IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| 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 REPLY BRIEF

Joanna McKim, Esq. SB#144315
P.O. Box 19493
San Diego, CA 92159
(619) 303-6897
joannamckim@cox.net
Attorney for Appellant

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## INTRODUCTION

In his supplemental opening brief, appellant argues errors pertaining to prosecutorial misconduct, trial court error in not severing appellant's case from his co-defendants, error in admitting evidence of the translated cell phone data and cumulative prejudice from the errors. In response, the Attorney General argues many of the issues were forfeited; but, there was no error anyway.

This reply brief addresses only points raised in respondent's brief that require further discussion. Any omission of argument on issues discussed more fully in appellant's supplemental opening brief and disputed in respondent's brief is not appellant's concession of such issue.

## 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 GUILTY AND PENALTY DETERMINATION

On this issue, respondent argues that appellant forfeited his claim there was a discovery violation because he failed to advance that argument in the trial court and counsel acknowledged that it was understandable why the interview was not turned over absent an agreement to cooperate by Handshoe. Respondent claims that because of this failure to advance the argument, the trial court never ruled on it. Yet, even if there was not a forfeiture, the claim lacks merit. The discovery statutes authorize a court to order the withholding of otherwise discoverable information on a showing of good cause and the prosecutor sought such an order. Also, the prosecutor turned over the statement when circumstances changed. Appellant had an adequate opportunity to use the statement at the trial. (Respondent's Brief ("RB") at pp. 9, 12.)

Contrary to what respondent argues, counsel did inform the court of the discovery violation. Counsel stated:

> "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." (11 RT 1861-62.)

Further, the trial court ruled on the request knowing of the information contained in the interview. (13 RT 2221-22.)

In any regard, appellate courts have the authority to address any issue where the issue does not involve the admission or exclusion of evidence. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.) When issues that are "close and difficult" and it is unclear whether the defendant has preserved the ground for appeal, the reviewing court can choose to reach the merits. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn.5.)

Respondent further argues that the prosecutor turned the interview over when circumstances changed; thus, there was no violation of the discovery laws. (RB at p. 9.) Appellant acknowledges his mistaken assertion in his supplemental brief, that 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. (Appellant's Supplemental Opening Brief ("SOB") at p. 30.) The court did in fact have the interview tapes prior to the change in plea and the prosecutor had requested a delay in disclosure. (13 RT 2221-22.) However, based on the fact that Handshoe admitted that starting two years before when he was arrested, in May of 2003, the intent was to reach a plea agreement with the prosecutor (22 RT 3301), the prosecutor had to have known at the time of the request to delay disclosure that a plea agreement would be reached, Handshoe would be a prosecution witness against

appellant, and the interview would be the factual basis of the plea agreement.

Respondent fails to acknowledge that there still was an unjustified delay by the prosecution in disclosing the interview. At the April 20th hearing, although Handshoe had already been interviewed, the prosecutor failed to inform the trial court of the interview or the real possibility of a plea. Had the trial court been informed of this, it would have been able to make an informed ruling on the motions and likely granted the defense's motions for severance or continuance. Yet, by May 2nd, when the prosecutor finally did disclose the interview, the circumstances had changed. The trial court already having denied the defense's motions, voir dire was soon to start.

Additionally, the trial court was informed of the interview of Handshoe on May 2nd. Yet, its ruling on the prosecution's request on disclosure was not timely. Instead, the trial court delayed its ruling and Handshoe ended up pleading guilty nine days later. None of the reasons set forth by the prosecution, i.e., safety issues, interview not exculpatory, deal falling through (13 RT 2221-23) are justifications for the delay. The trial court's failure to timely rule on the prosecution's request constituted an abuse of discretion and resulted in an ambush to the defense. The defense was unfairly surprised and lacked time to accommodate the radical change in circumstances with Handshoe's change in plea.

Respondent also argues that there was not a discovery violation because the information in the interview was not favorable to appellant and in any regard was disclosed 11 days before opening statements giving the defense adequate time. Handshoe's statement was cumulative evidence anyway and appellant's defense counsel did not object when Handshoe testified. (RB at pp. 14-16.) Appellant disagrees.

The interview was information that was required to be disclosed. Under the federal Constitution's due process clause, the prosecution has a duty to disclose to a criminal defendant evidence that is both favorable to the defendant and material on either guilt or punishment. (*In re Bacigalupo* (2012) 55 Cal. 4th 312, 334.) This duty extends to evidence reflecting on the credibility of a material witness (*People v. Hayes* (1990) 52 Cal.3d 577, 611) and any inducements made to prosecution witnesses for favorable testimony. (*People v. Westmoreland* (1976) 58 Cal. App. 3d 32, 43.) Under the state discovery statutes, this includes the statements of all defendants, relevant written or recorded statements of witnesses or reports of the 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.) Here, the transcript was the type of information that should have been disclosed. It was relevant to Handshoe's credibility and even the trial court found some of the interview possibly exculpatory. (13 RT 2222.)

Additionally, the strategy of the defense was a united defense. To expect appellant's defense team to radically alter its strategy to accommodate the change of plea in a matter of days was unrealistic, especially in a death penalty case. Further, the interview was not cumulative evidence. It contained statements about Handshoe expressing remorse for what happened and the prosecution vouching for his credibility. Even if cumulative, that does not dispense with the prosecution's duty of disclosure. In *People v. Filson* (1994) 22 Cal. App. 4th 1841, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, cited by appellant in his supplemental opening brief (SOB at pp. 30-32), the court rejected the argument that there was no duty of disclosure because the tapes were cumulative. According to the appellate court, the tapes of the defendant's statement should have been

disclosed. 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. (*Id.* at pp. 1848-50.)

Also, appellant's defense counsel objected to the lack of time to accommodate the change of plea. (10 RT 1604-1609; 11 RT 1861-62.) That he did not do so again after the trial court had denied his request and Handshoe was presented to the jury as a witness did not waive the claim. (*People v. Hill* (1998) 17 Cal.4th 800, 821.)

Finally, respondent's recitation of the facts in its brief omits mention of the defense's prejudice from its reliance on the prosecutor's inaccurate representations concerning the two burglaries discussed by Handshoe, referred to at length in appellant's supplemental opening brief at pages 24 through 29.

## 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 RIGHT TO A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY VERDICT

Respondent argues that the issue is an evidentiary issue, not prosecutorial misconduct. The issue was forfeited anyway. Also, there was nothing in the

record to indicate the jury was given a transcript of Handshoe's interview. (RB at pp. 16-17.)

Contrary to respondent's assertion, this Court has the authority to review the issue. When issues that are close and difficult, and it is unclear whether the defendant has preserved the ground for appeal, the reviewing court can choose to reach the merits. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6; *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn.5.) Here, appellant's trial counsel objected to most everything related to Handshoe, which included his testimony. (AOB at pp. 67-75.) The trial court made its position clear. It would have been futile to do more.

As to whether the jury saw the interview, the trial court stated it would send the plea agreement into the deliberations room. (30 RT 5296.) The interview formed the factual basis for the plea agreement. (43 CT 9008-09; Pros. Ex. No. 66; AOB at pp. 68-69.) There is nothing in the record to indicate that the jury did not have the interview, that it was somehow extricated from the plea agreement. The trial court itself reiterated the importance of the jury having the agreement to decide if it was mischaracterized by the prosecutor. (30 RT 5333-34.)

That said, the prosecutor had an independent 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. This was not admissible evidence. The trial court also had a duty to redact the transcript. (Pen. Code, § 1137; See also SOB at pp. 44-48.)

As to prejudice, respondent says there was none under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, that nothing the prosecutor

said made appellant's trial unfair. (RB at p. 19, 22.) Respondent argues there was no impermissible vouching by the prosecution since the prosecutor did not know what Handshoe had to say, that he was just saying he was "willing to listen to Handshoe. . . because he believed that Handshoe had expressed remorse." (RB at p. 20.) Further, it was insignificant anyway since jurors could decide his credibility for themselves, Handshoe's testimony was corroborated and the defense never mentioned this in argument. (RB at pp. 20-22.) Respondent is incorrect.

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.) Here, the misconduct pertained to the prosecution's primary witness against appellant and implicated appellant's constitutional right to due process, a fair trial. The appropriate prejudice standard is the one set forth in *Chapman, supra*.

Contrary to what respondent contends, it defies logic to assert the prosecutor was not vouching for Handshoe. The prosecutor plainly conveyed that he truly believed Handshoe. This was highly prejudicial. It went to an issue of critical importance, Handshoe's credibility, as Handshoe was the only witness who placed appellant at the scene of the crime. Much of what he testified to was not cumulative evidence or otherwise corroborated to by witnesses. Privy to the prosecutor's vouching on behalf of Handshoe's credibility, it is probable that the jury applied the remarks in an erroneous manner, believing that the only reason Handshoe implicated appellant as the murderer was because it was true. 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* (1952) 39 Cal. 2d 719, 728-29; AOB at pp. 48-49.)

## 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 RIGHT TO A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY VERDICT

Respondent argues there was no prejudice, that counsel's deprivation of a chance to question some of the potential jurors about accomplice issues and consider and address the factual basis of Handshoe's guilty plea are unrelated to the joint trial decision of the trial court. (RB at pp. 23-24.) Further, there was no prejudice from the limited participation of Handshoe's attorney in the jury selection process. (RB at p. 24.) The cases cited by appellant are distinguishable since in *Kritzman v. State* (Fla. 1988) 520 So.2d 568 the jurors were conditioned by Mailhes' attorney's questions. In *Allen v. State of Florida* (Fla. 1990) 566 So.2d 892, the jury was partially chosen by a former codefendant. No such circumstances exist here. (RB at pp. 25-26.) Further, Lee's defense did not undermine appellant's ability to present a defense. The acceptance of Lee's defense did not require the jury to reject appellant's defense. (RB at p. 26.)

This Court should reject respondent's assertions. Respondent ignores that Handshoe's lawyer participated in an information and strategy sharing with counsel for the other two codefendants while negotiating the plea agreement. His failure to disclose the contents of Handshoe's interview while still

participating in the strategy discussions with co-defendants' counsel resulted in undermining appellant's right to counsel. Appellant's defense was left scrambling after the change in plea with minimal time to change what had been a united front. The disappearance of Handshoe's attorney from the trial and reappearance as a someone who was 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. Jurors likely saw Handshoe as a credible witness and embraced what he had to say that implicated appellant. Had the trial court severed appellant's case, the defense would not have been so prejudiced.

Although *Kritzman, supra,* 520 So.2d 568 involved a co-defendant fully participating in jury selection, many of the concerns expressed by the Florida court applies 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.)

Further, in *Allen, supra,* So.2d 892, similar to this case, the former co-defendant changed his plea before trial started but after the jury was sworn, 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.)

Also, the lack of ability to question jurors about accomplice issues and address the factual basis of Handshoe's guilty plea were not unrelated to the prejudice from the failure to sever. Appellant ended up tried before jurors

without knowing if these jurors were biased on the subject of defendants turned state's witnesses, not knowing how the jurors felt about accomplice liability, and without enough time to address the assertions made by Handshoe about roles played in the crime. Appellant's defense counsel did not know if any of the potential jurors would have regarded Handshoe's testimony as more credible because he ended up cooperating with the prosecution instead of remaining as a charged defendant. Also, there was insufficient time to deal with the information pertaining to the two burglaries that surfaced from Handshoe's interview.

## A. THE TRIAL COURT'S ERROR IN GRANTING LEE'S PENAL CODE SECTION 1118.1. MOTION UNDERMINED APPELLANT'S ABILITY TO PRESENT HIS OWN DEFENSE AND RESULTED IN A GROSSLY UNFAIR TRIAL

A point respondent does not discuss in its brief is the error in the trial court directing a verdict on the conspiracy count against Lee. Instead of allowing the jury to decide the issue, the trial court did it for the jurors, resulting in irreparable harm to appellant's defense. (SOB at pp. 52-54, 57-59.)

The trial court deciding that Lee was not part of the conspiracy resulted in appellant becoming the likely participant. If Lee was a part of the conspiracy, then appellant's alleged role became much more difficult for the prosecution to explain. In this respect, as to respondent's claim that Lee and appellant lacked antagonistic defenses, they were indeed antagonistic. 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. With Lee's conspiracy count gone, jurors had only appellant as the one designated by the prosecution as the crime's mastermind. There was no physical evidence to tie appellant to the robbery.

The prosecutor's arguments in his letter brief on the conspiracy show why the judgment of acquittal on the conspiracy count for Lee was not justified. The prosecutor 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.)

The trial court's discussion of the evidence on the conspiracy showed it made credibility determinations, improper in the context of a Penal Code section 1118.1 motion. Although the prosecutor argued that reasonable interpretations were the province of the jury, the trial court took it upon itself to decide the issue. It found the evidence could support the jury convicting Lee of conspiracy; however, because of other evidence suggesting an alternative scenario implicating appellant instead, it would preclude the jury from deciding that issue as to Lee. The trial court stated:

> Why would he [Lee] continue to say let's do it or you should do it if there wasn't an agreement? I think the reason here, and I don't want to usurp the role of the jurors at all, that the jury could easily, if this conspiracy count went to them, I think they could easily convict Mr. Lee, but I don't believe on appeal that court of appeals would find there was sufficient evidence, and I think the reason is this thing we talked about yesterday. There is an equally plausible, in fact, possibly more plausible explanation as to how this all came about.
>
> Randy Lee wanted his boys to commit this crime and his boys had cold feet right up until the end of March. . . About that time is when Mr. Anderson comes on the scene. . . you can argue that by the

evidence in Counts 3 and 4 and by Mr. Handshoe's statement that he's out at Dictionary Hill a week before and he's out at Medill the day before.

Apollo Huhn has some information that Randy Lee passed along, and it's a logical inference, but only until somebody. . . who could be a mastermind. . . did they actually utilize that information." (25 RT 4454-55.)

The prosecutor tried to explain to the trial court that this was the jury's decision to make, but to no avail:

My problem with that is an appellate court will not, in my view, ever look at a juror's decision where a juror has been instructed that you are to determine – you, the jury, are to determine whether there are two reasonable interpretations. I understand that the – what the court says, gee, I think this is a reasonable – reasonable and likely way in which this could have happened.

My point on that on the 1118.1, sir, with all due respect, is that that's their decision because if a juror – if a jury considers that evidence and those arguments that will be made by counsel, and determines that they don't feel that there is another reasonable explanation, no appellate court is going to disturb that. (25 RT 4455-56.)

The trial court acknowledged this, but focused on whether there was evidence of an agreement:

I agree with that, but I've given you what I believe are two reasonable interpretations, but I would challenge you to come up with evidence, evidence of an agreement. (25 RT 4456.)

The prosecutor responded:

[t]he jury is entitled to consider conversations before, consequences of the crime, what happened subsequent to the crime and during the crime to determine things that actually can related back to the agreement.

And I suggest to you, your honor, that a jury could infer a – reasonably infer 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, that is an admission that he was in it, that it was an agreement that he was part of, and I'm entitled to prove that circumstantially. Not just because there was some mutual conduct. Each essentially becoming an overt act.

And I honestly believe, judge, the bottom line here is on an 1118.1, I honestly believe that you cannot, obviously you can, but you should not substitute your own belief of what a reasonable explanation may be because the trier of fact may not feel the same way. (25 RT 4457-58.)

The trial court stated:

But it's all pointing against an agreement. See, that's what is really bothersome about you're saying, Judge, let it go to the jury. (25 RT 4458.)

The prosecutor responded:

No, because the agreement that Randy Lee was seeking never involved his own direct participation in going to commit the crime. It never did. You guys can do this and I'll get 15 percent. You guys go to the scene. .You can hold him hostage. You can get in and do the safe. . . He repeated that a number of times. (25 RT 4458-59.)

> The question isn't whether or not I can prove by direct evidence that yes, on the 14th he was still there involved in the crime. He is shopping this crime that got- conspiracy is an ongoing deal. It starts here and ends up at the completion of the crime. And my point is, can a jury reasonably infer that he did the very things that he offered to do, that he did drive them by, that he did identify the location of the home. And then can you or can the trier of fact in this case, the jury, look at his behavior afterwards and use that to establish that yes, circumstantially, he's talking about the same place, the same victim, wanting something for the offense, wanting the offense to be done and yes, lo and behold, he makes these comments both to Navarette and to Handshoe after the crime. (25 RT 4459.)

The trial court erred. Not only did substantial evidence exist to send the issue to the jury, as argued by the prosecutor, the trial court invaded the province of the jury in deciding the issue. The purpose of Penal Code section 1118.1 is to ensure speedy acquittals of criminal charges which are unsupported by substantial evidence, not to interfere with the jury process. (*People v. Odom* (1970) 3 Cal. App. 3d 559, 565 ["We believe that we must view this case in its proper perspective and in light of the obvious purpose of section 1118.1, which is not to interfere with the jury process but to insure speedy acquittals of criminal charges which are not supported by substantial evidence."].) The trial court's ruling plainly benefitted Lee; but it prejudiced appellant's defense, resulting in a grossly unfair trial, and was a direct impact of the joinder of appellant's case.

## IV. THE TRANSLATED CELL PHONE DATA WAS ILLEGALLY OBTAINED, CONTAINED ERRORS AND INTRODUCED BY SURROGATE WITNESSES THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE 4TH, 6TH, 8TH, AND 14TH AMENDMENTS

Respondent asserts that the issue is forfeited; in any event, the claims lack merit. Respondent claims the record does not necessarily support appellant's assertion about the hexadecimal translations, that the translations were relied on by the prosecution witnesses. Respondent asserts it is unclear if Tischer did her own translations. The testimony suggests the records included raw data for cell site information and that some, but not all of it had been translated. Further, Taylor did not say who did the translations. (RB at pp. 29-30.) Respondent also asserts that the Confrontation Clause was not violated since the challenged evidence was not testimonial. The hexadecimal and decimal systems are objective, fixed numerical systems, readily accessible to the public. The conversions were independently verifiable neutral facts. (RB at p. 30-31.) Also, there was no Due Process violation or unfairness to the trial since there was nothing to show the translations were wrong or unreliable, just that Tischer could not explain the two anomalies. (RB at p. 32.) Further, there was not a Fourth Amendment violation since there was no reasonable expectation of privacy in the records. An en banc ruling a year after *United States v. Graham* (4th Cir. 2015) 796 F.3d 332 reversed its ruling, and circuit court opinions have come to the same opinion. (RB at pp. 34-35.) Respondent finally argues any error was harmless since it was just a piece of circumstantial evidence and other evidence was presented against appellant. (RB at p. 35.)

### i. Forfeiture

Defense counsel did request suppression of the cell site evidence. The trial court ruled on the request, also addressing the Fourth Amendment issue, rejecting the defense arguments. Further objections would have been futile. (5 RT 888-912 [April 21, 2005 hearing on defense's motion to suppress].)

This point aside, this Court may decide the issue even if no objection was raised below. The forfeiture rule will generally not be applied "when the pertinent law changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. (*People v. Black* (2007) 41 Cal.4th 799, 810-812.; *People v. Turner* (1990) 50 Cal. 3d 668, 703.) Much of the law occurring on the subject cited in appellant's supplemental brief occurred after appellant's trial. Also, no objection was required for appellant to raise a deprivation of a fundamental constitutional right which he has in this instance, a violation of his federal right to confront adverse witnesses. (*People v. Vera* (1997) 15 Cal. 4th 269, 276; *People v. Saunders* (1993) 5 Cal. 4th 580, 592 ["Defendant's failure to object does not, however, preclude his arguing on appeal that he was deprived of his constitutional right not to be placed twice in jeopardy."].)

ii. Merits of Appellant's Argument

The translated raw cell data is testimonial evidence because although pertaining to numbers, 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 v. Bryant* (2011) 562 U.S. 344, 356, 360.) Further, although raw

data may not be testimonial, the translated data, used for the purpose of trial, is. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321-22.)

> "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." *Id.*, at 114, . . . The analysts' certificates--like police reports generated by law enforcement officials--do not qualify as business or public records for precisely the same reason." (*Melendez-Diaz, supra,* 557 U.S. 305, 321-22.)

Additionally, the "comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar." (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 660.) In rejecting the state supreme court's reasoning for its holding that surrogate testimony was adequate to satisfy the Confrontation Clause because analyst Caylor simply transcribed the result generated by the gas chromatograph machine, presenting no interpretation and exercising no independent judgment, the Court presented the following example to show just why that reasoning "raise[d]red flags." (*Id.*)

> Suppose a police report recorded an objective fact--Bullcoming's counsel posited the address above the front door of a house or the readout of a

> radar gun. . . . Could an officer other than the one who saw the number on the house or gun present the information in court--so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." See *Davis v. Washington*, 547 U.S. 813, 826, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the . . . testimony of the declarant" . . .. (*Id.* at p. 660.)

The Court held that "when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way." (*Id.* at p. 663.) As far as the blood alcohol reports, the Court stated that "[a] document created solely for an evidentiary purpose. . . made in aid of a police investigation ranks as testimonial. . . the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify Caylor's assertions as testimonial." (*Id.* at p. 664-65.) Here, translations of the cell site data were made for an evidentiary purpose, constituting evidence before the jury, and presented through expert witnesses. No less than the radar gun readout referenced in *Bullcoming, supra,* they are testimonial in character.

Contrary to what respondent argues, the record was not unclear about who did the translations. Taylor testified that he became involved only after Tomasello had performed the original translations. (20 RT 3391.) Tischer's testimony disclosed she was provided with already-interpreted cell site data and that she merely checked to see if his information was consistent based on her understanding of the hexadecimal system. (20 RT 3303.) She testified:

> 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.)

Further, respondent is incorrect in its assertion that there was no showing the results of the translation were wrong. (RB at p. 33.) They were indeed wrong. Tischer testified she could not explain why two of the translations had erroneous digits that did not relate to the number translated and did not convert to a number. When asked if she had an explanation, she said: "No." (20 RT 3353-54.)

Q: Both of the numbers that are in the record have things that don't translate. Would that be fair to say?

A. Correct.

Q. Can you have – do you have an explanation for that?

A. No. (20 RT 3355.)

On this basis alone, the evidence was unreliable and the right to confront was triggered. (*Bullcoming, supra*, 564 U.S. at pp. 654, 660.)

Respondent also argues that appellant's rights were fully vindicated when his attorney cross-examined the expert. (RB at p. 33.) Yet, the person who did the translations, translations containing errors, was not available to be cross-examined.

> To be sure, the 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 . . . .Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes. . . . Respondent and the dissent may be right that there are other ways--and in some cases better ways--to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.
> (*Melendez-Diaz, supra,* 557 U.S. 305, 317-18, citing *Crawford v. Washington* (2004) 541 U.S. 36, 61-62.)

As to appellant's Fourth Amendment claim, while the Fourth Circuit reversed its earlier decision in *United States v. Graham* (4th Cir. 2015) 796 F.3d 332, deciding that the use of CSLI falls outside of the Fourth Amendment protections (*United States v. Graham* (4th Cir. 2016) 824 F.3d 421), the United States Supreme Court still has yet to decide the constitutionality behind the government's search of cell site location data. A

decision is forthcoming in *Carpenter v. United States* (6th Cir. 2016) 819 F.3d 880, cert. granted sub. nom. *Carpenter v. United States*, June 5, 2017, No. 16-402, 137 S.Ct. 2211. 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.) 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.)

As to respondent's claim there was no prejudice, there was prejudice. An aura of infallibility existed behind the evidence. It was presented through two expert witnesses. Jurors would not have known how to decide their credibility as they were not experts on cell data translations. Jurors had no reason not to accept their testimony. In any regard, because appellant asserts a Sixth Amendment violation, no additional showing of prejudice is required. (*Bullcoming, supra,* 564 U.S. at p. 663.)

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

Respondent offers nothing additional beyond what was set forth in its initial response to appellant's opening brief.

## CONCLUSION

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

DATED: March 19, 2018

Respectfully Submitted,

_____

Joanna McKim
California Bar No. 144315
Attorney for Appellant Anderson

Certification Regarding Word Count

The word count in appellant's supplemental reply brief is 6415 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 March 19, 2018, at San Diego, California,

Signature: _____, Name: Joanna McKim - 144315
P.O. Box 19493
San Diego, CA 92159
(619) 303-6897

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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,

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San Quentin State Prison
4 EB 101
San Quentin, CA 94974

Attorney General's Office
M. Murphy, DAG
[Mike.Murphy@doj.ca.gov]
P.O. Box 85266
San Diego, CA 92186-5266

Clerk, Superior Court
Hon. Lantz Lewis
220 West Broadway
San Diego, CA 92101

Liesbeth C. VandenBosch, Esq.
Alternate Public Defender's Office
450 B St Suite 1200
San Diego, CA 92101

CAP [vlindsay@capsf.org]
101 Second St. Ste. 600
San Francisco, CA 94105

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_____
Joanna McKim

**STATE OF CALIFORNIA**
Supreme Court of California

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Last Name, First Name (PNum)

joanna mckim
Law Firm