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 SUPPLEMENTAL OPENING BRIEF

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ARGUMENT

I. THE JUDGMENT SHOULD BE REVERSED BASED ON PROSECUTORIAL MISCONDUCT FROM THE PROSECUTOR INTERVIEWING HANDSHOE BUT FAILING TO IMMEDIATELY INFORM THE COURT AND OBTAIN LEAVE TO WITHHOLD HANDSHOE'S INTERVIEW PENDING COMPLETION OF PLEA NEGOTIATIONS AND MISREPRESENTING THE FACTS AT THE APRIL 20 PRETRIAL HEARING ON APPELLANT'S MOTIONS TO SEVER AND CONTINUE THE TRIAL, AND THE TRIAL COURT FAILING TO GRANT A MISTRIAL OR CONTINUANCE DUE TO THE DISCOVERY VIOLATIONS; THE ERRORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Introduction

On April 11, 2005, the prosecution interviewed co-defendant Handshoe for plea negotiations. The interview could not have been used against Handshoe should the negotiations have been unsuccessful. However, if negotiations succeeded, which they did, then the statement could form the factual basis of the plea agreement and Handshoe would testify at appellant's trial after pleading guilty to lesser charges.

When the prosecutor interviewed Handshoe, the audiotaped interview later transcribed, the interview should have been immediately disclosed to the defense unless the trial court had granted leave to delay disclosure. Yet, the prosecutor took no steps before or after the interview with Handshoe to seek leave for delayed disclosure. It was not until Handshoe pled guilty, on May 11, that the interview was disclosed.

After Handshoe changed his plea, appellant immediately objected and moved for a mistrial. Jury selection had already started, days before. Up until the time the guilty plea was disclosed, Handshoe's lawyer had participated in an information and strategy sharing agreement with the other co-defendants and had not withdrawn from that agreement while negotiating the plea agreement. His disappearance from the trial and reappearance as a person who was repeatedly mentioned during Handshoe's testimony was an undue

influence on the jury given his two days of interacting with the jurors, building a rapport with them, during jury selection. Especially in a capital case, the risk of a biased jury as a result of jurors' exposure to Handshoe's attorney was substantial.

As further prejudice to the defense, appellant's trial team needed time to investigate and redo the defense strategies following Handshoe's guilty plea. In addition to Handshoe's trial lawyer having been privy to the case-planning decisions, decisions that would have to be reconsidered given Handshoe's status as a prosecution witness, the defense was misguided in its investigations. The prosecution had represented at pre-trial hearings that it was sure it would not be using any statements by Handshoe to prove its case. The prosecution's position on April 20 was that the prosecution was ready and there was no reason for a thirty-day continuance. Defense counsel's attention was not on Handshoe as counsel did not know he would turn into the prosecution's star witness. The change in plea surprised the defense and compromised the integrity of the defense trial preparations. Yet, the trial court refused to grant a mistrial or a continuance following Handshoe's guilty plea.

Even after Handshoe pleaded guilty, the prosecutor not only failed to disclose material evidence relating to Handshoe's statements, specifically pertaining to two additional burglaries alleged, but also misrepresented that the investigation produced no results. When defense counsel called the detective to testify and establish this fact, the detective gave contrary testimony. Had the prosecutor fulfilled his duty to disclose the results of the investigation into these two burglaries, appellant's counsel would not have called the detective to testify. Defense counsel presented testimony from the owner of the alarm company on the burglary. Yet, the harm was already done by counsel's reliance on the prosecution's misrepresentations. The prosecutor presented a stipulation to remedy the harm. Yet, it did not, instead leaving the jury confused. Later, the trial court sent the plea agreement into the jury deliberations room without redacting portions of Handshoe's interview. The interview disclosed the prosecutor vouching for Handshoe's credibility, referenced the two burglaries and included reference to Handshoe's conversations that

the prosecutor listened to – evidence that had not been admitted at trial. The trial court, however, mistakenly believed Handshoe's statement added nothing to the prosecution's case. Had the proper pretrial notice been provided, the issue of the non-admissible portions of the statement would have been litigated in pre-trial motions.

The disclosure violations and other instances of prosecutorial misconduct resulted in an uninformed court, misguided defense counsel and a biased and confused jury. The fact-finding process was so distorted by these errors that the traditional harmless beyond a reasonable doubt prejudicial error analysis is not applicable. In any event, the prosecution cannot show that these errors were harmless beyond a reasonable doubt. A new trial is required.

B. Factual and Procedural Background

1. Handshoe is arrested in May of 2003 and immediately instructs his lawyer to seek a plea bargain.

Handshoe was arrested on May 14, 2003 on the basis of a Crime Stoppers tip indicating that Handshoe and "Stressed Eric" were responsible for Brucker's death. (1 RT 46; 22 RT 3798.) Two weeks later, on May 28, 2003, Handshoe was charged with murder and conspiracy to commit residential burglary and robbery along with three others: Huhn, Lee, and appellant. (1 CT 1-4.) At trial, Handshoe admitted that from the moment of his arrest until shortly before trial, he was committed to negotiating a plea deal:

Q. And isn't it fair that you -- you had a lawyer representing you?

A. Yes.

Q. And that lawyer was a fellow by the name of Allan Williams?

A. Yes.

Q. And isn't it fair to say that between May 14th, when you were arrested, and April 11th of 2005, when you gave your first statement to law enforcement,

you and your lawyer were working very, very actively to try to get you a plea bargain?

A. Yeah, I'd say so.

Q. In fact, the focus of your time the last two years has been to get you a plea bargain in this case?

A. Yeah.

Q. That's what you wanted to do?

A. I wanted to go home. So --

Q. You wanted to get a plea bargain?

A. Yeah. (22 RT 3801).

Indeed, Handshoe admitted Williams did a good job for him, was actively pursuing a deal, and because of his efforts, Handshoe could be out of custody at a young age. (22 RT 3901-02; 23 RT 3992.)

2. Appellant's August 2004 motion for a separate trial is denied.

On August 17, 2004, appellant moved for a separate trial. (1 CT 155-56 [Notice of Motion for Separate Trials]; 162-196 [Points and Authorities in Support of Motion for Separate Trials]). The prosecution's opposition made clear that the prosecution sought to have a separate jury for Huhn, with appellant, Handshoe and Lee before a second jury, and both juries viewing the same witnesses. (1 CT 201-16.)

On September 13, 2004, the trial court denied appellant's request to be tried separately from his codefendants "with this premise, that the district attorney has indicated -- and my rulings are founded on the district attorney's indication that the statements of Handshoe are not going to be offered, with one exception, and we'll have a final ruling on that." (3 RT 600-30 to 600-31.) The trial court previously had tentatively denied the severance motion, stating: "If this tentative ruling stands, of course, the People suffer the risk of this one statement – I believe it's a statement of defendant Handshoe that you feel

can be effectively redacted, that it might not be effectively redacted and lose that." (3 RT 600-6.)

3. On April 11, 2005, Handshoe is interviewed by the prosecution as part of a plea bargaining process.

With a May 6 trial date looming, the prosecutor finally agreed to interview Handshoe in a free talk session on April 11, 2005. (22 RT 3803-04.) Detectives Goldberg and Baker were both present, along with the prosecutor, Glenn McAllister, and Handshoe's attorney, Mr. Williams. (22 RT 3804.) A transcript of this recorded interview formed the factual basis for Handshoe's guilty plea. (Supp. 45 CT 9163-9252.)

The interview opened with the prosecutor reading the interview out loud, declaring he only wanted the truth and explaining "that the reason we are sitting down here today" was that he had heard Handshoe's prior conversations and telephone calls, and he believed Handshoe to have shown genuine remorse. He promised to keep Handshoe safe in jail. (Supp. 45 CT 9166-67.)

Handshoe talked about the current crime and also described two other previously unknown burglaries, one of which was the alleged source of the murder weapon. Handshoe asserted that on the night of the Brucker shooting, appellant was carrying a black .45 gun that Handshoe had picked up during a burglary in Spring Valley/Dictionary Hill two days before the Brucker robbery. He claimed to have found the gun at the property and given it to appellant, who was present during the Spring Valley burglary. (45 CT 9178, 9185-9186.) When asked, Handshoe described the location of the house as being at the bottom of Dictionary Hill. He said there was a parking lot; but, no cars were at the house at the time of the burglary. He did not believe he could identify the house. Yet, he agreed to go with the detectives to attempt to show them where it was. (Supp. 45 CT 9186-9187.)

Handshoe mentioned another burglary when asked whether he knew where they were going when they set out to rob Brucker on April 14th. He admitted doing burglaries with

Huhn and appellant. He denied knowing anything about where they were going on April 14th except that Huhn told him they were going to the house which was next door to the house they had been at two days earlier. (Supp. 45 CT 9189-9190.)

When told that witnesses said they saw the Bronco parked on April 14th in a different place than as described by Handshoe, Handshoe's explanation was that it "might have been the day before cause the day before is when, or the day before, the day before that, two or three days before, is when we tried to go rob the next door neighbors… on top of the hill.... Eric rammed the [front] door and broke it…. And then alarm went off so we ran." (Supp. 45 CT 9210-9211.) When asked if there were other burglaries that he did with appellant, Handshoe replied: "Just that one." (Supp. 45 CT 9227.)

4. Handshoe takes Detectives Goldberg and Brown and identifies the locations of two additional burglaries he described during his interview and a follow-up investigation is completed on April 12, 2005.

Immediately following the April 11 interview, Handshoe went with the two detectives to identify the location in Spring Valley/Dictionary Hill, where the .45 gun, the murder weapon, was obtained. Handshoe also showed detectives the location, 8122 Medill Avenue, where Handshoe had said the alarm sounded after appellant allegedly rammed the door. (22 RT 3828-29; 26 RT 4490-4492.)

On April 12, Detective Goldberg investigated whether there were any police reports to corroborate Handshoe's testimony concerning the Dictionary Hill burglary. He uncovered one such report which he turned over to Detective Baker on April 12, 2005. (26 RT 4624-25).

5. An April 20 hearing was held on the defense's renewed motions to sever and continue.

A hearing on appellant's renewed motion to sever defendants was held on April 20, three weeks before jury selection would begin. (See "Joinder In Codefendant Lee's

Motion to Sever, filed April 1, 2005. (5 CT 1075.) A motion to continue was heard on the same day. (4 RT 613-620.) Appellant requested four weeks beyond the trial date which was then set for May 2. (4 RT 620.) The defense also had filed points and authorities in support of a motion for separate trials on March 18, 2005 and the prosecution filed a consolidated reply to motions for severance and for a continuance of the trial on April 7, 2005. (3 CT 621; 6 CT 1281.)

> As set out in appellant's joinder in Lee's motion to sever: [1]
>
> The motion by counsel for Mr. Lee was precipitated by the prosecution disclosure, just prior to and during court proceedings on January 31, 2005, that a witness named Julio Navarret, who was incarcerated with Mr. Lee, had provided the authorities with incriminating information about Lee's statements in jail. The District Attorney represented that a severance might be compelled, and subsequently filed a request for a separate jury for Mr. Lee. That motion was tentatively denied on February 18. (5 CT 1076.)

Appellant's motion and trial counsel argued that a severance and a continuance were needed based on late disclosures, among other reasons. The prosecutor argued that a continuance was unnecessary. (4 RT 627.) Before ruling on the continuance motion, the trial court reviewed the history of the case and the need for the three prior continuances. It stated that it was "not granting any further continuances based upon any further statements of the defendants…. We are approximately four weeks still away from any opening statements in this case. My conclusion is the moving parties have failed to present affirmative proof that the ends of justice require a fourth continuance, and the request is denied." (4 RT 630.)

6. Jury selection begins on May 6, 2005.

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[1] The motion to sever filed by co-defendant Lee is not in the record on appeal in this case. A motion to augment will be filed with this court.

Jury selection began on May 6, 2005. (8 RT 1242-49). Jurors completed their questionnaires and hardship excusals were addressed. Handshoe's counsel, Mr. Williams, was introduced to the venire. (8 RT 1250). He participated in the determination of which jurors would be excused for hardships. (8 RT 1275, 1283.) He also argued about the number of peremptories to be allowed the parties. (8 RT 1327.) The second day of jury selection was on May 11. Mr. Williams ratified a list of jurors to excuse. (9 RT 1332-33). He was the first lawyer to voir dire the first section of the venire and spoke extensively. (9 RT 1364 -1378; 1395-1396.) When it came time to argue for-cause challenges just before the noon break on May 11, he passed. (9 RT 1470.) After lunch, Mr. Williams voir dired a second section of the venire. (9 RT 1564-1573.)

Appellant's counsel objected to the pace at which jury selection was proceeding and the harm done by Lee's counsel telling the jury he was a second prosecutor:

> At every turn, what Ms. Vandenbosch and I are trying to do in this case is counteracted by counsel for People who are not facing capital punishment. We simply have very much divergent interests, and I would say that's particularly 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. And I object again to this joinder. I also think that this voir dire is proceeding much too quickly. I'll leave it at that. (9 RT 1599-1600.)

7. Handshoe pleads guilty late in the day on May 11, 2005.

At the end of the day on May 11, 2005, Handshoe pled guilty. Transcripts were not delivered to counsel until May 12. (10 RT 1601.) Handshoe pled guilty to voluntary manslaughter and attempted residential robbery with the use of a firearm, carrying a 17-

year prison sentence. In exchange, Handshoe would testify at trial for the prosecution. (Supp. 45 CT 9160.) Among other things, the plea agreement required Handshoe to confirm that the taped statement he made on April 11 was "true and accurate… At all times the defendant shall tell the truth …. It is further understood that defendant shall lose the benefits of this agreement for any intentional deviation from the truth, and if a false statement occurs while he is on the witness stand, he shall be subjected to prosecution for perjury." (Supp.45 CT 9161.)

Counsel immediately requested a mistrial based on the 6th, 8th, and 14th Amendments of the U.S. Constitution and parallel provisions of the California Constitution, arguing that previous to this change of events, he "had thought that this was a united front. . . It has always been presented to us, specifically by Mr. Williams, that his client would not be testifying, would not be working out a deal with the prosecution, and would not be testifying at a joint trial. So to characterize this as a surprise, I think, is very much an understatement." Other problems were:

- strategy meetings had been held among all the co-defendants' counsel, requiring that strategic decisions be re-visited;
- the jury questionnaire would have been different, as well as the voir dire, had there been timely disclosure that Handshoe was a prosecution witness;
- one-third of the venire had not been questioned on attitudes toward testifying former co-defendants;
- the prosecution's witness list would change substantially as a result of Handshoe's change of plea, and therefore additional time was needed to prepare for the new prosecution. (10 RT 1604-1609.)

Counsel also asked for a continuance based on discovery rule violations:

> We are requesting 30 days. The support for that is that discovery ordinarily must be provided 30 days prior to trial. That's -- the theory of that requirement is that the -- it avoids surprises to the other side. That's the whole purpose of ordering discovery to be provided 30 days prior to the

commencement of trial. I've already stated yesterday that what's happened with Mr. Handshoe, in terms of switching sides here, changes the entire approach that we have.

And at least with respect to the continuance motion, it will necessitate investigation, it will necessitate a reworking of the entire case, . . . (11 RT 1861-62.)

Lee's counsel pointed out: "At least as to a full third of the jurors, we were denied a meaningful voir dire on the issue of whether making a deal with the government to spare your life in prison might influence testimony." (12 RT 2123-24.)

The trial court denied the motion for a mistrial and delayed ruling on the continuance until May 17, 2005 at which point it was denied. (13 RT 2227-2228.) In denying the motion for a continuance, the court said there was not "any significant shift in the prosecution theory of the case." (13 RT 2227.) "It appears that what Mr. Handshoe is willing to say . . . it is consistent with the prosecution's theory that's laid out in Count 2, step by step." (13 RT 2227.) The court noted that Handshoe would not be testifying until late in the trial. So, there was no "unusual handicap now created for the defense in responding to the surprise turn of events, which is Mr. Handshoe being a prosecution witness." (13 RT 2228.)[2]

8. Handshoe testifies at trial.

The trial began with opening statements on May 23, 2005. (15 RT 2316.) On June 3, 2005, Handshoe testified for the prosecution. (22 RT 3749.) He testified that Lee had approached him four or five times to talk about a robbery. Lee knew a house where a substantial amount of money was kept and the house was down the street. Lee said there

[2] Appellant has already raised an issue challenging Handshoe's testimony. [See AOB, Issue 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).]

was a safe with a lot of money in it. (22 RT 3764-66.) Lee offered to drive Handshoe to the Brucker residence. (22 RT 3782.) After the shooting of Brucker and prior to Handshoe's arrest, Lee approached Handshoe. He asked Handshoe if they went to the house. Handshoe testified he did not know what house Lee meant. (22 RT 3783.) Handshoe testified that Lee said: "I know you went there; and he tried to get me to tell him. . . I'm pretty sure he said the Brucker residence." (22 RT 3786.)

Handshoe replied affirmatively when asked if he had seen the murder weapon, the .45 gun, prior to the day of the crime. (22 RT 3756.) The prosecutor also asked Handshoe if he had ever committed any crimes before with appellant and whether he had divided property from a crime before. Handshoe answered yes to both questions. (23 RT 3945.) Throughout Handshoe's testimony, the prosecutor did not ask about the two additional burglaries alleged in the factual basis of the guilty plea. (22 RT 3749-95; 23 RT 3930-3957.)

The assertion in Handshoe's interview, that appellant first suggested the idea of targeting the Brucker house, was not raised during Handshoe's testimony. The closest in subject matter was testimony in response to questions related to the planning and preparations that occurred in Handshoe's trailer on the day of the crime.

The name of Handshoe's lawyer surfaced in questions asked Handshoe. (See 22 RT 3801 [Mr. Williams represented Handshoe and conducted plea negotiations]; 22 RT 3901-02 [Mr. Williams was Handshoe's lawyer and did a good job for Handshoe]; 23 RT 3992 [Mr. Williams was Handshoe's lawyer and was trying to make a deal].)

9. On June 3, the prosecutor represents that the investigation into the two burglaries described in Handshoe's interview produced no results.

On June 3, before the prosecution finished their direct examination of Handshoe, defense counsel made a first request for disclosure related to the two burglaries described in Handshoe's interview:

Vandenbosch: It is clear from the free talk, the discussions at the end of the free talk, that the sheriff's and the district attorney's office take Mr. Handshoe, he points the house out on Medill Avenue, where the -- where the attempted burglary allegedly occurs. And he also points out the area and gives the date of the alleged burglary in Spring Valley. We have received absolutely no discovery of any follow-up investigation concerning either of those two incidents. And I would like to ask . . . whether any follow-up investigation has been done and what the results were.

. . . .

McAllister: She's free to ask Mr. Goldberg or Mr. Baker that on the stand. I'm not aware of - was there anything other than - - I think there was a general attempt to see whether these things happened, and there was no - - no follow up beyond that. **What I'm saying, there is no reports that document these crimes, . . .** (22 RT 3778-79.) (emphasis added.)

10. On June 13, the defense calls Detective Goldberg as a witness to establish that the investigation into the burglaries described in Handshoe's interview produced no results.

On June 13, 2005, defense counsel called Detective Goldberg to testify that Handshoe had identified the house next door to Brucker's house as having had its door kicked in and the alarm triggered two or three days before the Brucker robbery. As represented by the prosecutor, Goldberg would confirm there was no corroborating evidence to support Handshoe's story. The examination of Goldberg went according to plan initially. Goldberg testified that he drove Handshoe to 8122 Medill Avenue and Handshoe identified it as the house with the kicked in door and alarm sounding. (26 RT 4491-92.)

As to reports of the burglary, the following testimony occurred:

Vandenbosch: And would it be fair to say that, after hearing that from Mr. Handshoe back on April 11th of 2003, you checked police records to see whether there was any independent report concerning such a burglary?

Goldberg: I did.

Vandenbosch: Did you find anything?

Goldberg: We found a burglary that was similar in the area.

Vandenbosch: And did you have any report concerning that?

Goldberg: I turned the information over to Mr. Baker for follow-up.

Vandenbosch: You turned it over to Mr. Baker?

Goldberg: Yes.

Vandenbosch: When did you turn it over?

Goldberg: When I got it back, whatever day - - it was the 12th, so I would say when crime analysis finished up giving me the information.

Vandenbosch: So are we talking about April of 2005, you got additional information?

Goldberg: Yes, ma'am. (26 RT 4624-25.)

Appellant's counsel objected to the disclosure violations:

"As the court will recall, probably about a week ago, I – and I wanted to ask that question on the record - I specifically asked Mr. McAllister if there had been any follow-up investigation regarding –by his office or the sheriff's department regarding the alleged attempted burglary at 8122 Medill, and likewise, whether there had been any follow-up investigation as to the alleged burglary up in the Dictionary Hill Area.

And Mr. McAllister represented to me that there was – that there had been some follow-up investigation done, but nothing of consequence – nothing of any consequence had resulted from that investigation.

> We have not received any type of a report concerning anything that was done, even though Mr. Jack Stevens indicated he had spoken with somebody from the district attorney's office and told them there was no alarm triggered around that time, but we have received no report of that.
>
> In any event, now I ask Mr. Goldberg on the stand what I assume to be a very safe question, and he makes a comment that there was a similar burglary in the area, and that he has -- had that report since May -- excuse me, April 12th or 13th of 2005. It's already two months ago, he gave it to Mr. Baker, and we have not received anything. (26 RT 4646-4647).

The court responded: "I think the question now shifts: is there something that could be conceivably considered exculpatory that has been uncovered by the People as a result of checking into the alarm and checking into a similar burglary?" (26 RT 4647.) The prosecutor replied:

> Any information that came from the free talk that we had with Mr. Handshoe was only information available to us and usable information if and when we had a deal. . . . We had pursued getting a deal, . . . Then, of course, we ended up with a deal, and I made general inquiry through computer reports and things like that: is there any specific evidence of reports which substantiate these particular claims? And the answer is no. (26 RT 4647-48.)

The court replied: "I think we have to kind of reframe this in terms of the absence of something that substantiates those claims, and I think at this stage would clearly be considered exculpatory, in the fact that it goes to the credibility of a key witness for the prosecution." (26 RT 4648-49.)

Defense counsel argued: "The jury has a completely false impression at this point. They think there is something the prosecution has found that corroborates what Mr. Handshoe said about this burglary on Dictionary Hill. That's what they're going to get out of that testimony." (26 RT 4649.)

The court responded:

"Detective Goldberg has not been excused, so he will be subject to follow-up. And if you revisit this, I won't sustain an objection that it's beyond the scope of your original direct.

So I would suggest that maybe you get together before that occurs so that you can get the details as to whether or not you want to follow up as to how similar or whether it's going to be a conclusion -- it wasn't similar enough for us to conclude that that substantiated Mr. Handshoe's description." (26 RT 4649-4650.)

Following Goldberg's testimony, the defense called John Stevens as a witness, the owner of Safe and Sound Alarm Company. The company installed the alarm system at 8122 Medill Avenue in August of 2000 and thereafter maintained the alarm. According to Stevens' testimony, Safe and Sound Alarm Company receives electronic signals when an alarm system is triggered. During April of 2003 there was "no alarm activity at all" at 8122 Medill Avenue. (26 RT 4495-99.)

11. The prosecution's later stipulation referenced only the Dictionary Hill burglary, not the Medill Avenue burglary

The prosecutor informed the trial court that he was "willing to stipulate - - I told Mr. Bradley I'm willing to stipulate that the burglaries that were investigated were not similar enough in nature for a conclusion to be drawn that they were the burglaries that Brandon Handshoe spoke of." (27 RT 4850.) However, the final version of the stipulation only related to the Dictionary Hill burglary, and not to the burglary on Medill Avenue which had been the subject of Detective Goldberg's testimony. The stipulation read, in relevant part:

"The parties do . . . stipulate that computerized law enforcement records for the week preceding April 14th, 2003, were checked, and no crime reports were located that would coincide with the testimony of Brandon Handshoe that a specific burglary was committed in or around the Dictionary Hill area of East County during that time." (28 RT 4910-11.)

This stipulation was read to the jury just before the defense rested its case. (28 RT 4911.) The trial court allowed the jury to have Handshoe's plea agreement during deliberations. The prosecution did not object. (30 RT 5334.)

C. The Prosecutor Violated The Discovery Rules And The Trial Court Erred In Not Giving An Appropriate Order To Remedy The Violations Because The Duty To Disclose All Co-defendant Statements At Least 30 Days Before Trial Should Apply To Any Interview Of Such Defendant Unless Leave Has Been Granted To Delay Disclosure Pending Completion Of Plea Negotiations

> "Under the due process clause of the Fourteenth Amendment to the United States Constitution, the prosecution has a duty to disclose all substantial material evidence favorable to an accused, including evidence bearing on the credibility of a prosecution witness; the duty exists whether or not the evidence has been requested, and it is violated whether or not the failure to disclose is intentional." (*People v. Hayes* (1990) 52 Cal.3d 577, 611.)

A statutory duty of disclosure also exists. Thirty days before trial the prosecution is required to disclose to the defense, among other things, the statements of all defendants and the names and relevant written or recorded statements of witnesses or reports of statements of witnesses whom the prosecutor intends to call at the trial. (Pen. Code, §§ 1054.1, 1054.7; *People v. Bowles* (2011) 198 Cal.App.4th 318, 325.) This duty of disclosure is intended to facilitate the ascertainment of truth and is based on the fundamental proposition that the accused is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (Pen. Code § 1054; *Clinton K. v. Superior Court* (1995) 37 Cal.App.4th 1244, 1247.)

To enforce these provisions, courts are empowered to make any lawful order and may instruct the jury of the party's failure to comply with disclosure, including excluding the evidence. (Pen. Code § 1054.5; *People v. Bowles, supra,* 198 Cal.App.4th 318, 325-26; compare *U.S. v. Koopmans* (7th Cir. 1985) 757 F.2d 901, 906.) Enforcement is important

since if the violation goes unredressed, the offending party could obtain an unfair advantage. As stated by the court in *People v. Gonzales* (1994) 22 Cal.App.4th 1744:

> "Whether or not conduct was willful, it would be inappropriate for the offending party to gain by his or her conduct the very consequence the discovery statute seeks to avoid. A party who creates prejudice to the other side by surprise or newly listed witnesses should not have the advantage of the disadvantage to which he or she has placed an opponent." (*Id.* at p. 1757.)

Although Penal Code section 1054.7 has an exception for delayed disclosure when evidence is found within thirty days of trial, the exception is met only if the prosecutor acted in good faith and immediately disclosed the information. (See *People v. Rutter* (2006) 143 Cal.App.4th 1349, 1352.) The prosecution's duty is not linked to the prosecutor's personal knowledge. The prosecution's duty to inquire and disclose is mandated by Penal Code section 1054.1. (*People v. Little* (1997) 59 Cal.App.4th 426, 433.)

Discovery orders are reviewed for an abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 458.)

In this case, the prosecutor never informed the trial court prior to Handshoe's guilty plea that a statement had been obtained from him and never sought leave to delay disclosure of that statement pending the outcome of plea negotiations. It was only after Handshoe pleaded guilty and the defense objected that the prosecutor explained that he could not disclose the free-talk interview because it was part of the plea agreement. There was no good cause for this lack of disclosure. The prosecutor violated the discovery rules and the late disclosure was unfair to the defense. Defense counsel had no time to change the defense to account for the evidence because the trial court failed to grant a mistrial, exclude the evidence or allow defense counsel more time. Not only making the playing field uneven, this undermined the confidence in the case outcome, violating appellant's constitutional right to due process, a fair trial and fair and reliable penalty determination. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474-76 [93 S.Ct. 2208, 37 L.Ed.2d 82]; *People*

v. Filson (1994) 22 Cal. App. 4th 1841, 1848-49, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434; *U.S. v. Lanoue* (1st Cir. 1995) 71 F.3d 966, 973-77, abrogated on other grounds in *U.S. v. Watts* (1997) 519 U.S. 148 [117 S.Ct. 633, 136 L.Ed.2d 554]; *People v. Ochoa* (1998) 19 Cal.4th 353, 474; *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.)

In *People v. Filson, supra*, 22 Cal.App.4th 1841, defense counsel said during trial that he just discovered an additional taped statement of the defendant made after his arrest. Counsel said he did not have a copy of the newly discovered tape's transcript and had not heard it. He asked for a limiting instruction for the jury that jurors would not consider it for the truth of the matter asserted. The prosecutor replied defense counsel had not asked for the tapes and the tapes were cumulative of other evidence. (*Id.* at pp. 1846-47.)

According to the appellate court, the tape should have been disclosed. That the defense did not ask for it was irrelevant. The prosecution has a duty to disclose all substantial material evidence favorable to an accused, including evidence bearing on the credibility of a prosecution witness. Also, inadvertence and good faith cannot excuse the failure to comply with the duty of disclosure. The prosecution also could not escape its duty by claiming the tape was cumulative. The tape would be cumulative only if corroborating testimony, something that could not be assumed unless one heard the tape. The appellate court further found because counsel did not know the contents of the tape, he could not know its impeachment value. Lacking this extrinsic aid, counsel would in effect be "flying blind, forced to trust to hunch and luck while being deprived of a vital tool ordinarily backing up cross-examination." (*Id.* at pp. 1848-50.)

In *U.S. v. Lanoue, supra,* 71 F.2d 966, Lanoue contended his convictions should be reversed because the prosecutor cross-examined defense witness Carron with Lanoue's own recorded statements which the government failed to disclose. Defense counsel argued the prosecutor violated the discovery rule and the pre-trial discovery order, that Carron's credibility had been irreparably damaged, and he was deprived of the

opportunity to prepare Carron with the statement or make an informed decision whether to call him as a witness. (*Id.* at pp. 971-72.) The government conceded it violated the discovery rule; but it was in good faith and the defense was not prejudiced. The trial court decided a mistrial or other remedial action was unnecessary since the prosecutor acted in good faith and the defendant was not prejudiced. (*Id.* at pp. 972-73.)

The appellate court found the good faith finding by the trial court unsupported. Although having the statement, the prosecutor did not disclose it prior to using it before the jury. As to the prosecutor's contention the conversation was not relevant until after Carron testified, the duty to disclose did not hinge on whether or when the statement was used. (*Id.* at pp. 973-75.) Further, the purpose of the discovery rule was subverted from the conduct:

> "The court's reasoning that surprising a witness with the defendant's statements promoted accuracy and therefore militated against remedial action turns Rule 16 on its head. Due to the nondisclosure, the defense was deprived of the opportunity to refresh Carron's recollection and to investigate the circumstances surrounding the conversation. This unfairly surprised the defense and deprived it of the opportunity to design an intelligent litigation strategy that responded to the statement." (*Id.* at p. 976.)

The appellate court found had the conversation had been disclosed prior to trial when it should have been, defense counsel could have obtained necessary witnesses. The incomplete mid-trial hearing necessitated by the prosecutor's failure to disclose was neither fair nor efficient. (*Id.* at p. 977.)

Similarly, here, the prosecution did not timely disclose Handshoe's interview or seek leave from the trial court to delay disclosure until resolution of the plea negotiations. The interview occurred well before trial and was beneficial to the prosecution. It formed the basis for Handshoe's later testimony. The prosecutor plainly knew of its significance. Also, the prosecution's late disclosure was unfair to the defense. The defense was caught by surprise and could not plan a strategy at the inception of trial that accounted for the

evidence. Voir dire had already started. Jurors had been presented with appellant's defense as being a united front with the other defendants. Jurors had not been questioned about their views on defendants turning to be state's witnesses. Counsel did not know the propensity for bias of any of the jurors.

There also was no justification for the lack of disclosure. This was not a case where witness safety was at issue or there was a danger of elimination of an adverse witness, both justifying the prosecution's failure to disclose. (*Alvarado v. Superior Court* (2000) 23 Cal. 4th 1121, 1136.) This also was not a case where the prosecution had just been informed of the material belatedly disclosed. For instance, in *People v. Rutter*, *supra,* 143 Cal.App.4th 1349, the trial commenced on a Tuesday. On the preceding Thursday, the prosecution's computer consultant gave the prosecutor a 113-page report summarizing the computer evidence which supported the charge that Rutter forged Diaz's name on the photo shoot release. The prosecutor gave a copy of this report to Rutter's attorney the next day. At the start of trial, Rutter's attorney advised the trial court he had just completed reviewing the report and had learned for the first time the prosecution would seek to introduce expert testimony that Rutter's laptop contained evidence that the release had been forged. On appeal, Rutter argued that the trial court erred in not excluding the prosecution expert's opinion, drawn from his examination of the laptop, because the prosecution did not turn over the expert's report of his examination until a few days before trial. (*Id.* at pp. 1352, 1353.) The appellate court found no violation of the reciprocal-discovery statute. According to the court, there was no violation because it was "undisputed the prosecution immediately turned over its expert's report to Rutter. . . [and] Nothing in the record suggests the prosecution learned of its expert's opinion based on the laptop evidence prior to receiving his written report." (*Id*. at p. 1354.)

By contrast, here, the prosecution's interview with Handshoe was weeks prior to the change of plea and the start of trial. Handshoe admitted beginning from the time of his arrest he was committed to negotiating a plea deal. The delay in negotiating a plea agreement until the eve of trial and lack of candor and withholding of information which

was critical to the trial court's informed exercise of discretion on appellant's motions to continue and sever denied the prosecutor any reasonable claim of good faith.

Additionally, this is not a case where the defense knew the content of the interview before being belatedly informed of it. In *People v. Valdez* (2012) 55 Cal. 4th 82, where at issue were the identities of witnesses, the Court found no disclosure or constitutional violation as the defense actually knew the identities of the witnesses as much as two weeks prior to beginning cross examination and at least a day or more before their testimony. The trial court said it would grant defense counsel continuances; yet, counsel never asked for a continuance before beginning cross examination. Also, there was no showing that defense counsel had been hampered in developing his theory of the case. (*Id.* at pp. 110-111, 117.)

Here, however, trial counsel did ask for a continuance and because he was not given more time, ended up severely compromised in presenting the defense. Prior to the plea deal, it was believed that the defendants would be presenting consistent defenses. This was no longer the case with Handshoe suddenly becoming the prosecution's primary witness. The defense had no advance knowledge of the change of events. The prosecutor had sole possession of the interview of Handshoe. Only the prosecutor and Handshoe knew that plea negotiations were at an advanced stage. The prosecutor also was the one who was in constructive possession of the investigation on the two newly alleged burglaries which Handshoe spoke of in his interview. (Contrast *People v. Cook* (2007) 40 Cal.4th 1334, 1358 [Court found no prejudice from the failure to timely disclose Allen's testimony as defendant given report relating Allen's information].)

Additionally, no reason was ever given for the failure to disclose the results of the police investigation of Handshoe's allegations relating to the two burglaries. No police report on the crime scene visits by Handshoe was disclosed although he must have said something during those visits that the detectives memorialized and this should have been turned over. The prosecutor had a duty to verify his representations and be candid with the trial court at the April 20 hearing.

In short, the prosecutor violated the discovery rules that exist to protect a defendant against an unfair trial. Once informed of the change in plea, the trial court also erred in failing to give an appropriate remedy, e.g., grant a mistrial, exclude the evidence or give counsel more time. It was presented with such motions, all of which were denied. (See, e.g., 10 RT 1608-11 and 13 RT 2228; 11 RT 1864.) The errors resulted in a fundamentally unfair trial, and an unreliable verdict. (See *Brown v. Municipal Court* (1978) 86 Cal.App.3d 357, 363 ["The remedies to be applied need be only those required to assure the defendant a fair trial. . .."]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

D. Reversal Is Required

Some errors, e.g., structural defects in the constitution of the trial mechanism, defy the harmless error standard analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Given the magnitude of the errors here, it is structural error requiring reversal. Alternatively, a violation of the compulsory process clause is an error of constitutional magnitude and therefore the *Chapman* reversible error test would apply. (*People v. Gonzales*, *supra*, 22 Cal.App.4th at p. 1759; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) As Penal Code sections 1054.1 and 1054.5 are considered part of the compulsory process for criminal trials, governing as they do the exchange of information, this court must reverse unless the error is proven harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Here, reversal is required because appellant's trial was grossly unfair, violating his constitutional right to due process. First, the failure to disclose the existence of Handshoe's interview resulted in the trial court's exercises of discretion being misinformed and unfair to the defense, stacking the "balance of forces" in favor of the prosecution at the April 20th hearing. (*People v. Valdez* (2012) 55 Cal. 4th 82, 120,

citations omitted ["the due process clause, though having little to say about the amount of discovery to which a criminal defendant is entitled, does speak to the balance of forces between the accused and his accuser."].) Specifically, the trial court had ruled on severance and continuance motions. The hearing on those motions, on April 20, was after Handshoe's interview. Handshoe had been seeking a plea bargain since he was first arrested, years earlier. Yet, this was not before the trial court. The trial court had no knowledge that Handshoe had been interviewed at all or that Handshoe might at any time be pleading to reduced charges. Without that information, the trial court could not at that time exercise its discretion intelligently and fairly on the several motions. As a result, the prosecution reaped the benefits from its late disclosure. Those benefits included:

- Limited ability of the defense to consider and address the factual basis of Handshoe's guilty plea, which included:
    - two new burglaries, alleged for the first time;
    - the origins of the weapon used during the robbery; and
    - prosecutorial vouching for Handshoe's remorse/credibility.
- Two days of voir dire by Handshoe's lawyer, who was able to ingratiate himself to a large number of the prospective jurors.
- Two days of voir dire without questioning the venire about testifying accomplice issues.
- A surprise revelation in front of the jury that a similar burglary had happened right by the crime scene, which was never adequately explained or rebutted by stipulation despite the prosecutor's promise.

Also, the defense's ability to present a defense was compromised. Voir dire had already started and the defense strategy planned. The belated disclosure resulted in no additional time to change the strategy from a unified front, Handshoe on the side of the defendants, to one responding to Handshoe now as a prosecution witness helping to convict appellant. Voir dire was not restarted either. Had the defense been informed of Handshoe's interview and his testimony being used against appellant, the strategy would

have been different. Meetings would not have included Handshoe's attorney, the jury questionnaire and jury voir dire would have accommodated the change in Handshoe's plea and change in defense strategy, specifically, the entire venire would have been questioned on attitudes toward testifying former co-defendants, prospective jurors would not have been exposed to the rapport-building by Handshoe's counsel. As defense counsel stated in the request for continuance: "Mr. Handshoe, in terms of switching sides here, changes the entire approach that we have. . . It will necessitate investigation, it will necessitate a reworking of the entire case, ..." (11 RT 1861-62.) This is in direct contrast to the defendant in *People v. Verdugo* (2010) 50 Cal.4th 263 where this Court found that despite reciprocal-discovery statute violations, the defendant could not demonstrate prejudice because counsel was afforded additional time to prepare for cross-examination and nothing indicated anything would have been done differently if the witness statements were disclosed earlier. (*Id.*, at pp. 281-283, 285.)

Appellant's case is also unlike *People v. Thompson* (2016) 1 Cal.5th 1043 where the defendant had claimed she was denied a fair trial based on delayed disclosure of certain letters she had written and Lee's identity as an authenticating witness. The Court held that defendant was not prejudiced by the discovery violation because she "presumably knew the content of the letters (because she wrote them) and knew of Lee's participation as well, so she could not have been caught off guard to such an extent that we might conclude she was unable to prepare a meaningful defense." (*Id.* at p. 1096.) The Court ruled that defendant was aware of the evidence's potential significance, and "had sufficient opportunity to fairly meet the evidence when it was presented to the jury." Accordingly, the discovery violation did not deprive her of the right to a fair trial. (*Ibid.*)

Here, however, the defense was caught unprepared at the change of events, having no idea that Handshoe would plead guilty, and was unable to prepare a meaningful defense to accommodate the change because the trial court forged on with the trial, denying the subsequent requests for a mistrial or continuance. (Compare *Alvarado v. Superior Court* (2000) 23 Cal. 4th 1121, 1151 [When nondisclosure of the identity of a crucial witness

precludes effective investigation and cross-examination of that witness, the confrontation clause does not allow the prosecution to rely on the testimony of that witness at trial].)

In short, the errors resulted in a violation of appellant's constitutional right to a fair trial and fair and reliable guilt and penalty verdict. Reversal is required.

II. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE FAILED TO REDACT THE INTERVIEW OF HANDSHOE PRIOR TO THE JURY HAVING ACCESS TO IT DURING DELIBERATIONS TO DELETE HIS STATEMENT THAT HE BELIEVED HANDSHOE EXPRESSED REMORSE AND TO DELETE HIS REFERENCE TO CONVERSATIONS OF HANDSHOE THAT HE HAD OVERHEARD, AND THE TRIAL COURT ALSO ERRED IN NOT REDACTING THE INTERVIEW TRANSCRIPT BEFORE ALLOWING JURORS ACCESS TO IT; THE ERRORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY VERDICT

A. Introduction

Prosecutorial misconduct was raised in appellant's opening brief. (AOB at pp. 152-64; Issue XVI.) Appellant supplements his argument to include the prosecutorial misconduct relating to the unredacted interview transcript that formed part of Handshoe's plea agreement and given to the jury for its deliberations. Appellant further adds factual and legal support for the prosecutorial misconduct issue already set forth in the opening brief. To exhaust the legal and factual basis of his argument in his opening brief, appellant revisits the misconduct relating to Handshoe's plea agreement.

Because of the prosecutor's misconduct, the jury was allowed to review an unredacted transcript which included the prosecutor vouching for Handshoe's credibility and references to conversations of Handshoe that was not evidence admitted at trial. The prosecutor should have redacted all of this from the document before allowing the jury to see it. (Supp. 45 CT 9160-89.) Because the prosecutor failed to do this, the trial court

should have done so prior to the jury having the interview transcript during deliberations. The result was an unfair trial and unreliable guilt and penalty verdicts.

B. Factual and Procedural Background

Handshoe's interview opened with the prosecutor reading the agreement out loud, declaring he only wanted the truth and explaining "that the reason we are sitting down here today" was that he had heard Handshoe's prior conversations and telephone calls, and he believed Handshoe to have shown genuine remorse. (Supp. 45 CT 9166.) Specifically, he stated:

> "And I, I said it before, I will say it again, I have listened to some of your conversations that you made, telephone calls, things like that. The reason we are sitting down here today is I believe of all the defendants, you have shown remorse, that you're sorry for what happened. And that's why we're sitting here. So that you have an opportunity to tell us, and we have an opportunity possibly at a later date that your lawyer and I will discuss with the District Attorney, to fashion something in the way of a sentence which would mean you would not spend the rest of your life in prison." (Supp. 45 CT 9166.)

He further promised to keep Handshoe safe in the jail. (Supp. 45 CT 9167.)

During his argument to the jury, the prosecutor remarked: "And he could have blamed this crime on Martians, and it wouldn't have changed his 17-year stipulated sentence." (30 RT 5295-96.) Defense counsel objected on the grounds that it misstated the evidence. (30 RT 5296.) The trial court allowed the argument to continue, stating to jurors: "This is argument. 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.)

The prosecutor continued:

> Now, if you could make a case for perjury, if you could say, "oh, geez, he perjured himself," yeah, you can do a prosecution for perjury, which is what we call a low-level felony, couple years maximum in state prison or something like that. The point is: the deal was struck, and no matter what he said, he was getting 17 years. If he came in and said it was Martians that did it, the deal that he was going to testify and get 17 years was a done deal. It can't go up, it can't go down; that's the way it is. So you have to ask yourself: if that's true - - and it is - - then why would he lie? Why would he lie? (30 RT 5296-97.)

Defense counsel objected again:

> It's normally not my practice to object in the middle of an argument. I wanted to address one of the things that Ms. Vandenbosch did enter an objection to, and that was Mr. McAllister's reference to the plea agreement that he had with Mr. Handshoe.
>
> And the specific phrase is that the deal was "written in stone"; Mr. Handshoe could have testified that Martians committed the offense, and he would still get the benefit of the deal.
>
> I believe, in addition to objecting to comments that we believe are inappropriate in an argument, we also have to, for the record, assign it as misconduct, or otherwise it is of no significance later on. So I'm making that assignment as well.
>
> With respect to those particular comments, I don't think that's a fair comment on the evidence. It's not an interpretation of the facts, and I believe, as a result, it's not an appropriate argument, the reason being that Mr. McAllister was a party to that agreement.
>
> That's my belief, that the agreement was actually written by Mr. McAllister, at least – or at least someone acting under his direction -- so he knows full well what we all know from having read the agreement, that that agreement was revokable if Mr. Handshoe deviated from the truth.

So the argument that Mr. Handshoe could have told a tale that was not true and still be -- get the benefit of that plea bargain is totally false, and I think especially coming from Mr. McAllister, who was a party to that agreement, totally misleads the jury. (30 RT 5331-33.)

Counsel for Lee stated he wanted to "piggypack" on the objection and federalize the issue. He cited *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1326. (30 RT 5333.) The prosecutor responded: "I believe the represented agreement was as represented. I don't believe there is any wrongdoing or misconduct." (30 RT 5333.)

The trial court stated:

[I]t did appear to me that it might have been a characterization that was not borne out by the language of the agreement itself. And it could be, however, that any reasonable person reviewing that would conclude that what is the truth and what is not the truth is going to be hard to establish; and, therefore, it would be difficult to revoke that agreement.

My response was to leave that decision in the hands of the jurors, simply because the agreement, the precise language of that, is going to be accessible. They can interpret it and determine if it was mischaracterized by Mr. McAllister.

As to the issue of "all my heart," I don't believe that was vouching for the credibility of any particular witness. I believe it was establishing that, in terms of the case that has been presented, the evidence that has been presented, the People have presented, and he was arguing he has presented a comprehensive case.

I don't believe it could be interpreted that Mr. McAllister has inside information, that he is communicating on what the jurors should rely in determining the credibility of any particular witness.

The objections and the citation for misconduct are noted. I'm not going to cite Mr. McAllister for misconduct. I believe that the particular issue, as I said, regarding the agreement can be subject to careful scrutiny by our jurors. (30 RT 5333-34.)

When the trial court indicated that it would be sending the plea agreement into the deliberations room (30 RT 5296), the prosecutor had a duty to identify in the transcript the vouching and references to conversations of Handshoe that were not admitted into evidence so redactions could be done. Given the prosecutor failed to do so, the trial court should have done the redactions.

C. A Prosecutor May Not Vouch For Witnesses Or Testify To Facts Outside The Record

A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 180-81 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Hill* (1998) 17 Cal.4th 800, 819; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves the use of deceptive methods to attempt to persuade the court or jury. (*People v. Hill, supra,* 17 Cal.4th 800, 845*; People v. Earp* (1999) 20 Cal.4th 826, 858; *U.S. v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481].) It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691, superseded by statute on other grounds as stated in *People v. Levesque* (1995) 35 Cal.App.4th 530.)

In closing argument, "[t]he prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.) Yet, a prosecutor still must not use deceptive or reprehensible methods to persuade the jury. (*People v. Rowland* (1992) 4 Cal.4th 238, 274.) A prosecutor may not put the prestige of the government behind the prosecution's witness through personal assurances of the witness's veracity or its own veracity. (*People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Perez* (1962) 58

Cal.2d 229, 246; *People v. Anderson* (1990) 52 Cal.3d 453, 479; *U.S. v. Hermanek* (9th Cir. 2002) 289 F.3d 1076, 1098.) Additionally, although grounding argument in the facts of the case is not misconduct (*People v. Medina* (1995) 11 Cal.4th 694, 757), a prosecutor basing an argument on the implication of what is unavailable to the jury is misconduct. (*People v. Williams* (1997) 16 Cal.4th 153, 257.)

Also, no matter if indirect or direct:

> "[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.)

Such argument constitutes misconduct and violates a defendant's constitutional right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 845; *People v. Ayala* (2000) 23 Cal.4th 225, 283-84; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.)

In deciding a claim of prosecutorial misconduct, the reviewing court examines its effect on the jury. The intent of the prosecutor is irrelevant. (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1085.) "[A] court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror." (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

In this case, the prosecutor committed misconduct in allowing the unedited interview transcript to go before the jury. The prosecutor had a duty to redact his own statement in the transcript, that he believed Handshoe's expression of remorse, and that he had heard the conversations and telephone calls of Handshoe. The prosecutor would have known that his belief in Handshoe's credibility should not have been disclosed to the jury. Also, Handshoe's conversations that the prosecutor listened to was not evidence presented to the jury. The prosecutor's failure to excise the statements gave the jury outside evidence that further incriminated appellant and improperly bolstered Handshoe's credibility in the eyes of the jury.

This case is similar to *People v. Kirkes* (1952) 39 Cal. 2d 719 where the Court also found misconduct. The Court stated:

> Not only did the deputy district attorney state his belief in Kirkes' guilt, without which he would not have been associated with the prosecution; he also flatly stated that he knew of Kirkes' guilt "prior to the time" that he entered the case. Such knowledge could not have been based upon inferences from the evidence presented. In effect, the prosecutor, who had just laid a foundation by showing his own excellent character and long years of public service, was testifying to the ultimate fact in issue without disclosing the source of his information. Such markedly unfair conduct cannot be condoned. (*Id.* at p. 724.)

Here too, the prosecutor provided the jury with his personal opinion on the ultimate fact at issue without disclosing the source of his information, i.e., what he was relying on to believe Handshoe was truly remorseful. This was improper. Not only did the prosecutor convey his personal opinion on Handshoe's credibility, the jurors did not know which conversations the prosecutor referenced. The jurors did not hear these conversations. Jurors did not know why the prosecutor believed Handshoe, as opposed to the other defendants, was telling the truth. The effect was to have the jury decide the issue of credibility based on the prosecutor's opinion, not the evidence presented. (Contrast *People v. Bonilla* (2007) 41 Cal. 4th 313, 335, 337-38 [although Court found issue waived, it found no prosecutorial misconduct since prosecutor only relayed the terms of the plea agreement and argued inferences based on the agreement and evidence; prosecutor did not suggest personal knowledge of facts showing witness was telling the truth].) In effect, the prosecutor turned Handshoe into a falsely reliable witness and dispensed with the jurors' duty to evaluate the credibility of witnesses as they would with every other witness, based on the evidence presented at trial. (*People v. Seumanu* (2015) 61 Cal. 4th 1293, 1329-30, citations omitted ["Similarly, it is misconduct to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness. The vice of such remarks is that they may be understood by jurors to permit

them to avoid independently assessing witness credibility and to rely on the government's view of the evidence."].)

D. The Trial Court Erred In Not Redacting Handshoe's Interview Transcript Prior To Allowing Jurors Access To It; Penal Code Section 1137 Prohibits Unedited Transcripts From Being Given To Jurors During Deliberations

Penal Code provides limits on what jurors may take with them during deliberations:

> Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person. The court shall provide for the custody and safekeeping of such items. (Pen. Code, § 1137.)

"The obvious reason for section 1137's proscription is that depositions may contain a great deal of inadmissible material." (*People v. Manson* (1976) 61 Cal.App.3d 102, 214.)

Here, the trial court violated Penal Code section 1137 in allowing the jury access to the unredacted interview transcript, violating appellant's constitutional right to a fair trial. (Pen. Code, §1137; *People v. Manson, supra,* 61 Cal.App.3d 102, 214*; People v. Evans* (1923) 63 Cal. App. 777, 783; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Manson supra,* 61 Cal.App.3d 102, the appellate court found counsel's proposal to have all testimony admitted into evidence go into the jury room "patently ridiculous" since unedited transcripts of the trial, like depositions, "may contain a great deal of inadmissible material." (*Id.* at p. 214.) In *People v. Evans, supra,* 63 Cal.App.777, a policeman's statement after his arrest for murder that had been transcribed and contained matters not referred to in trial was delivered to the jury for

deliberations. The appellate court found this prejudicial and violated the defendant's constitutional right to a fair trial.

The court stated:

> If immediately after killing the one man and arresting the other, who was intoxicated, the defendant shot at the latter on his attempt to escape, the jury would probably attribute to him a reckless disregard for human life and the more readily conclude that he shot the deceased without any real necessity therefor. The natural effect of the facts improperly before the jury would be to prejudice the defendant's case. (*Id.* at pp. 781-83.)

Similarly, here, the jury was given a transcript containing information that should have been redacted. Because of its significance, Handshoe's expression of remorse, his conversations heard by the prosecutor, and the prosecutor vouching for his credibility, "[t]he natural effect of the facts improperly before the jury would be to prejudice the defendant's case." (*Id.*)

1. The Transcript Contained Statements That Would Have Been Inadmissible At Trial

An important element of a fair trial is that a jury consider only competent evidence bearing on the issue of guilt or innocence. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) In general, "all relevant evidence is admissible." (Evid. Code, § 351; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 387.) Evidence is relevant if it "logically, naturally and by reasonable inference tends to establish some fact." (*People v. Simms* (1970) 10 Cal.App.3d 299, 311; Evid. Code, § 210.) Although a trial court has broad discretion in determining the relevance of evidence, it lacks discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.)

Relevant evidence is still subject to exclusion under Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) A "careful weighing of prejudice against

probative value . . . is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; cf. *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) "Prejudice" refers to evidence that tends to evoke an emotional bias against a party. (*People v. Wright* (1985) 39 Cal.3d 576, 585.)

An appellate court reviews a trial court's ruling concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) A reviewing court will find the trial court abused its discretion when, considering all the circumstances, there is a clear showing that court exceeded the bounds of reason. (*People v. Martinez* (1998) 62 Cal. App.4th 1454, 1459.)

"Discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'" (*People v. Delarco* (1983) 142 Cal.App.3d 294, 306, citing *People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

In this case, the trial court erred in not redacting the transcript to delete the prosecutorial vouching and references to conversations of Handshoe the prosecutor heard. This was irrelevant and prejudicial evidence. The prosecutor's opinion of the credibility of his witness was not relevant evidence. It was not evidence the jury could rely on to decide the case. Handshoe's conversations referenced by the prosecutor also was not something the jury could use to decide the issues. It was not evidence presented to the jury. All of this also was extremely prejudicial, likely to evoke an emotional bias against appellant since if believing the prosecutor's opinion on Handshoe, that he was truly remorseful and credible, the jury would necessarily believe appellant was the murderer. (*People v. Seumanu* (2015) 61 Cal. 4th 1293, 1329.)

E. The Error Was Prejudicial

Where federal constitutional rights are implicated, the standard for prejudice is that set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], i.e.,

whether the error is harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 24-26 [87 S.Ct. 824, 17 L.Ed.2d 705].) Since the prosecutor's misconduct implicated appellant's constitutional right to a fair trial, the appropriate prejudice standard is the one set forth in *Chapman, supra*.

Here, the judgment should be reversed. The prosecutorial misconduct was egregious and highly prejudicial. It went to an issue of critical importance, Handshoe's credibility, as Handshoe was the only witness who could definitively place appellant at the scene of the crime. The prosecutor needed the jury to find that Handshoe was a believable witness to obtain a conviction. Also, given the terms of the plea deal, it was improbable that jurors would have believed Handshoe was free to lie on the witness stand. The reasonable inference jurors would have made from the plea agreement terms was that Handshoe was bound to testify to the truth or at the very least consistent with the version of events he discussed in the interview. Privy to the additional vouching on behalf of Handshoe's credibility, jurors likely applied the remarks in an erroneous manner, believing that the only reason Handshoe implicated appellant as the murderer was because it was true; even the prosecutor thought so. Because jurors hold a prosecutor in higher regard, this was extremely damaging for appellant's case. (*People v. Bolton* (1979) 23 Cal.3d 208, 213; compare *People v. Kirkes, supra,* 39 Cal.2d 719, 728-29 [misconduct prejudicial because "improper information that the deputy district attorney had personal knowledge of Kirkes' guilt, . . . undoubtedly weighed heavily against Kirkes and may well have been [one of] the deciding factors which brought about his conviction."].)

Additionally, it was not as if this part of the interview transcript was withdrawn and the jury admonished to disregard it. Instead, jurors were free to regard the entire interview like any other evidence presented during the trial, relying on it in the decision-making process. (Contrast *People v. Cooper* (1991) 53 Cal.3d 771, 835-36 ["The fact that the evidence was inadvertently admitted and then withdrawn does not elevate the error to one of misconduct [thereby establishing presumption of prejudice]."].) Further, there was no evidence that the jury did not read the transcript or otherwise not consider it. In fact, the

record indicates otherwise as jurors were focused on Handshoe's trial testimony during deliberations, asking for a readback of it. (7 CT 1466, 1544.) (Contrast *People v. Nelson* (1928) 90 Cal.App. 27, 32-33 [where jury had the confessions of co-defendants in deliberations that had not been received into evidence, but returned them in minutes without reading anything of substance from them, the court found no prejudice].)

In short, given the nature of the errors, it was prejudicial by any standard and the judgment 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, a reasonable (i.e., realistic) 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, 447-48.) The prosecutorial misconduct and errors in failing to redact the transcript may well have strongly influenced the jurors' interpretation of the evidence. Jurors were likely to have believed Handshoe and rejected appellant's defense, resulting in the jury not only finding appellant guilty but also deciding he should have the maximum penalty. The errors 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.)

III. THE EFFECT OF THE TRIAL COURT'S DENIAL OF A SEPARATE TRIAL FOR APPELLANT, INCLUDING THE PROSECUTOR'S DISCLOSURE VIOLATIONS, THE RISK OF BIAS TO THE JURORS WHO WERE VOIR DIRED FOR TWO DAYS BY HANDSHOE'S LAWYER BEFORE HANDSHOE CHANGED HIS PLEA, AND THE TRIAL COURT UNDERMINING APPELLANT'S DEFENSE BY ERRONEOUSLY GRANTING LEE A NOT GUILTY DIRECTED VERDICT ON THE CONSPIRACY COUNT DESPITE THE ANTAGONISTIC DEFENSES VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY VERDICT

A. Introduction

Appellant has already raised in his opening brief a claim of error relating to the trial court's denial of appellant's motion to have his trial severed from Lee's trial. Appellant

maintains that claim of error and includes the following supplemental argument based on his finding that the basis originated earlier than as set forth in the opening brief and includes additional harm caused by the joinder of defendants.

Before Handshoe pled guilty, the trial court denied appellant's motions to sever his trial from Handshoe and Lee. It was this denial that led to numerous errors which could have been avoided had separate trials been granted. Handshoe's late guilty plea meant that Handshoe's lawyer had been interacting with jurors when he should not have been, the voir dire of the venire was conducted without questioning jurors about their views relating to defendants turning into state's witnesses, the defense, who was promised that the trial would not involve statements by Handshoe, had not focused their investigation on Handshoe, and the defense was given misinformation about the two burglaries referenced in Handshoe's interview. Appellant's defense was further compromised when the trial court granted Lee's motion under Penal Code section 1118.1, dismissing the conspiracy count against him. This ruling was made in the face of evidence that, if presumed true, showed that Lee supplied the inside information about the location of the safe, instigated the scheme, expected a percentage of the burglary proceeds and attempted to obstruct justice with offers of money and assistance to Handshoe. Lee's theory at trial was that appellant was the mastermind. If appellant was not present at the burglary, then someone else had to be the third person and someone had to be the mastermind. By removing the question of Lee's participation in the conspiracy from the jury's consideration, the jury would have been led to believe that the trial court had resolved the question against appellant, leaving appellant as the alleged third person and mastermind of the crime.

The actual impact of joinder in this case was a grossly unfair trial which resulted in an unreliable verdict. The fact-finding process was so distorted by these errors that traditional harm analysis is not possible. In any event, the prosecution cannot show that these errors were harmful beyond a reasonable doubt. A new trial is required.

B. Factual and Procedural Background

1. In June of 2003, Lee offers to pay Handshoe money in exchange for testimony clearing Lee of the crime.

Handshoe was arrested on May 14, 2003 based on a tip that Handshoe and appellant were responsible for Brucker's death. (1 RT 46; 22 RT 3798.) On May 28, 2003, Handshoe was charged with murder and conspiracy to commit residential burglary and robbery along with Huhn, Lee, and appellant. (1 CT 1-4.)

After Handshoe and Lee were arrested, Lee offered to put money on Handshoe's books and look after Handshoe's family if he would testify that Lee "had no part in" the crime. (22 RT 3787-89, 3916-17.) He described the encounter with Lee during plea negotiations:

Det. Baker:	Okay. At some time did Randy Lee come to you and basically say, if you keep me out of this, I'll help you, I'll financially, I'll help you?
Handshoe:	Yeah.
Det. Baker:	What, tell us, tell us about that conversation.
Handshoe:	We were on the bus coming from court and he said, just keep me out of it and I'll, I'll make sure you have money on your books, this and that, and that your family's okay and, stuff like that.
Det. Baker:	So, while you're on the bus, now are you going back downtown or are you coming out here?
Handshoe:	We're going back to Vista, or we're coming here from Vista. Either we're coming back or going to Vista.
Det. Baker:	And he says, Randy says to you, tell me again.

Handshoe:	He says that, he told me that, that uh, he just told me, I don't know.
Baker:	Does he say, if you keep me out of this,
Handshoe:	Yes.
Baker:	I'll make sure you got money on your books.
Handshoe:	Yes. Yes.
Baker:	Do you say, okay I will.
Handshoe:	Yes. (Supp. 45 CT 9233.)

After his agreement with Lee, Handshoe attended the preliminary hearing. He listened to the testimony of all the witnesses. (9 CT 1749-1773.) The details of his subsequent plea negotiations, guilty plea and trial testimony are set forth in this supplemental opening brief and incorporated here by reference.

2. Appellant's August 2004 motion for a separate trial was denied.

After the preliminary hearing, appellant moved for a separate trial. (1 CT 155-56 [Notice of Motion for Separate Trials]; 162-196 [Points and Authorities in Support of Motion for Separate Trials].) In the prosecution's opposition, the prosecution asked for all the defendants to be tried together with a separate jury for Huhn. Appellant, Handshoe and Lee would be tried before a second jury. (1 CT 201-16.) The trial court denied appellant's request to be tried separately from his codefendants. (3 RT 600-4 to 600-9, 600-30 to 600-31.) It stated the motions were denied "with this premise, that the district attorney has indicated -- and my rulings are founded on the district attorney's indication that the statements of Handshoe are not going to be offered, with one exception, and we'll have a final ruling on that." (3 RT 600-31.)

3. The trial court grants a directed verdict of acquittal for Lee on the conspiracy count.

After the testimony of the guilt phase defense witnesses, appellant's trial counsel made three motions: to enter a judgment of acquittal as to all counts and allegations, to enter a judgment of acquittal as to Counts 1 and 2 because of the lack of sufficient corroboration of accomplice testimony, and to strike overt acts 1 through 12 as not stating an overt act. (24 RT 4350.) The trial court denied the motion to acquit on Counts 1 and 2 but said it needed to think more about the arguments on the overt acts; "so the motion to strike is under submission, and that is incorporated in the 1118.1. . .." (24 RT 4355.) The trial court stated it was inclined to grant the motion that Lee's counsel joined in, that the first five overt acts were not overt acts; an overt act "has to follow the agreement and I'm not sure if it's 1 through 5 or 1 through 6. . . The weight of the circumstantial evidence establishes there wasn't an agreement." (25 RT 4460-4462.) The prosecution had argued that when "this defendant says to Julio Navarette, nobody was supposed to get killed, that that is, if nothing else, an adoption of the fact that he – that there was an agreement when he goes to Brandon Handshoe and says if you keep me out of this, I'll put money on your books and take care of your family. . ." (25 RT 4457.) The trial court rejected the prosecution's argument and said the circumstantial evidence was all pointing against an agreement. (25 RT 4458, 4462.) In its letter brief, the prosecution had argued that the court: "should not impose its view of 'reasonable' because such a determination rests squarely with the jury." (43 Supp CT 8915.) It further argued:

> In the instant case the evidence supports the People's contention that Lee repeatedly brought this particular victim up to two of the three conspirators who eventually committed that very crime. Lee offered to drive co-conspirators to the victim's home and point it out. Lee suggested how they might commit the offense and encouraged the others to do the crime. Lee indicated that he wanted 15% of anything the others obtained. All of these actions were before the offense. After the offense but before Handshoe was identified as a suspect Lee approached Handshoe and said, "you guy's went to the house, didn't you?" When Handshoe claimed not to know what Lee was talking about, Lee went on to say "I saw

Brucker was shot[.]" He knew who did the crime because he had been the one to propose and select the victim. Lee also told Handshoe while both were in custody that, "if you keep me out of this I'll put money on your books and take car [sic] of your family." The clear implication is that if Handshoe was being asked to keep Lee out of it, Lee was "in it" to begin with.

Also, Lee tells Navarette while house [sic] together in jail that "nobody was supposed to get killed[.]" The clear implication of that statement is that Lee was involved in the details of what was supposed to happen.

It is not necessary that the People prove that Lee personally committed an overt act, only that he was a conspirator at the time another conspirator committed one or more overt acts. CALJIC 6.10.5 paragraph 2 is instructive on that issue. Overt acts of disquising [sic], gathering weapons, driving to the victim's home, etc. were done by Anderson, Handshoe and Huhn, but they are attributable under the law to Lee if the jury finds that he was a conspirator in the underlying attempted robbery/burglary. (43 Supp CT 8917.)

Subsequently, the trial court informed parties that it was staying with its tentative opinion as to the 1118.1 motion of Lee on Count 2. (26 RT 4596.) According to the court, although there was "substantial evidence of Mr. Lee's intent to achieve an agreement," what was missing was substantial evidence that the alleged conspirators intended to agree. (26 RT 4597.)

It further stated:

The state of the evidence, as I see it, is after approximately six months of marketing his deal to Mr. Huhn and Mr. Handshoe, there is no evidence of an actual agreement. None in the testimony of Valerie Peretti, Zachary Paulson, or Brandon Handshoe. In fact, Mr. Handshoe says he goes to do the crime thinking Mr. Lee is not involved. (26 RT 4597.)

To infer a deal or agreement on the basis the crime was committed, we need some evidence of Mr. Lee's participation. (26 RT 4598.)

The trial court granted the motion as to Count 2 only, acquitting him as to Count 2, the conspiracy. (26 RT 4598.)

4. The trial court denies the defense's motion for new trial which raised the direct impact of joinder

The impact of joinder was raised in appellant's new trial motion. (8 CT 1663.) The trial court denied appellant's motion for new trial based on the trial court's denial of the motion to sever, errors premised on allowing Handshoe to testify after his deal was made and on other grounds. (38 RT 5735.)

C. The Impact of Joinder Includes The Prejudice Arising From Handshoe's Change Of Plea After The Trial Started

Throughout the entire pre-trial period and for two days of jury selection, prior to Handshoe's change of plea, Handshoe's lawyer participated in an information and strategy sharing with counsel for codefendants while negotiating the plea agreement. His disappearance from the trial and reappearance as a someone who was repeatedly mentioned during Handshoe's testimony combined with his two days of interacting with the jury during jury selection constituted an undue influence on the jury. Especially in a capital case, the risk of a biased jury as a result of jurors' exposure to Handshoe's attorney was too much.

The Florida Supreme Court has ruled in a per curium opinion that participation in jury selection by counsel for a testifying co-defendant who has pled guilty is structural error which requires a new trial. (*Kritzman v. State* (Fla. 1988) 520 So.2d 568, 570, per curium.) The court stated: "While Kritzman has shown that he was actually prejudiced by the error below, we do not hold at this point that prejudice need be shown. Where substantive due process has been violated to this degree, we will presume prejudice." (*Id.* at p. 570.) Although *Kritzman* involved a co-defendant fully participating in jury selection, many of the concerns expressed by the Florida court apply equally here:

> "Allowing the state's star witness to participate in picking the jury that would eventually determine Kritzman's guilt and punishment amounts to a breakdown in the adversarial process. It is difficult enough for a jury to sift through the complicated issues surrounding a murder case; it is nearly impossible to do so when the lines between who is on trial and who is not are unclear." (*Id.* at p. 570.)

Similarly, in *Allen v. State of Florida* (Fla. 1990) 566 So.2d 892, the court found the defendant was denied a fair trial because he was tried before a jury partially chosen by a former co-defendant testifying for the state. The former co-defendant changed his plea after the jury was sworn but before trial started, and testified against the defendant. The defendant's motion for mistrial had been denied by the trial court. The District Court of Appeal reversed and remanded for a new trial. (*Id.* at p. 893.)

Additionally, appellant's trial team needed time to investigate and re-vamp defense strategies. The prosecution had represented at pre-trial hearings that it would not be using any statements by Handshoe to prove its case. The prosecution's position on April 20th was that the prosecution was ready and there was no reason for a thirty-day continuance. The defense was then surprised by the plea change. This is in marked contrast to *Hodgkins v. State* (Fla. 1993) 613 So.2d 1343. In that case, after the jury was selected, the co-defendant changed her plea and the trial court denied the defendant's motion for mistrial. The District Court found no error since the trial court had prohibited the state from calling the co-defendant as a witness, did not use her statements and her attorney did not condition the jury during voir dire. (*Id.* at p. 1344.)

Further, during the trial, based on the existing information at the time, defense counsel called a detective to testify to establish that a check into police records had not uncovered any similar burglaries during the time described in Handshoe's interview. However, the detective gave contrary testimony. Had the prosecutor fulfilled his duty to disclose the results of the investigation into the uncharged burglaries, obtained in the interview with Handshoe, appellant's counsel would not have called the detective to testify. Although defense counsel presented testimony from the owner of the alarm company to establish

her point, the harm was done by the prosecution's misrepresentations. The stipulation from the prosecutor did not help either; it only probably confused the jurors.

Exacerbating the harm, in violation of Penal Code section 1137, the trial court sent the plea agreement into the deliberations room with the jury without redacting portions of the interview of Handshoe which showed the prosecutor vouching for Handshoe's credibility, referring to Handshoe's remorse and commenting on Handshoe's conversations that were not included as the evidence at trial. Had the proper pretrial notice been provided, the issue of any non-admissible portions of the interview would likely have been litigated in pre-trial motions. Yet, as it stood, appellant's trial counsel was not provided a fair opportunity to represent her client when the trial court refused to grant a mistrial or even a continuance following Handshoe's guilty plea. Had the prosecutor made the proper disclosures, that may well have affected the trial court's exercise of discretion. As it was, the trial court was unaware of the true state of affairs, believing that Handshoe's interview added nothing to the prosecution's case.

Appellant's defense was severely impacted, enduring two days of voir dire by Handshoe's lawyer, who was able to ingratiate himself to a large section of the venire, two days of voir dire without questioning the venire about testifying accomplice issues, limited ability to consider and address the factual basis of Handshoe's guilty plea, which included the two new burglaries, the origins of the weapon used during the robbery, and prosecutorial vouching for Handshoe's remorse and credibility.

In short, there was substantial prejudice as a result of Handshoe's change of plea. This exacerbated the prejudice from the joinder of all defendants in the case.

D. The Impact Of Joinder Includes The Prejudice Arising From The Trial Court's Error In Dismissing The Conspiracy Count Against Lee

The trial court's error in directing a judgment of acquittal on the conspiracy charge as to Lee was legally erroneous. It also was highly prejudicial to appellant's defense at trial

which was that appellant had nothing to do with the burglary and Lee was the mastermind, putting the crime into play.

In ruling on a motion for judgment of acquittal pursuant to Penal Code section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged. (*People v. Whalen* (2013) 56 Cal. 4th 1, 54; *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) "Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*Id.*) "We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction." (*Ibid.*)

Here, the trial court erred in its ruling because the evidence showing Lee intended for someone else to break into the Brucker home was strong. Multiple witnesses described Lee claiming knowing about a safe which he sought others to steal from. (17 RT 2866, 2868-73; 22 RT 3764-68, 3772-74.) Lee offered to drive Handshoe there. (22 RT 3782.) Witnesses described Lee stating that he wanted a percentage of any proceeds arising from the use of his inside information. (16 RT 2523-30; 17 RT 2870-73.) The day following the burglary Lee came to Handshoe, asking if they went to the house. (22 RT 3783, 3786.) Lee told Handshoe that Brucker was shot. (22 RT 3787.) Indeed, the prosecutor in its letter brief on conspiracy detailed all of this, that Lee offered to drive the co-conspirators to Brucker's home, pointing out how they could commit the offense, offering encouragement and stating he wanted 15 percent of the value obtained. According to the prosecution, "[Lee] knew who did the crime because he had been the one to propose and select the victim." (43 Supp. CT 8917.)

Also, the risks which arose from the scheme to steal money from the Brucker home were foreseeable. Lee had to have known of them when he shopped around his inside information, attempting to get others to be the ones to break into the house. Once

Brucker was shot, it was too late for Lee to withdraw from the conspiracy. He never disavowed the conspiracy or attempted to stop his inside information from being used in the way it ultimately was.

Based on the substantial evidence of an agreement, the trial court erred in directing a verdict on the conspiracy count.

E. The Impact Of Joinder Includes The Prejudice Arising From Lee's Antagonistic Defense

The ruling of the trial court on the directed verdict effectively removed part of the prosecution's case-in-chief, distorted the fact-finding process and confused the jury regarding a substantial part of appellant's defense theory, resulting in significant prejudice to appellant. 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. Lee's defense was antagonistic to appellant. It was either Lee who identified the Brucker house or appellant, not both. Specifically, appellant's defense 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.) However, Lee's defense focused on appellant being the mastermind and the one with the plan. In opening statements, Lee's attorney stated:

> [t]hey were undereducated, 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, pointing out the antagonistic defenses, were overruled:

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. (15 RT 2349-50)

Counsel for Huhn also objected and requested the severance to protect the rights of her client as well:

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.) The following exchange occurred:

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 replied:

> 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. . .
> 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.

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 described appellant as "a man who was somewhat older, 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 5145-46.) Counsel also said the reason Brucker's house was hit was "[b]ecause 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 5143-45.)

Because of the antagonistic defenses, the trial court's withdrawal of the conspiracy charge against Lee ultimately undermined the reasonable doubt sought by appellant since appellant's defense was premised on Lee being the mastermind, i.e., the one identifying the Brucker house, offering to share details of the crime. With Lee out of the picture, jurors had only appellant as the one designated as the crime's mastermind. This severely compromised appellant's defense. (*United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 900; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082-85; *People v. Massie* (1967) 66 Cal.2d 899, 913; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amends. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *United States v. Mayfield, supra,* 189 F.3d 895, the defendant was jointly tried with co-defendant Gilbert for possession of cocaine with intent to distribute. Gilbert's defense was mutually exclusive with the defendant's. Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield, and her closing argument barely addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client. (*Id.* at pp. 897, 900.) The Ninth Circuit reversed the conviction due to the trial court's failure to sever the defendants for trial. According to the court, Gilbert's defense and Mayfield's defense were mutually exclusive because the core of the co-defendant's defense was so irreconcilable with the core of Mayfield's own defense that the acceptance of the co-defendant's theory by the jury precluded acquittal of the defendant. Gilbert's mutually exclusive defense prevented the jury from making a reliable judgment about Mayfield's guilt. (*Id.* at pp. 899-900.) The court further stated that in this situation,

> [T]he jury often cannot assess the guilt or innocence of the defendants on an individual and independent basis. Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant . . . cross examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant . . . closing arguments allow a final opening for codefendant's counsel to portray the other defendant as the sole perpetrator of the crime. (*Id.* at pp. 899-900, citations omitted.)

In *United States v. Tootick, supra,* 952 F.2d 1078, Frank and Tootick were jointly tried and convicted of assault resulting in serious bodily injury. They appealed arguing error in the trial court's failure to sever their cases. (*Id.* at p. 1080.) The principle defense of each defendant was that the other alone committed the assaults. Frank swore that he drove to an isolated spot at the side of a hill and remained in the car while Tootick stepped out with Hart and stabbed him. Frank testified that he watched in horror as codefendant Tootick repeatedly stabbed Hart. Because only Frank and Tootick were present when Hart was attacked, and because there was no suggestion that Hart injured himself, the jury could not acquit Tootick without disbelieving Frank. Each defense theory contradicted the other in such a way that the acquittal of one necessitated the conviction of the other. (*Id.* at p. 1081.) The Ninth Circuit decided that the joint trial of Frank and Tootick resulted in reversible prejudice with respect to each defendant. The jury could not have been able to assess the guilt or innocence of the defendants on an individual and independent basis. The court pointed out that counsel portrayed Frank as the sole guilty party. The jury heard inflammatory testimony against Tootick. The prosecutor's closing argument rested on the logical impossibility of accepting both defendant's versions. There were no limits placed on the defendants' respective counsel as "they acted as unsanctioned prosecutors during the course of the trial." (*Id.* at pp. 1082-85.)

In *People v. Massie, supra,* 66 Cal.2d 899, co-defendant Vetter argued the trial court erred in denying his request for a separate trial. According to the Court, the propriety of the denial of severance turned on whether the incriminating portions of defendant

Massie's confessions could have been properly deleted. (*Id.* at pp. 914, 919.) According to the Court, even if Vetter's name had been deleted, Massie referred to the same individual throughout the confessions. Once Vetter's identity was otherwise established by other evidence, the jury could fill in the deletions in the confession. The *Aranda*[3] rules left the trial court only the option of severance. Its denial of Vetter's motion constituted error. (*Id.* at p. 919.)

In this case as well, the trial court erred, resulting in a violation of appellant's constitutional rights to a fair trial, to confront adverse witnesses, and to a fair and reliable guilt determination. Lee's defense was that appellant was the mastermind behind the crimes and Lee had no part in it. (15 RT 2336; 29 RT 5158-59.) The jury's acceptance of Lee's defense, finding he was not guilty of murder and the withdrawal of the conspiracy charge, meant that appellant was left as the only alleged mastermind of the crime and likely shooter. (30 RT 5190-96, 5233-43; 33 RT 5430.) Additionally, two of the most crucial witnesses in the prosecution's case, Peretti and Handshoe, supported the theory that appellant, not the other defendants, was the mastermind of the crimes. Their testimony was partially or entirely beneficial to Lee and Huhn. Although Huhn had a separate jury, Peretti and Handshoe testified before both juries simultaneously. With counsel for Huhn and Lee supporting the credibility of these witnesses, the trial had three prosecutors instead of one against appellant –clearly unfair to appellant. No different than in *United States v. Tootick, supra*, co-defendants' counsel were given free rein to act as unsanctioned prosecutors during the course of the trial, i.e., without the limits imposed on government prosecutors. "The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor." (*Id.* at p. 1082.) Appellant was left trying to attack the credibility of these significant witnesses alone with the co-defendants joining forces against him to buttress their credibility. These being the circumstances, the

[3] *People v. Aranda* (1965) 63 Cal.2d 518.

trial court should have severed the cases. Its failure to do so implicated appellant's constitutional rights to due process, a fair trial, right to confront adverse witnesses, and fair and reliable guilt determination. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. I, §§ 7, 15; contrast *People v. Carasi* (2008) 44 Cal.4th 1263, 1297 ["classic" case for joinder where statements made by each defendant did not implicate the other and if credited, would have been mutually exculpatory].)

F. The Prejudice From The Joinder Was So Harmful That It Resulted In A Fundamentally Unfair Trial And Unreliable Verdict

A joint trial violates the federal constitution if it results in prejudice so great as to deny the defendant due process, a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S. Ct. 725, 88 L. Ed. 2d 814]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 343 [a reviewing court may reverse a conviction where because of the consolidation a gross unfairness has occurred depriving defendant of a fair trial, due process of law].) The Fifth, Sixth and Fourteenth Amendments provide that every defendant have due process rights, including the right to compulsory process and the right to confront witnesses against him or her, and the right to a fair trial. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302.)

Cumulative errors, including those pertaining to an erroneous denial of a motion to sever, may infect a trial with such unfairness that the resulting conviction is a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 815; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741 ["When all [errors] are combined, there is no doubt that appellant was deprived of his right to a fair trial guaranteed to him by the due process clauses of the United States and California Constitutions."]; U.S. Const., Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Thus, even if the errors individually are not prejudicial, the combined effect of such errors may rise to the level of harmful prejudice required to have a

judgment be reversed. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-48; *People v. Cardenas* (1982) 31 Cal.3d 897, 907.)

Where errors are of constitutional and non-constitutional magnitude, the appropriate standard for reversal is the harmless error test set forth in *Chapman v. California*, *supra*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People* v. *Morris* (1991) 53 Cal.3d 152, 216, disapproved on other grounds by the court in *People v. Stansbury* (1995) 9 Cal.4th 824.)

Here, the multiple errors arising from the failure to sever, causing gross unfairness and distortion to the adversarial process, amounted to structural error, requiring automatic reversal. Yet, even if this court finds otherwise, that by themselves the errors are not sufficiently prejudicial, cumulatively the errors are prejudicial, resulting in a trial so unfair as to violate appellant's federal and state constitutional rights to due process. (U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

First, as set forth in appellant's opening brief, the evidence against appellant was unconvincing. It was built on the testimony of three untrustworthy teenage witnesses, Peretti, Handshoe and Paulson, testimony that had not even convinced the trial court to allow the conspiracy count against Lee to go to the jury. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653; 2706, 26 RT 4626-28, 4551-55; 27 RT 4668; 17 RT 2906-09.) Further, the case outcome depended on who the jury believed. (30 RT 5319, 5190-96, 5233-43.) Thus, it was especially important for appellant to be presumed innocent. However, the errors individually or combined ensured that appellant would not be who the jury believed. Specifically, Lee's defense, absolving himself of any blame and pointing at appellant as a perpetrator, and the case having multiple prosecutors instead of just one, diminished this presumption and appellant's credibility before the jury. The directed verdict, removing part of appellant's defense that Lee was the mastermind, further diminished the defense, making it harder for appellant to show reasonable doubt. Making matters worse was Handshoe belatedly turning prosecution witness with appellant's defense without enough time to cobble a defense to respond to the change in

circumstances. The defense was left with the jury exposed to Handshoe's lawyer's interaction during voir dire, no means to question the jurors on their thoughts on accomplice liability or defendants turned state's witness. With the jury also having the unredacted interview to review in the deliberations room, an interview which had the prosecutor himself vouching for Handshoe's credibility, there was no way appellant could have had a fair trial.

In short, the result of the joinder in this case was a grossly unfair trial that distorted the adversarial process and deprived appellant of his constitutional rights to due process, a fair trial and to confront adverse witnesses. A new trial should be ordered.

IV. THE TRANSLATED CELL PHONE DATA WAS ILLEGALLY OBTAINED, CONTAINED ERRORS AND INTRODUCED BY SURROGATE WITNESSES THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Three claims of error arise from the cellphone evidence used against appellant in this case. They all involve similar facts.

B. Procedural History[4]

On October 5, 2004, the prosecution received an email from Cingular Wireless in response to a subpoena duces tecum. (2 CT 382.) In the email Cingular attached three separate documents. (*Id.*) One document was a listing of Cingular cell site locations in the San Diego area. (*Id.*) The other two documents consisted of raw cell data "in computer language that was meaningless" to the prosecutor and other laypersons. (*Id.*) The

[4] This procedural history is in part taken from the prosecution's response to a request for evidentiary hearing. (2 CT 382-85.)

prosecution never obtained a warrant for the data, instead relying on the subpoena duces tecum and an "Order Directing AT&T Wireless Services, Inc. To Produce Records Pursuant To Subpoena Duces Tecum." (1 CT 133-135; 2 CT 387-388.) On October 13, 2004, the prosecution sent the Cingular documents including the raw cell data to Tim Tomasello, an engineer for Cingular Wireless. (2 CT 382.) Two days later Tomasello forwarded the attachments with some limited interpretation and informed the prosecution that the information needed to be converted from hexadecimal system to the decimal system. (*Id.*) Ramona Tischer, a Cingular communications analyst testified at trial that Tomasello wrote down that he had translated the values from hexadecimal to decimal. (20 RT 3300, 3349.)

The prosecution called two witnesses to testify on the cell site information. (20 RT 3300-95.) The first witness, Tischer, was tendered as an expert on cell site data and the hexadecimal translation system. (20 RT 3300-03.) The prosecution used her testimony to affirm the calls and cell site location connecting appellant to the other defendants and to the location of the crime. (20 RT 3303-32.) The prosecution also created and published exhibits relating to the cell data, including a blow-up map illustrating the alleged locations of calls sent from appellant's phone. (20 RT 3316-3330.) The prosecution provided Tischer with already-interpreted cell site data and she merely checked to see if the translations comported. Tischer did not personally perform or witness the original interpretations. (20 RT 3303.)

On cross-examination, Tischer claimed that the untranslated raw cell data would be meaningless to a lay person. (20 RT 3347.) Tischer also disclosed she only received a half-day's course training in the hexadecimal system, the system relied upon to translate the raw cell data to a useable form. (20 RT 3346.) She testified that she had no engineering background and used a calculator for the translations. (20 RT 3343, 3347.) Tischer further testified she did not know Tomasello, the engineer who did the original translations, personally; but, she had spoken with him before. (20 RT 3349.) After this, the following exchange occurred:

Q. [The People] Now, the records that he sent to the court are described in his handwriting on the front of that document. Are you able to read and understand what he wrote there?

A. [Ms. Tischer] Yes.

Q. What did he write?

A. "Extracted call recs from archived files, based on M.S.I. specified. Translated record values where required from coded to normal."

Q. And what does that mean?

A. It means that he pulled these records from archive and then translated the values where they were asked to be translated.

Q. Translated from what to what?

A. From hexadecimal to decimal and then line the decimal up with the legend.

Q. Okay.

A. That tells it what cell site it was. (20 RT 3349.)

During cross-examination, defense counsel had Tischer do some in-court hexadecimal translations. (20 RT 3352-3355.) She did and found two numbers did not translate. (20 RT 3355.) Tischer could not explain why. (20 RT 3355.)

The prosecution's second cell-site expert witness was Christopher Taylor, a Radio Frequency Engineer for Cingular Wireless. (20 RT 3370-71.) Using the prosecution's chart showing calls from appellant's cell phone on April 14th, Taylor identified the cell site locations to the jury on another diagram. He testified that he had reviewed the raw cell data to determine the locations. (20 RT 3373-77.) (Pros. Ex. Nos. 55, 62.) On cross-examination, Taylor admitted the prosecutor obtained the information on Prosecution Exhibit Number 55 from a source other than himself. The reference numbers Taylor

prepared with the prosecution; the translations had been done prior to Taylor's involvement on the case. (20 RT 3391.)

In his argument to the jury, the prosecutor claimed that Tischer and Taylor's testimony was to show "what phone calls were made and from what cell site locations. Where was Eric Anderson when either he was making or receiving the telephone calls on April the 14th?" (29 RT 5105.)

C. The Introduction of the Translated Cell Phone Data Through A Surrogate Witness Violated Appellant's Sixth Amendment Right to Confrontation Requiring Reversal of the Guilt Phase Verdict

1. The Translated Cell Data Was Testimonial Evidence Because Its Primary Purpose Was For Use At Trial.

The translated raw cell data introduced at trial was testimonial evidence. The translations were done by Tomasello, someone other than the prosecutor's witnesses, for use at trial. (20 RT 3303; 2 CT 382.) The prosecutor failed to call this individual as a witness or allege that he was unavailable. The admission into evidence of the translated data violated appellant's Sixth Amendment right to confrontation.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., Amend. VI.) The United States Supreme Court has stated, "this bedrock procedural guarantee applies to both federal and state prosecutions." (*Crawford v. Washington* (2004)541 U.S. 36, 42 [124 S.Ct. 1354, 1369, 158 L.Ed.2d 177].)

> [T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. (*Id.* at p. 61.)

For testimonial statements, the Sixth Amendment's Confrontation Clause requires their exclusion unless the defendant had an opportunity for cross-examination and the witness

is unavailable to testify. (*Crawford, supra,* 541 U.S. 36, 54; U.S. Const. Amend. VI.) "They [statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 2273-74, 2278, 165 L.Ed.2d 224]; *Michigan v. Bryant* (2011) 562 U.S. 344, 356.)

> An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the primary purpose of the interrogation. The circumstances in which an encounter occurs--*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards--are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. (*Id.*, at p. 360.)

Laboratory analysts' sworn affidavits certifying the analysis of an illegal substance are testimonial evidence even when comprised entirely of objective facts since, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz v. Mass.* (2009) 557 U.S. 305, 319 [129 S. Ct. 2527, 174 L. Ed. 2d 314].) In *Melendez-Diaz, supra,* the United States Supreme Court held that the analysts' affidavits were testimonial statements. The analysts were witnesses for purposes of the Sixth Amendment. Absent a showing that they were unavailable to testify at trial and that defendant had a prior opportunity to cross-examine them, defendant was entitled to "be confronted with" the analysts at trial. (*Id.* at p. 311.) The Court found that because the sole purpose of the affidavits was to create prima facie evidence of the composition, quality, and weight of the substance, the laboratory analysts' notarized affidavits were testimonial. The Court assumed the analysts were aware of the affidavits' evidentiary purpose, since that purpose was reprinted on the affidavits themselves. (*Id*; compare *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 663 [forensic lab report created specifically to serve as evidence in a criminal proceeding is testimonial; "when the State elected to introduce Caylor's certification, Caylor became a

witness Bullcoming had the right to confront."]; see also *People v. Sanchez* (2016) 63 Cal.4th 665, 695 [police reports are testimonial].)

Here, the translated raw cell data was testimonial evidence because its primary purpose was to create an out-of-court substitute for Tomasello's testimony. Tomasello did not produce the translations during an ongoing emergency, which is "among the most important circumstances" relevant to whether a statement is testimonial. (*Michigan, supra*, 562 U.S. at p. 361.) Tomasello received the raw cell data and he sent the translated data two days later to the prosecution. The translations were produced in response to a subpoena duces tecum. (2 CT 382; 20 RT 3349.) Both Tomasello's receipt of the data and subsequent translations came well after appellant had been detained and in custody of the state. Accordingly, the circumstances objectively indicate that Tomasello produced the translations at a time when there was no ongoing emergency.

Tomasello's translations were testimonial also because they were intended to create evidence for trial. Like the affidavits certifying the analysis of the substance in *Melendez-Diaz, supra,* 557 U.S. 305 the primary purpose of the translations was to create evidence of appellant's whereabouts, linking him to the scene and the other defendants around the time of the murder. The prosecutor even argued the same to the jury. (20 RT 3303-32; 29 RT 5105-06.) Despite the prosecution characterizing Tomasello's work as "limited interpretations," his translations allowed the prosecution to make use of raw cell data that was originally in "meaningless" computer language. (2 CT 382.) Tomasello's translations were turned into charts and blow up maps that the prosecutor introduced through surrogate witnesses at trial. (20 RT 3303-32.)

Even though a computer produced the raw cell data at issue, Tomasello's subsequent translations related to past events and human actions. They attempted to relate appellant's cell activity and location on the day of and preceding the murder. (20 RT 3303-32.) The data became useable only when it was sent to Tomasello and translated. Additionally, the surrogate witnesses were tendered as experts in translating raw cell data. Indeed, the purpose in both Tischer and Taylor testifying was to provide their specialized insight into

the hexadecimal system to the jury. (20 RT 3303-32.) The potential for human error was realized when the two inaccuracies in Tomasello's translations were disclosed at trial. Tischer's testimony revealed that two of the translations had erroneous digits that did not relate to the number translated and did not convert to a number. (20 RT 3353.) On this basis alone, the right to confront was triggered. (*Bullcoming, supra*, 564 U.S. at pp. 654, 660.)

D. The Judgment of Guilt Must be Reversed Because The Evidence Was Introduced By Surrogate Witnesses Without a Showing of Unavailability Or Prior Opportunity To Confront The Analyst Who Translated The Raw Cell Data

When there is no showing of unavailability and no prior opportunity to cross- examine the witness who analyzed the data being presented at trial, the prosecution may not introduce that analysis through a surrogate witness. (*Davis*, *supra*, 547 U.S. at p. 826.) In such circumstances, the Sixth Amendment requires that the witness who made the statement or certification introduce that evidence at trial. (*Id.*; see also *Bullcoming*, *supra*, 564 U.S. at p. 665; *Melendez-Diaz*, *supra*, 557 U.S. at p. 329.)

Here, there was no showing of unavailability for Tomasello. The prosecution improperly used a surrogate witness to introduce Tomasello's raw cell data translations. (20 RT 3303-32.) Although the two surrogate witnesses may have been qualified experts in the storage and translation of raw cell data, neither expert did the original translations used at trial. (20 RT 3300, 3371.) Tischer's testimony revealed she was provided with already-interpreted cell site data and that she merely checked to see if the information was consistent based on her understanding of the hexadecimal system. (20 RT 3303.) Similarly, Taylor testified that he became involved only after Tomasello had performed the original translations, that all the "information that's actually extracted from those records, translating. . numbers into other. . numbers" was done before he was involved. (20 RT 3391.) The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's

testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming, supra*, 564 U.S. at p. 662.)

Further, that the surrogates were experts did not dispense with the Confrontation Clause requirements. In *Bullcoming, supra,* the Court reiterated that the obvious reliability of a testimonial statement did not dispense with the Confrontation Clause. That Clause demands that reliability be assessed by testing through cross-examination. Thus, "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme.Curie and the veracity of Mother Teresa.'" (*Bullcoming*, 564 U.S. at pp. 651-52.)

Even more compelling, Tischer's testimony revealed two untranslatable digits, thus raising doubts about the competency of Tomasello's translations. Confronting Tomasello would have provided opportunity to discover the source of the problems and would have shed light on Tomasello's competency or lack thereof. Neither Tischer nor Taylor were able to testify to any personal observation regarding the particular translations or process employed because neither were present during Tomasello's translations. Tischer testified she could not account for the errors. (20 RT 3355.)

Accordingly, Tischer and Taylor's surrogate testimony do not meet Constitutional requirements. The judgment of guilt must be reversed.

E. Admission Of The Translated Cell Data Enhanced The Risk Of An Unwarranted Conviction In Violation Of The Eighth Amendment's Requirement For Heightened Reliability In Capital Proceedings

Admission at trial of the translated cell data deprived appellant of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty, under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7,15, 17*; Johnson v. Mississippi* (1988) 486 U.S. 578, 590 [108 S. Ct. 1981, 100 L. Ed. 2d 575]; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Beck v. Alabama* (1980) 447 U.S. 625, 638*; Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S. Ct. 2954, 57 L. Ed. 2d 973];

Gardner v. Florida (1977) 430 U.S. 349, 358; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Because death is a different form of punishment than any other, both the state and federal Constitutions require a heightened degree of reliability in the fact finding procedures that lead to a death sentence. (U.S. Const., Amend. VIII and XIV; *Ford v. Wainwright* (1986) 477 U.S. 399, 411.) This is to ensure that the death penalty is "based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The Eighth Amendment prohibits procedural rules that tend to diminish the reliability of both the sentencing and guilt determinations since such rules enhance the risk of an unwarranted conviction. (*Beck v. Alabama* (1980) 447 U.S. 625, 637–38.)

To this end, ensuring the reliability of scientific evidence is especially important in capital proceedings. Even in noncapital cases, courts are reluctant to expose jurors to scientific evidence of questionable reliability because such evidence carries an "aura of infallibility." (See *In re Amber B.* (1987) 191 Cal.App.3d 682, 690-91.) This aura is difficult to refute because a dispassionate evaluation of the reliability of many scientific techniques is "beyond the scope of critical analysis of the average lay person." (*Id.,* at p 691; see *People v. McDonald* (1984) 37 Cal.3d 351, 372, overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896.) Accordingly, a trial court should exclude unreliable expert opinions not only generally, but especially in capital proceedings. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1174-1175.)

1. Appellant's Cell Site Location Information Was Obtained In Violation Of The Federal And State Constitutions' Prohibition Against Unreasonable Searches

The Fourth Amendment of the United States' Constitution protects against unreasonable searches by the government. When the government performs a search without a warrant, it is presumptively unreasonable. (*People v. Rios* (1976) 16 Cal.3d 351, 355.) "The burden is as always on the People to show that contraband seized during

a search without a warrant falls within a recognized exception to the warrant requirement if they are to prevail. . ..” (*Id.*)

Congress enacted the Electronic Communications Privacy Act of 1986 (“ECPA”) to protect against unreasonable seizures of electronically stored information. (Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, codified as amended in sections of 18 U.S.C.) The ECPA extended Fourth Amendment protection to citizens whose information was stored with Internet and cell phone service providers. (See 18 U.S.C.A. § 2510 (12).)

As part of the ECPA, 18 U.S.C. 2703 governs privacy rights for subscribers of cell phone services. (18 U.S.C. § 2703.) This section limits government's ability to compel an Internet Service Provider to disclose subscriber information. (*Ibid.*) It establishes the method through which the government may obtain certain stored information based on the privacy right at stake. (*Ibid.*) While some information data may be obtained by subpoena, some information can only be obtained by a special court order or a search warrant. (*Ibid.*)

The government may only obtain the contents of an electronic communication through a warrant. (18 USC 2703 (a) - (b).) “Contents” of electronic communication is defined as “any information concerning the substances, purport, or meaning of that communication.” (*Id.* § 2510, subd. (8); *Cf. Warshak v. United States* (6th Cir. 2010) 631 F.3d 266, 288 [a subscriber is entitled to a reasonable expectation of privacy to the contents of emails].) On the other hand, basic subscriber information may be obtained by subpoena. (18 U.S.C. 2703, subd. (b) (c) (2) (A-F).) The rationale behind this is that the consumer knowingly exposes to a service provider such information when that person registers for the service: “[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection.” (*Katz v. United States* (1967) 389 U.S. 347, 351 [88 S. Ct. 507, 19 L. Ed. 2d 576]; see 18 U.S.C § 2703, subd. (c)(2)(A)-(F).) Basic subscriber information consists of, among other things, the customer’s name, address, and records of calls. (*Ibid.*)

None of the subsections in 18 U.S.C. 2703, subdivision (c)(2) cover call location information. It cannot be legally obtained via subpoena. (*Ibid.*) Rather call location information is governed by 18 U.S.C. 2703, subd. (c)(1). That section sets forth four ways for the government to obtain cell site records: a) the consent of the customer; b) an investigation of telemarketing fraud; c) a search warrant; or d) "a court order for such disclosure under subsection (d) of this section." (18 U.S.C. 2703, subd. (c)(1).)

An order may only issue "if the governmental entity offers specific and articulable facts that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." (18 U.S.C. 2703, subd. (d).) A court order "shall not issue if prohibited by the law of such State." (18 U.S.C. § 2703, subd. (d).) Accordingly, California law still governs the scope of lawful searches and seizures in the state. Law enforcement officials are still required to follow that law. (*People v. Larkin* (1987) 194 Cal.App.3d 650, 654; Cal. Const. art. I, § 13.)

Under California law, a warrant is required in order for the government to obtain cell site location information. The California Constitution establishes a legitimate expectation of privacy in one's phone records and thus prohibits the warrantless search of cell site location information. (Cal. Const. art. I, § 13; *People v. Blair* (1979) 25 Cal.3d 640, 655; *People v. Chapman* (1984) 36 Cal.3d 98, 107.) Proposition 8 did not repeal the provisions in the California Constitution which provide for the right to be free from unreasonable searches and seizures. (*In re Lance W.* (1985) 37 Cal.3d 873, 886; Cal. Const. art. I, § 13.)

Similarly, the Fourth Circuit prohibits the government's extended access to cell site location data without a warrant. (*United States v. Graham* (4th Cir. 2015) 796 F.3d 332, 344-345.) In *Graham, supra,* the Fourth Circuit rejected the argument that cellphone users voluntarily convey their cell site location data to service providers. (*United States v. Graham, supra,* 796 U.S. at p. 353.) The Fourth Circuit asserted that cellphone users have

a reasonable expectation of privacy in their cell site location information when it provides a detailed account about a person's past movements. (*Id.* at p. 345.)

The United States Supreme Court has yet to decide the constitutionality behind the government's search of cell site location data. However, the Court has affirmed that the Fourth Amendment protects people, not places. (*Katz v. United States* (1967) 389 U.S. 347, 351; *United States v. Jones* (2012) 565 U.S. 400, 413 [attaching an electric monitoring device to a person's vehicle without a warrant constituted a search]; *Kyllo v. United States* (2001) 533 U.S. 27, 34-35 [use of a thermal image to detect whether defendant was growing marijuana in his home was a search because it constituted technology not in general public use].) In *Katz, supra,* 389 U.S. 347, the United States' Supreme Court held that a person who enters a public phone booth and shuts the door before placing a call is constitutionally protected against unreasonable searches. (*Id.* at p. 352.)

The United States Supreme Court also has refused to expand searches incident to arrest to digital data contained in cell phones after determining that cellphones are both qualitatively and quantitatively different compared to physical objects on an arrestee's person. (*Riley v. California* (2014) 134 S.Ct 2473, 2483, 2488-2489.) In *Riley,* although noting that its decision did "not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances," the Court elaborated that a cellphone's massive storage capacity allows it to contain "the privacies of life" for many Americans. (*Id.* at p. 2489 and n.1, 2494-95 quoting *Boyd v. United States* (1886) 116 U.S. 616, 630.) According to the Court, officers cannot rely on searches incident to arrest to justify the warrantless search of cellphones. The Fourth Amendment requires a warrant since citizens have a reasonable expectation of privacy in the contents of their cellphones. (*Id.* at p. 2495.)

Here, the government unreasonably obtained appellant's cell site location in violation of the federal and state constitutions as well as the ECPA because it did not obtain a warrant before searching appellant's cell records and obtaining information on his cell

site location. Appellant had a reasonable expectation of privacy in his cell site location information. He never consented to the government's search of his cell site records. The telemarketing exception did not apply. Rather, two subpoena duces tecums were issued and the court signed an order under 18 U.S.C. 2703, subdivision (d). (1 CT 133-135; 2 CT 387-388.) Since cell site location information is more akin to content than subscriber information, a subpoena did not suffice to make the search permissible under federal law. Instead, the government was required to obtain a warrant.

Even if not considered content, the only way the search was permissible was through a valid court order for such disclosure under 18 U.S.C 2703, subdivision (d). However, the trial court's order in this case was still invalid. The subpoenas and order were issued pursuant to a declaration written entirely in conclusory language. There is not a single fact in the declaration attached to the subpoenas and order to show relevance or materiality. (2 CT 387-388.)

Even if an order had been properly drafted and served, the prosecution still was not authorized to view or seize the records because California law requires a warrant in such circumstances. Under the California Constitution, a citizen has a reasonable expectation of privacy in the contents of his or her cell phone. State law requires the government obtain a warrant before searching a citizen's cell site location. (Cal. Const. art. I, § 13; *People v. Blair* (1979) 25 Cal.3d 640, 655; *People v. Chapman* (1984) 36 Cal.3d 98, 107.) Thus, the government's search of appellant's records without a warrant was in violation of California law.

In short, the government's search of appellant's cell site location information violated the federal and state constitutions as well as the ECPA.

F. Reversal Is Required

The trial court's admission of the translated raw cell data and cell site location information deprived appellant of his constitutional rights to due process, a fair trial and right against unreasonable search and seizures, and prohibited a reliable determination of guilt and penalty, requiring a reversal of his conviction. As violating appellant's federal constitutional rights, 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. This test provides that the appellate court must reverse a conviction unless proven that the error is harmless beyond a reasonable doubt. (*Id.* at p. 23 [17 L.Ed.2d at p. 710].)

Here, although the cell site location evidence was proven to be of questionable reliability (20 RT 3353-3355), it presented itself as irrefutable. It was presented to the jury by two employees of the cellular carrier who the prosecution tendered as experts in translating raw cell data. Tischer was a Communications analyst for Cingular and an expert on the hexadecimal translation system, used for the translations at issue. (20 RT 3300, 3303.) Taylor was a senior engineer for Cingular Wireless with substantial experience in the industry. (20 RT 3371.) Their aura of infallibility was impossible to rebut because the interpretation of the raw cell data translations was beyond the analytical expertise of the average lay person. The prosecutor himself had characterized the raw, untranslated cell data as meaningless computer language. (2 CT 382.) Jurors did not have the requisite knowledge to be able to accurately assess the reliability of the translated cell data on their own. Because Tomasello was not called as a witness, jurors were forced to rely on the surrogate experts' opinions. Yet, even then, the jurors could not properly assess the credibility of Tomasello's work because neither of the testifying experts participated in or observed the original translations used at trial. Tischer admitted that she couldn't explain what may have caused the erroneous untranslatable digits. (20 RT 3303, 3355.) Similarly, Taylor testified that he became involved only after Tomasello had performed the original translations. (20 RT 3391.) So, the jury was left without any

information to properly evaluate their credibility. Because of the importance of the evidence, the prosecution relying on it to argue that appellant's cell phone history implicated him as a perpetrator (29 RT 5105-06), the risk of an unreliable and unwarranted conviction was substantial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637–38.) After all the testimony had been presented and the jury viewed the prosecution's exhibits, jurors would have been hard-pressed not to believe appellant was there, at the crime scene, and the shooter.

In sum, the errors were not harmless. The judgment for both the guilt and penalty phase should be reversed.

V. THE CUMULATIVE EFFECT OF THE ERRORS RESULTED IN A GROSSLY UNFAIR AND UNRELIABLE TRIAL

Appellant raised cumulative error arguments in his opening brief. However, as a result of the issues raised in this Supplemental Opening Brief, the cumulative error argument must be supplemented to include these additional errors. They interact in such a way that increased the cumulative prejudice as well as denying appellant his constitutional right to a fair trial.

Cumulative errors may infect a trial with such unfairness that the resulting conviction is a denial of due process. (*People v. Hill* (1998) 17 Ca1.4th 800, 815; *People* v. *Hudson* (1981) 126 Cal.App.3d 733, 741 ["When all [errors] are combined, there is no doubt that appellant was deprived of his right to a fair trial guaranteed to him by the due process clauses of the United States and California Constitutions."]; U.S. Const., Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Thus, even if a trial court's errors individually are not prejudicial, the combined effect of such errors may rise to the level of harmful prejudice required to have a judgment be reversed. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-48; *People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Where errors are of constitutional and non-constitutional magnitude, the appropriate standard for reversal is the harmless error test set forth in *Chapman v. California, supra,* 386 U.S. 18 [87 S.Ct.

824, 17 L.Ed.2d 705]. (*People* v. *Morris* (1991) 53 Ca1.3d 152, 216, disapproved on other grounds by the court in *People v. Stansbury* (1995) 9 Ca1.4th 824 [when errors of federal constitutional magnitude combine with nonconstitutional errors, all errors reviewed under a *Chapman* standard].)

The prejudice which arose from the joinder of the defendants resulted in a fundamentally unfair trial. However, there were additional errors that also contributed to the gross unfairness at appellant's trial. The cell phone evidence used against appellant contained mistakes that remained unexplained because the evidence was presented through surrogate witnesses who could not account for the errors. The result was an aura of reliability, giving a false impression that the cell phone evidence implicated appellant as a perpetrator and that it all was credible evidence. There was also the erroneous exclusion of defense evidence supporting the defense that appellant was not a perpetrator, the trial court's error in not excluding Handshoe's testimony and its error in not allowing the defense to test Peretti's credibility. All of this left the defense at an insurmountable disadvantage. Combined with the trial court's error in not severing the trial or allowing the defense more time following Handshoe's change of plea, the defense was left without a fair chance of presenting appellant's defense. Just as important was the prosecutorial misconduct and failure of the trial court to remedy it. Both the prosecutor and trial court failed to redact Handshoe's interview, allowing it to go to the jury during deliberations. It contained references to evidence not admitted at trial, conversations involving Handshoe that the prosecutor had listened to but the jury did not have as evidence, and included the prosecutor vouching for Handshoe's credibility. Along with the instructional errors and the trial court's error in dismissing the conspiracy charge against Lee, the defense was destroyed and the jury misled to appellant's detriment. The prosecutor's closing arguments, which included his vouching for Handshoe's credibility and testimony, further ensured the jury would reject appellant's defense.

Given the totality of the circumstances, revealing multiple errors that eviscerated appellant's credibility and defense, and the jury's indecision, the combined effect of the

errors should not be considered anything but prejudicial. The judgment should be reversed. (*People v. Ortiz* (1962) 200 Cal.App.2d 250, 259 [combined effect of errors required reversal].) As stated by the court in *People v. Williams* (1971) 22 Cal.App.3d 34:

> "This probable difficulty in decision is mentioned because there are errors and near improprieties in the case which taken together spell prejudice. Any one of the defects, as a sole irregularity in the face of a strong prosecution case, would probably not be considered prejudicial, but the totality of all the matters to be discussed, in combination, in light of the demonstrably close case herein, does reach, we feel, the level of harmful prejudice." (*Id.* at p. 40.)

Even if this Court finds no cumulative prejudice at the guilt stage of the trial, there was cumulative prejudice in the penalty stage, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton*, *supra*, 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The errors resulted in substantially minimizing appellant's defense, designated him as the only mastermind of the crimes and the shooter. Jurors were unlikely to have seriously considered his defense and likely 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 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.)

CONCLUSION

For the foregoing reasons, and those in his opening and reply briefs, appellant Eric Anderson respectfully requests reversal of his convictions and the judgment of death.

DATED: Feb. 6, 2018

Respectfully Submitted,

_____

Joanna McKim
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Certification Regarding Word Count

The word count in appellant's supplemental opening brief is 23,982 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 Feb. 6, 2018, at San Diego, California,

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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 Feb. 6, 2018 I served the document described as:

Appellant's Supplemental Opening 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 emailed as addressed below or 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 Feb. 6, 2018 in San Diego, California.

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Joanna McKim