445.)

The same can be said here too. The articles were prejudicial, describing appellant in demeaning terms and disclosing Huhn's defense which was that he was deathly afraid appellant. (33 RT 5418, 5422; Pros. Ex. Nos. 52, 53.) Also, here too, the court's instructions before releasing the jury did not make an inquiry into whether the jurors were actually exposed to the article unnecessary. Although informing the jury not to read or listen about this case in the news media, the instructions did not tell the jury to avoid all newspapers. (32 RT 5388-89.) Only if speculating could an assumption be made that no juror saw or heard of the article. (Contrast *People v. Clark* (2011) 52 Cal. 4th 856, 867-68 [where defendant argued trial court had duty to inquire of jurors about whether they were exposed to mid-trial publicity, Court found the news coverage referred to by counsel that prompted the defense request for jury questioning did not contain anything innately prejudicial to defendant; "Indeed, the only news item that concerned defendant in any respect was the article reporting that the victim's family members danced at her grave site after the guilty verdicts."].)

As to prejudice, respondent says there was none because the record does not show a juror could not perform his or her duty due to the news accounts. (RB at pp. 151-52.) Appellant disagrees. When the jury has been exposed to improper outside influences, the test for prejudice is whether the impartiality of the jury has been compromised. (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1488, fn. 5.) Jury misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) Here, respondent cannot point to proof that no prejudice resulted because no inquiry was made of any juror to determine that the juror did not read the article.

In *U.S. v. Aragon, supra*, 962 F.2d 439, the appellate court reversed based on similar facts:

> "This newspaper publicity raised a significant possibility of prejudice, but the district court did not make requisite inquiry into the possible prejudice. It failed to make its own independent determination as to the alleged intrusion upon jury impartiality. Under the specific facts of this case, we reverse for a new trial." (*Id.* at p. 447.)

In sum, the trial court erred and the error was prejudicial at the guilt phase and penalty phase of the trial, jurors using the same evidence presented in the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) (*People v. Brown* (1988) 46 Cal.3d 432, 447-48.) Jurors knowing that appellant was believed to be a maniac with a gun and that Huhn feared him may well have been convinced that appellant was the most culpable of all the defendants and deserved the death penalty. The error violated appellant's right to a fair and reliable guilt and penalty determination. The judgment should be reversed. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

XIII. THE JUDGMENT SHOULD BE REVERSED BASED ON JURY MISCONDUCT

In his opening brief, appellant argued jury misconduct occurred when an exhibit that had not been admitted into evidence was put in the jury room. It was a letter from the district attorney offering his opinion that appellant was a dangerous man. The letter was in response to Pasquale's letter to the district attorney on his potential testimony in appellant's trial. (38 RT 5733.) The district attorney wrote: "As you pointed out, the greater good here is to see that Anderson is not in a position to harm others." (38 RT 5733.) Respondent asserts there was no error

because there was no misconduct. The inadvertent placement of the letter in the jury room did not constitute jury misconduct but was instead "akin to evidentiary error." (RB at p. 156.) In so arguing, respondent says the case appellant cites to, *People v. Andrews* (1983) 149 Cal.App.3d 358, is no longer good law based on the decision in *People v. Cooper* (1991) 53 Cal.3d 771. Also, there was no miscarriage of justice because "the opinion of Pasquale that he should come out to testify because Anderson should not be allowed to harm anyone else was already properly before the jury. . .." and the prosecution case against appellant was strong. (RB at pp. 157-59.) Respondent is incorrect.

First, the decision in *People v. Andrews, supra,* 149 Cal. App.3d 358 has not been overruled. The language respondent cites to in *People v. Cooper, supra,* 53 Cal.3d 771 in claiming the case is no longer good law refers to the Court's discussion on the standard of prejudice. (*Id.* at p. 836 and n. 12.) In any case, at issue in *People v. Cooper, supra,* 53 Cal.3d 771 was an exhibit received into evidence inadvertently and then withdrawn. The jury was told not to consider it. (*Id.* at pp. 834, 836.) The Court concluded that there was no misconduct because the exhibit had been admitted into evidence, even if inadvertently. The jury was thus justified in reading it. (*Id.* at p. 835.) By contrast, here, the jury was given information (the exhibit) that had not been admitted as evidence in the trial. They were not justified in reading it. (38 RT 5733.) (Compare *People v. Nesler* (1997) 16 Cal.4th 561, 579 (AOB at p. 174) [Court decided that even if unintentional, a jury's receipt of information on its case that was not part of the evidence received at trial is misconduct]; *People v. Andrews* (1983) 149 Cal.App.3d 358, 363 [same].)

As to prejudice, no evidence was presented rebutting the presumption that misconduct occurred affecting the verdict. The jury having before it the opinion of Pasquale does not make the error harmless. The jury was given the opinion of the

prosecutor that appellant should be locked up permanently. This had to have influenced one or more jurors. Juries regard the prosecuting attorney as unprejudiced and impartial, and statements made by the prosecutor are apt to have great influence. (*People v. Perez, supra,* 58 Cal.2d 229, 247; *People v. Bolton* (1979) 23 Cal.3d 208, 213.) As a conviction cannot stand if even a single juror has been improperly affected by the misconduct, reversal is required. (*People v. Pierce* (1979) 24 Cal.3d 199, 208; compare *People v. Vigil* (2011) 191 Cal.App.4th 1474, 1487-88 [court decided presumption of prejudice not rebutted; jurors were undecided and misconduct pertained to issue in the case].) This point aside, the prosecution lacked a convincing case against appellant. The prosecution relied on the testimony of teenage witnesses, all having credibility problems (e.g., 16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653; 26 RT 4626-28, 4554-55; 27 RT 4668; 17 RT 2906-09; 22 RT 3801-06, 3809, 3811-15). The error was not harmless.

The error was prejudicial also at the penalty phase of the trial. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.) There, the jurors were free to use evidence from the guilt phase in making their decision. (CALJIC No. 8.85; 8 CT 1642.) Given the inflammatory nature of the exhibit, jurors were likely persuaded that appellant deserved the maximum penalty. The error violated appellant's right to a fair and reliable guilt and penalty determination. The judgment should be reversed. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

XIX. THIS COURT SHOULD REVIEW THE TRIAL COURT'S IN-CAMERA PROCEEDING ON APPELLANT'S *PITCHESS* MOTION

Respondent agrees with appellant on this issue. (RB at p. 159.) So, following *People v. Mooc* (2001) 26 Cal.4th 1216, appellant requests this Court to review the records relating to past complaints on Investigator Baker as to any dishonesty and other misconduct to decide if the trial court's determination that there was no discoverable information to turn over constituted error.

XX. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING APPELLANT TO PRESENT AN IRRELEVANT AND INFLAMMATORY STATEMENT TO THE JURY DEMANDING THE DEATH PENALTY, NOT STRIKING THE TESTIMONY SUA SPONTE, AND FAILING TO ADEQUATELY INSTRUCT THE JURY GIVEN APPELLANT'S STATEMENT, THEREBY VIOLATING STATE LAW AND THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

Here, respondent claims there was no error. It says that a defendant's testimony on preferring the death penalty "may or may not be" relevant. Yet, relevancy is not dispositive because "a defendant's fundamental right to testify demands some flexibility in the application of the evidentiary rules." (RB at p. 161.) As to whether the trial court erred in not properly instructing the jury about appellant's testimony demanding the death penalty, respondent justifies the lack of instruction by asserting appellant's demand related to his testimony about his innocence. As relevant to mitigating evidence, it was proper for the jury to consider. (RB at p. 162.) Appellant disagrees.

A defendant's opinion as to the proper penalty does not bear on that defendant's character or record, or circumstances of the offense. (*People v. Smith* (2003) 30 Cal.4th 581, 622.) In *People v. Webb* (1993) 6 Cal. 4th 494, this Court

appeared to agree. Although finding a defendant's absolute right to testify cannot be foreclosed or censored, this Court found any improper effect from such testimony is to be alleviated by an appropriate instruction when suitable. (*Id.* at p. 535.) Respondent does not explain how this remedy does not convey that testimony requesting a death penalty is not probative of any aggravating or mitigating factor and is thus irrelevant to the penalty determination. Without proper precautionary instructions, this type of testimony injects an irrelevant factor into the weighing process and encourages a jury to decide the penalty arbitrarily, e.g., based on a defendant's stated preference for death. (See *People v. Ramos* (1984) 37 Cal 3d 136, 155-156; AOB at p. 185.)

Respondent also has ignored the plain meaning of what appellant said. Appellant unequivocally stated he wanted the death penalty: "I don't give a shit. Give me the death penalty." (35 RT 5623.) This case is unlike the case respondent relies on, *People v. Danielson* (1992) 3 Cal. 4th 691, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal. 4th 1046. (RB at p. 161.) In that case, during the penalty phase, after the defendant had testified on his own behalf regarding his religious conversion, his remorse, and his desire for a fair judgment, the prosecutor asked on cross-examination and over objection what penalty the defendant believed was appropriate for his crimes. He replied: "If I were one of the 12 jurors, I would vote for the death penalty." This Court found that under the circumstances, the evidence was relevant to matters raised by the defendant in his direct examination. The prosecutor's penalty question followed the defendant's self-serving testimony regarding his conversion to Christianity, and his willingness to accept responsibility for his acts in the form of the jury's fair judgment. Seen in the context of the defendant's entire testimony, this Court decided the prosecutor's question was unobjectionable for it bore on the extent of the defendant's remorse

for his crimes, his realization of their seriousness, and his willingness to atone for them by paying society's highest price. (*Id.* at p. 715.)

Here, however, appellant gave no self-serving testimony or testimony expressing a willingness to accept responsibility for his acts in the form of a fair decision from the jury. What testimony he provided, that he wanted the death penalty, pertained to nothing relevant for the jury's penalty determination.

In responding to appellant's argument, respondent does not address appellant's discussion distinguishing his case from *People v. Mai* (2013) 57 Cal. 4th 986 and *People v. Webb, supra,* 6 Cal.4th 494. (AOB at pp. 186-87.) In *People v. Mai, supra,* 57 Cal. 4th 986, this Court concluded the jury had instructions informing that the list of factors in mitigation and aggravation was exclusive. Thus, no risk existed of the jury using a defendant's preference for death as a factor to weigh in deciding the appropriate penalty. (*Id* at p. 1056.) In *People v. Webb, supra,* 6 Cal.4th 494, this Court found the defendant's testimony was not entirely irrelevant because it revealed factors that were relevant to the circumstances of the crime and his character, thus fitting within the factors listed in Penal Code section 190.3. This Court did not state that the defendant's preference for death was relevant as an aggravating or mitigating factor (*Id.* at pp. 513, 535; AOB at pp. 186-87.)

Respondent also cites to *People v. Whitt* (1990) 51 Cal.3d 620 in support of its argument that this Court should reject appellant's argument. (RB at p. 161.) In that case, the defendant was called to the stand as the last witness at the penalty phase. Shortly after the examination began, the prosecutor objected to questions on relevance grounds: "[D]o you want to live?" and "Why do you deserve to live?" The defendant argued that by sustaining prosecutorial objections, the court violated his federal constitutional right to have the sentencer consider all relevant mitigating evidence. This Court agreed. (*Id.* at pp. 646-48.)

Yet, in *People v. Whitt, supra,* 51 Cal.3d 620, the answer of why the defendant deserved to live would have been relevant to mitigating circumstance. By offering an explanation, the defendant would have provided insight into his character. By contrast, here, appellant's testimony was not relevant because it provided no insight as to his character or any circumstance of the offense.

Respondent further argues that appellant's statement that "he did not care about getting the death penalty was more a manifestation of frustration or defiance than a genuine plea for that outcome." (RB at p. 162.) Respondent is speculating. Appellant could not have been more clear in what he wanted. As to respondent's claim that because the court need not identify which factors are aggravating and which are mitigating, it must not restrict the jurors' consideration of the evidence (RB at p. 162), respondent incorrectly assumes that what appellant said was a proper aggravating factor for the jury to consider. It was not. Therefore, the jury should not have been allowed to use it in making its decision.

On the question of prejudice, respondent does not offer an argument as to how appellant's sentence can be considered reliable when he was allowed to order the jury to choose a penalty of death and clear instructions were not given for the jury to properly decide the penalty without considering that testimony. Appellant's statement was a defining moment in the trial, especially given he also conveyed his disdain for the jury. (35 RT 5623). This introduced arbitrary considerations in the penalty process. Absent the error, the prosecution would have been hard-pressed to persuade the jury to vote for the death penalty. The record did not support it. There was no premeditated plan to kill Brucker. Appellant's prior burglaries were not violent crimes.

In short, appellant's penalty trial was constitutionally unfair and unreliable. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S.

Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.) The judgment should be reversed and the case remanded for a new penalty trial.

XXI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY WITH A REVISED VERSION OF CALJIC NO. 8.85, DIRECTING THAT THE LIST OF AGGRAVATING AND MITIGATING FACTORS WAS AN EXCLUSIVE LIST

Respondent attempts to describe appellant's argument as one claiming that the instruction was deficient in failing to identify all the mitigating and aggravating factors. (RB at p. 164.) This is not so. Appellant argues that the jury should have been instructed that the list of aggravating and mitigating facts was an exclusive list. (AOB at pp. 195-96.) As appellant stated in his opening brief, a point not discussed by respondent, the commentary to CALCRIM 763, the CALCRIM equivalent to CALJIC No. 8.85, states: "The committee has rephrased this for clarity and included in the text of this instruction, 'You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case.'" (CALCRIM 763, Commentary.) CALCRIM 763 in relevant part provides that:

> "Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case." (CALCRIM 763.)

Without this language, it is not clear to jurors whether additional circumstances might be considered as aggravating factors, the risk being the jury may rely on a circumstance not included on the statutory list of factors. (*People v. Williams* (1988) 45 Cal.3d 1268, 1325, abrogated on other grounds in *People v. Guiuan*

(1988) 18 Cal.4th 558; *People v. Boyd* (1985) 38 Cal.3d 762, 778, fn. 10.) Respondent appears not to argue otherwise.

In this case, the prosecutor reinforced the lack of limit on factors the jury could use by arguing to the jury that it could consider "all the things that you heard in the guilt phase. Everything." (36 RT 5692.) The jurors therefore probably believed any factor was applicable as set forth in CALJIC No. 8.85. (CALJIC 8.85; 8 CT 1642.) Given also appellant's testimony and the dearth of mitigating evidence, the error was not harmless. The penalty judgment should be reversed.

XXII. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY THAT THERE NEED NOT BE ANY MITIGATING CIRCUMSTANCES TO JUSTIFY A DECISION THAT THE PENALTY BE LIFE WITHOUT PAROLE

On this issue, respondent says there was no error, that this Court has held that the language of CALJIC No. 8.88 is sufficient to convey that there need not be any mitigating circumstances to justify a decision that the penalty be life without parole. (RB at p. 165.) In so arguing, respondent fails to explain why CALCRIM 766 has included the language appellant sought in its instruction if not for its necessity. In pertinent part, that instruction states: "Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death." (CALCRIM 766.) This language was required given the circumstances of appellant's case. The jury was not instructed on lingering doubt or that even one factor alone was sufficient to base a decision. Also, the defense presented minimal mitigating evidence. So, the question for jurors was whether they could decide on a life without parole penalty if not finding any mitigating factors from the evidence presented. The jury was not instructed that the defendant has no burden to introduce factors in mitigation and the absence of these factors does not require a verdict of death. Also, given the theme of the

penalty phase instructions was the required weighing process, the obvious inference from the dearth of mitigating circumstances was that the aggravating circumstance would be "substantial in comparison." (CALJIC No. 8.88; 36 RT 5719.) The drafters of CALCRIM 766 appeared to agree on this point and believed the jury should be so instructed, that that it could choose life without parole instead of death absent mitigating factors. Respondent fails to explain how in appellant's case that the meaning of the language in CALCRIM 766 was conveyed to the jury in CALJIC No. 8.88.

In short, the trial court erred in denying the defense's request to instruct the jury that there need not be any mitigating circumstances to justify a decision that the penalty be life without parole. The error violated appellant's constitutional right to a fair and reliable penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.) Also, the error was prejudicial. There was limited mitigating evidence presented. The jury probably thought the only issue it had to decide was whether there were aggravating factors and if so, the penalty must be death since those aggravating factors would have been "so substantial" in comparison. (CALJIC No. 8.88; 36 RT 5718-20; 8 CT 1657.) The penalty judgment must be reversed.

XXIII. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT ON LINGERING DOUBT

Respondent says prior decisions of this Court have held that the trial courts are not obligated to instruct on lingering doubt, even on request. (RB at p. 166.) As set forth in appellant's opening brief, there was evidence in this case, Mason's testimony, supporting a lingering doubt instruction. This evidence would have

allowed the jury to find that lingering doubt did exist, sufficient to support the jury deciding against death penalty. Without the jury being so instructed, it is doubtful jurors would have known it could apply a greater degree of certainty of guilt for imposition of the death penalty and that this standard could not be met given evidence of appellant's innocence. The trial court's failure to so instruct the jury violated appellant's constitutional rights to due process and to a fair and reliable penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

Further, the error was prejudicial. Defense counsel argued lingering doubt to the jury. (36 RT 5708-09, 5712-13.) Had jurors been instructed on this point and thus known they could apply a higher standard in deciding the appropriate penalty, it was likely they would have decided against the death penalty. (AOB at pp. 203-04.) The penalty judgment should be reversed.

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

According to respondent, each of appellant's claims have been rejected by this Court. Therefore, this Court should reject them as presented here as well. (RB at p. 167.) Appellant refers this Court to arguments set forth in his opening brief and urges the Court to revisit its prior decisions on the issues. (AOB at pp. 205-24.)

XXV. CALIFORNIA'S SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

Respondent argues this claim too has been rejected by this Court and appellant offers nothing persuasive to have this Court reconsider the issue. (RB at p. 167.) Again, appellant refers this Court to arguments set forth in his opening brief and asks it to revisit its prior decisions on the issue. (AOB at pp. 225-27.)

XXVI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent asserts that this argument too has been rejected and it should not be reconsidered. (RB at pp. 167-68.) Appellant asks that this Court reconsider this issue too as presented in his opening brief. (AOB at pp. 227-29.)

XXVII. THE TRIAL COURT ERRED IN IMPOSING SENTENCE FOR THE SERIOUS FELONY PRIOR AND PRISON PRIOR BASED ON THE SAME PRIOR CONVICTION

Respondent agrees with appellant on this issue. (RB at p. 168.) As appellant argued, a trial court may not impose both an enhancement pursuant to Penal Code section 667, subdivision (a)(1) for a prior serious felony conviction and an enhancement under Penal Code section 667.5, subdivision (b) for a prior prison term resulting from that same conviction. The one year term must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150, 1153.) (AOB at p. 229-30.)

XXVIII. THE CUMULATIVE EFFECT OF THE GUILT PHASE AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND THE DEATH PENALTY JUDGMENT

Respondent says because there was no error, there can be no cumulative error. Reversal of the convictions and death sentence is not warranted. (RB at p. 168.) Appellant disagrees.

There were serious errors that cumulatively violated appellant's due process rights under *Chambers* v. *Mississippi, supra,* 410 U.S. 284. The jury was allowed to hear improperly admitted testimony that depicted appellant as an experienced criminal, dangerous to society and criminally disposed to having committed the current crimes. Appellant also had to proceed to trial with co-defendant Lee whose defense was at odds with appellant's and resulted in a "second prosecutor" against him. The jury also heard the government's representative vouching for its case, misrepresenting the evidence and stating facts not in evidence. Erroneously admitted evidence further pointed to appellant as a perpetrator and mastermind of the crimes, he was precluded from presenting necessary evidence to support his defense, and the jury was improperly instructed on important points of the law. These errors individually and cumulatively buttressed the prosecution's case and reduced the credibility of appellant's defense, making it more likely the jury would reject it. The prosecution cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [the combination and cumulative impact of the guilt phase errors in this case] might have contributed to [appellant's] conviction." (*Chapman, supra,* 386 U.S. at p. 24.) Appellant's convictions must be reversed.

Additionally, the numerous and substantial errors in the guilt phase of the trial, as set forth in Arguments I through XVIII, inclusive, including the cumulative effect of the errors in the guilt phase of trial, which arguments are incorporated here by reference, deprived appellant of a fair and reliable penalty determination.

(*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S. Ct. 2978, 49 L. Ed. 2d 944]; *Zant* v. *Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; U.S. Const. Amend. V, VI, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

Even if this Court were to decide that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermined confidence in the integrity of the penalty proceedings. The constitutional violations, violations of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights, compounded one another, and created a pervasive pattern of unfairness resulting in a penalty trial that was fundamentally flawed and a death sentence that was unreliable.

In sum, it cannot be determined that the combined effect of these errors had no effect on at least one juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Appellant's death sentence must be reversed.

CONCLUSION

For the foregoing reasons, and those in his opening brief, appellant respectfully requests reversal of his convictions and the judgment of death.

DATED: _____, 2017

Respectfully Submitted,

_____

Joanna McKim
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Attorney for Appellant

Certification Regarding Word Count

The word count in appellant's reply brief is 22,338 words according to my Microsoft Word program. (Cal. Rules of Court, Rule 8.630.)

I declare under penalty of perjury that this statement is true.
Executed on _____at San Diego, California,

Signature: _____, Name:

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DECLARATION OF PROOF OF SERVICE

I, Joanna McKim, declare that:

I am a member of the State Bar of California and attorney of record in this proceeding. I am over the age of 18 years, not a party to this action, and my place of employment is in San Diego, California. My business address is P.O. Box 19493, San Diego, California,

On _____ 2017 I served the document described as:
Appellant's Reply Brief, S138474/SCE230405

on the interested party/parties in this action as set forth below:

_x__ (By Mail) I caused such copies of the document to be sealed in an envelope and deposited such envelope in the United States mail in San Diego, California. The envelope was mailed with postage thereon fully prepaid addressed to:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on _____, 2017 in San Diego, California.

_____
Joanna McKim