In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RAYSHON DERRICK THOMAS,** **Defendant and Appellant.**	Case No. S185305

Fifth Appellate District Court of Appeal, Case No. F056337

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In its Opening Brief, respondent explained why appellant was properly prosecuted in Madera County under Penal Code section 781's multiple venue provisions. (RBM 6-14.)[1] [2] Respondent also showed why any error as to venue should have been assessed for harmlessness. (RBM 14-15.) In response, appellant raises several federal and state constitutional concerns. He relies principally on outdated law and unsupported racial allegations. This reply addresses appellant's arguments in the order appellant presents them.

ARGUMENT

I. TRIAL IN MADERA COUNTY DID NOT INFRINGE UPON APPELLANT'S STATE OR FEDERAL CONSTITUTIONAL RIGHTS

Appellant contends that several of his state and federal constitutional rights were violated when he was tried in Madera County instead of Fresno County. (ABM 3-36.)[3] Though not mentioned previously, appellant asserts that, because he is black, the prosecutor tried him in Madera County because that county had disproportionately fewer blacks than Fresno County. His accusations of racial discrimination and forum shopping border on the frivolous. Appellant was tried in Madera County because that is where he lived and conducted his illegal drug business. He was stopped by his Madera County parole officer and investigated by Madera County law enforcement. The matter was turned over to the local Madera

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[1] RBM signifies Respondent's Opening Brief on the Merits.

[2] Subsequent section references are to the Penal Code unless indicated otherwise.

[3] ABM signifies Appellant's Answer Brief on the Merits.

county prosecutor who prosecuted him in Madera County Superior Court. Only appellant's inventory -- his cocaine -- was located just over the border in adjacent Fresno County. But he used a Madera County apartment to convert cocaine to cocaine base, which he then sold on Madera streets. Consequently, appellant was properly prosecuted in Madera County for possessing cocaine with intent to sell.[4]

Appellant specifically argues that his rights to proper vicinage and venue in state court are guaranteed by both the California Constitution and the Sixth and Fourteenth Amendments to the federal constitution. (ABM 4-21.) He is incorrect; these rights are protected primarily by state law, not the federal constitution.

It is helpful again to define terms. Venue refers to the location or place where trial is held; it is governed by statute in California, not the California Constitution. (*People v. Posey* (2004) 32 Cal.4th 193, 209 (*Posey*); *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1054 (*Price*); § 777 et seq.) "[B]ecause venue for trial implicates legislative policy, not constitutional imperative, the Legislature may determine the venue for trial except to the extent the vicinage or due process provisions of the state or federal Constitutions circumscribe that authority." (*Price*, p. 1056, citations omitted.) Venue is also referred to as territorial jurisdiction. (§§ 691, subd. (b), 777; *People v. Britt* (2004) 32 Cal.4th 944, 955; *Posey, supra*, 32 Cal.4th at p. 199.) Jurisdiction refers to the inherent power of a court to decide a case and is composed of personal and subject matter

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[4] Appellant asserts that he "exhausted all 20 of his peremptory challenges." (ABM 4.) It does not appear that he used his final challenge. (2 ART 458.) Appellant mentions the denial of his mistrial motion. (ABM 4.) That motion, based on a prospective juror's response to appellant representing himself, is unrelated to the matters under review. (2 ART 432.)

jurisdiction. (*Burns v. Municipal Court* (1961) 195 Cal.App.2d 596, 599.) Importantly, venue does not implicate a trial court's fundamental jurisdiction, either personal (authority to proceed against a defendant) or subject matter (authority to decide a criminal action). (*Posey, supra*, 32 Cal.4th at p. 208.)

Vicinage refers to the geographical area from which the jury pool is drawn, generally the area where the crime occurred. (*Price, supra*, 25 Cal.4th at p. 1054.) Vicinage generally refers to the county. (*People v. Martin* (1995) 38 Cal.App.4th 883, 887.) The boundaries of the vicinage are ordinarily coterminous with the boundaries of the county within which at least some act preliminary to or requisite to the offense charge occurred. (*People v. Alvarado* (2006) 144 Cal.App.4th 1146, 1152.)

The Sixth Amendment to the federal constitution protects a defendant's right to a trial "by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...." The right to an impartial jury has been incorporated by the Fourteenth Amendment's due process clause to apply to state criminal trials. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) The Sixth Amendment impartial jury clause also protects the right of criminal defendants to a jury drawn from a representative cross-section of the community; this has also been incorporated by the Fourteenth Amendment. (*Taylor v. Louisiana* (1975) 419 U.S. 522.) The final right stemming from the quoted portion of the Sixth Amendment is the vicinage right; that has *not* been incorporated by the Fourteenth Amendment. Ten years ago, this Court held that the Sixth Amendment's vicinage clause does *not* guarantee a right to trial in state courts before a jury drawn from the county where the crime was committed. (*Price, supra*, 25 Cal.4th at pp. 1056, 1065.) Earlier precedent, which had only assumed but not held otherwise, was expressly disapproved. (*Id.* at p. 1069, n. 13.) *Price*

established that the state constitutional vicinage right is not coextensive with the Sixth Amendment right. (*Id.* at p. 1071.) As explained by this Court seven years ago:

> In *Price v. Superior Court, supra*, 25 Cal.4th 1046, we concluded that the vicinage right embodied in the Sixth Amendment, which is the right of an "accused ... to a ... trial ... by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," applies only against the United States and is not incorporated by the Fourteenth Amendment's due process clause for operation against the states. (*Price v. Superior Court, supra*, 25 Cal.4th at pp. 1057-1069.) We also concluded that the vicinage right implied in article I, section 16 of the California (see *Price v. Superior Court, supra*, 25 Cal.4th at pp. 1071-1078), constitutes simply the right of an accused to a trial by an impartial jury drawn from a place bearing some reasonable relationship to the crime in question (*id.* at p. 1075).

(*Posey, supra,* 32 Cal.4th at p. 222.) That appellant's Madera County jury had a reasonable relationship to appellant's crimes is beyond any dispute.

Appellant argues that, under *People v. Bradford* (1976) 17 Cal.3d 8 (*Bradford*), his "rights through the Sixth and Fourteenth Amendments" were protected. (ABM 5.) Since appellant relies so heavily on *Bradford* (ABM 4-6, 20-21, 45-46), this case bears close scrutiny. There, a defendant robbed a bank in Ventura County and was soon stopped for speeding by an officer. On the roadside, the defendant grabbed the officer's gun. The officer was struck by another motorist. The defendant fired several shots at the officer and motorist before fleeing. The officer chased him to the adjacent Los Angeles County, where the defendant was apprehended after a traffic accident. The defendant was prosecuted in federal court for the bank robbery, in Los Angeles County for the assaults that occurred there, and in Ventura County for offenses arising out of the original stop. (*Bradford*, at p. 13.)

On appeal from his Ventury County convictions, the defendant argued that the separate proceedings in Los Angeles and Ventura Counties violated section 654's proscription against multiple prosecutions. (*Bradford, supra*, 17 Cal.3d at pp. 13-14.) He claimed that section 783 provided an alternative venue in Los Angeles County for the Ventura County offenses that were otherwise triable in Ventura County. (*Id.* at p. 15.) Section 783 provides in part that when a public offense is committed in California on a car "prosecuting its trip," jurisdiction will lie in the jurisdictional territory the vehicle passes through or where the trip ends. (*Ibid.*) The question before the Court was whether the Ventura County offenses could "be said to have occurred 'on a ... motor vehicle' within the meaning of section 783." (*Ibid.*) The Court said no; section 783 did not apply because "the vehicle was stopped and the offenses were committed outside the vehicle at an identifiable spot along the highway." (*Ibid.*)

To support its interpretation of section 783, this Court noted that the substance of the common law vicinage right "is preserved in the federal Constitution, the Sixth and Fourteenth Amendments guaranteeing a defendant in a state criminal proceeding a right to be tried by a jury drawn from, and comprising a representative cross-section of, the residents of the judicial district in which the crime was committed. (*Ibid*, citing *People v. Jones* (1973) 9 Cal.3d 546, 556 (*Jones*).) At common law, this right was so strictly interpreted that offenses committed partly in one county and partly in another were not prosecutable at all. (*Ibid.*) This Court noted that section 781, the section at issue in the instant case, was intended to broaden criminal jurisdiction beyond the rigid limits of the common law. (*Ibid.*) The Court pointed out that this same purpose underlay section 783 -- "to assure that venue will lie somewhere when the exact site of an offense cannot be ascertained because it was committed in a moving vehicle." (*Id.* at p. 16.) The Court concluded that, "[i]n light of the federal constitutional

right to a trial by a jury drawn from the vicinage in which the crime occurred, section 783 must be held inapplicable where, as here, the location of the crime is readily identifiable." (*Id.* at p. 17.) In other words, defendant's section 654 multiple prosecution claim was denied in part because the defendant could *not* be prosecuted in Los Angeles County under section 783 for the offenses that occurred by the side of the road in Ventura County. Section 783 did not support defendant's section 654 claim because the location of the crime was ascertainable and because of the constitutional concerns for vicinage.

Bradford is of no help to appellant. This is a section 781 case, not a section 654 case. More importantly, *Bradford's* discussion of the vicinage right relies on *Jones*, which this Court disapproved in *Price*. (*Price, supra*, 25 Cal.4th at p. 1069, fn. 13.) This explains why *Bradford* has mainly been relied on since *Price* for section 654 principles. (See, e.g., *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1217; *People v. Vang* (2010) 184 Cal.app.4th 912, 916; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565; *People v. Flores* (2005) 129 Cal.App.4th 174, 186; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1144.) Succinctly stated, *Price* impliedly overruled that portion of *Bradford's* analysis that relied on *Jones*. (Cf., *People v. Miles* (2008) 43 Cal.4th 1074, 1094, fn. 14.) And it did so before appellant was arrested.

Appellant cites *People v. Betts* (2005) 34 Cal.4th 1039, 1059, fn. 16 (*Betts*), to support his claim that *Bradford's* discussion of the federal vicinage right remains viable. (ABM 5-6.) But the point of the cited footnote is that the court did not have to decide whether venue was proper under section 783 since it had already determined it was proper under section 781. Having expressly reversed *Jones*, the basis for *Bradford's* discussion of this issue, California law was clear on June 25, 2001, when

Price was decided: the Sixth Amendment vicinage right is not an attribute of Fourteenth Amendment due process. (*Price, supra*, 25 Cal.4th 1046.)

Next, appellant makes three subarguments. First, he claims his Sixth Amendment vicinage right in state court is protected by United States Supreme Court precedent. Then, he argues that this same precedent established that the Sixth Amendment's right to a jury included the right that the jury be drawn from a representative cross-section; this right, appellant claims, was also violated by his Madera County trial. Finally, he asserts that *Bradford* further relied on the Fourteenth Amendment's due process and equal protection clauses as guaranteeing a state defendant's rights to proper venue and vicinage. (ABM 6-21.) All these arguments fail.

The Sixth Amendment guarantee of a fundamental right to trial by jury in criminal cases is protected in state courts by the Fourteenth Amendment's due process clause. (*Price, supra*, 25 Cal.4th at p. 1057, citing *Williams v. Florida* (1970) 399 U.S. 78, 86 (*Williams*), and *Duncan v. Louisiana, supra,* 391 U.S. at p. 149.) But as *Price* explained, *Williams* did not hold that the vicinage provision of the Sixth Amendment's jury trial right was applicable to the state by incorporation through the Fourteenth Amendment. (*Id.* at pp. 1059-1061.) Neither Congress nor the states that ratified the Fourteenth Amendment expressed an intent that the vicinage clause apply to the states, nor is that right "so fundamental and necessary to the purpose of jury trial that such intent must be presumed." (*Id.* at pp. 1063-1065, 1069.) In short, appellant's argument based on Supreme Court precedent raises no question not dealt with in *Price*.

His representative cross-section argument fares no better. The Sixth Amendment's impartial jury right is protected by a jury panel that includes a representative cross-section of the community. (*Duren v. Missouri* (1979) 439 U.S. 357, 481; *People v. Horton* (1995) 11 Cal.4th 1068, 1087.) The

Fourteenth Amendment, besides incorporating this Sixth Amendment right, also contains a separate equal protection right to an impartial jury selection process. (*Batson v. Kentucky* (1986) 476 U.S. 79.) Appellant voiced no objection based on *Duren* or *Batson* below. Rather, he raised a venue and vicinage claim predicated on *Bradford, supra,* 17 Cal.3d 8, and other state venue provisions. (1 CT 205, ALB 16.) *Bradford's* discussion of vicinage, however, was not the law even when appellant made his motions in the trial court -- *Price* was. In any event, he has not, and cannot now, show the systematic exclusion of a distinctive group from his jury selection process. (*People v. Horton, supra*, 11 Cal.4th at p. 1087; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 997-998, fn. 3.)

Undeterred, appellant broadly asserts that he was denied a representative jury because the prosecutor "selected and chose its most advantageous jury pool that contained almost 50% fewer of appellant's African-American peers." (ABM 13.) He points to a single statistic: in 2006, the African-American population in Madera County was 2.53% while in Fresno County it was 4.89%. (ABM 3.) Appellant's argument reduces to a logical absurdity: when a criminal case involving an African-American defendant can be filed in either Madera or Fresno County, it *must* be filed in Fresno to avoid violating the defendant's right to a fair cross-section of the community.

Appellant's aspersions against the prosecutor alleging forum-shopping should be quickly dispatched. (ABM 13.) Forum shopping is "'[t]he practice of choosing the most favorable jurisdiction ... in which a claim might be heard.'" (*Posey, supra*, 32 Cal.4th at p. 222, n. 12.) There is nothing, absolutely nothing, in this record or in logic to suggest the prosecutor filed the charges in Madera County rather than Fresno County so as to manipulate the jury pool and reduce appellant's African-American peers. Appellant's crimes were discovered by Madera County law

enforcement which investigated the crimes and turned the case over to the Madera County District Attorney's office. That office prosecuted the charges in Madera County. That the general venue statute (§ 777), or the joint venue statute (§ 781), *may* have allowed the prosecutor to turn the matter over to Fresno County prosecutors did not obligate him to do so. The logical place to prosecute this case was in Madera, where appellant both lived and conducted his illegal drug business.

Next, appellant claims that the Fourteenth Amendment's due process and equal protection provisions protected him from the systematic exclusion of African-Americans from his jury pool. (ABM 13-19.) As shown, no evidence of systematic exclusion exists. Moreover, appellant has never articulated an equal protection argument. (*In re M.S.* (1995) 10 Cal.4th 698, 727 [although Supreme Court rejected contention because it was not raised before the Court of Appeal, it added that "[w]ere we to reach it" it would be rejected on the merits].)

Relatedly, appellant claims that this Court in *Bradford* created a state liberty interest that is protected against arbitrary state action by the due process clause of the Fourteenth Amendment. (ABM 20-21.) His theory is that *Bradford* protects his federal constitutional rights to proper venue and vicinage, and that the state acted arbitrarily here by allowing trial to occur in Madera County. (*Ibid.*) This claim has no foundation; as *Price* and *Posey* teach, *Bradford's* analysis of the federal vicinage right is non-viable. The trial court did not act arbitrarily in denying appellant's dismissal motions because there was a reasonable relationship between Madera County and appellant's crimes which satisfied the state constitutional test. Respondent's Opening Brief demonstrated that the standards of the applicable venue statute, section 781, were met as well. There being no error of state law, there can be no violation of a liberty interest. (*Clemons*

v. Mississippi (1990) 494 U.S. 738, 747 [no liberty interest where state law did not create an entitlement].)

Next, appellant expands his forum shopping argument by claiming California's venue statutes must be narrowly construed to respect the "constitutional concern for trial in the vicinage" and to prevent the prosecution from choosing a more favorable tribunal. (ABM 21-23.) He forgets that the statute at issue here is section 781, which provides:

> When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.

This statute is one of the many exceptions to the general rule (§ 777) that venue lies in the county where the crime is committed.

As this Court explained in *Posey*:

> In determining the meaning of section 781, we construe the provision liberally in order to achieve its underlying purpose, which is to expand venue beyond the single county in which a crime may be said to have been committed (see, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1118; *People v. Simon, supra*, 25 Cal.4th at p. 1109; *People v. Bismillah* (1989) 208 Cal.App.3d 80, 85; cf. *Price v. Superior Court, supra*, 25 Cal.4th at p. 1055 [concluding that provisions like § 781 are "remedial and for that reason [are] construed liberally to achieve the legislative purpose of expanding criminal jurisdiction"] -- consistently, of course, with "protect[ing] a defendant from being required to stand trial in a distant and unduly burdensome locale" (*People v. Simon supra*, 25 Cal.4th at p. 1110, fn. 18).

Here, appellant was prosecuted where he lived; he was not "required to stand trial in a distant and unduly burdensome locale." (*Ibid.*) Again, there is simply nothing to support appellant's forum shopping assertion. Given the fact that the great bulk of the evidence came from Madera County, it seems that it is appellant who is forum shopping to make prosecution in

another county more difficult and expensive. And appellant fails to recognize that vicinage "also protects the right of the offended community to pass judgment in criminal prosecutions." (*People v. Martin, supra*, 38 Cal.App.4th at p. 889, citations omitted.) Appellant, a Madera resident who sold his drugs in Madera, was properly prosecuted there.

Finally, in subsection c, appellant addresses the heart of the matter. He fleshes out the gist of the appellate court ruling, arguing that he was charged with only "possessory offenses" and "possessory acts." (ABM 23-27.) He does not engage the critical point: he was not charged with merely possessing cocaine; he was charged with possessing it *for sale*, and the evidence showed he intended to sell it in Madera County. And though dismissed post-trial, both counts included a gang enhancement, which connected appellant's crimes to his gang activity in Madera. As the prosecution's expert declared, appellant possessed the cocaine located in Fresno with the intent to convert it to cocaine base in Madera and then sell it on the streets in Madera. (1 CT 43; 6 RT 1539.) In short, appellant's offenses were not just "possessory."

Appellant repeatedly invokes *United States v. Cabrales* (1998) 524 U.S. 1 (*Cabrales*). (ABM 25-27.) *Cabrales* does not advance appellant's case because it involved federal constitutional and statutory provisions and the federal crime of money laundering. (*Cabrales*, *supra*, 524 U.S. 1-10.) Specifically, *Cabrales* dealt with Rule 18 of the Federal Rules of Criminal Procedure which echoed the constitutional requirement that prosecutions should occur in districts where the crimes occurred. (*Cabrales, supra*, 524 U.S. at p. 6.) This unremarkable point in no way undermines *Price* and *Posey*.

The appellate court recognized that appellant's right to control the contraband "could be inferred from the evidence found in Madera, including the key and receipts[,]" but believed this did not mean appellant

constructively possessed the contraband in Madera. (Opn., at p. 5.) The court did not explain how it could seemingly recognize yet deny that appellant constructively possessed the contraband. Appellant now argues that the "prosecution failed to prove constructive possession by a preponderance of the evidence because [he] had no right to control and no immediate and exclusive access to the storage facility locker and contents." (ABM 28.) But the locker receipts and locker key appellant possessed when he was apprehended gave him immediate access to and control over the contraband. All he had to do was drive over the county line and open the storage locker. Appellant points out that the storage locker was not rented to him. (ABM 28.) True, but it was rented by his ex-wife, Tarica Howard, the mother of his three children. Personal items in the locker also connected the contraband to appellant. Inside the unit was a backpack containing plastic baggies virtually identical to the baggies found in the Madera apartment appellant used to convert the cocaine into cocaine base. (35 RT 10281-10297.) Appellant's high school diploma was underneath the cocaine in the locker. (35 RT 10304-10306.) Throughout the locker were reams of paperwork addressed to appellant at various addresses. (35 RT 10306-10314.) There were a few pieces of paperwork for Tarica Howard and Frederick Thomas, appellant's brother. (35 RT 10314.) A revolver with the letter "R" stitched into the side and ammunition were found as well (35 RT 10318-10320); appellant's first name starts with "R." The address on at least one of the storage locker receipts was appellant's secret apartment which he used to convert cocaine to cocaine base. In short, the contraband in the Fresno locker, the money, keys, and receipts appellant had when stopped, and items in the two Madera apartments were all part of his illegal drug business, a business which he operated in Madera County. As a result, he was properly prosecuted for possessing cocaine with the intent to sell it in Madera County.

Contrary to appellant's assertion (ABM 27-29), a preponderance of the evidence showed he constructively possessed the contraband in the Fresno locker while in Madera County. It was immediately accessible to him in a place under his control. (*People v. Barnes* (1997) 57 Cal.App.4th 552, 556.) Indeed, he could not have possessed it -- either actually or constructively -- without the key (which gave him access) and the receipts (which entitled him to access), and appellant had these items in his possession when he was arrested in Madera. Indeed, the locker key was on the same ring as his residence key. Appellant claims there was no evidence he knew the locker password. (ABM 28.) Since appellant had the key and receipts, and the valuable contraband was closely linked to him personally, it may reasonably be inferred that he knew the password as well. It is also reasonable to infer that cocaine from the Fresno locker stash had been brought to Madera, converted into cocaine base, and sold there.

Respondent's Opening Brief demonstrated that appellant was properly tried in Madera County because he constructively possessed the cocaine for sale there, or he engaged in acts requisite to that offense there, or he caused the requisite effects there. (RBM 6-14.) Appellant protests that the preparatory acts did not occur, but if they did, the preparatory-acts doctrine is unconstitutional. (ARB 30-33.) Respondent disagrees.

Appellant posits that the preparatory acts are really just one act: possessing cocaine, and since that was the only criminal act, it was not preparatory to anything. (ARB 30.) Actually, appellant's ongoing drug sale business, which involved two apartments and the rental car he was stopped in, as well as items in his possession like the phones, money, and locker key, were preparatory acts to possessing the cocaine in the Fresno locker *for sale*. Again, appellant's crime was not merely possesssory. Nor is this doctrine unconstitutional because it "emanates from a liberal constructive of the venue statute...." (ARB 30.) Appellant again engages

in a discussion of irrelevant federal law (ARB 30-33). (See *Betts, supra,* 34 Cal.4th at p. 1057.) Appellant committed his crime in part in Madera County by constructively possessing the cocaine and operating his drug business there.

Similarly, appellant claims he did not cause requisite effects in Madera County because he was charged with possessing cocaine, not selling cocaine. (ABM 33-35.) Actually, he was charged with possessing cocaine *with the intent to sell it*, and the evidence all pointed to Madera as the place where that cocaine would be converted into cocaine base and sold. As respondent has explained, appellant's mental state, an element of the offense, is relevant to the venue issue. (See RBM 12-14.)

Furthermore, even if appellant possessed the cocaine only in Fresno County, as he and the appellate court maintain, he committed enough acts in Madera County to allow prosecution there under section 781. As this Court recently noted in *People v. Carrington* (2009) 47 Cal. 4th 145, 185:

> Pursuant to section 781, an offense may be tried in a county "in which the defendant made preparations for the crime, even though the preparatory acts did not constitute an essential element of the crime." (*People v. Price, supra*, 1 Cal.4th at p. 385 [Humboldt County had jurisdiction over a murder committed in Los Angeles County because the defendant went to Humboldt County to obtain weapons for the purpose of killing the victim in Los Angeles County].).

Here, appellant set up his business of selling cocaine in Madera County, and all of his acts in connection with this business were preparatory acts to the charged offense.

Lastly, appellant appears to argue that, even if venue in Madera was proper under the California Constitution's "reasonable relationship" test, it is still improper under the Sixth and Fourteenth Amendments. (ABM 35-36.) As respondent has already shown, the applicable rights under the Sixth Amendment (impartial jury, representative cross-section) and Fourteenth

Amendment (due process, equal protection), were either not raised below or were not violated. Consequently, respondent submits that appellant was properly prosecuted in Madera County.

II. APPELLANT'S CONVICTIONS SHOULD BE REINSTATED BECAUSE ANY ERROR WAS NONPREJUDICIAL

Appellant asserts that the venue error here requires reversal of his convictions because it was structural error under the California Constitution and the Sixth Amendment. (ABM 37-45.) There was no error here, as shown above. Nor is this a new rule, as appellant claims. (ABM 45-46.) If a decision does not establish a new rule of law, no question of retroactivity arises. (*Betts, supra*, 34 Cal.4th at p. 1056; *People v. Guerra* (1984) 37 Cal.3d 385, 399.) Here *Price*, not *Bradford*, has always been the controlling legal precedent as to appellant's vicinage right under the state and federal constitutions. *People v. Simon* (2001) 25 Cal.4th 1082 and *People v. Welch* (1993) 5 Cal.4th 228 do not assist appellant because the overwhelming weight of authority (*Price*, *Posey*) had already rejected appellant's argument. (ABM 46.) And contrary to appellant's claims (ABM 46), this case involves no retroactive expansion of criminal liability so as to violate due process. (*Bouie v. City of Columbia* (1964) 378 U.S. 347.)

Furthermore, *Price's* holding that the Sixth Amendment's vicinage right is not an attribute of Fourteenth Amendment due process affected the appellate test for determining whether a vicinage error is prejudicial. Since it is at most a state law error, it is reviewable under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, not the standard for federal

constitutional error in *Chapman v. California* (1967) 386 U.S. 18, 24.[5] As respondent has explained, venue does not implicate a trial court's fundamental jurisdiction, and errors which are not jurisdictional in the fundamental sense are reviewed for prejudicial error. (RBM 14-15.) Here, that standard is *Watson's* reasonable probability test. It cannot be seriously disputed that appellant would not have received a more favorable result had he been tried in Fresno County because the evidence of his crimes was overwhelming.

To summarize, appellant's vicinage right under the California Constitution was not violated. Any conceivable infringement did not result in a miscarriage of justice. (Cal. Const., art. I, § 16 & art. VI, § 13.) Appellant's federal constitutional arguments fail outright because they are based on irrelevant law. The state and federal constitutional issues under discussion rely on existing case law, especially *Price*, which was decided in 2001 before appellant was apprehended. The application of the prejudice test flows from *Price* as well. Consequently, appellant's meritless arguments should be rejected.

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[5] Appellant's argument that improper venue simply requires reversal is not well-taken. (ABM 45-46.) His California authorities are outdated; for example, *People v. Crise* (1990) 224 Cal.App.3d Supp. 1, 4-5, relies on *Bradford*. Nor do appellant's authorities *hold* reversal was required. His federal cases are inapplicable because this case turns on a state law issue.

CONCLUSION

For all these reasons, the decision of the court of appeal should be reversed.

Dated: March 24, 2011

Respectfully submitted,

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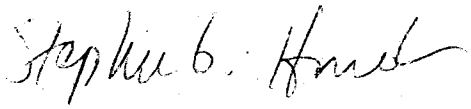

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4786 words.

Dated: March 24, 2011

KAMALA D. HARRIS
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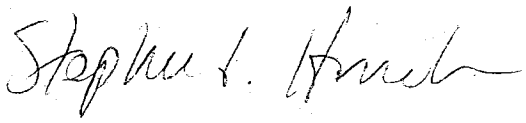

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 24, 2011, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Carlo Andreani
Attorney at Law
582 Market Street, Suite 811
San Francisco, CA 94101
(2 copies)

Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

CCAP
2407 J Street, Suite 301
Sacramento, CA 95816

The Honorable Michael R. Keitz
Madera County District Attorney
209 West Yosemite Avenue
Madera, CA 93637

Madera County Superior Court
209 West Yosemite Avenue
Madera, CA 93637

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 24, 2011, at Sacramento, California.

_____
Declarant

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