In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC ANDERSON,

Defendant and Appellant.

CAPITAL CASE

Case No. S138474

San Diego County Superior Court
Case No. SCE230405
The Honorable Lantz Lewis, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

I. THE RECORD DOES NOT SUPPORT ANDERSON'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT BY VIOLATING DISCOVERY OBLIGATIONS

Appellant contends the prosecutor failed to timely disclose Handshoe's pretrial statement to authorities, and that the delayed disclosure violated California's discovery statutes and his Sixth, Eighth, and Fourteenth Amendment rights to a fair trial and to a fair and reliable penalty determination. He further argues the trial court erred by failing to order an appropriate remedy. (Supp. AOB 14-38.) Appellant forfeited the claim there was a discovery violation by failing to raise it in the trial court. Even if not forfeited, the claim lacks merit. There was no violation of the discovery statutes because those statutes authorize a court to order the withholding of otherwise discoverable information upon a showing of good cause, and the record shows the prosecutor sought such an order with respect to Handshoe's statement. The record further shows that when circumstances changed such that delaying disclosure was no longer justifiable, the prosecutor promptly turned over the statement. And there was no violation of appellant's constitutional rights because the statement was disclosed sufficiently in advance of the start of testimony to give appellant an adequate opportunity to make use of the statement at trial. For similar reasons, the trial court properly exercised its discretion in denying appellant's motions for a mistrial and a continuance.

A. Trial Court Proceedings

By the end of February 2005 (all further references to dates in this section are to the year 2005), a joint trial of all four defendants was scheduled to begin May 2, or within ten days thereafter. (9 CT 1800, 1803; 3 RT 600-248—600-250.) On April 11, Handshoe participated in a recorded interview with authorities—known as a "free talk"—in an effort to

reach a plea bargain. (13 RT 2212-2213; 22 RT 3803-3804; 9 CT 1840; 45 CT 9164-9252; see *People v. Rices* (2017) 4 Cal.5th 49, 82 ["As used here, it appears a 'free talk' is a statement about the crime that a criminal defendant provided to the prosecutor or investigator (or both), in defense counsel's presence, with the aim of possibly leading to a plea bargain and the defendant testifying against a codefendant."].) After the free talk, the district attorney offered a deal that included a 22-year prison term, but Handshoe rejected that offer. (22 RT 3805.) The exact dates of the offer and the rejection are not reflected in the record on appeal.

On April 22, the court scheduled a status conference for May 5, and the commencement of jury selection for May 6. (9 CT 1819-1820.)

On May 2, the prosecutor submitted a transcript of the free talk to the court, along with a written joint request by the prosecutor and Handshoe's attorney for an order that the transcript not be disclosed "because it was not exculpatory and the deal had fallen through," and because of "safety issues." (13 RT 2221-2223; see 45 CT 9253 [envelop relating to "free talk" file stamped May 2, 2005].) The court needed time to research the matter, and did not immediately rule on the request. (13 RT 2221-2223.)

On May 6, prospective jurors were sworn, and the court provided an orientation. Prospective jurors not seeking to be excused from service based on a legal hardship were released until at least May 11. The remaining prospective jurors were examined by the court and counsel regarding their requests to be excused. (9 CT 1825-1826.)

Voir dire began May 11. (9 CT 1827.) The court had planned to meet with the prosecutor and Handshoe's attorney, after voir dire concluded for the day, to discuss the May 2 request to withhold Handshoe's statement. (13 RT 2222.) Coincidentally, that same day, Handshoe accepted a plea bargain, which included a 17-year prison term, and pleaded guilty late that afternoon. (10 RT 1601; 13 RT 2222; 9 CT 1829-1830.) A copy of the

change of plea form, the written plea bargain, and a transcript of the April 11 free talk were filed with the court. (13 RT 2212; 45 CT 9156-9252.) The prosecutor provided a transcript of the free talk to appellant the following morning. (43 CT 8857-8858; see 10 RT 1601; 11 RT 1863.)

Appellant moved for a mistrial based on the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (10 RT 1608; 12 RT 2177; 43 CT 8858.) In the alternative, he requested a 30 day continuance. (10 RT 1604-1605; 11 RT 1861-1862; 43 CT 8858-8859.)

Appellant argued a mistrial was required because Handshoe's attorney had already participated in voir dire on May 11 with a third of the potential jurors, and this resulted in irreparable prejudice to appellant. (10 RT 1606.) He also argued that his own questioning of the prospective jurors would have been different, and he would have suggested different questions for the jury questionnaires, had he been aware of Handshoe's statement sooner. (10 RT 1608-1609; 13 RT 2177, 2187-2189.) Appellant argued a continuance was required because Handshoe's plea agreement came as a surprise, and necessitated additional preparation and investigation. (10 RT 1605-1609; 11 RT 1861-1862; 13 RT 2177-2179, 2182-2187.)

The trial court denied both requests. (10 RT 1605, 1609; 11 RT 1864; 13 RT 2227-2228; 9 CT 1840.) The court did not state reasons for denying the motion for mistrial, but said with respect to the continuance motion that it concluded the interest of justice would not be served by another continuance of the trial date. (13 RT 2228.) The court explained there was no "significant shift in the prosecution theory of the case" based on Handshoe's statement, and "no substantial change in what the People will be presenting" as far as evidence. (13 RT 2227; see also 13 RT 2227-2228 ["it appears that Mr. Handshoe's testimony would be cumulative of that evidence that the People have already put on the table"].) It further noted that the prosecutor had indicated Handshoe would be called as a witness

near the end of the People's case-in-chief (see 13 RT 2191), which the court estimated would be about a month away. (22 RT 2228.) Handshoe was not in fact called as a witness until June 3, some 17 days after the court's ruling. (22 RT 3749.) Finally, the court observed that some of the potential impeachment evidence against Handshoe the defense now wanted to review would not have been accessible before the trial even if Handshoe's status as a witness had been known earlier. (13 RT 2228.)

B. Anderson Forfeited His Prosecutorial Misconduct Claim by Failing to Raise It in the Trial Court

Appellant's prosecutorial misconduct argument is forfeited because he failed to advance that argument in the trial court. While he argued the defense was unfairly surprised by Handshoe's decision to plead guilty and to turn state's evidence on the eve of trial, he never asserted that the defense's predicament was the result of discovery violations or some other form of misconduct by the prosecutor. Indeed, appellant disclaimed any such arguments. In arguing for a continuance, appellant's counsel told the court:

> "I have cited a number of cases that I think apply by analogy that have to do with the discovery statute. The discovery statute is we're supposed to know about all of the prosecutor's witnesses and their statements 30 days prior to trial. The purpose of that rule is to prevent unfair surprise. *And I'm not saying that it is necessarily a violation of the discovery agreement*. Mr. McAllister did know about this statement in the free talk 30 days prior to trial,[1] but since no agreement had been reached with Mr. Handshoe for his testimony, I understand why that was not turned over to us. There was no way he could call Mr. Handshoe without Mr. Handshoe agreeing to some cooperation agreement, but that does not change the fact that all of us are put in the position of being unfairly surprised at the last moment. I think when I say 30 day's continuance as an alternative to a mistrial,

[1] The prosecutor could not have known of Handshoe's statement 30 days before trial. Trial was scheduled for May 6, and Handshoe did not provide his statement until April 11.

I'm relying on the discovery statute as some kind of presumption of the amount of time that's needed to avoid an unfair, last-minute surprise like this."

(13 RT 2178-2179, emphasis added.)

Thus, appellant never presented the issue of whether the prosecutor violated discovery obligations or otherwise committed misconduct, and the trial court never ruled on such issues. Instead, the issue presented to and ruled on by the trial court was confined to whether the surprise circumstance of a co-defendant striking an eleventh-hour deal with the prosecution required either a mistrial or a continuance in order to protect appellant's right to a fair trial. Therefore, appellant's arguments relating to alleged misconduct and discovery violations are forfeited. (Cf. *People v. Banks* (2014) 59 Cal.4th 1113, 1192-1194 [defendant forfeited statutory and constitutional claims relating to alleged discovery violation by failing to raise them in trial court], overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

C. The Record Shows the Prosecutor Acted Consistently with Penal Code Sections 1054.1 and 1054.7 by Seeking an Order of the Court to Withhold Handshoe's Statement

A prosecutor has a statutory obligation to disclose to the defense, at least 30 days before trial or immediately if discovered within 30 days of trial, statements of all defendants and statements of all persons he intends to call as a witness at trial. (Pen. Code, §§ 1054.1, 1054.7.) However, such statements need not be disclosed to the defense within these timeframes upon a showing of good cause. (Pen. Code, § 1054.7.) Good cause is limited to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (*Ibid*.)

Appellant's allegation that the prosecutor violated his statutory discovery obligations is based on an erroneous factual premise. Appellant repeatedly asserts that, prior to Handshoe's guilty plea, the prosecutor hid from the court the fact that Handshoe provided a statement to authorities. (Supp. AOB 14 ["the prosecutor took no steps before or after the interview with Handshoe to seek leave for delayed disclosure"], 30 ["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 outcome of plea negotiations"], 32 ["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"].) But he offers no citations to the record to support these assertions and, in fact, the record shows otherwise.

Shortly before denying the motions for mistrial and continuance, the trial court informed the parties that on May 2 the prosecutor submitted to the court a transcript of Handshoe's April 11 free talk, and a written joint request by the prosecutor and Handshoe's attorney for an order that the transcript not be disclosed "because it was not exculpatory and the deal had fallen through," and because of "safety issues." (13 RT 2221-2223.) The prosecutor's request was authorized by Penal Code section 1054.7. Accordingly, the prosecutor did not violate his discovery obligations under Penal Code sections 1054.1 and 1054.7.

Nor did the prosecutor violate his constitutional duty to disclose evidence that is both favorable to appellant and material to either guilt or punishment. (See *In re Sassounian* (1995) 9 Cal.4th 535, 543 [discussing this constitutional obligation].) First, Handshoe's statement was not favorable to appellant (appellant does not contend otherwise in his supplemental brief). (*People v. Rices*, *supra*, 4 Cal.5th at 84 [no *Brady* violation where "free talk contained nothing favorable to defendant"].) And

second, the statement was disclosed to appellant 11 days before opening statements (10 RT 1601; 11 RT 1863; 15 RT 2315 et seq.; CT 1842-1843), thereby providing the defense sufficient time to make use of the statement at trial (see *People v. Morrison* (2004) 34 Cal.4th 698, 715 ["when information is fully available to a defendant at the time of trial . . . the defendant has no *Brady* claim"]; e.g., *People v. Wright* (1985) 39 Cal.3d 576, 591 [finding no deprivation of right to fair trial where impeachment evidence was disclosed after closing arguments and jury instructions, but before deliberations began, because trial court was "able to allow defendant to present the additional evidence to the jury in a timely manner, so that it could be considered in their deliberations"]; *United States v. O'Hara* (7th Cir. 2002) 301 F.3d 563, 569 [finding no *Brady* violation where information was disclosed during trial because the defense had sufficient time to make use of the material]).

D. The Trial Court Properly Denied Anderson's Motions for Mistrial and Continuance Because Handshoe's Statement Was Provided to the Defense in Sufficient Time for It to be Used at Trial

To the extent appellant argues the trial court erred in failing to grant a mistrial or a continuance independent of any alleged discovery violation, his argument fails. A mistrial should be granted "'only when a party's chances of receiving a fair trial have been irreparably damaged.'" (*People v. Clark* (2011) 52 Cal.4th 856, 990; see also *Renico v. Lett* (2010) 559 U.S. 766, 774 ["a mistrial is appropriate when there is a '"high degree"' of necessity"].) The decision to grant a mistrial rests within the sound discretion of the trial court. (*Renico v. Lett*, 559 U.S. at p. 774; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Likewise, the decision to grant a continuance in the midst of trial is a matter for the sound discretion of the trial court, who must ultimately determine whether "substantial justice will be accomplished or defeated by granting the motion." (*People v. Samayoa*

(1997) 15 Cal.4th 795, 840.) A denial of a motion to continue does not require reversal absent a showing of an abuse of discretion and prejudice to the defendant. (*Ibid*.; see also *Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [ruling on a continuance motion will be erroneous only where it is "so arbitrary as to violate due process"].)

Here, the trial court did not abuse its discretion by denying appellant's motions. Jury selection continued for three more days following disclosure of Handshoe's statement. (9 CT 1831-1836; 10 RT 1613-12 RT 2157.) Opening statements occurred 11 days after the disclosure (9 CT 1842-1843 [opening statements began May 23]), and Handshoe was called as a witness 22 days after (22 RT 3749 [Handshoe called on June 3]). In addition, as the trial court noted and respondent argued in its Respondent's Brief, Handshoe's testimony was largely cumulative to other evidence. (13 RT 2227-2228; RB 71.) When Handshoe was finally called as a witness, Anderson did not object on the ground that he had not had sufficient time to prepare for cross-examination. (See 22 RT 3749.) Accordingly, appellant had sufficient time and opportunity to adjust to the change in circumstances brought by Handshoe's guilty plea and the disclosure of his statement, and the record fails to show that the trial court's decision was arbitrary, such that it resulted in an unfair trial.

II. THE RECORD DOES NOT SUPPORT ANDERSON'S CLAIM THAT THE JURY RECEIVED A COPY OF HANDSHOE'S PRETRIAL STATEMENT

Appellant contends the prosecutor committed misconduct by not offering to redact one paragraph from the transcript of Handshoe's interview before it was provided to the jury, and that the trial court erred in not making the redaction sua sponte. (Supp. AOB 38-49.) According to appellant, the paragraph was inadmissible because it showed the prosecutor vouching for Handshoe's credibility, and the prosecutor referring to

statements that were not in evidence. (Supp. AOB 38, 42, 43.) Although appellant frames this issue principally as one of prosecutorial misconduct, it is more aptly characterized as an evidentiary issue because he is complaining about the admission of particular evidence. In any event, he forfeited this issue by failing to object at trial. Even if not forfeited, his contention lacks merit. Like the previous claim, appellant's contention here is based on an assertion of fact that is not supported by the record. Specifically, there is no support in the record for the assertion that the jury was given a transcript of Handshoe's interview.

A. Anderson Forfeited His Claim That the Jury Improperly Received a Copy of Handshoe's Statement by Failing to Raise It in the Trial Court

Appellant does not assert that he objected below to the jury receiving a copy of Handshoe's transcript, and respondent cannot find any indication in the record that he did so. Therefore, the issue is forfeited on appeal. (Evid. Code, § 353; see, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 717.)

B. There Is No Indication in the Record That the Jury Received a Transcript of Handshoe's Statement

Appellant asserts that a transcript of Handshoe's free talk was provided to the jury during deliberations. (Supp. AOB 38 [asserting the "interview transcript that formed part of Handshoe's plea agreement [was] given to the jury for its deliberations," and "the jury was allowed to review an unredacted transcript"]; 43 ["the prosecutor committed misconduct in allowing the unedited interview transcript to go before the jury"]; 45 ["the trial court violated Penal Code section 1137 in allowing the jury access to the unredacted interview transcript"].) However, he fails to cite to the record to support this assertion. (See Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a) [an appellant is required to "[s]upport any reference to a matter in the record by a citation to the volume and page

number of the record where the matter appears"].) And respondent's review of the record failed to find any support for it.

Appellant seems to rely on a statement of the trial court to the jury, made during closing arguments, that "you will have a copy of the agreement that was reached with Mr. Handshoe." (Supp. AOB 42 [citing 30 RT 5296].) While this statement supports the conclusion that the jury received a copy of the *plea agreement*, it does not support the conclusion that it received a copy of the *transcript of the free talk*.

On May 17, 2005, the trial court acknowledged having received a copy of the transcript along with the prosecutor's request to delay disclosure of the transcript. (13 RT 2221-2223.) The court also stated that the transcript, along with Handshoe's change-of-plea form and the plea agreement, would be part of the trial record. (13 RT 2212; see 45 CT 9156-9253.) On June 3, 2005, during Handshoe's testimony, the prosecutor offered three pages as People's Exhibit 66, consisting of a one-page agreement outlining the terms of the free talk, and a two-page plea agreement; the exhibit did not include the interview transcript. (22 RT 3750-51 [Exhibit 66 offered during testimony]; 8 CT 1635 [People's Exhibit List reflecting Exhibit 66]; 43 CT 9007-9009 [copy of People's Exhibit 66].) The exhibit was received in evidence the same day, and presumably made available to the jury during its deliberations. (8 CT 1635.) The trial court's statement to the jury is most reasonably understood as referring to People's Exhibit 66, which does not include a copy of the transcript. Respondent could find no indication in the record that the transcript of the free talk was in fact provided to the jury, and there is otherwise no reason to believe that it was since it was not admitted in evidence during the trial. (See 8 CT 1634-1638 [People's and Defense's Exhibit Lists].)

Because the record does not support appellant's contention that a transcript of Handshoe's free talk was provided to the jury, his claim must fail. To analyze the propriety of allowing the free talk into evidence under these circumstances would be an exercise in speculation. (Cf. *People v. Waidla*, *supra*, 22 Cal.4th at p. 717 [failure to object in trial court resulted in a record that was insufficient to analyze evidentiary issue raised on appeal].)

C. Even If the Transcript of Handshoe's Free Talk Was Erroneously Admitted in Evidence, Reversal Is Not Required Because the Error Was Harmless

Even if Handshoe's free talk was erroneously provided to the jury, reversal is not required because, in light of the whole record, it is not reasonably probable that a result more favorable to Anderson would have been reached in the absence of the error.

Under the California Constitution, the erroneous admission of evidence does not require reversal of a conviction or sentence unless the error resulted in a miscarriage of justice, which will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the defense would have been reached in the absence of the error. (Cal. Const. art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) That hurdle cannot be satisfied in this instance.

Appellant offers only one reason in support of his claim that the transcript was prejudicial: because in one paragraph of the 89-page transcript, the prosecutor allegedly vouched for Handshoe's credibility. (Supp. AOB 48-49.) The offending language is identified by appellants as the following:

> And I, I said it before, I will say it again, I have listened to some of your conversations that you made, telephone call, 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.

(AOB 39, quoting 45 CT 9166.)

This language does not demonstrate impermissible vouching. "As a general matter, '[i]mpermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1329.) The remarks identified by Anderson cannot reasonably be interpreted as vouching for the credibility of Handshoe's testimony, or even his pre-trial statements, because they were made before the prosecutor ever heard what Handshoe had to say. The prosecutor was merely explaining that he was willing to listen to Handshoe, and possibly negotiate a plea bargain, because he believed that Handshoe had expressed remorse. Therefore, no reasonable juror would be inclined to abdicate his responsibility to independently assess Handshoe's credibility based upon the prosecutor's remarks. (See *id*. at 1329-1330 ["The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and rely on the government's view of the evidence.'"].)

In addition, the prosecutor's remarks, in context of the whole record, were insignificant in terms of assessing the credibility of Handshoe's testimony. This is so for three reasons. First, the jurors were able to make their own, first-hand assessment of Handshoe's credibility while he

answered questions by the prosecutor on direct examination, and while he was cross-examined by three defense attorneys.

Second, the jurors were provided independent evidence that corroborated Handshoe's testimony about Anderson's involvement in the murder. For example, Handshoe testified that on the day of the murder Anderson was in Handshoe's mobile home with a gun and disguises, Anderson talked about burglarizing a house, and Anderson said something to the effect of, "We're going to do this right." (22 RT 3792-3793, 3857-3860, 3892-3894, 3911-3913.) Handshoe also testified that Anderson drove his Bronco to the Brucker residence (22 RT 3752), and that Anderson walked towards the front door of the Brucker residence with a .45 caliber handgun shortly before a gunshot rang out (22 RT 3755-3757). All of these material assertions were corroborated by other witnesses. Peretti testified that Anderson was at Handshoe's mobile home with guns and a disguise (16 RT 2500-2502, 2504, 2507-2510), that Anderson talked about committing a robbery of a house with a red car and a white car and a safe (16 RT 2510, 2512-2516), and that Anderson pulled a handgun from his waistband, pulled the slide back, and said, "Let's do this fast," after which he drove away in his Bronco with Handshoe and Huhn (16 RT 2520-2521, 2533-2534, 2538). Four witnesses testified to seeing a Bronco similar to Anderson's near the Brucker residence the day of the murder. (18 RT 2980-2986, 2991, 2999-3000, 3083-3085; 19 RT 3258-3264.) And a deputy sheriff testified he found a .45 caliber shell casing outside the front door of the Brucker residence. (17 RT 2824, 2826-2827.)

And third, while Handshoe's credibility was addressed by counsel during their closing arguments, the prosecutor's comments cited above were never brought to the attention of the jurors. (See 29 RT 5880-5133 [prosecutor's opening argument], 29 RT 5138-5176 [Lee's argument]; 30

RT 5188-5261 [Anderson's argument], 5273-5330 [prosecutor's closing argument].)

Considering the foregoing circumstances, it is not reasonably probable that a result more favorable to Anderson would have been reached had the prosecutor's remark about believing Handshoe was remorseful not been given to the jurors (assuming for the sake of argument that it was given to the jurors).

Anderson contends the alleged error should be subject to the federal harmless error standard, articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, because the error implicated his constitutional right to a fair trial. (Supp. AOB 48.) "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403.) Respondent disagrees that the *Chapman* harmless error test is applicable here, because even if the prosecutor's remarks contained in the transcript of the free talk were improperly admitted, for the reasons discussed above, they did not render the trial fundamentally unfair. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 ["admission of evidence . . . results in a due process violation only if it makes the trial *fundamentally unfair*"].) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Ibid*.) But even under the *Chapman* standard, for the same reasons the alleged error was harmless under the state standard, any error was harmless beyond a reasonable doubt.

III. THE TRIAL COURT'S DECISION NOT TO SEVER ANDERSON'S TRIAL FROM THE TRIALS OF HANDSHOE AND LEE DID NOT RESULT IN A DENIAL OF DUE PROCESS

Appellant revisits Argument I from his opening brief, wherein he argues the trial court erred in denying his motion to sever his trial from that of co-defendant Lee. In addition to the contentions he made in the opening brief, appellant now argues the trial court's decision not to sever his trial from the trials of both Lee and Handshoe denied him a fair trial, and points to allegedly additional prejudice that resulted from the trial court's ruling; namely, the impact of Handshoe's decision to become a prosecution witness, the impact of the dismissal of the conspiracy charge against Lee, and the impact of Lee's allegedly antagonistic defense. (Supp. AOB 49-68.) These arguments, combined with appellant's arguments contained in the opening brief, fail to demonstrate that Anderson's trial was not fair.

A. The Refusal to Sever Handshoe's Trial Did Not Render Anderson's Trial Unfair Because Handshoe Had No Material Role in Selecting Appellant's Jury

Appellant argues that, because the trial court denied his motion to sever Handshoe's trial from his own, he suffered prejudicial effects from Handshoe's late decision to accept a plea bargain and testify for the prosecution. He asserts he was unduly prejudiced in three ways: 1) Handshoe's lawyer "was able to ingratiate himself to a large section of the venire"; 2) he was deprived of an opportunity to question some of the potential jurors about "testifying accomplice issues"; and 3) he had a limited ability to consider and address the factual basis of Handshoe's guilty plea. (Supp. AOB 57.) Appellant's argument is unpersuasive.

The second and third points are unrelated to the trial court's decision to order a joint trial. The timing of appellant's knowledge of Handshoe's statement and plea deal, and the effect of that timing on his ability to question prospective jurors and to use that information for trial preparation,

was solely dependent upon the timing of Handshoe's plea agreement, and the timing of the trial court making a decision on the prosecution's request to avoid disclosure of the statement. Regardless of whether separate trials had been ordered, unless and until Handshoe agreed to testify for the prosecution, there would be no "testifying accomplice issues" to ask prospective jurors about. And even if Handshoe had participated in a free talk but never reached a plea deal, the timing of the disclosure of his statement depended upon the timing of the trial court making a ruling on the prosecution's request to avoid disclosure. In either circumstance, the alleged harm to appellant's case did not have a causal link to the trial court's decision on the motion to sever, and therefore cannot be considered a prejudicial result of that ruling.

The first point appellant raises is different. It is true that, had the court ordered separate trials, Handshoe's counsel would not have participated in any part of the jury selection process in appellant's case. Nonetheless, appellant fails to show that this limited participation resulted in an unfair trial. He claims he was prejudiced because Handshoe's counsel "ingratiate[d] himself" with some of the jury venire (Supp. AOB 57), and that he had an "undue influence on the jury" (Supp. AOB 55). But these allegations are conclusory and speculative, and unsupported by any citations to the record.

Handshoe's attorney, Mr. Williams, participated in voir dire only one out of three full days. (See 9 RT 1340 thru 11 RT 2111.) During that one day, his questioning of prospective jurors consumed only 15 transcript pages with one group (9 RT 1363-1377), and only 10 transcript pages with a second group (9 RT 1564-1573). His questions were general in nature, in that they were not focused on Handshoe or on any particular evidence; instead, they were directed at finding if any prospective jurors harbored prejudices that would inhibit their ability to be a fair juror. After that first

day, Mr. Williams no longer appeared as counsel in the case. (See 10 RT 1601 et seq.) He took no further part in voir dire (10 RT 1613-11 RT 2117), and did not exercise peremptory challenges against prospective jurors. (12 RT 2137-2157.) Nothing about these circumstances supports appellant's claim that Mr. Williams ingratiated himself or had an undue influence on the jury.

Moreover, the two Florida cases relied on by appellant are materially different from the circumstances here, and do not support his position. In *Kritzman v. State* (Fla. 1988) 520 So.2d 568, the state charged Kritzman and two co-defendants with capital murder and their cases were joined for trial. One of the co-defendants, Mailhes, struck a deal with the prosecution. In return for pleading guilty to first degree murder and testifying against his co-defendants, the state agreed to recommend a life sentence for Mailhes. Even though Mailhes had pleaded guilty before the trial began, he was allowed to participate fully in selecting a jury, for purposes of the penalty phase of the trial. (*Id*. at p. 569.) The Florida Supreme Court reversed Kritzman's conviction and death sentence. It reasoned that "[a]llowing 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." (*Id*. at p. 570.) It also found that Kritzman suffered prejudice, because the jurors "were conditioned by Mailhes' attorney's questions during voir dire to believe his client's story implicating the codefendant and exonerating himself," and because "the state's chief witness" was permitted "to excuse jurors who would be prone to disbelieving his story, which implicates Kritzman." (*Ibid*.) These circumstances deprived Kritzman of the ability to fairly choose jurors without interference from a state's witness. (*Ibid*.)

In *Allen v. State* (Fla.Dist.Ct.App. 1990) 566 So.2d 892, a codefendant participated fully in jury selection, and struck two of the

prospective jurors that Allen had accepted. The codefendant then accepted a plea bargain and testified for the state against Allen. The court reversed Allen's conviction, finding that he was denied a fair trial "because he was tried before a jury partially chosen by a former codefendant testifying for the state." (*Id*. at p. 893.)

Here, in contrast, Handshoe was not permitted to excuse prospective jurors, and was not given an opportunity to condition prospective jurors about his testimony once he decided to become a witness. When Handshoe initially participated in the jury selection process, he did so while similarly situated to appellant, and while their interests were aligned; when he agreed to become a witness, he no longer participated in the process.

B. The Refusal to Sever Lee's Trial Did Not Render Anderson's Trial Unfair Because Lee's Defense Did Not Undermine Anderson's Ability to Present a Defense

Appellant argues that, because the trial court denied his motion to sever Lee's trial from his own, he suffered prejudicial effects from the dismissal of the conspiracy charge against Lee at the conclusion of the prosecution's case-in-chief and from Lee's defense, which appellant contends was antagonistic to his own. (Supp. AOB 57-66.) These arguments are redundant to the arguments raised in the opening brief. (Compare with AOB 37-44.) As argued in the respondent's brief, Lee's defense was not antagonistic to Anderson's defense, and there was substantial independent evidence demonstrating Anderson's guilt. (RB 32-35.) Moreover, the joint trial did not in fact result in an unfair trial for Anderson because the acceptance of Lee's defense at trial did not require the jury to reject Anderson's defense, and because Anderson cannot point to any evidence that was impermissibly offered against him as a result of the joint trials. (See RB 35-41.)

IV. THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF ANDERSON'S CELL PHONE USAGE

Appellant contends the admission of evidence relating to his cellular phone usage violated his constitutional rights because the evidence was the fruit of an unreasonable search and seizure, it was unreliable, and it amounted to hearsay, which deprived him of the right to confront the witnesses against him. Appellant forfeited the claims that the evidence should have been excluded on the grounds of unreliability and confrontation. Regardless of forfeiture, none of these claims has merit.

A. The Trial Court Was Not Required to Exclude Evidence Relating to Anderson's Cell Phone Records on the Basis That It Was Hearsay and Therefore Violated His Confrontation Rights

Appellant contends his Sixth Amendment right to confrontation was violated because two Cingular Wireless employees who testified for the prosecution relied on hexadecimal translations of cell phone data contained in business records, and those translations were performed by a third Cingular Wireless employee who was not called as a witness. (Supp. AOB 71-74.) But appellant did not raise this issue in the trial court, so it is forfeited. For this same reason, the record is unclear regarding the facts relevant to Anderson's claim. In any event, Anderson's contention lacks merit because the challenged evidence is not the type of "testimonial" evidence that implicates the Confrontation Clause.

1. Anderson Forfeited His Sixth Amendment Confrontation Claim by Failing to Raise It in the Trial Court

Appellant does not assert that he advanced this theory of exclusion in the trial court, and respondent cannot find any indication in the record that he did so. Therefore, the issue is forfeited on appeal. (Evid. Code, § 353; see, e.g., *People v. Waidla*, *supra*, 22 Cal.4th at p. 717.)

2. The Record Is Unclear Regarding Facts Relevant to Anderson's Sixth Amendment Confrontation Claim

Appellant asserts that hexadecimal translations of cell phone data performed by a Cingular Wireless employee named Tim Tomasello were relied on by prosecution witnesses Ramona Tischer and Christopher Taylor at trial. (Supp. AOB 71 [citing 20 RT 3303 and 2 CT 382].) But his record citations do not necessarily support this assertion.

The prosecution introduced business records of Cingular Wireless, which showed the location of cell towers used by appellant's cell phone during particular calls. (20 RT 3301-3309, 3316-3324 [People's Exhibits 52-56], 3373-3380 [People's Exhibit 62]; 8 CT 1635 [Clerk's Exhibit List].) It appears that the individual cell towers are represented in Cingular's records as decimal numbers, and that Cingular's business records also include a legend that correlates those numbers with the geographical locations of the towers. (See 20 RT 3301, 3349.) After a period of time, Cingular archives its customer records, and when it does this, in order to save computer space, it converts decimal numbers to hexadecimal numbers. (20 RT 3301, 3347.) When archived records are retrieved, like in this case, they remain in hexadecimal numbers. (See 20 RT 3349.) Thus, in order to correlate the archived cell site information from a particular user's account with the cell tower legend, the hexadecimal numbers need to be converted back to decimal numbers.

Tischer told the jury that, prior to her testimony, she had been shown Cingular Wireless records submitted to the court pursuant to a subpoena. Those records had been presented to her before trial for "interpretation." (20 RT 3301-3303 [referring to People's Exh. 52].) On cross-examination, she testified those same records had been sent to the court by Tomasello, who indicated on the front of the documents that he had retrieved the

records from archives and translated certain values from hexadecimal to decimal. (20 RT 3348-3349.) According to Tischer, the translations by Tomasello related to cell site numbers; Tomasello did not translate the cell phone numbers that were involved in the calls. Instead, Tischer, who knew how to convert hexadecimal numbers to decimal numbers, did those translations herself. (20 RT 3345-3350.)

What is unclear is whether Tischer also did her own translations of the cell site data. It appears that the subpoenaed documents from Tomasello included the archived data for both the site information and the cell phone number information. In pretrial hearings, the prosecutor indicated that Tomasello provided two pages of "computer language that was meaningless," that Tomasello provided "limited interpretation" of those pages, and that Tomasello indicated "the information needed to be converted from the Hexadecimal system to the Decimal system." (2 CT 382.) The prosecutor also indicated that he made those conversions himself, then met with Cingular Wireless personnel in San Diego to confirm his conversions were correct and "to establish the various cell site locations pertinent to April 14, 2003." (*Ibid*.)

Tischer's testimony also suggests that all the raw data was contained in the records:

> Q. Now, if you take a look at these records, what is actually translated here are numbers that pertain to cell sites; is that correct?
>
> A. Yes.
>
> Q. But in the records that were produced by Mr. Tomasello, there is no – it doesn't – at least to me it does not appear to be a translation in terms of what numbers are called and so forth.

A. These are actually the numbers that are called. And what you need to do is go through this and flip them around.

(20 RT 3349-3350.)

This testimony suggests the records included raw data for cell site information and call information, and that some of the raw data had been translated but some had not been.

Elsewhere, Tischer testified that she was provided with these records to "correlate and interpret." (20 RT 3300-3303 [referring to People's Exh. 52].) Finally, Tischer testified that she did the conversions shown on People's Exhibit 53, which were records of relevant calls highlighted by the prosecutor during Tischer's testimony. (20 RT 3350.) That testimony included caller information and cell site information. (20 RT 3304-3324.)

Thus, while there is no dispute that Tomasello provided certain translations of cell site information in documents returned to the court, it is not clear that those translations were relied upon by Tischer in her testimony.

Appellant also contends that Taylor relied on Tomasello's translations. (Supp. AOB 74.) But again, the record is unclear on this point. Taylor testified about cell site locations based on cell site data that had been translated by someone else, but he did not know who had done the translations. (20 RT 3391-3392.) It could have been Tischer.

3. The Confrontation Clause Was Not Violated Because the Challenged Evidence Was Not "Testimonial"

Even if Tischer and Taylor relied on Tomasello's translations, there was no confrontation violation because the numerical translations are not "testimonial" evidence within the meaning of Confrontation Clause jurisprudence.

Not all hearsay implicates the Confrontation Clause. (*Crawford v. Washington* (2004) 541 U.S. 36, 51.) Instead, the Confrontation Clause is principally concerned with "testimonial" statements against an accused. (*Id*. at pp. 51-53.) In determining whether certain evidence is testimonial, and therefore whether it implicates the Confrontation Clause, the Supreme Court has looked to the purpose behind the clause. (See *Williams v. Illinois* (2012) 567 U.S. 50, 82-83.) "The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id*. at p. 82.) The numerical translations at issue here do not have these characteristics.

The hexadecimal and decimal systems are objective, fixed numerical systems with a defined conversion process that is readily accessible to the public. (See, e.g., Permadi, *Converting Hexadecimal to Decimal* <http://www.permadi.com/tutorial/numHexToDec/> [as of Feb. 21, 2018].) Archived cell site information from Cingular's records, that is, the hexadecimal representations of the various cell towers, was received in evidence at trial. (20 RT 3301-3304, 3348-3351) So, too, were Tomasello's conversions to the decimal system. (20 RT 3349.) These records were also provided to appellant in discovery prior to trial. (2 CT 382-383.) Accordingly, the defense had everything it needed to verify, or contest, the conversions shown in the documents received in evidence. It is no different than if a record contained the Roman numerals XXV, and they needed to be converted to Arabic numerals: the one and only answer of 25 is as easily accessible to the defense as anyone else. In these circumstances, because numerical conversions are independently verifiable neutral facts,

Tomasello's translations of hexadecimal numbers do not amount to testimonial statements against appellant in a constitutional sense.

B. The Trial Court Was Not Required to Exclude Evidence Relating to Anderson's Cell Phone Records on the Basis That It Was Unreliable

Appellant contends that testimony based on cell phone data that was translated from hexadecimal to decimal numbers was unreliable, and therefore its admission violated his constitutional rights to a fair trial and a reliable penalty determination. (Supp. AOB 75-76.) This claim is forfeited and it lacks merit.

1. Anderson Forfeited His Due Process Claim by Failing to Raise It in the Trial Court

Appellant does not assert that he advanced this theory of exclusion in the trial court, and respondent cannot find any indication in the record that he did so. Therefore, the issue is forfeited on appeal. (Evid. Code, § 353; see, e.g., *People v. Waidla*, *supra*, 22 Cal.4th at p. 717.)

2. The Due Process Clause Was Not Violated Because the Challenged Evidence Did Not Render Anderson's Trial Fundamentally Unfair

Appellant offers no explanation to support his contention that the testimony about cell phone data was unreliable. (See Supp. AOB 75-76.) However, his supplemental brief otherwise suggests that he bases his contention on the fact that, during defense counsel's cross-examination of Tischer, she could not explain anomalies in two instances of numerical translations of appellant's cell phone number from hexadecimal to decimal. (See Supp. AOB 81 [citing to 20 RT 3353-3355 as proof that the evidence was unreliable].) But this does not prove that the translations offered in evidence were wrong or even unreliable—it only suggests the prosecution's witness was not so expert in hexadecimal translations such that she could

explain those two anomalies. Appellant offered no evidence to show that the results of the translation were in fact wrong.

Even if the reliability of the testimony was questionable, appellant's constitutional rights were not violated by its admission. The Due Process Clause does little to regulate the admission of evidence, which is generally left to state and federal statutes. (*Perry v. New Hampshire* (2010) 565 U.S. 228, 237; *Dowling v. United States* (1990) 493 U.S. 342, 352-354; *People v. Fuiava* (2012) 53 Cal.4th 622, 696-697.) "The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." (*Perry*, at p. 237.) "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' [citation], have we imposed a constraint tied to the Due Process Clause." (*Ibid*.; accord *People v. Partida*, *supra*, 37 Cal.4th at p. 439 ["admission of evidence . . . results in a due process violation only if it makes the trial *fundamentally unfair*"].) Accordingly, appellant's rights were fully vindicated when his attorney exposed the expert's weakness to the jury through cross-examination. (See *Delaware v. Fensterer* (1985) 474 U.S. 15, 21-22 [the Confrontation Clause is generally satisfied when the defense is given full and fair opportunity to probe and expose a witness's weaknesses, such as forgetfulness, confusion, or evasion]; also *id*. at 22-23 [reserving question of "whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial"].)

C. The Fourth Amendment Was Not Violated When the Prosecution Received Cell Phone Records from Cingular Wireless Without a Warrant Because Anderson Did Not Have a Reasonable Expectation of Privacy in Those Records

Appellant filed a pretrial motion to suppress evidence relating to "cell site" information for his phone. (4 CT 655-677.) One of the grounds advanced in support of the motion was that the prosecution obtained the cell site information from Cingular Wireless in violation of appellant's Fourth Amendment rights. Appellant argued he had a constitutionally protected privacy interest in the cell site records, and that the failure of the prosecution to obtain a search warrant for those records violated that interest. (4 CT 660, 675-677; 5 RT 895.) The trial court rejected the Fourth Amendment claim, finding that appellant did not have a constitutionally protected privacy interest in the records. (5 RT 910-912.)

Appellant maintains the trial court was wrong. (Supp. AOB 80 ["Appellant had a reasonable expectation of privacy in his cell site location information."].) For the proposition that individuals have a reasonable expectation of privacy in cell site information and that, consequently, the government's obtaining such information without a warrant violates the Fourth Amendment, appellant cites *United States v. Graham* (4th Cir. 2015) 796 F.3d 332, 344-345. (Supp. AOB 78-79.) *Graham* does make that holding. However, appellant fails to point out that an en banc panel of the Fourth Circuit reversed that holding, and held instead that individuals do not have a reasonable expectation of privacy in cell site information, and that the government does not violate the Fourth Amendment when it obtains such information from a service provider without a warrant. (*United States v. Graham* (4th Cir. 2016) (en banc) 824 F.3d 421, 425, 427). Nor does appellant acknowledge that other Circuit Courts of Appeals have uniformly reached the same conclusion. (See *United States v. Thompson*

(10th Cir. 2017) 866 F.3d 1149, 1154-1160; *United States v. Carpenter* (6th Cir. 2016) 819 F.3d 880, 887-890, cert. granted sub. nom. *Carpenter v. United States*, June 5, 2017, No. 16-402, 137 S.Ct. 2211; *United States v. Davis* (11th Cir. 2015) (en banc) 785 F.3d 498, 511-513; *In re Application of the United States for Historical Cell Site Data* (5th Cir. 2013) 724 F.3d 600, 605-615.) Thus, while a definitive decision from the Supreme Court is forthcoming in *Carpenter v. United States*, No. 16-402, relevant authorities currently support the trial court's ruling on appellant's Fourth Amendment claim.

To the extent appellant is also arguing that suppression of the evidence was required due to a failure to comply with 18 U.S.C. § 2703, this argument, too, lacks merit. (*United States v. Carpenter*, *supra*, 819 F.3d at 890 [holding that suppression of evidence is not an available remedy for violating that section].)

D. Any Error in the Admission of the Challenged Evidence Was Harmless Because There Was Otherwise Compelling Evidence Linking Appellant to the Brucker Murder

Even if cell phone information was erroneously admitted in evidence, this error does not require reversal because it was harmless beyond a reasonable doubt. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-308 [constitutional violation involving trial error is subject to harmless error analysis].) The cell phone information was but one piece of circumstantial evidence connecting appellant to the Brucker murder, and the case against appellant was otherwise compelling. Both Peretti and Paulson testified to being present when Anderson discussed plans to rob the owner of the El Cajon Speedway; a Bronco similar to Anderson's was seen leaving the victim's house around the time of the murder; Handshoe testified that Anderson drove his Bronco to the Brucker residence, approached the residence on foot armed with a .45 caliber handgun,

returned to the Bronco minutes later, and admitted he "shot the guy"; police found a .45 caliber shell casing near Brucker's front door; Peretti's description of Anderson's wig matched the description of the hair of the shooter that Brucker gave to police; Anderson threatened Handshoe, Huhn, and Northcutt that they would be next if they revealed his involvement in the murder; and Anderson changed his appearance and fled to Oregon days after the murder. Thus, there is no reasonable doubt that an erroneous admission of cell phone information was harmless.

V. THE CUMULATIVE EFFECT OF THE ALLEGED GUILT AND PENALTY PHASE ERRORS DOES NOT REQUIRE REVERSAL OF THE CONVICTIONS OR DEATH JUDGMENT

Appellant contends that, with the addition of the alleged errors contained in his supplemental opening brief, his cumulative error argument raised in the opening brief requires reversal. (Supp. AOB 82-84; see AOB 230-234.) However, for the reasons articulated in the Respondent's Brief and herein, no prejudicial errors occurred during the trial. Accordingly, appellant's theory of reversal based on cumulative error should be rejected.

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Supplemental Respondent's Brief uses a 13 point Times New Roman font and contains 8,422 words.

Dated: March 5, 2018

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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