IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

CALVIN DION CHISM,

Defendant and Appellant.

Case No. S101984

Los Angeles County Superior
Court Case No. NA043605

DEATH PENALTY CASE

APPELLANT'S OPENING BRIEF

VOLUME 1 OF 2:
PAGES 1 THROUGH 236

On Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

Honorable Richard R. Romero, Judge Presiding

MARK D. LENENBERG
Attorney at Law
State Bar No. 77161
P.O. Box 940327
Simi Valley, California 93094-0327
Telephone: (805) 526-5988
Email: mmdl@roadrunner.com

Attorney for Appellant
CALVIN DION CHISM

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CALVIN DION CHISM, Defendant and Appellant.	**Case No. S101984** Los Angeles County Superior Court Case No. NA043605

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

The Los Angeles County District Attorney's Office filed an amended complaint on February 10, 2000, charging Samuel Taylor ("Taylor"), Marcus Johnson ("Johnson"), and appellant Calvin Dion Chism with the murder (Pen. Code, § 187, subd. (a))[1] in Count 1 and attempted second degree robbery (§§ 211 & 664) in Count 2 of Richard Moon ("Moon") on June 12, 1997. A special circumstance of robbery-murder (§ 190.2, subd. (a)(17)) was alleged on the murder count. It was alleged as to all perpetrators as to both counts that a principal was armed with a firearm (§ 12022, subd. (a)(1)) and alleged as to appellant only that he personally used a fire-

[1] Unless otherwise indicated, all further statutory references shall be to the Penal Code.

arm (§ 12022.5, subd. (a)(1)). Count 3 charged only appellant with the second degree robbery (§ 211) of Chung Ja Jung ("Chung") on May 18, 1997, and alleged that appellant personally used a firearm (§ 12022.5, subd. (a)(1)). (CT 1:8-13.)[2] On March 27, 2000, appellant was held to answer on all charges and special allegations following a preliminary hearing (CT 1:23-24.)

The pleading on which appellant was tried was an information filed April 10, 2000, containing the same charges and special allegations against Taylor, Johnson, and appellant. In addition, a prior juvenile adjudication was alleged against appellant pursuant to the "Three Strikes" law (§ 667, subds. (b)-(i) & § 1170.12, subds. (a)-(d)). (CT 1:138-144.) On April 10, 2000, appellant pleaded not guilty to all charges and denied all enhancement and special allegations. (CT 1:144-145.)

Jury selection commenced July 27, 2000, and continued until August 10, 2000, when a jury was impaneled (CT 2:498, 578-579.) The jury retired to deliberate at the conclusion of the guilt phase trial on September 1, 2000. (CT 3:610.) Jury deliberations concluded on September 7, 2000, at which time the jury found appellant guilty of the first degree murder and attempted second degree robbery of Moon, together with true findings on the robbery-murder special circumstance and personal use of a firearm allegations. The jury also found appellant guilty of the second degree robbery of Chung, together with a true finding on the personal use of a firearm allegation. Appellant waived trial by jury as to the "Three Strikes" prior conviction allegation only. (CT 3:737-738.)

---

[2] The Clerk's Transcript will be thus cited and will be formatted "CT VOLUME:PAGE". In like manner, the Reporter's Transcript will be cited "RT" and will be formatted "RT VOLUME:PAGE".

The penalty phase trial commenced September 13, 2000. (CT 3:739.) Jury deliberations commenced September 21, 2000. (CT 3:746-747.) When the jury was unable to reach a unanimous verdict on the penalty, a mistrial was declared on September 25, 2000. (CT 3:822.)

Selection of a jury for retrial of the penalty phase commenced on February 28, 2001, and continued until March 7, 2001, when a jury was impaneled. (CT 3:843, 865.) The jury retired to deliberate at the conclusion of the penalty phase trial on March 29, 2001, and ended the same day with a verdict of death. (CT 4:1042-1043.)

On October 24, 2001, the trial court found true the "Three Strikes" prior conviction allegation. The court denied appellant's motions for a new trial and for modification of the death sentence. The court imposed a judgment of death on the murder count. The court additionally sentenced appellant to an upper term of 6 years for the Moon attempted robbery, with a consecutive term of 5 years for the personal use of a firearm enhancement, and stayed the sentence pursuant to section 654. The court imposed a consecutive upper term of 5 years for the Chung robbery, doubled to 10 years pursuant to "Three Strikes," plus a 10 year consecutive sentence for the personal use of a firearm enhancement, for a total consecutive term of 20 years. Appellant was granted credit for 643 days custody time prior to sentencing. (CT 4:1096-1100.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (§ 1239, subd. (b).)

STATEMENT OF FACTS

GUILT PHASE

RITE WAY ROBBERY

On May 18, 1997, Chung owned and was working in the Rite Way Market, 520 West Alondra Boulevard, Compton. (RT 6:1147-1148.) At approximately 11:30 a.m. to noon, the store was open and a 17 or 18 year old boy came in and asked for hair gel. Chung said she did not have any and the boy left. Fifteen or twenty minutes later, about four or five African American boys came into the store. One of the boys approached Chung at the counter, pointed a gun at her, and told her to hold up her hands. Another boy came around the counter and told Chung to open the cash register. (RT 6:1148-1149, 1155.) Chung opened the register, but the boy saw a videotape underneath the register and asked for it. As Chung went for the videotape, the boy saw Chung's husband's gun behind the video and took the gun. One boy in front of the counter was pointing a gun, the boy behind the counter took money, and the other boys took wine, some caps, and other things. (RT 6:1150.) Someone said, "Give me your back" to Chung and she felt like they were going to kill her. (RT 6:1154-1155.) Chung testified that she kept her eyes closed throughout the incident. (RT 6:1167.)

Officer Kenneth Lipkin ("Lipkin") testified that he has spoken to appellant multiple times in the past and can recognize appellant and his voice. (RT 5:890-891.) Lipkin testified that he has viewed the Rite Way Market videotape[3] about three times and recognizes appellant. (RT 5:897.)

---

[3] The videotape is Exhibit 3 and was played for the jury prior to Lipkin's testimony about the videotape. The transcript of the audio portion of the videotape was marked Exhibit 5, but was not provided to the jury. (RT

According to Lipkin, appellant is the person wearing a blue sweat shirt that first comes in the door and asks if the store has hair gel, leaves, returns, eventually obtains a gun, and points the gun at the proprietor. Appellant is the last person, with a gun, to leave the store. (RT 5:898.) Lipkin testified that he recognized appellant's voice on the tape and appellant commented that, "We're in the house. They don't have a video." Appellant may have said, "There's a Glock," a reference to a firearm, but Lipkin was not sure appellant made the statement. Finally, appellant made a reference to "187," meaning this is a robbery and should not become a murder. (RT 5:898-900, 907.)

Detective Frederick Reynolds ("Reynolds") testified that he was the investigating officer in this robbery, has viewed the videotape five or six times, and has seen co-defendant Marcus Johnson up close. Reynolds opined that Johnson is one of the perpetrators shown in the videotape. (RT 7:1365.)

The trial court took judicial notice that Johnson previously pleaded guilty to the robbery of the Rite Way Market, admitted personally using a firearm in connection with the offense, and is serving an appropriate prison sentence for the crime. (RT 6:1168.)

KILLING OF RICHARD MOON

On June 12, 1997, Edward Snow ("Snow") was the owner of Eddie's Liquor Store, located at the intersection of Artesia Boulevard and Butler Avenue, Long Beach. Moon was the day manager. No weapon was at the store. (RT 7:1308-1310.)

5:897, 903.) It was stipulated that the videotape was from the Rite Way Market robbery. (RT 6:1166.)

On Thursday, June 12, 1997, Zonita Wallace ("Wallace") owned a light gray Plymouth Voyager van. She was dating co-defendant Samuel Taylor at the time. (RT 5:731-732, 738.) Wallace loaned the van to Taylor "on Thursday" at an hour not recalled. (RT 5:737-739, 741.)

Stephanie Johnson ("Stephanie")[4] was in her car, going westbound on Artesia Boulevard.[5] After turning north on Butler Avenue, a male ran out in front of her car from the direction of the liquor store. She stopped her car to let him cross the street and he kept running toward Artesia Lane. (RT 6:1009-1113.) She next observed a second male run diagonally across Artesia Lane. Both men were running at a fast pace. (RT 6:1112-1113.) Stephanie saw the top part of the first man's body. He was 18 to 21 years old, dark skinned, no facial hair, slim build, and medium height. The lower part of his head was shaved with one inch of hair on top, and he was wearing a black shirt, with a white t-shirt underneath, and black khakis. She saw the front and back of his shirt, but did not see any symbols, including a Nike swoosh, on the front of the shirt. (RT 6:1114-1117, 1126-1127.) She saw the second person only from behind and could not remember anything about him. She did not see anything in the hands of either man. (RT 6:1117, 1128.) Before her observations, Stephanie heard two gunshots, but did not immediately connect it to what she saw. When she returned to the scene about 15 minutes later, she saw the police and thought the people she observed might have a connection. (RT 6:1121-1122, 1127.) Stephanie was unable to identify any of the defendants as the runners she observed. (RT 6:1118.)

---

[4] Stephanie is not related to Marcus Johnson and Marcia Johnson.

[5] Stephanie testified that the time was between 2:00 p.m. and 3:00 p.m. (RT 6:1110.)

Another witness, Peter Motta ("Motta"), was driving westbound on Marker Lane, near Butler Avenue.[6] (RT 7:1265-1267.) He observed a light colored Voyager van -- the same make and model as Wallace's van[7] -- parked eastbound on Marker Lane, very close to the corner of Butler Avenue. Motta saw African Americans in the driver's seat and passenger seat. (RT 7:1267-1268, 1275-1276, 1302-1303.) When he was close to Butler Avenue, Motta observed two males running very fast toward the van on the sidewalk from the direction of Butler Avenue. The first runner was African American, thin, slightly tall, with short, curly hair. The second runner was short and stocky. Motta later told the police the second runner was bald. Motta did not recall what either man was wearing. (RT 7:1268-1271, 1305-1306.) Motta saw the runners disappear into the van. Motta looked down Butler Avenue and saw a commotion at the liquor store at the corner of Artesia Boulevard. It appeared that everyone was hysterical. (RT 7:1271-1273.)

Motta made a left turn on Butler Avenue and as he waited at the red light at Artesia Boulevard, the van made a U-turn. He observed the van in his rearview mirror make a right turn on Butler and proceed northbound, eventually turning out of view. (RT 7:1272, 1278, 1304-1305.) Motta continued to his workplace and called the incident in after he arrived. (RT 7:1272.) The next day, Motta told the police that he believed he saw male African Americans in both the front driver's and passenger's seats in the van. Motta told the police at the time that he believed he could identify the runners. (RT 7:1287, 1299.) Two weeks before he testified, he repeated

---

[6] Motta wanted to say that the time was between 3:30 p.m. and 5:00 p.m. (RT 7:1265.)

[7] Motta could not identify Wallace's van as the van that he saw. (RT 7:1279.)

his statement to the police that he saw two male African Americans seated in the van. (RT 7:1288.) During the lunch break at trial, Motta told the prosecutor that appellant looked familiar, but he could not place him at the crime scene. (RT 7:1298-1299.)

A 911 call was received on June 12, 1997, at 2:06 p.m., from Debbie Williams, relating to Eddie's Liquor Store, at Artesia Boulevard and Butler Avenue. (RT 6:1079-1081, 1098.) Officers Rudy Romero ("Romero") and Stacey Holdredge ("Holdredge") received a radio broadcast at 2:07 p.m. directing them to 299 East Artesia Boulevard, Long Beach -- at the north-east corner of Artesia Boulevard and Butler Avenue -- and were the first police to arrive at the scene at 2:09 p.m.. (RT 5:934-935, 918-919, 975-976, 6:1084, 7:1313-1314.)

Romero observed two males and one female standing by the north-east side of the building. Holdredge went into the store and observed a male lying on the ground behind the counter, blood on his face, and checked for vital signs. From past contact with the store, Holdredge recognized the person as the man that normally worked behind the counter. Holdredge radioed for paramedics. (RT 5:935-937, 7:1315-1317, 1319.)

According to Romero, of the two males he saw, one male was white and the other male was neither white nor African American. Romero made contact. The white male said his name was Steven Miller ("Miller"). Miller was very nervous and said, "I think he's dead." (RT 5:938-940, 942, 944-945.) Miller told Romero he was sitting across the street at a bus bench with his girlfriend when he saw two male blacks walking westbound enter the liquor store. Miller said that shortly afterward he heard a popping sound like a gunshot, then observed the same two men run out of the store, go northbound approximately two blocks on Butler Avenue, and possibly go eastbound on Marker Street. (RT 5:942-943, 949, 980.)

Miller stated that he immediately ran across the street to the liquor store, entered, and saw the clerk on his back under the counter, unconscious and bleeding. Miller ran to a telephone and called the police. (RT 5:944.) Miller described both suspects as 17 to 18 years old, 5'8" to 5'9" tall, with short, not shaved, Afro-style hair and thin builds. He said one suspect was wearing a black shirt with more than one white stripe on the front and dark jeans. Miller said that the other suspect was wearing a colored shirt of unknown color and long dark shorts. (RT 5:945, 953, 959.) Romero also spoke to the female at the scene, Debra Williams. She appeared not to be shaken at all. The other male was Mr. Pakhchanian. (RT 5:950, 979.) According to Romero, there is a bus bench on the southeast corner of the intersection. (RT 5:947.)

When Romero and Holdredge went inside Eddie's Liquor Store, there was money on the counter. (RT 5:954-955.) A bullet was found next to the right hip of the victim. (RT 5:918-919, 7:1249.) A spent 9 millimeter casing was on the floor next to the liquor shelves and the ice cream machine appeared to have a fresh dent consistent with a ricocheting bullet. (RT 5:920-922, 928, 6:1190-1193, 7:1250, 1311.) The cash register tape was retrieved.[8] The cash drawer on the register was found closed. (RT 5:926, 930, 7:1262.) According to Snow, the owner, nothing was missing from the store. (RT 7:1311-1312.)

After responding to the crime scene, Sergeant Jorge Cisneros ("Cisneros") was given the videotape from the video recorder inside Eddie's Liquor Store. (RT 8:1458-1459.) On a later date, after he had viewed the videotape, Cisneros took the videotape to Aerospace Corporation to have it enhanced and to obtain still photographs. According to Cisneros, he asked them to enhance the videotape and they put it in some

kind of machine and processed it through a computer. Cisneros remained at Aerospace Corporation to obtain the photographs. Cisneros was told by Aerospace Corporation that they could not enhance the videotape, but the machinery allowed more of the frames to be seen. Cisneros received back both the original and new videotape, but did not know which one was played for the jury.[9] The new videotape displayed faces not visible on the original. (RT 8:1459-1460, 1517-1518, 1520-1521, 1524-1527, 1529, 1542-1543.) Cisneros received two enhanced photographs.[10] (RT 8:1468, 1538.)

In June, 1997, the Long Beach Police Department would have only one helicopter in the air at a time. (RT 5:977, 6:1011, 1088.) On June 12, 1997, Officer Brian Hauptmann ("Hauptmann") was the observer in the helicopter that responded to the intersection of Artesia Boulevard and Butler Avenue, arriving at 2:15 p.m. (RT 6:1011, 1013, 1085.) The helicopter's orbit covered several blocks with the center at the target intersection. News helicopters were also in the immediate area. (RT 6:1013, 1015.) The helicopter departed the area at 3:55 p.m. (RT 6:1015.) Hauptmann testified that he was up in the helicopter from 7:00 a.m. until 4:00 p.m. that day and that prior to the call on this matter, they flew over downtown Long Beach many times and that if something looked interesting or suspicious, they might circle a few times. Hauptmann did not recall if they had other calls earlier in the day that put them at an assigned position. (RT 6:1068-1069.)

---

[8] Exhibit 12.

[9] Exhibit 36 was played during the testimony of Stacey Holdredge. (RT 7:1318.)

[10] Exhibits 41 and 42. (RT 8:1538.)

Iris Johnston ("Iris") was 15 years old on June 12, 1997. She had known appellant for five to six months, having met him through friends, including Johnson and Taylor, known to her as "Junior". (RT 5:754-755.) That morning, Iris was at a house in downtown Long Beach, near Pine Street, with Valicia, Valicia's cousin, and a little boy. Iris arrived at about 9:00 a.m. on the Metro. (RT 5:756-758.) Iris paged appellant at approximately 11:00 a.m. to make arrangements to return home. Appellant called back about 20 minutes later. (RT 5:758.) Appellant showed up about 1 to 1½ hours after he called back in a vehicle that looked like a white version of Wallace's van.[11] With appellant when he arrived were Taylor, Johnson, and Marcia Johnson ("Marcia"). (RT 5:759-760.) Iris, Valicia and the little boy got into the van. They drove south to the 710 Freeway, but Iris did not recall if they took the 710 to the 91 Freeway. While on the freeway, Iris observed multiple helicopters hovering over downtown Long Beach. Iris asked about the helicopters and someone in the group said, "There must have been a robbery." Appellant said "they knew the guys who did it." (RT 5:761-762, 771, 791-792, 837.) Iris' recollection was refreshed and she recalled that appellant said, "Yeah, we know the niggas that did that." (RT 5:784-785, 840.)

The van continued to appellant's house, located off of Rosecrans, in Compton. (RT 5:790, 793.) Everyone got out of the van, but only Taylor, Johnson, and appellant went inside. At some point, Iris went inside to sit down. She did not recall if the television was on. Appellant reappeared. After about 20 minutes at the house, Iris and appellant walked to the store. (RT 5:793-794.)

---

[11] On cross-examination, Iris testified that she gave a recorded statement to the police on February 18, 1998, in which she said the van was blue

Later, Iris and Valicia were dropped off at Iris' house. Afterward, Iris spoke by telephone to appellant. Appellant said something about a news broadcast and it concerned Iris. Marcia was on the line during the conversation and something troubled Iris when they wanted to speak privately without Iris listening. (RT 5:797-798, 800, 827.) Iris wrote a letter to appellant[12] and delivered it to appellant later that night. Appellant did not read it in front of her and neither responded nor discussed the contents with Iris at any time. Iris did not hear from appellant after she gave him the letter until shortly before her testimony at appellant's capital trial.[13] (RT 5:800-801, 825, 834.) In a subsequent search of Iris' home, the police recovered a letter from appellant to Iris dated August 11, 1997. The letter was booked into property and read by Reynolds but he did not note its contents in any report. (RT 7:1371, 1380-1381.)

Reynolds testified that when he spoke with Iris on June 23, 1997, she never mentioned that co-defendant Johnson was present when appellant picked her up from the house in Long Beach. At that time, Iris was shown a photograph of Wallace's van and said that it was not the same van that picked her up. (RT 7:1372-1373.)

Cisneros, one of the investigating officers, told the jury he spoke to Iris on June 25, 1997. Iris told him she stayed overnight at Valicia's house

---

and when showed a picture of Wallace's van, said it was not the same van. (RT 5:814, 816, 873-874.)

[12] The letter was admitted into evidence as Exhibit 2. In the letter, Iris wrote about things she observed during the day that caused her concern and mentioned matters spoken in the van. While she did not accuse anyone of doing anything, she wrote that she thought they might be involved in the Long Beach robbery because of the helicopters, statements, and watching the news.

[13] Iris testified on August 21, 2000.

and was picked up the next day by Taylor and appellant in a gray van at approximately 11:00 a.m. They stayed at Valicia's house for two to three hours. Then everyone went to appellant's house, there they remained for a period of time, finally going to Ania's house, after which Iris went home. Iris said nothing about seeing helicopters. (RT 8:1474-1475, 1486-1487, 1494.)

Cisneros testified he spoke to Iris again on February 18, 1998. Iris repeated the same story and did not mention seeing police helicopters. Cisneros then confronted Iris with the letter she wrote to appellant on June 12, 1997. Iris appeared startled. Cisneros told her he had other information. Iris' mother entered the room and told Iris to tell the truth. Cisneros again questioned Iris about June 12, 1997. (RT 8:1475-1477, 1480.) Iris told Cisneros that she was at Valicia's house and called appellant to pick her up. Iris said that appellant arrived later with Taylor, Johnson, and Marcia in a gray van owned by Taylor's girlfriend and they remained at the location for about two or three hours. (RT 8:1481.) Iris then changed the story to say that she paged appellant and he returned the page within ten minutes. She did not know what time appellant, Taylor, Johnson, and Marcia arrived, but they stayed for ten minutes and Iris and Valicia departed with them. (RT 8:1482.) Iris told Cisneros they took the 710 Freeway to appellant's house and that during the drive, she observed two or three helicopters. She said that after seeing the helicopters, appellant said, "There must have been a robbery, we know the niggas that did that." When they arrived at appellant's house, she and Valicia stayed in the van while the other four people went inside. (RT 8:1483-1484.) Iris said the van was blue in color, then said she did not know the color. She was not sure what time she was picked up at Valicia's house, but believed it was around 11:00 a.m. or noon. (RT 8:1485.)

Marcia Johnson ("Marcia") was detained by the police and questioned by Detective Paul Edwards ("Edwards") on September 23, 1999. According to Marcia, she thought she was going home. Having no reason to lie, she tried to tell the truth. She also acknowledged that she was first arrested at her house, handcuffed and taken to the police station in a police car, read her rights, knew she had a problem, and did not expect to be released. (RT 8:1599, 1605, 1631, 1696-1697.) Marcia first told Edwards that on June 12, 1997, Taylor picked up Johnson at school at noon, then they picked up Marcia at her house and went to Compton High School to watch cheerleaders. She did not mention appellant even though she was far more interested in helping her brother than appellant. They were in a brown Cutlass. (RT 8:1601-1602, 1630-1631.) Marcia said they went to the liquor store at about 4:00 p.m. and that she went into the liquor store while Taylor and Johnson stayed in the car in the parking lot. Marcia testified that she said there were two clerks inside. (RT 8:1602, 1605.)

According to Marcia, Edwards told her he did not believe her and suggested that there must have been some kind of plan made the evening before the robbery. Marcia agreed with Edwards and gave a second statement the same day. She was aware of a tape recorder in the room that was not there previously. (RT 8:1606-1608, 1613-1614, 1632.) This time Marcia told Edwards that she was picked up at her house by Johnson, Taylor, and appellant. Marcia told Edwards that she was told to go into the store and buy something, but did not know why. Marcia told Edwards that there were a couple of customers in the store and only one clerk. (RT 8:1608-1609.) Marcia said that Johnson was wearing a long sleeved baggy green Gap sweater, shorts, and a black baseball cap. (RT 8:1612-1613.) Marcia told Edwards that she had never before seen appellant with a gun. (RT 8:1615.)

At some point, Edwards told Marcia that he still did not believe her story and said that he believed the robbery was planned the night before it occurred. Edwards also suggested that a bulge in appellant's waistband could have been a gun and Marcia saw the handwriting on the wall. She knew what the police wanted and that the only way to save herself was to give information against other people. (RT 8:1615, 1632-1633.) At this point, Marcia agreed with Edwards and said that Johnson, 16 years old at the time of the robbery, was just a little boy looking up to appellant. (RT 8:1615.)

Marcia gave a videotaped statement to the police on November 1, 1999, after speaking with an attorney about cooperating with the prosecution and signing a letter of intent saying her statements could not be used against her.[14] Marcia believed that she was potentially looking at the death penalty for her culpable behavior and gave the statement with the hope of saving her own life. (RT 8:1580, 1617.) At that time, Marcia said everything was planned the night before. Marcia said that before the robbery, Johnson, Taylor, and appellant picked Marcia up where she "kicked it on Elm Street." Marcia said that appellant instructed Taylor where to drive and park. (RT 8:1581, 1594, 1618-1619.) Marcia told the police that there were two clerks in the store. (RT 8:1619.)

Marcia explained to the jury that she testified at the preliminary hearing in this case after entering a formal agreement with the state under which she would be sentenced to 12 years for manslaughter. (RT 8:1619.) After signing the agreement and just before testifying at the preliminary hearing, Marcia told the police that appellant told Johnson he was only to be a lookout, but she testified that appellant never made that statement. (RT 8:1620.) Marcia acknowledged that she was confused when she testi-

fied at the preliminary hearing that the planning meeting was the night before the robbery because the same group was at her house that night, but they did not plan anything. (RT 8:1636-1637, 1645-1647.) Marcia acknowledged that she wrongly made the same assertion about meeting the night before in the tape recorded interview with Edwards and the videotaped interview with Edwards. (RT 8:1638-1640.) At appellant's trial, Marcia testified that she lied many times in her testimony at the preliminary hearing. (RT 9:1724.)

Marcia testified that Johnson is her brother and she knows Taylor and appellant. (RT 8:1550-1551.) According to Marcia, she awoke on June 12, 1997, at about 8:00 a.m. Johnson and their ill mother were home. Their mother was asleep in her bedroom. Appellant came over around 9:00 a.m. Taylor came over after appellant. They stayed at her house about an hour after everyone arrived, talking about a lot of things. (RT 8:1553-1554, 1635, 9:1718-1720.) Appellant said he wanted them to check out Eddie's Liquor Store so they could rob it. Appellant said he wanted Marcia to look inside the store for cameras and clerks, he wanted Taylor to drive the car, and he wanted Johnson to go in with him. No one responded positively or negatively. The conversation about Eddie's Liquor Store took about ten minutes. Marcia saw a black Glock semiautomatic in appellant's front waistband. She had seen him with the gun for about a month prior to this conversation. (RT 8:1554-1556, 1561-1563, 1667, 1669, 9:1708.)

About fifteen minutes after the end of the conversation, Johnson and Marcia dressed and all four people departed together. Appellant was wearing black jeans and a black T-shirt with the Nike sign on it. Marcia was wearing jeans and white T-shirt. Johnson was wearing black shorts and a

---

[14] Exhibit J.

green sweater-like Gap shirt. Taylor drove the gray van.[15] Appellant was the front passenger, Marcia was in the middle row of seats on the left, and Johnson sat by the right sliding door. (RT 8:1557-1558, 1563, 1693.) They took surface streets directly to the store and parked around the corner one block up from the traffic light, about a block from the store.[16] There was no conversation as they drove. (RT 8:1559-1560, 1683-1684, 1693-1694.)

Marcia got out of the van and walked to the store, went inside and looked around. She saw two cameras and one clerk behind the counter, a tall, white, older man with gray hair. She bought some Jolly Ranchers at a cost of 65 cents, paid with a dollar and got change. Marcia walked back to the van and found everyone still inside. (RT 8:1564-1566, 1680, 1693.) Marcia told them there were two cameras and a clerk and described where the clerk was situated. She got into the van as Johnson and appellant got out. Taylor remained in the driver's seat and Marcia sat in the middle row on the left side. Marcia did not see appellant's gun as he departed, but saw a bulge in his waistband as he got out and believed it might be a gun. She did not see Johnson with a weapon. (RT 8:1566-1568, 1670-1671, 1682, 1695.)

Marcia lost sight of Johnson and appellant as they went around the corner in the direction of the store. After they were gone about ten minutes, Marcia heard one or two gunshots, then saw Johnson and appellant running together toward the van. Johnson got in through the open sliding door and appellant got into the passenger seat through the open window in the door. Neither Johnson nor appellant had anything in their hands, but appellant

---

[15] Marcia identified a photograph of Wallace's van as the vehicle they used. (RT 8:1558.)

[16] Marcia also testified that they may have parked in the store parking lot. (RT 8:1689.)

appeared to have a bulge in his waistband. Taylor drove off. (RT 8:1568A-1569, 1574, 1685-1686, 1695, 9:1721.) No one spoke. They went to the home of Valicia and Iris in Long Beach, taking twenty to thirty minutes to get there. Valicia and Iris were both there and they stayed about ten minutes. Valicia and Iris got into the van in the back row and Taylor got on the 710 Freeway, driving toward Compton. (RT 8:1569-1571, 1689-1690.)

After about five minutes on the freeway, Marcia observed three or four helicopters directly above them. When they saw the helicopters, Marcia said, "There's helicopters in the air," but nobody said anything else during the drive and they proceeded to appellant's house. (RT 8:1571-1572, 1690-1691.) Everyone got out of the van, went inside the house, and turned on the television. Watching the news, they saw a broadcast about what occurred at Eddie's Liquor Store. No one made a comment while watching the news. (RT 8:1573.) They stayed at appellant's house about twenty minutes, then took Iris home and everyone went their own way. (RT 8:1574.)

Marcia testified that she expected to get a share of anything taken at Eddie's Liquor Store, but there had been no discussion about it and she received nothing. (RT 8:1574-1575.) Marcia testified with murder and attempted robbery charges pending against her and had entered an agreement with the prosecutor, dated January 12, 2000, allowing her to plead guilty. Her expectation was a 12 year sentence in exchange for telling the truth. She told the jury that pursuant to the agreement, if the trial judge found her testimony was not truthful, she could receive a life sentence.[17] (RT 8:1575-1577.)

---

[17] The written "Memorandum of Understanding" was Exhibit 46 and in the redacted form that went to the jury, it was Exhibit 46A.

Detective Edwards corroborated many aspects of Marcia's trial testimony. He testified that on September 23, 1999, he interrogated Marcia in the homicide interview room of the police department after she was arrested and handcuffed, although he normally would take the handcuffs off during questioning. Edwards informed Marcia that she was under arrest as part of the Eddie's Liquor Store homicide investigation. (RT 9:1728-1730, 1733.) The first part of the interview was not tape recorded. Marcia said she was accompanied to the store by Johnson and Taylor at about 4:00 p.m., although she was not sure of the time, after they picked her up at home and went to Compton High to watch cheerleaders. (RT 9:1730-1731, 1733-1734.) She said she went inside while the others waited in Taylor's brown Cutlass in the store parking lot, purchased Jolly Rancher candies for 65 cents, and observed five customers and two clerks. (RT 9:1731-1732.) There was no discussion of appellant having a gun. (RT 9:1761.)

Edwards testified he told Marcia he believed she went into the store by herself, but did not believe the remainder of her story. He told her she should tell the truth. (RT 9:1735.) At that point, Marcia admitted she accompanied Johnson, Taylor, and appellant to the store. She said the other three people picked her up from her house and Taylor was driving Wallace's gray van. She sat in the middle row of seats with Johnson. They turned onto Butler from Artesia, then turned right and parked on one of the side streets. (RT 9:1735-1737.) Marcia told Edwards that she went into the store, bought some Jolly Ranchers for 65 cents, and walked back to the van, telling everyone that there was one clerk in the store. (RT 9:1737-1738.) Johnson and appellant then got out of the van and walked toward the store while she remained in the van with Taylor. Marcia claimed she saw a gun in appellant's right hand, but had never seen it before. Marcia said she saw Johnson and appellant run back to the van; Johnson came in through the sliding door and appellant dove through the open passenger window. She

described Johnson as wearing a long sleeved, green Gap sweater with a half zip in front, black shorts and a black baseball cap. Appellant was wearing pants and a black T-shirt. (RT (9:1738, 1761, 1763.) Marcia told Edwards they went to pick up Iris and Valicia in Long Beach and after picking them up, she saw helicopters flying above them. (RT 9:1739.)

Edwards testified that he told Marcia he believed some of her story, but he knew she was with the other people planning the robbery the prior night. He believed she went into the store by herself. Marcia agreed with Edwards that the four of them had been at her house the night before and planned to rob the store in Long Beach. Marcia also told Edwards that appellant told them he had watched the store, had been in the store, that there was only one clerk, and he was planning to rob the store. (RT 9:1746, 1752, 1754.) Appellant told her he wanted her to go in to buy something and check out the number of clerks in the store, told Taylor he wanted him to drive, and told Johnson to go into the store with him to do the robbery. (RT 9:1752-1753.) Marcia said they all got into the van, drove to the store, she went in and bought the Jolly Ranchers, then returned to the van and told appellant there was only one clerk behind the counter. Marcia stated that Johnson and appellant left the van while she waited with Taylor and a short while later, Johnson and appellant ran back from the store, jumped into the van, and they drove off quickly to Long Beach to pick up Iris and Valicia. (RT 9:1753.) In this version of the story, Marcia told Edwards that appellant had a black semiautomatic firearm with him during the planning session the night before and it was the same gun he had used in a robbery. She said she had seen him with it on prior occasions for one or two months. (RT 9:1763.) After Marcia made this latest statement, she repeated it in a tape recorded statement, adding that she saw helicopters while on the 710 Freeway and they drove to appellant's grandmother's house and watched the news. (RT 9:1764-1768.)

On June 19, 1997, appellant's grandmother's house, located at 926 North Chester Street, Compton, was twice searched. Articles of clothing were found in appellant's bedroom, including a black T-shirt with a Nike swoosh on both sides. On top of a dresser was a letter from Iris to appellant.[18] (RT 5:892-893, 6:999-1000, 1003, 7:1346-1347, 1377, 1380, 8:1470-1471, 1473.) The 9 millimeter semi automatic Glock firearm taken from Rite Way Market was found on the top shelf of a closet. (RT 5:891-892, 910-911, 913-914, 7:1331-1335, 1342, 1344.)

Later on June 19, 1997, Wallace spoke with Detective Reynolds. Wallace had her van with her and told Reynolds that Taylor took her van at approximately 1:30 p.m. and returned it at approximately 4:30 p.m. the preceding Thursday. (RT 5:739, 7:1347-1348, 1359.) After the conversation, Detective Catherine Chavers ("Chavers") accompanied Wallace in the van to Wallace's home while Reynolds followed. While Reynolds went looking for a vehicle pointed out by Wallace, Chavers observed the vehicle at a gas station at Alondra and Alameda. Wallace told Chavers that the two African American males inside the vehicle were Johnson and his cousin, Michael. (RT 7:1359-1360, 8:1446-1450.) Chavers observed the two men speak with Wallace. Chavers heard one of the males say that Wallace had spoken with the police and Wallace denied the assertion. One of the males asked Wallace who Chavers was and Wallace said she was a social worker. Afterward, Wallace became frightened. Reynolds met up with Chavers and Wallace at the gas station and Chavers told Reynolds that Wallace had pointed out Johnson. Wallace did not deny the statement. Reynolds believed that Wallace appeared frightened and Wallace said that she would not come to court because she was afraid. (RT 7:1360-1361, 1363, 8:1450-1453.) Wallace testified that she did not recall if they stopped at a gas sta-

---

[18] Exhibit 2.

tion or if she saw Johnson at a gas station. (RT 5:748-749.) Chavers could not identify Johnson. (RT 8:1456.)

On June 12, 1997, appellant was 5'9" tall and weighed 152 pounds. Taylor was 6' tall and weighed 176 pounds. Johnson was 6' tall and weighed 150 pounds. (RT 7:1418, 9:1801.)

An autopsy revealed that Moon died as the result of a through-and-through gunshot wound to the chest. (RT 6:1026, 1050.) The bullet traveled back to front, level, and slightly left to right. (RT 6:1045.) Moon's shirt was examined for soot and stippling, but none was observed. (RT 6:1051, 1053-1054, 1056.)

Firearm examiner Robert Hawkins ("Hawkins") testified that the gun recovered from appellant's grandmother's house is a Glock model 19, 9 millimeter Luger caliber semiautomatic pistol with a "Glock action." According to Hawkins, the trigger cannot be pulled until the slide has been pulled back, a round chambered or the slide is pushed forward, and cannot fire without pulling the trigger all the way back to continue the cocking process. This makes it a very safe firearm. Hawkins measured the trigger pull to determine if the gun was within the firearm's standards and found it functioned properly. (RT 6:1169, 1172-1173.) Hawkins compared the bullet and casing recovered at Eddie's Liquor Store with the Glock. He concluded that the bullet could have been fired from the gun, but there was not enough information on the bullet to say that it was or was not fired from the gun. He concluded that the casing was fired from the Glock gun. (RT 6:1171, 1180-1182, 1184.) Hawkins examined Moon's shirt for soot and stippling to determine the distance from the shooter. (RT 6:1195.) When visual inspection revealed nothing, Hawkins used chemicals to elicit a reaction to nitrites. He found two particles, 2½ and 3½ inches from the center of the entry bullet hole, on opposite sides of the hole. (RT 6:1196-1197.) Hawkins concluded that the sparse amount of gunpowder was con-

sistent with being fired at a distance that didn't form a pattern. Because it was not close enough to produce a pattern, yet was not far enough away to leave no powder, Hawkins opined that the gun was four to five feet from the victim, with the result bracketed by a range of error of a couple of feet in either direction. (RT 6:1199-1200, 1202.)

Johnson presented defense evidence that on June 12, 1997, at approximately 2:00 p.m.,[19] Michael Cayton ("Cayton") was employed by the Long Beach Harbor Patrol Department. Cayton was visiting a friend at a barbershop next door to Eddie's Liquor Store that shared the liquor store parking lot. (RT 9:1865, 1878.) Cayton left the barbershop, got in his car that was parked in the parking lot, and commenced driving eastbound in the parking lot. As he drove, he observed three individuals standing around and believed they appeared suspicious because they kept turning their heads as if they were up to no good. (RT 9:1866-1868.) Cayton described them as dark skinned and between 5'9" and 6'1". One of the people started to walk toward the liquor store and Cayton watched him as Cayton drove toward the northeast part of the parking lot toward the exit onto Butler Avenue. (RT 9:1869-1870.) Before Cayton reached the sidewalk, he saw another individual walk toward the liquor store while the third person stood outside looking around. Cayton observed two of the men go inside while the third remained outside where originally seen. (RT 9:1870.) Cayton left the scene, traveling three blocks to his destination, but when he heard helicopters circling the area 45 minutes to an hours later, he was curious and returned to the liquor store. Cayton found a crime scene set up and spoke with Officer Holdredge and one other police officer. (RT 9:1870-1871,

---

[19] Cayton testified he arrived at 12:30 or 1:00 p.m. and could have left anywhere between arrival and 3:00 p.m., noting that it was not a short stay. (RT 9:1878-1879.)

1880, 1882, 1892.) Cayton told Holdredge what he had seen. Cayton denied telling Holdredge that he was driving west on Artesia Boulevard. (RT 9:1871-1873.) Cayton told Holdredge he could identify the faces of the three individuals. He could not identify anyone in the courtroom. (RT 9:1873-1875, 1893.)

FIRST PENALTY PHASE

PROSECUTION CASE

GILBERT HIGH SCHOOL INCIDENT

On December 9, 1993, appellant was a continuation student at Gilbert High School, in Anaheim, and was known to assistant principal Cheryl Quadrelli-Jones ("Jones"). (RT 11:2266.) Before and after school, Jones monitored the school parking lot and the area next to the school, near Jack-in-the-Box. There was a brick wall across the street from the parking lot, eight feet high with pedestrian pass-throughs to the residential neighborhood on the other side of the wall. (RT 11:2266-2267.) Prior to classes, between 7:30 and 8:00 a.m., Jones observed appellant in the Jack-in-the-Box area throwing gang signs with other boys. Appellant made a telephone call and a short period later, two other people arrived on bicycles. One of the people gave appellant something, the bell rang, and everyone went to class. (RT 11:2268, 2274-2275, 2280.) After classes ended, between 11:30 a.m. and noon, Jones saw about 120 to 130 students, including appellant, leave school. Appellant passed Jones, went to the street and crossed to the brick wall, near one of the pass-throughs. (RT 11:2275-2276, 2280.) A male popped out of another pass-through about twenty yards from appellant, appellant pivoted and extended his arm parallel to the ground. Almost immediately, Jones heard three popping sounds from appellant's direction

that she recognized as gunfire. Jones testified that it sounded like a .22 caliber gun although she neither saw a gun in appellant's hand nor did she see smoke or flashes. (RT 11:2276-2279, 2282, 2284.) Jones yelled, "Get down," looked across the street, and saw appellant turn and move slowly through the pass-through. It appeared that appellant put something in his clothing. Jones could not determine if the other person had anything in his hands. Jones radioed her office to call 911. (RT 11:2278-2279.) Appellant was 16 years old at the time. (RT 11:2281.)

CYPRESS ARNOLD PARK INCIDENT

On January 31, 1994, shortly before 6:00 p.m., Bradley Turner ("Turner") was at Cypress Arnold Park, in Cypress. Turner went to his car in the parking lot to put team baseball equipment in his car. (RT 11:2286.) Turner observed three people reflected in his rear tailgate, one with a gun, approach him rapidly. The person with the gun put it to Turner's temple and pulled him to the side of the car. Another person, standing in front of Turner, screamed for Turner to give him money and told Turner to squat. Turner squatted. (RT 11:2287-2288.) Turner said his wallet was inside the car. The speaker ran around to the driver's door and looked for the wallet while the gunman kept the gun to Turner's head. When the wallet could not be found, the man looking for it said Turner was lying and urged that Turner be killed. The man with the gun said nothing. (RT 11:2289-2290.) The man looking for the wallet ran back to Turner and said to kill Turner. Turner reached up as he stood up, shoving the gun down. The gun discharged into Turner's leg and the three men ran off. (RT 11:2291--2292.) A .25 caliber automatic casing was recovered near the vehicle. Turner could not identify any of the perpetrators and nothing was taken from him. Turner was taken to the hospital and a .25 caliber bullet was extracted from

his leg. He suffered no lasting injury. (RT 11:2292-2293, 2346-2348, 2351-2352.)

Turner's friend, Rhonda Lee Griffin ("Griffin"), was at the park and heard screaming accompanied by a loud noise, then observed people running. (RT 11:2297-2298.) Running in the direction of the noise, Griffin observed Turner leaning against his white Ford Explorer in the parking lot on the west side of the park. Griffin observed two people running in different directions as someone said, "He's running away." Griffin ran onto Crescent Avenue and observed the same male African-American she earlier saw running run toward the street. Griffin chased him, getting close enough for the person to point a gun between her eyes and ask, "Do you want some of this, bitch?" (RT 11:2301-2303.) As Griffin backtracked, taking children who had followed her with her, the man got into a car and departed east on Crescent Avenue. Griffin did not recall seeing the person's face. (RT 11:2303, 2309.) Later that day, Griffin was shown individuals, but did not recall identifying anyone. (RT 11:2306.) About a month later, she was shown a photographic six-pack and pointed to a picture of appellant, stating that he pointed the gun at her. She could not identify anyone in the courtroom. (RT 11:2306-2307, 2380-2381.)

Shortly after this incident, a car containing four males, including appellant, was followed then stopped on South Street, west of Gridley, in Cerritos. There were four males in the car, including appellant, and all were eventually arrested. (RT 11:2340-2343.) A .25 caliber automatic handgun was hidden in the dashboard, behind the stereo. (RT 11:2345-2346, 2354-2355, 2357, 2359.)

The bullet recovered from Turner's leg and the casing recovered near Turner's car were both fired from the handgun recovered from the stopped vehicle in which appellant was a passenger. (RT 11:2397-2399.)

Appellant was read his constitutional rights and agreed to speak with the police. (RT 11:2262-2263.) Appellant denied knowledge of the shooting at the park. (RT 11:2364.) Appellant was recontacted 15 to 20 minutes later and said he was 100 yards from the shooting. Appellant said that he was with three other people and they were looking for someone that had beaten one of them. Appellant stated that as they walked through the park, they saw the victim next to his car and "Miller" handed appellant a chrome handgun, telling appellant to point the gun at the man and rob him. (RT 11:2365-2366.) Appellant said that he took the gun, approached the victim, and told the man to get on his knees. Appellant said that after the victim complied, he asked the man where the money was and the victim stated that his money might be in the car. Appellant revealed that Miller searched inside the car, then came out and said to shoot the man. Appellant felt that Miller's statement was meant to intimidate the man, but the man jumped up and when the man's knee hit the gun, the gun discharged. Appellant said that he had not been sure if the gun was loaded. (RT 11:2367.) Appellant told the police that he ran to their car and left the area. (RT 11:2368.)

It was stipulated that appellant was committed to the California Youth Authority on August 8, 1994, paroled on March 28, 1997, and taken back into custody on June 19, 1997. (RT 11:2412.)

VICTIM IMPACT

Maryann Morris ("Maryann") testified that Moon was her stepfather and that he always treated Maryann and her two brothers like his own children. According to Maryann, Moon was always happy and telling jokes. Moon kept their family together. (RT 11:2330-2332.) When Moon died, Maryann felt like she lost a best friend and her mother moved in with Maryann and her husband, sleeping on a cot in the living room for one year because she could not go back to her house. Maryann's mother had to go

back to work full time and has to rely on her children for support. (RT 11:2332-2333.) Maryann testified that part of her mother is missing and that her eyes no longer sparkle. (RT 11:11:2333.)

Stephen Morris ("Morris") testified that he is married to Maryann. First meeting Moon in 1986, Moon took on the role of Morris' father in a manner that Morris' own father never could. Moon called Morris his son because he loved Morris as he did his own family. When Morris went through the police academy, his family did not support him, but Moon did. (RT 11:2316.) Morris considered Moon one of his best friends. The day Moon died, Morris had plans with Moon to go to the movies. According to Morris, Moon loved Morris' one year old daughter, Christina. (RT 11:2317-2318.)

Jolene Watson ("Watson") testified that she first met Moon when she was seven years old and that he was a long time family friend, similar to a father or uncle to her. According to Watson, her stepfather is Snow, owner of Eddie's Liquor Store. Watson lived with Moon for about two years and dated Moon's son for seven years. Moon was the grandfather and best friend of her young son. (RT 11:2326-2327.) Watson opined that even if Moon did not know you, he would give you the shirt off of his back. He taught Watson that there is good in everyone, a trait that became hard for her to see because Moon's death was senseless. (RT 11:2328-2329.)

Robert Bernhardt ("Bernhardt") testified that he had been Moon's friend for over 50 years, originally meeting as children. According to Bernhardt, Moon came from an impoverished neighborhood. Moon's father did not work and his mother was the sole support of the family. Moon's father was physically abusive, his mother emotionally abusive. (RT 11:2387, 2390.) Moon sought to better himself and get out of the environment in which he grew up, although he had minor scrapes with the law as a juvenile, ending up in reform school for a year. (RT 11:2390-2391.)

Moon had but a seventh grade education, but learned through reading. Moon was always an optimist. (RT 11:2391.) When Bernhardt moved to California, he shared an apartment with Moon for a number of years. (RT 11:2392.) Bernhardt felt that he lost a very good friend and missed the closeness of their families. (RT 11:2394.)

DEFENSE CASE

Deandre Brown ("Brown") met appellant in 1994 when they were both confined at the California Youth Authority facility in Paso Robles. Appellant had just arrived and heard Brown and his roommate singing. Appellant joined in, singing gospel. Brown ended up roommates with appellant and both sang in the choir at the church in Paso Robles. (RT 11:2445-2447.) Appellant was active in the choir and influenced Brown to join. Appellant helped Brown with his religious faith. Appellant also talked religion to others in the facility and spent most of his time at the chapel, cleaning and preaching. (RT 11:2447-2449.)

Robert Curry ("Curry") testified that he is a protestant chaplain with the California Youth Authority at the El Paso de Robles Youth Correctional Facility in Paso Robles. (RT 12:2467.) According to Curry, appellant approached him during his orientation program early in his confinement, during Fall, 1994, or Winter, 1995, asking if he could sing in church or help in any way possible. A day or so later, Curry spoke with appellant and appellant became a regular at the chapel. (RT 12:2468.) Appellant sang in church, eventually leading the music and worship service. Appellant impacted the young men present in a positive way. Appellant also cleaned toilets and polished floors, all without pay. Appellant enrolled in the regular high school program, eventually graduating. (RT 12:2469-2470, 2487.) Curry testified that young men would have religious conversion experiences because of appellant. While appellant was at Paso Robles from 1994

to 1997, appellant was filled with joy and Curry observed few people with the impact appellant had on others. (RT 12:2472, 2475, 2477-2478.) Appellant blossomed within a structured environment. (RT 12:2480.) Appellant was very good at reducing conflict between people and was charismatic in both spiritual and non-spiritual ways. (RT 12:2500.)

Lorraine Wahlberg ("Wahlberg") testified that she is a religious volunteer at El Paso de Robles Youth Authority in the Epiphany program. Appellant went through a weekend program in October, 1995, and she met him in May, 1996. (RT 12:2524-2525.) Before appellant was paroled in early 1997, she saw him at reunions and was impressed with the things he shared with others and thought he was an encouragement to others. (RT 12:2526.) Wahlberg believed that appellant had a call to be a preacher or evangelist. (RT 12:2528.) After appellant was arrested in the present case, Wahlberg communicated back-and-forth with appellant by letter. Appellant's letters had a positive impact on Wahlberg and encouraged her when she was frustrated. Appellant eloquently told her that life is a constant struggle between heaven and Satan and advised her what to share with confined youths so they would stay positive. Appellant told Wahlberg that he held onto his faith when he received bad news from home and that it was important for the inmates to know that what matters is that Christians care. Appellant said that he wanted to get involved in Bible college. (RT 2537-2540.)

While in California Youth Authority in 1997, appellant met Lawrence Mills ("Mills"), a high school vocational instructor. Appellant was a student and one of Mills' lead persons in class. Appellant received certifications for warehousing and forklift. (RT 12:2512-2513, 2515.) Appellant was a good student and taught others very well. (RT 12:2515-2516.)

Edna Kristina Brown ("Edna") testified that she became pregnant with appellant when she was 13 years old and appellant was born August

24, 1977. (RT 11:2414.) Edna took care of appellant until he was 7 years old, but because she was selling drugs at her house and was on probation, her mother and her father's mother became appellant's primary child care providers. (RT 11:2415.) While he lived with Edna, appellant cooked and cleaned house, starting at age 4. When Edna had another child, appellant prepared the baby's food. Appellant had no stable male figure in his life during this period. (RT 11:2416-2417, 2428.) Edna never married appellant's father. She has a total of six children by four different fathers. (RT 11:2418.) According to Edna, appellant's father was in-and-out of appellant's life. Appellant's father died, although she did not know the cause, when appellant was 11 or 12 years old. Appellant was living with his father and paternal grandmother at the time and had developed a close relationship with his father. Appellant had to identify the body that had been found blown up under a house. Edna was in a drug program in Arizona at the time. (RT 11:2424-2426, 2435-2436.) Appellant was taken from Edna to McClaren Hall, which she described as a "kid's house." Afterward, appellant went to live with Edna's mother, then to his father's house. (RT 11:2429-2430.) At the time of her testimony, Edna had been in-and-out of custody for the previous 15 years. (RT 11:2430.) Edna testified that before his father's death, appellant was a good little boy, very happy, with a nice personality, but after his father's death, appellant became rebellious. One day, after Edna told appellant something, he said, "I don't give a fuck. My daddy is dead. They can bury me on top of my daddy." (RT 11:2433-2434.)

Appellant testified that he was born August 24, 1977, and lived with his mother until he was taken away from her at age 7 or 8. (RT 12:2560-2561.) After he was taken from his mother, but before his father was killed, appellant was sexually abused by a neighbor on two occasions. Appellant's mother and father were in and out of his life. (RT 12:2561-2562.)

When he was 10 years old, appellant's father was shot and killed. Appellant had to identify the body at the hospital. Appellant felt he had nothing to live for and there was no point in life. (RT 12:2561-2562.) Appellant began using alcohol and drugs at age 11. Appellant eventually had a religious conversion in his life and attempted to help others in religious ways. (RT 12:2563.) Appellant's favorite music is gospel and he used his voice getting to friends in California Youth Authority. Appellant sang "Amazing Grace" for the jury. (RT 12:2563-2564.)

SECOND PENALTY PHASE

PROSECUTION CASE

GILBERT HIGH SCHOOL INCIDENT

On December 9, 1993, Jones was the assistant principal at Gilbert High School West Campus, a continuation school in the Anaheim Union High School District. Appellant was a student at the school. (RT 17:3736-3737.) Before classes in the morning, while Jones was in the parking lot area of the school, appellant was in the parking lot adjacent to the school, in front of Jack-In-The-Box. There appeared to be difficulties between appellant and a group of boys in front of the restaurant and Jones saw appellant make a telephone call. (RT 17:3737-3739.) Shortly after the call, a person on a bicycle appeared and met with appellant, speaking in close proximity. The bell rang and appellant went to his classroom. (RT 17:3740-3741, 3760, 3762, 3764.) When the morning session terminated at 11:20 a.m., Jones went to the parking lot. At about 11:30 or 11:35 a.m., she observed appellant go through the parking lot and cross La Palma Avenue to a residential area walled off with a high masonry barrier containing pedestrian pass-throughs. (RT 17:3742-3743, 3751,) Jones saw another indi-

vidual pop out from a pass-through about 100 feet away from appellant. Appellant turned, extended his arm, hand closed at shoulder level, and Jones heard multiple sounds she identified as .22 caliber gunfire come from appellant's direction. Jones saw neither a gun, smoke, nor a muzzle flash. Appellant was about the length of a football field from Jones. Jones may have said, "Get down." (RT 17:3743-3745, 3778, 3779-3780, 3782, 3820.) The other person went back through the pass-through to the residential neighborhood. Appellant turned around, put whatever he had in his hand into his pants, and disappeared through another pass-through. (RT 17:3746.)

CYPRESS ARNOLD PARK INCIDENT

On January 31, 1994, Turner was at Cypress Arnold Park, in Cypress. At approximately 6:00 p.m., Turner was taking team softball equipment to his car in the parking lot. Many other people were present. (RT 17:3830-3831.) As Turner opened the tailgate of his car, he detected the reflection on his car of three African American males rushing up behind him. As they reached his location, one of the men brought up a chrome handgun to Turner's temple. (RT 17:3832-3833.) A second man did all the talking, screaming, "We want your money or we're going to kill you." The third man was behind Turner. The speaker directed Turner to the passenger door of the car, then told him to squat. The gun still at Turner's temple, Turner complied. (RT 17:3833-3834.) When Turner stated that he had neither his wallet nor money, the speaker continued threatening to kill him. Turner remembered that his wallet was in the pouch on the driver's door, so stated, and the speaker said that he would retrieve it as Turner remained crouched. (RT 17:3835.) When the speaker could not find the wallet, he stated that Turner should be killed. Thinking he would be shot in the head, Turner reached up, grabbed the gun, stood up as the gun went down, and

the gun discharged into Turner's leg. (RT 17:3836-3837.) The three men ran north as Turner ran south. Turner did not see the face of the man holding the gun and could not recall what any of the men looked like. (RT 17:3838, 3844.) An expended casing was recovered from the immediate area of Turner's car. (RT 18:3986-3987, 3989-3990, 4006.) A .25 caliber bullet was recovered from Turner's leg. (RT 18:4026-4027, 4029, 4064.) Turner was shown photographs on February 3, 1994, and selected a couple of photographs -- possibly of the speaker -- but testified he told the police he was not making a positive identification. (RT 17:3841-3842, 3844.) According to the police, Turner identified appellant's photograph as one of the people involved, but could not state whether he was the shooter. (RT 17:3888.)

Griffin was at the park and heard a loud noise that she thought was a firecracker. Immediately afterward, she heard what she thought was a scream and multiple scared voices. (RT 16:3688-3691.) Someone said that someone had been shot and Griffin proceeded toward the area where the original noise came from. (RT 16:3693-3694.) Griffin pursued a running African American man and got within an arm's length of the person. The person turned, pointed a gun at Griffin's face, and said, "Do you want some of this, also, you fucking bitch?" (RT 16:3694-3696.) Griffin froze, fearing for her life. Because several small children had followed her, Griffin backed up and held the children back. The person with the gun moved toward a car, dove head first through a passenger side window, and the car drove eastbound on Crescent Avenue. (RT 16:3696-3697, 17:3703-3704, 3728.) Griffin was transported in a police car and asked to look at people that had been detained. Griffin recognized the person with the gun, but did not recall if she identified anyone. (RT 17:3707-3708, 3724.) On February 3, 1994, Griffin was shown multiple photographic six-packs. She testified she did not recall if she recognized anyone. (RT 17:3711-3712.) Accord-

ing to the police, Griffin identified appellant, saying that she had chased him and he pointed a handgun at her. (RT 17:3886.)

The vehicle was stopped. Four African American males, including appellant, were inside and detained. (RT 18:4009, 4023-4024.) A .25 caliber semiautomatic handgun was recovered from the car. (RT 18:3991, 3993, 4008, 4056.) The bullet recovered from Turner's leg and the cartridge case recovered near Turner's car were fired from the recovered handgun. (RT 18:4061, 4064-4065.)

Appellant was read his constitutional rights at the police station and said that he understood them. (RT 17:3858-3859, 3865.) At first, appellant denied knowledge or involvement in the incident at Cypress Arnold Park and the interrogation was terminated after ten or fifteen minutes. (RT 17:3866-3867.) Fifteen to thirty minutes later, the police recontacted appellant. (RT 17:3867-3868.) This time, appellant stated that he came to the park with two other people, last names Miller and McKinney, looking for someone that earlier assaulted one of their friends. Appellant said that as they walked through the parking lot, they observed a man standing near a car and Miller gave appellant a chrome handgun and told appellant to rob the man. (RT 17:3874.) Appellant told the police that after Miller and appellant walked over to the man, appellant pointed the gun at him, told him to kneel down, and demanded his money. Appellant said that Miller looked in the car for money, then got out of the car and told appellant to "Shoot the mother fucker." Appellant believed Miller was trying to scare the man to tell them the location of his money. (RT 17:3875.) Appellant stated that immediately after the statement, the man jumped up and the gun went off, shooting the victim in the leg. Appellant said that Miller, McKinney, and appellant ran to a car parked on a nearby street. (RT 17:3876.) Appellant said that the safety on the gun was disengaged, but he was unaware if it was loaded. (RT 17:3880-3881.)

It was stipulated that on July 25, 1994, appellant entered an admission to the allegations in a juvenile petition charging him with the attempted second degree robbery and assault with a semi-automatic weapon on Turner. (RT 22:4909.)

RITE WAY ROBBERY

On May 18, 1997, Chung and her husband owned Rite Way Market, 520 West Alondra Boulevard, Compton. (RT 18:4166.) While Chung's husband was gone, sometime after 11:00 a.m. or noon, an African American male that was about 18 or 19 years old came into the store, asked for hair gel, and left. Afterward, four African American males came into the store. (RT 18:4167-4168.) While Chung was at the cash register, one of the men pointed a gun at her while another came around the counter to her position. Chung was scared. Two other people went to the area of the beer and wine cooler and grabbed inventory. The person that went behind the counter took money from the cash register and a gun from under the cash register. (RT 18:4168-4170, 4109-4111, 4117, 4166.) A video camera taped the incident and the resultant videotape was given to the police. (RT 18:4113, 4166, 4169.)

Lipkin testified that he supervised appellant while appellant was on parole. (RT 18:4123-4124.) Lipkin testified that he has viewed the Rite Way Market videotape[20] and recognizes appellant. (RT 18:4144, 4150.) According to Lipkin, appellant is the person wearing a blue shirt without a hat that first comes in the door and asks if the store has hair gel, leaves, re-

---

[20] As in the previous trial, the videotape is Exhibit 3 and was played for the jury prior to Lipkin's testimony about the videotape. The transcript of the audio portion of the videotape was marked Exhibit 5. (RT 18:4149-4150.) It was stipulated that Exhibit 3 was the videotape made during the Rite Way robbery. (RT 18:4162, 4171.)

turns, eventually finds a gun at the store, and points it at the proprietor. Appellant was not the perpetrator that first pointed a gun. (RT 18:4150-4152, 4156.) Lipkin testified that he recognized appellant's voice on the tape and appellant commented that, "We're in the house. They don't have a video." Appellant said, "We got a Glock." Finally, someone made a reference to "187," a reference to the murder section of the Penal Code. (RT 18:4151, 4153.)

KILLING OF RICHARD MOON

On June 12, 1997, Wallace owned a gray Plymouth Voyager van. On an unknown day, she loaned her van to Taylor, her friend, sometime after 1:00 p.m. The van was returned to Wallace by Taylor at some point. (RT 18:4173-4178, 21:4710.) On June 19, 1997, Wallace told Detective Reynolds that she loaned the van to Taylor the previous Thursday at approximately 1:30 p.m. and that Taylor returned it at 4:30 p.m. the same day. She said that Johnson and appellant were in the van when it was returned. (RT 21:4711-4712, 4715-4716.) Wallace also told Reynolds that she did not want to be involved because she was afraid and that she would not come to court. (RT 21:4721.)

Romero and Holdredge arrived at Eddie's Liquor store at 2:07 p.m.[21] after receiving a radio dispatch a few minutes earlier. (RT 21:4630-4631, 4673-4674.) They observed two men and a woman standing near the northeast corner of the parking lot. (RT 21:4631-4633, 4675.) As Holdredge went into the store, Romero spoke with one of the men -- a Caucasian male wearing a baseball cap. He appeared very nervous and shaken. (RT 21:4634, 4639, 4687.) The man said, "I think he's dead." Holdredge

---

[21] Romero testified that they arrived at 2:07 p.m. (RT 21:4630.) Holdredge testified that the arrival occurred at 2:12 p.m. (RT 21:4674.)

entered the store. Romero entered a little later. (RT 21:4640-4641.) Behind the counter Moon was lying on his back. He appeared to be dead. (RT 21:4643, 4653, 4659, 4675-4676.) Paramedics came and left shortly afterward. (RT 21:4644-4645, 4677.) While Romero was in the store, the witness remained outside with a white female identified as his girlfriend and a male of apparent Indian descent. (RT 21:4651-4652.) Romero re-contacted the male witness in the parking lot, asking him what he had seen. The man told Romero that his last name was Miller. (RT 21:4646, 4648-4649, 4651.) The man said that he had walked with his girlfriend to the bus bench at the southeast corner of Butler and Artesia, kitty-corner from Eddie's Liquor Store, when he saw two African American males walk toward the store. The man stated that the two men entered the store, he heard a popping sound almost immediately, and observed the two men run northbound from the store for about two blocks on Butler. He said that the men then ran eastbound, probably on Marker Street. (RT 21:4648-4650.) The man told Romero that the first African American male was wearing a shirt with multiple white stripes on it and possibly dark jeans. He said the second male wore an unknown colored shirt and long, dark shorts. He said that both men had short Afro-style haircuts and both were 5'8" to 5'9" tall.. (RT 21:4650-4651, 4663.)

Moon was lying on the floor of the store. (RT 20:4409.) A spent bullet and 9 millimeter casing were found inside the store. The bullet was near Moon's right hip. (RT 20:4398-4399, 4401-4402, 4404-4405, 4411-4412, 4422, 4425, 4435, 21:4663, 4684.) There was a dent in the ice cream machine consistent with a bullet ricochet, although there could have been other causes for the dent. (RT 20:4406, 4408, 4425-4426, 4448, 4486, 4538-4541, 4545-4547.) The cash drawer on the register was closed and the cash register tape was recovered. The tape contained entries for both 60 cents and 65 cents close to the time of the incident, although the last entry

before the incident was for 53 cents. (RT 20:4415, 4417, 22:4845-4847.) Money was recovered from the counter top near the cash register. (RT 20:4415, 4418-4419.)

Hauptmann was the observer in a police helicopter that responded to the area of Butler Avenue and Artesia Boulevard at 2:09 p.m.. (RT 19:4363-4365.) They orbited the area, centered over the intersection, until they left the area at approximately 3:55 p.m. Hauptmann believed that the helicopter crossed both the 91 and 710 Freeways while orbiting. (RT 19:4365, 4368-4369.) There was only one police helicopter in the air at the time, although there were also news helicopters in the area. (RT 19:4375-4376.)

A videotape was recovered from Eddie's Liquor Store.[22] (RT 19:4228-4230, 4232.) Cisneros watched the videotape, but could not see the heads or faces of some individuals. As a result, Cisneros took the videotape to Aerospace Corporation in El Segundo, because he wanted to enhance the clarity of the tape. (RT 19:4230-4231, 4234, 4267.) Cisneros observed someone put the videotape in a machine and watched the videotape with that person. The machine looked like a computer, was large, had a monitor, and had the capability of printing, although Cisneros did not know the name or total function of the machine. According to Cisneros, he could now see more of the top and bottom portion of the frame on the videotape, albeit the picture did not become more clear. (RT 19:4233-4234, 4268-4270.) At Cisneros' request, the person gave Cisneros still pictures,[23] the original videotape, and a copy of the original tape that played at a slower speed. (RT 19:4235-4236, 4250.) The new still photographs in-

---

[22] The videotape -- Exhibit 36 -- was played during Romero's testimony. (RT 21:4638.)

clude about ¾ inch at the top and ¾ inch at the bottom not visible on the original videotape, including the face of the person shown in the photographs. (RT 19:4245-4246.)

Appellant's house was searched on June 19, 1997, at the time of appellant's arrest. (RT 18:4130-4131.) The 9 millimeter handgun taken from Rite Way Market was found in a closet in appellant's bedroom. (RT 18:4132-4133, 4187-4189, 4216, 21:4704.) On appellant's bed was a letter.[24] (RT 18:4133, 4198-4199, 19:4216, 4261, 21:4705.) From the middle bedroom was taken a black T-shirt with the word "Air" and a Nike swoosh emblem on the front, and a swoosh emblem near the neck on the back. (RT 19:4252-4253, 4255, 4258, 4263, 21:4709.)

Iris testified that she was 16 years old in June, 1997, and had known appellant for slightly less than a year.[25] They were friends with no romantic attachment. She also knew Taylor, Johnson, and Marcia. (RT 21:4559-4562, 4605-4606.) The morning of June 12, 1997, Iris was at a friend's house in East Long Beach. Prior to arriving, Iris paged appellant at about 11:00 a.m. to arrange her return travel home. (RT 21:4563-4565.) Appellant called back about 10 to 20 minutes later and showed up a couple of hours later in a light colored minivan along with Johnson, Taylor, and Marcia. The van belonged to Taylor's girlfriend. (RT 21:4564, 4566, 4572) After about 10 or 15 minutes, during which the group stayed in the minivan, Iris joined them in the minivan and they departed for appellant's house, taking the 710 Freeway northbound. Appellant was driving. Also in

---

[23] Exhibit 41.

[24] Exhibit 2A.

[25] At the guilt phase trial before a different jury, Iris testified that she was 15 years old. (RT 5:754.)

the van was Iris' friend, Valicia. (RT 21:4567, 4572-4573.) As they traveled north on the 710 Freeway, Iris observed two helicopters hovering on the east side of Long Beach. In response to questions from Iris, appellant stated that he knew who committed the robbery. (RT 21:4573-4578.) They got off the freeway at Rosecrans, in Compton, and proceeded to appellant's house. Everyone went inside except Valicia, Marcia, and Iris. After a short period, appellant emerged from the house, said, "Let's go watch the news," and everyone went inside. (RT 21:4579-4580, 4582-4583.) Everyone remained inside about 30 minutes, then some of them -- including appellant and Iris -- walked to the store and returned. While walking, they saw police cars and while appellant behaved normally, Iris believed he appeared nervous. (RT 21:4583-4585, 4587.) Iris was taken home in the same minivan and dropped off. (RT 21:4588-4589.) Iris had a telephone conversation with appellant later that evening and nothing about the conversation gave rise to suspicions for her. (RT 21:4589-4593.) After she spoke with appellant on the telephone, Iris wrote a letter[26] the same night, asked appellant to meet her, and handed the letter to appellant. Appellant departed on foot in a different direction than Iris. (RT 21:4593-4595, 4606-4607.) In the letter, Iris wrote about things she observed during the day that caused her concern and mentioned matters spoken in the van. While she did not accuse anyone of doing anything, she wrote that she thought they might be involved in the Long Beach robbery because of the helicopters, statements, and watching the news. (RT 21:4596-4600, 4624-4625.) Iris never spoke to appellant about the contents of the letter and he never wrote her a re-

---

[26] Exhibit 2A.

sponse. Iris did not know if appellant ever read the letter.[27] (RT 21:4595-4596, 4607.)

Marcia testified that Johnson is her brother. (RT 21:4732, 4734.) According to Marcia, on June 12, 1997, she met with Johnson, Taylor, and appellant at her house in the early morning. Marcia's mother was asleep in her mother's bedroom. (RT 21:4735-4736.) Appellant started talking about committing a robbery and told Marcia she had to walk in and check the place out, looking for clerks and cameras. Marcia did not feel threatened by appellant. (RT 21:4737, 4781, 22:4809.) Taylor was to be the driver and Johnson's role was to go in with appellant to rob the store. While at her house, Marcia observed a black Glock in appellant's waistband. (RT 21:4737-4738, 4753-4754, 224809, 4813.)

At some point, all four of them left the house and went to Eddie's Liquor Store. (RT 21:4736.) They drove to Long Beach on surface streets in a gray van that belonged to Taylor's girlfriend. (RT 21:4738-4739.) Marcia had never been to the store before. The store was near the 710 Freeway. Taylor parked the van on a side street around the corner from the store. (RT 21:4739-4740.) Marcia got out and went to the liquor store alone. She believed that she saw two clerks inside, one behind the counter and another by the back door. She bought some Jolly Ranchers for 65 cents, giving the clerk $1 and receiving change. (RT 21:4741-4743, 4761.)

Marcia returned to the van and told appellant the location of two cameras in the store and that there were two clerks present. Marcia got into

---

[27] Reynolds testified that he saw a letter written by appellant to Iris in reply to her letter, that he booked it into evidence, and that he unsuccessfully attempted to locate it for trial. According to Reynolds, he obtained the letter on August 20, 1997, at Iris' residence and it was postmarked August 11, 1997. Reynolds did not recall if he read the letter. (RT 21:4723-4726.)

the van. (RT 21:4744-4745.) Johnson and appellant got out of the van. Appellant was wearing a black Nike T-shirt and long black jeans. Johnson was wearing a long sleeved, green Gap sweater and black shorts. Taylor remained in the driver's seat. (RT 21:4745, 4748-4749.) Johnson and appellant left in the direction of the liquor store and Marcia lost sight of them. After they were gone at least five minutes, Marcia heard two gunshots. (RT 21:4746.) Marcia saw Johnson and appellant in the middle of Butler Avenue, running toward the van. Johnson entered the van through the sliding door and appellant got in through the front passenger door window. (RT 21:4747-4748.)

Taylor drove them on surface streets to the house of Marcia's friend, Valicia. Iris was also present at the house. (RT 21:4749-4750.) After 5 or 10 minutes, Valicia and Iris joined them and they departed, getting on a freeway to drive back to appellant's house in Compton. (RT 21:4750-4751.) As they drove on the freeway, four helicopters were overhead and Marcia mentioned the helicopter's presence. (RT 21:4751.)

At appellant's house, everyone went into appellant's bedroom and watched the news on television, including a broadcast involving Eddie's Liquor Store. (RT 21:4751-4752.) After the broadcast, one of the people present wondered whether someone was dead. (RT 21:4752.) Everyone left the house and walked to Elm Street. Both Iris and Taylor resided on Elm Street. As they walked, Marcia saw a police car and thought that appellant behaved in a paranoid manner. (RT 21:4752.) When they got to Elm Street, Marcia departed. (RT 21:4753.) Marcia never received any money as the result of the Eddie's incident and believed that no money was taken. (RT 21:4759.)

Marcia testified that she was interviewed by Edwards in September, 1999. (RT 21:4767.) Marcia admitted lying in that interview when she said that she never saw appellant with a gun before. (RT 21:4779, 4789.)

She also lied when she said that the robbery was planned the day before it took place. (RT 21:4780-4781.) In the interview, Marcia told Edwards that the car used was a brown Cutlass and never mentioned appellant. (RT 22:4798-4799.) Afterward, Edwards suggested to Marcia that there had been planning the night before and that somebody was a leader in planning the robbery. Because Marcia did not want to implicate her brother and wanted to minimize her own involvement, she understood what she should tell Edwards. (RT 22:4816.)

Marcia testified that she was arrested in connection with the incident at Eddie's Liquor Store and was charged with attempted robbery and murder. (RT 21:4756.) Marcia entered into a signed agreement with the District Attorney's Office, dated January 12, 2000, under which she would be given leniency, sentenced to a term of 12 years, and agreed to testify truthfully.[28] Marcia understood if she did not fulfill the terms of the agreement, she would probably be sentenced to life in prison. (RT 21:4756-4758.)

Marcia testified she was a witness in a preliminary hearing and in a prior trial in this case in which Taylor and Johnson were additional defendants. (RT 21:4759, 4763, 22:4808-4809.) Marcia acknowledged that she wanted to help her brother because he was facing a life sentence, but understood that he was not eligible for the death penalty. Marcia understood that she was eligible for the death penalty and it was of some concern to her. (RT 21:4763-4766.) Marcia felt that it would help her brother if she portrayed appellant as the heavy in her testimony. When she testified at the preliminary hearing and first trial, it bothered Marcia a lot that she was testifying against her brother because she loves him. According to Marcia, she would give her life for her brother and has lied to help him. (RT 21:4767, 4803.) At the preliminary hearing, Marcia lied when she testified

that Taylor, Johnson, and appellant were in the van with her when she heard a gunshot. (RT 22:4800.) According to Marcia, she was trying to cooperate with the police and prosecutor since the preliminary hearing and believed that she pretty well knew what they wanted. (RT 22:4802.)

Edwards testified that the interview with Marcia took place on September 23, 1999, and that she was in custody after Edwards directed that she be arrested. Edwards advised Marcia that she was under arrest in connection with the murder and robbery at Eddie's Liquor Store. (RT 22:4825-4826.) During the interview, Marcia told three different stories. (RT 22:4849.) Initially, Marcia told Edwards that she had been in Eddie's one time in 1997 to buy some Jolly Ranchers, having gone there with Johnson and Taylor in Taylor's brown Oldsmobile Cutlass. Marcia said nothing about having been a participant in a robbery. (RT 22:4832.) Edwards testified that he told her that he had spoken to other people and they were telling a different story. (RT 22:4832-4833.)

Marcia then altered her story and said that she went to the store in a silver or gray van with Johnson, Taylor, and appellant. She said they parked on a side street, she walked to the store by herself, and bought Jolly Ranchers for 65 cents. (RT 22:4833.) Marcia told Edwards that she returned to the van and that Johnson and appellant got out, walking toward Eddie's. Marcia said that she saw a gun in appellant's right hand. She said that she waited in the van with Taylor, Johnson and appellant ran back to the van, jumped in, and they drove off, leaving the area. (RT 22:4834.)

Edwards told Marcia that he believed most of her story, but he knew they planned the robbery the night before at her house. Marcia agreed that the robbery was planned the night before and recited what occurred during

---

[28] Exhibits 46 and 46A.

the planning. According to Edwards, he never suggested to Marcia who he believed had a gun. (RT 22:4835, 4857.) Marcia then said she had seen appellant with the same gun one or two months earlier. (RT 22:4838.)

Marcia said that on June 12, 1997, appellant was wearing black pants and a black T-shirt with white writing on it. She said that Johnson was wearing a long sleeved, green Gap sweater with a half zipper in the front, black shorts, and a black hat. (RT 22:4836.) Marcia told Edwards that appellant dived through an open passenger window to get back into the van and Johnson jumped into the van through the sliding door. (RT 22:4838-4839.) Marcia said they drove to downtown Long Beach to pick up Iris and Valicia, then returned to Compton on the freeway, observing several helicopters flying overhead. (RT 22:4839.) According to Edwards, at the time of Marcia's statement, he had not threatened her or made promises of leniency in exchange for testimony. (RT 22:4839.)

An autopsy revealed that Moon died as the result of a through-and-through gunshot wound to the chest. (RT 19:4294-4296, 4308, 21:4672.) The bullet traveled back to front, level, and slightly left to right. (RT 19:4298, 4324.) Moon's shirt was examined for soot and stippling, but none was observed. (RT 19:4308-4309, 4312-4313.)

Hawkins testified that the gun recovered from appellant's house is a Glock semiautomatic pistol that cannot fire without either cocking or having the slide move before pulling the trigger. (RT 20:4499-4501.) In Hawkins' opinion, the bullet recovered from Eddie's Liquor Store could have been fired from the gun recovered from appellant's house and the recovered casing was fired from that gun. (RT 20:4520-4522.) He examined Moon's shirt and while he found two particles of gunshot residue, he was unable to opine on the distance from the gun other than stating that it was not a contact shot and was from a distance greater than two to three feet. (RT 20:4529, 4531, 4533, 4535.)

VICTIM IMPACT

Morris testified that he is a Los Angeles Police Officer and is married to Moon's daughter, Maryann. According to Morris, he first met Moon in 1986 while dating Maryann. They eventually married and lived in Moon's household commencing in 1993 or 1994. (RT 22:4867-4868.) Morris described Moon as the most generous person he ever met. Moon helped Morris get through the police academy and was responsible for just about everything Morris accomplished. (RT 22:4868.) Knowing that Morris' father left when Morris was young, Moon called Morris his son and wanted Morris to call him his father. They were best friends. (RT 22:4868-4869.) Morris felt that Moon loved life more than anyone else he knew, enjoyed many things, and had a joke for everyone. (RT 22:4869-4870.) Moon treated everyone wonderfully and was open to taking in anyone that needed him. (RT 22:4870.) When he learned that Moon died, Morris broke down and cried. Morris felt much guilt when Moon died because he is a police officer and could not help when he was needed. (RT 22:4874-4875.) After Moon's death, Moon's wife, Catherine, lived with Morris and Maryann for a year. Everything turned upside-down for Catherine and it is obvious there is a big hole in her life. (RT 22:4875-4877.)

Maryann testified that her mother is Catherine Moon and that Moon is her stepfather, although Moon always treated her as his natural child. (RT 22:4894.) According to Maryann, Moon was a very generous, giving, and happy person that always saw the good in whatever occurred. (RT 22:4895.) When she learned that Moon had been killed, it was the most painful thing that ever happened to Maryann. Now there is a void in the family and it always feels like someone is missing. (RT 22:4896.) Since Moon's death, Maryann's mother is very lonely, feels empty, has lost the sparkle in her eye, and is going through the motions of life. (RT 22:4898.)

Watson testified that she lived in Moon's household right after her son was born and that Moon was her son, Christopher's, grandfather. (RT 22:4884.) According to Watson, Moon would always drop whatever he was doing to play with Christopher. (RT 22:4885.) When she learned that Moon died, Watson had to call Moon's son, Bill, and tell him what happened and also had to explain Moon's death to 2½ year old Christopher. Watson dated Bill for 7 years had never seen Bill cry until that time. Bill and Moon were best friends. (RT 22:4885, 4888, 4892.) Watson testified that Christopher still refers to everything in terms of his grandfather and still talks to his grandfather. When Christopher asks why Moon is not there, it is the most difficult thing in the world for Watson. (RT 22:4886.)

DEFENSE CASE

Edna testified that appellant is her son. She became pregnant when she was 13 years old and he was born August 24, 1977. Appellant's father was Kelvin Chism and he was 15 at the time appellant was born. Edna has 5 other children, but appellant was her first born. (RT 22:4937-4939.) Edna raised appellant by herself until he was 7 years old. She was on welfare and lost appellant because she was selling cocaine out of her apartment. Until that time, appellant was a very helpful child, helping around the house and with his brothers. (RT 22:4941-4942, 4946-4947, 4960.) Appellant was taken to McClaren Hall, a place for young children. (RT 22:4943.) Appellant ran away from McClaren Hall and his custody was given to Edna Cartwright ("Cartwright"), Edna's mother. (RT 22:4943-4944.) Edna lost touch with appellant for a while and, at some point, appellant went to live with Mary Vaughn ("Vaughn"), his father's mother. Appellant's father was living with his mother at that time. Edna was in-and-out of jail or prison. (RT 22:4944-4945.) During that period of time, appellant's father was killed. Appellant was required to identify the body.

When Edna returned to California, she found appellant had changed and adopted a "I don't give a fuck" attitude because Edna had left him and his father was dead. (RT 22:4946, 4949, 4952.) Appellant told Edna that he did not care if he died and that he just wanted to be buried on top of his father. (RT 22:4950.)

Vaughn testified that she is appellant's grandmother on his father's side. Appellant began living with Vaughn when he was 7 or 8 years old. (RT 22:4982-4984.) Appellant lived with Vaughn for 1 or 2 years after his father died. Before his father died, appellant was an "A" student with perfect attendance. After his father's death, appellant had behavioral problems and was kicked out of school. Appellant was depressed about the death and everything he tried went downhill. As a result of appellant's problems, Vaughn gave his custody to Cartwright. (RT 22:4986, 4988.)

Cartwright testified that she is appellant's grandmother on his mother's side. (RT 22:5013.) Edna was 13 years old and living with Cartwright when appellant was born. Edna lived off-and-on with Cartwright, finally moving out when appellant was about 6 years old. (RT 22:5015-5016.) At some point, Cartwright learned that Edna's children had been taken from Edna. Cartwright investigated and found the children at McClaren Hall, so she went to Children's Court and the grandparents obtained custody of appellant. (RT 22:5017-5018.) At some point after appellant's father died, appellant came to live with Cartwright. (RT 5018, 5020.) Appellant became rebellious, hostile, and angry. Appellant told Cartwright he missed his father. Sometimes, appellant would cry and be very sad. Cartwright took appellant to therapy once per week for about a year. (RT 22:5023.)

Arthur Gray ("Gray"), a former Los Angeles County Deputy District Attorney, testified that he has been the senior pastor of Abundant Joy Christian Fellowship, in Inglewood, since February, 1984. (RT 23:5086-

5087.) Gray met Cartwright and her family, including appellant, when he joined the congregation before becoming pastor. His first recollection of appellant was in the late 1980s. (RT 23:5087-5088.) Appellant took part in many church activities, religious and social. When appellant participated, he was always very pleasant, courteous, and friendly, although at times he seemed shy and reserved. Appellant appeared to get along with other adults and young people. Gray had no negative memories of appellant. (RT 23:5090-5093.) Appellant periodically participated in the church choir. (RT 23:5101.)

Curry testified that he is a correctional chaplain with California Youth Authority in Paso Robles and an ordained minister of the American Baptist Church at the Paso Robles California Youth Authority for over 25 years. Curry first met appellant sometime between 1992 and 1994, when appellant first arrived in Paso Robles. Appellant came to his office and asked if he could help in any way, including singing and cleaning floors. (RT 23:5136-5138.) Curry utilized appellant as an aide on many occasions and appellant willingly worked without compensation. Appellant sang in church and eventually was encouraged and allowed to preach. (RT 23:5139-5140.) Curry felt that appellant was really reaching the young guys, helping them to get straight, and encouraged a lot of guys to make a commitment to Christ. In 25 years at Paso Robles, Curry felt that only one other person came close to appellant in the ability to inspire others. (RT 23:5140.)

Appellant was a peer counselor, able to turn some kids around both spiritually and in terms of institutional manageability. After Curry taught appellant to be an active listener, appellant would help guys get along with others by talking them through their difficulties. (RT 23:5141.) Appellant reduced racial tensions in the living unit and would tutor others in school-work. Appellant graduated from high school while in California Youth Au-

thority. (RT 23:5142-5143.) Curry believed that a reduction in violence during that period was partially based on the prayer meetings and bible studies appellant held in his living unit. (RT 23:5144.) When Curry went through his own personal dark period, appellant was the person that held him together. (RT 23:5146-5147.) While at Paso Robles, appellant was in a very structured environment. (RT 23:5145.)

Brown testified that he met appellant in 1994 at the El Paso Robles School for Boys, a California Youth Authority facility. (RT 23:5179-5180.) Appellant was placed in the cell next to Brown. They started singing, then talking, and became friends. (RT 23:5180-5181.) Appellant taught Brown to believe in God, to believe in himself, and not to be angry all of the time. They started singing in the choir together and became both friends and roommates. (RT 23:5181.) Appellant would preach in church on some Sundays. Appellant spoke to Brown about positive things. Brown saw appellant's positive impact on others in the California Youth Authority system. (RT 23:5182-5186.)

Wahlberg, a religious volunteer, first met appellant in 1996 when she started taking part in the epiphany program at Paso Robles Youth Authority. (RT 23:5103, 5110.) She became aware of appellant as a person that had just found something very new and special in his life. She heard appellant preach on occasion, sharing what the Lord was in his life. (RT 23:5104.) Wahlberg later got to know appellant better when they were both in a program at Camp Roberts. She always felt appellant was a very encouraging person and saw it both in how he treated others and herself. (RT 23:5104.) Wahlberg heard appellant speak at epiphany reunions and during church services at the California Youth Authority church in Paso Robles. Appellant spoke to a church that Wahlberg attends in Paso Robles, giving personal testimony and the hope he had in a relationship with Jesus Christ. (RT 23:5105.) According to Wahlberg, appellant had a very positive im-

pact on the young men around him at Paso Robles because he spoke from the heart and was an encourager. (RT 23:5106-5107, 5116.) Once appellant was able to get into the church program and became part of the choir, he was delighted, excited, happy, and content that things were going in a positive direction. (RT 23:5108.)

Mills testified that he was employed by the California Youth Authority in Chino at the Hemen G. Stark Youth Training School and Laural Egan High School. He met appellant in 1997 when appellant was in his class. (RT 23:5221-5222.) The classes were warehouses and distribution. Appellant progressed to be one of the lead persons in Mills' classes and was awarded certificates. The certificates were awarded after appellant's parole was violated by the present crime. Appellant had a very good demeanor with staff and students and had a position of responsibility. (RT 23:5221-5223.)

Appellant testified that he was born August 24, 1977. Appellant was taken away from his mother when he was 6 or 7 years old. (RT 23:5234-5235.) At the age of 10, he was living with Vaughn when his father was killed. Appellant had to identify his father's body at Martin Luther King Hospital. While living with Vaughn, appellant was twice sexually abused before his father's death. (RT 23:5235-5236.) Appellant started using alcohol and drugs when he was 11 years old. Afterward, appellant started participating in church activities at the church next door to Vaughn's house. Appellant developed an interest in religion and his favorite activity in church was gospel music. While not calling himself "religious," appellant stated that, "I believe." (RT 23:5236-5237.) Addressing the jury, appellant said that he was guilty of most of the crimes of which he was accused, but that he was not a murderer because he values human life too much to kill a man over a dollar. (RT 23:5238.) To Moon's wife, appellant stated that he did not know Moon, but that "sorry" would not be enough to say how he

feels because every time he sees her, he hears the spark that had been described in her eyes and he has to go to his cell every night and think about how her life was before Moon died. Appellant said that he wished he could change time and bring Moon back. (RT 23:5238.) Appellant sang "Amazing Grace" for the jury. (RT 23:5238.)

On cross-examination, appellant stated that he was taught the difference between right and wrong by Vaughn and Cartwright. (RT 23:5240-5242.) Appellant denied being in Eddie's Liquor Store on June 12, 1997. (RT 23:5244.)

ARGUMENT

INTRODUCTION

Appellant Calvin Dion Chism's capital conviction and sentence of death is the product of an overreaching prosecutor given carte blanche by a court that failed to perform its function as an impartial tribunal. Appellant's conviction and sentence rests on the unreliable, perjured and uncorroborated testimony of a charged accomplice who repeatedly changed her story and lied under oath, together with incompetent, improperly admitted and constitutionally impermissible evidence that lessened the prosecution's burden of proof.

During the guilt phase, the trial court repeatedly misinterpreted or ignored rules of evidence and consistently allowed the prosecutor to introduce, and the jury to hear, inadmissible evidence that prejudiced the defense. The trial court's rulings consistently favored the prosecution and undermined appellant's rights to due process and to present a defense. Indeed, so egregious were the trial court's errors that if the erroneously admitted and unreliable evidence is stripped away, the only "proof" allegedly supporting appellant's conviction is unreliable and perjured accomplice testimony, circumstantial evidence that appellant was in the company of his co-defendants after commission of the offense and, one week later, was in possession of a generic shirt similar to one worn by one of the perpetrators and the alleged murder weapon which he stole one month earlier. But for the improperly admitted evidence and a trial court that failed in its duty to ensure a fair trial, the outcome would have been more favorable to appellant.

It is in this context that the following significant claims of guilt phase evidentiary error must be considered:

- Introduction of an out-of-court statement made by Steven Miller, who did not testify, to Officer Romero describing the perpetrators as they departed Eddie's Liquor Store immediately after the shooting, used to identify appellant and to connect the van to the killing.
- Introduction of Detective Chavers' testimony that she observed co-defendant Marcus Johnson or another person ask Zonita Wallace if she had spoken to the police, improperly proffered and admitted to create an inference of appellant's guilt.
- Introduction of Detective Edwards' testimony about a statement made by Marcia Johnson -- that appellant told her he had previously been inside Eddie's Liquor Store finding only one old man inside as a clerk -- improperly offered as a prior statement inconsistent with the testimony of Marcia Johnson.
- Introduction of a letter written by Iris Johnston to appellant in which she broadly accused him of committing the crime at Eddie's Liquor Store, improperly proffered as an adoptive admission premised on appellant's failure to reply.
- Introduction without proper foundation of two enhanced still photographs taken from the videotape at Eddie's Liquor Store showing the heads of the two perpetrators not shown in the original videotape and the other still photographs made from it.
- Introduction of improper, incompetent evidence from the Rite Way Market robbery to prove identity, common plan, and intent to rob at Eddie's Liquor Store.

The overwhelming prejudice from the improperly admitted evidence compels reversal both of appellant's conviction and the special circumstance allegation. Indeed, without the improperly admitted evidence, there was insufficient evidence to corroborate the testimony of the charged ac-

complice and the findings of guilt and the true finding on the special circumstance allegation must fail.

After a declaration of mistrial resulting from a hung jury, the steady stream of prejudicial error continued at the retrial of the penalty phase. The prosecutor improperly exercised two peremptory challenges against African American jurors on discriminatory grounds during voir dire, citing pretextual reasons for justification, after which the same evidentiary errors were largely repeated, with the following noteworthy additions of both evidentiary error and the failure to give requested defense jury instructions:

- The failure to preserve a letter that was presumably appellant's reply to the letter written by Iris Johnston in which she accused appellant of committing the crime at Eddie's Liquor Store.
- Exclusion of a mitigating statement made by appellant to Marcia Johnson that he only shot the clerk in Eddie's Liquor Store after the man went for a gun.
- Introduction of substantial victim impact evidence from three witnesses, plus a poster board containing numerous improper photographs.
- Failure to instruct the jury on the appropriate use of victim impact evidence.
- Failure to instruct the jury that mitigation evidence is unlimited and that aggravating evidence is limited; failure to instruct that appellant need not prove mitigation beyond a reasonable doubt and that the jury need not unanimously agree that evidence is mitigating; failure to properly instruct on the concept of "weighing;" that the death penalty must be "appropriate" and not merely warranted; and failure to properly define the penalty of life without the possibility of parole.

As a result of these highly prejudicial errors, appellant was denied a fair trial, the verdicts were inherently unreliable, and reversal of the death penalty is required.

Individually and collectively these errors undermined confidence in the homicide convictions and the death penalty verdict. This Court must reverse the judgment below.

FIRST TRIAL - JURY SELECTION ISSUES

I. THE TRIAL JUDGE ERRONEOUSLY REFUSED TO CONDUCT INDIVIDUAL DEATH QUALIFICATION VOIR DIRE

Prior to jury selection, appellant's counsel requested that the trial court conduct the death qualifying voir dire of potential jurors individually and sequestered, pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80. (RT 2:52-53.) The trial judge denied the request. (RT 2:54.)

Group qualification is unconstitutional for numerous reasons, including but not limited to those discussed by this Court in *Hovey v. Superior Court, supra*, and in empirical studies.[29]

Juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. (See e.g., *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.)

Nor can such restriction withstand Eighth Amendment principles mandating heightened reliability in capital cases. (See e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

---

[29] See e.g., Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process* (1984) 8 Law & Human Behavior 121, 132 [death qualification creates an imbalance to the detriment of the defendant]; Haney, *Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Human Behavior 133, 151; Allen, Mabry & McKelton, *Impact of Juror Attitudes about the Death Penalty on*

Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges, the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

Appellant recognizes that this Court has repeatedly held that individual voir dire is not constitutionally required following passage of Proposition 115 and amendment of Code of Civil Procedure 223. (See e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 536-539; *People v. Carter* (2005) 36 Cal.4th 1215, 1247-1248.)

Appellant seeks reconsideration of this Court's prior decisions that individual voir dire is not constitutionally required.[30]

When inadequate voir dire leads to a doubt that a defendant has been "sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment," reversal per se of the death judgment is mandated. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739.)

Juror Evaluations of Guilt and Punishment: A Meta-Analysis (1998) 22 Law & Human Behavior 715, 724.

[30] This issue is briefed in abbreviated form in accordance with *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.

II. THE GUILT AND PENALTY JUDGMENTS SHOULD BE REVERSED BECAUSE DEATH QUALIFICATION IS UNCONSTITUTIONAL

Before a prospective juror may sit on a death penalty jury, the trial judge questions the individual in a group with other prospective jurors to learn whether he or she is "death qualified": whether the person is willing, in some cases at least, to sentence to death someone who stands convicted of a capital crime. If the court determines that the prospective juror is so strongly in favor of or against the death penalty that his or her views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," then that juror may be excused for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 582.) Such jurors are not permitted to serve at either the guilt or penalty phase of a trial. This process of death qualification violates appellant's federal and state constitutional rights to due process, a fair trial, and to a fair and reliable guilt and penalty determination for the following reasons: (1) death qualification does not screen out everyone who would always impose the death penalty, so that such jurors remain on the jury even after *Witt* voir dire; (2) death qualification results in jurors who are less likely to consider the defendant's mitigation evidence; (3) jurors exposed to the death qualification process are more likely to impose death; and (4) death qualified jurors are more likely to convict a defendant at the guilt/innocence phase of the trial.

The process by which a death penalty jury is selected in California violates appellant's federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois*, *supra*, 504 U.S. 719 at p. 726; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530-531; Cal. Const., Art. I, §§ 7, 15 & 16.) Death qualification violates appellant's Eighth and Fourteenth Amendment right to a reliable death sentence.

(*California v. Ramos*, *supra*, 463 U.S. at pp. 998-999; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) It also violates appellant's right to a jury selected from a representative cross-section of the community. (U.S. Const., 6th & 14th Amends.; Cal. Const., Art. I, § 16; *Taylor v. Louisiana*, *supra*, 419 U.S. at p. 526.)

Appellant recognizes that these issues have previously been rejected. This Court has held that individual sequestered voir dire is not required by the constitution. (See *People v. Carter*, *supra*, 36 Cal.4th at pp. 1247-1248.) This Court and the United States Supreme Court have rejected the claim that the use of death-qualified jurors for guilt and penalty phases violates the Sixth and Fourteenth Amendments. (*Lockhart v. McCree* (1986) 476 U.S. 162; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120; *People v. Steele* (2002) 27 Cal.4th 1230, 1240; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199; *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1.)

Appellant seeks reconsideration of these prior decisions without full briefing.[31]

Accordingly, the death judgment should be reversed.

---

[31] *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.

GUILT PHASE ISSUES

III. IMPROPER ADMISSION OF A STATEMENT MADE BY STEVEN MILLER TO OFFICER ROMERO WAS HEARSAY VIOLATIVE OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES

A. PROCEDURAL HISTORY

Officer Rudy Romero testified that his unit was the first police unit on the scene, arriving at Eddie's Liquor Store about five minutes after the initial radio broadcast, and he contacted a Caucasian male outside the store. (RT 5:938, 940.) The man was later identified as Steven Miller. (RT 5:945.) Romero described Miller: "He was very, very nervous and seemed to be unsettled his nerves." (RT 5:940.) When the prosecutor asked Miller, "What did he tell you?", appellant's counsel lodged a hearsay objection. (RT 5:941.) The following took place at side-bar:

> Mr. Glaser [defense counsel for co-defendant Johnson]: I don't have any objection to certain statements coming in as a spontaneous declaration describing relating to the event shortly thereafter while under the stress of the excitement depending on what the scope of those statements were.
>
> The Court: Why don't you tell us what you expect them --
>
> Ms. Lopez [the prosecutor]: I expect them to say precisely what is in the police report -- if I can get the police report -- and that is, basically every observation that he made that he saw, he heard the pop sound he saw two male blacks running away from the location he went in, looked over the counter, saw the victim laying on the floor, ran out, and he will give the officer -- and he gave the officer the direction of travel of these two individuals.
>
> The Court: Mr. Glaser, that's the offer.
>
> Mr. Glaser: I don't have any objection.

The Court: And Mr. Herzstein.

Mr. Herzstein [defense counsel for appellant]: Mr. Murphy wants --

Mr. Murphy [defense counsel for co-defendant Taylor]: I withdraw my objection, too.

Mr. Herzstein: I withdraw it, also, too.

The Court: We'll proceed.

Ms. Lopez: Thank you.

(RT 5:941-942.)

Romero then testified that Miller said, "I think he's dead." (RT 5:942.) Miller continued, stating that he was sitting across the street at a bus bench with his girlfriend when he saw two male blacks walk westbound and enter the liquor store. Miller said that shortly afterward he heard a popping sound like a gunshot, then observed the same two men run out of the store, go northbound approximately two blocks on Butler Avenue, and possibly go eastbound on Marker Street. (RT 5:942-943, 949, 980.) Miller stated that he immediately ran across the street to the liquor store, entered, and saw the clerk on his back, unconscious and bleeding under the counter. Miller said that he ran to a telephone and called the police. (RT 5:944.) Miller described both suspects as 17 to 18 years old, 5'8" to 5'9" tall, with short, not shaved, Afro-style hair and thin builds. He said that one suspect was wearing a black shirt with more than one white stripe on the front and dark jeans. Miller said that the other suspect was wearing a colored shirt of unknown color and long dark shorts. (RT 5:945, 953, 959.)

At a subsequent hearing, the prosecutor stated that Miller was presently in custody pending trial on a "Three Strikes" offense and was represented by counsel expecting Miller to invoke his Fifth Amendment right not to incriminate himself. The prosecutor said that she discussed use immunity with Miller's attorney so that Miller's testimony could not be used

to prove Miller's prior convictions, but the attorney believed that Miller would still refuse to testify. (RT 6:1101-1106.)

The following morning, Miller appeared in court with his attorney. The trial judge stated that Miller intended to invoke his Fifth Amendment privilege not to incriminate himself. Miller's attorney said that Miller had a pending third strike case in Orange County and that he would assert the privilege to all questions related to Miller's prior criminal history. Appellant's counsel stated that it was conceivable Miller would testify to something that would require impeachment with Miller's criminal history. (RT 7:1231-1232.) The trial judge stated that if any party wished to impeach Miller with his prior criminal record, that party had to state it immediately or be precluded from doing so. (RT 7:1233.) Miller's attorney indicated that no matter what the trial judge ruled on impeachment, it was Miller's intention not to answer any questions. When all defense counsel indicated that they lacked incriminating knowledge of anything relating to this case, the trial judge ruled that Miller lacked a Fifth Amendment privilege not to testify. (RT 7:1236-1237.) After Miller was sworn as a witness outside the presence of the jury, he refused to answer any questions, stating his intent not to do so. After Miller was ordered to answer questions and refused to do so, the trial judge found him in contempt of court, and the trial judge stated his inclination to rule Miller unavailable to testify. (RT 7:1238-1240.)

Officer Romero was then permitted to testify that Miller told him that he was sitting across the street at a bus bench with his girlfriend when he saw two male blacks walk westbound and enter the liquor store. Miller said that shortly afterward he heard a popping sound like a gunshot, then observed the same two men run out of the store, go northbound approximately two blocks on Butler Avenue, and possibly go eastbound on Marker Street. (RT 5:942-943, 949, 980.) Miller said that he immediately ran

across the street to the liquor store, entered, and saw the clerk on his back, unconscious and bleeding under the counter. Miller said that he ran to a telephone and called the police. (RT 5:944.) Miller described both suspects as 17 to 18 years old, 5'8" to 5'9" tall, with short, not shaved, Afro-style hair and thin builds. He said that one suspect was wearing a black shirt with more than one white stripe on the front and dark jeans. Miller said that the other suspect was wearing a colored shirt of unknown color and long dark shorts. (RT 5:945, 953, 959.)

In erroneously admitting the evidence of Miller's hearsay statements to Romero, appellant's federal due process rights under the Fifth and Fourteenth Amendment to the United States Constitution, as well as his Sixth Amendment right to confront witnesses, were violated. (*Crawford v. Washington* (2004) 541 U.S. 36.)[32] Because confrontation of witnesses is designed to prevent conviction upon suspect evidence, admission of Miller's statement without cross-examination enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of Eighth and Fourteenth Amendments which has greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

In addition to depriving appellant of the protections afforded under the principles discussed in this argument, the erroneous admission of this evidence was a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth

---

[32] The new rule announced in *Crawford* is applicable to all criminal cases pending on appeal, as was the present case at the time of the *Craw-*

Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant's right to cross-examine Miller was a constitutionally-protected liberty interest of "real substance" in the ability to cross-examine Miller. To uphold his conviction, when there was no cross-examination, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480, 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.)

This error was prejudicial and requires a reversal of appellant's conviction.

B. MILLER'S STATEMENT WAS TESTIMONIAL

In *Crawford*, the United States Supreme Court

> repudiated the high court's prior ruling in *Ohio v. Roberts* (1980) 448 U.S. 56, under which an unavailable witness' statements were admissible against a criminal defendant if the statement bore "adequate "indicia of reliability." To meet that latter test, evidence had to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." In overruling *Roberts, Crawford* held that out-of-court statements by a witness that are testimonial are barred under the Sixth Amendment's confrontation clause unless the witness is shown to be unavailable and the defen-

---

ford decision. (*Schriro v. Summerlin* (2004) 542 U.S. 348, 351; *People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4.)

> dant has had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the trial court. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rule of evidence, much less to amorphous notions of 'reliability.' . . . 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."

(*People v. Monterroso* (2004) 34 Cal.4th 743, 763-764, citations omitted.) The Sixth Amendment has been made applicable to the States through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403-405; *Davis v. Alaska* (1974) 415 U.S. 308, 315.)

"Of course, in any *Crawford* analysis, the first question for the trial court is whether proffered hearsay would fall under a recognized state law hearsay exception. If it does not, the matter is resolved, and no further *Crawford* analysis is required." (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 5.) Here, Miller's statement to Officer Romero was admitted as a spontaneous statement exception to the hearsay rule.[33]

The hearsay rule is codified in Evidence Code section 1200 which provides that:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
>
> (b) Except as provided by law, hearsay evidence is inadmissible.

---

[33] While no basis for admission was stated in the record during the first trial, it was so admitted over defense objection during the penalty phase retrial. (RT 21:4634-4637.) This issue will be revisited in the arguments relating to the penalty phase.

The common law hearsay exception for excited utterances is codified in Evidence Code section 1240, which provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Appellant concedes that Miller's statement was properly characterized as a spontaneous statement under state hearsay law analysis and would qualify for admission but for Confrontation Clause analysis.

In *Crawford*, the United States Supreme Court explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." (*Crawford v. Washington, supra*, 541 U.S. at p. 50.) The confrontation clause does not bar a declarant's out-of-court testimonial statements if that declarant appears and is available for cross-examination at trial. Furthermore, the confrontation clause does not bar "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59, fn. 9.) Testimonial statements include "[s]tatements taken by police officers in the course of interrogations." (*Id.* at p. 52.) *Crawford* relied on *Rhode Island v. Innis* (1980) 446 U.S. 291 ("*Innis*"), for the concept of interrogation in a colloquial, rather than in a technical legal sense. (*Id.* at p. 53, fn. 4.)

In *Davis v. Washington* (2006) 547 U.S. 813, two consolidated state cases were before the United States Supreme Court. In *Davis v. Washington*, No. 05-5224, a 911 call was made contemporaneous with an assault on the caller -- the perpetrator was still in the house -- and the 911 call was introduced into evidence. (*Id.* at pp. 817-819.) In *Hammon v. Indiana*, No.

05-5705, the police responded to an assault shortly after it occurred, spoke with the victim, and her statement was admitted at trial. (*Id.* at pp. 819-821.)

In the course of determining the *Davis* 911 call non-testimonial and the *Hammon* statement testimonial, the Court honed the definition of "testimonial" within the context of a police encounter as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Id.* at p. 822, fn. omitted.)

With reference to the nature of a statement taken by a first responder to a crime scene, the Court added:

> Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. Cf. *Crawford, supra,* at 52, n. 3, 124 S.Ct. 1354.

(*Id.* at p. 832, fn. omitted, italics in original.)

This position was clarified in a footnote:

> Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can po-

> lice conduct govern the Confrontation Clause; testimonial statements are what they are.

(*Id.* at p. 832 fn. 6, italics in original.)

With reference to the *Davis* 911 call, the Court held that statements to the 911 operator "speaking about events *as they were actually happening*" were non-testimonial, but that "[i]t could readily be maintained" that statements later in the call, once the alleged assailant drove away from the premises, "were testimonial." (*Id.* at p. 827, 828, italics in original.)

In *People v. Cage*, *supra*, 40 Cal.4th 965, this Court sought to explain the differences between the statements in *Davis* and *Hammon*:

> The court identified four factors that indicated McCottry was not testifying during the 911 call, as follows: First, a 911 call, and at least the initial questioning by the operator, are not primarily designed to prove some past fact, but to elicit current circumstances requiring police assistance. Second, though one *might* call 911 to relate a danger already past, McCottry clearly was seeking help against a bona fide, ongoing physical threat. Third, the conversation between McCottry and the 911 operator, viewed objectively, was focused on facilitating resolution of the current emergency, rather than establishing what had happened in the past. Finally, the level of formality between McCottry's 911 interview and the testimonial police station interrogation in *Crawford* was striking. "Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." (*Davis, supra,* --- U.S. ----, ----, 126 S.Ct. 2266, 2277.)
>
> It was much easier, the court said, to resolve the testimonial nature of the police interview with Amy Hammon. Amy's statements to the questioning officer, the court observed, "were not much different from the statements we found to be testimonial in *Crawford.* It is entirely clear from the circumstances that the interrogation [of Amy] was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged." (*Davis,*

> *supra,* --- U.S. ----, ----, 126 S.Ct. 2266, 2278.) When the officer arrived, he saw no evidence of an altercation still in progress. Amy told him everything was fine, and that she faced no immediate threat. When he interviewed her a second time, in the living room, "he was not seeking to determine (as in [Davis's case]) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime. . . ." (*Ibid.*)

(*Id.* at pp. 982-983, fn. omitted, italics in original.)[34]

This Court concluded its constitutional analysis, setting out factors to differentiate testimonial and non-testimonial statements for Confrontation Clause purposes:

> We derive several basic principles from *Davis.* First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony-to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate

---

[34] In a footnote, this Court explained one aspect of the *Hammon* conversation:

> In an aside, the court explained this was true "even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. [Citations.]" (*Davis, supra,* --- U.S. ----, ----, 126 S.Ct. 2266, 2276.)

(*People v. Cage, supra,* 40 Cal.4th at p. 982, fn. 12.)

> falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*Id.* at p. 984, fns. omitted, italics in original.)

In the present case, Miller was a potential witness to the event, having seen two people enter the liquor store, heard a gunshot, and observed the same two people run from the store. Officer Romero was the first police officer on the scene, having arrived with Officer Holdredge, his partner, at least five minutes after the initial 911 call from the scene. While Miller was quite nervous, the woman with him appeared calm. Holdredge went into the store, determining that Moon was dead and that there were no perpetrators inside, while Romero contacted the witnesses. The witnesses were not behaving as though there was a present emergency that required intercession and, indeed, there was no such emergency. Miller's comments were descriptions only of past events: his belief that the man in the store was dead, his depiction of where the alleged perpetrators came from and ran to, and his description of the alleged perpetrators and their clothing.

While the descriptions may have been useful to apprehend the alleged perpetrators at some other physical location, the immediate threat at the scene had faded into history and the requirement of an ongoing emergency rendering Miller's statement non-testimonial cannot be construed as extending in time indefinitely to the apprehension of perpetrators. The statement was "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, . . ." (*Davis v. Washington*, *supra*, 547 U.S. at p. 832.) Miller did not require help. There was no existing threatening situation.

While the questioning in this case was conducted in the parking lot and was relatively informal, it was "no less formal or structured than the

residential interview of Amy Hammon in *Davis*. Here, as there, the requisite solemnity was imparted by the potential criminal consequences of lying to a peace officer. In fact, we perceive no material difference, for purposes of the confrontation clause, between the two interviews." (*People v. Cage*, *supra*, 40 Cal.4th at p. 986, fns. omitted.)[35]

Because, "it is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate" (*Davis v. Washington*, *supra*, 547 U.S. at p. 822, fn. 1, Miller's interrogation was testimonial for Confrontation Clause purposes.

C. MILLER WAS UNAVAILABLE AS A WITNESS AND THERE WAS NO PRIOR OPPORTUNITY FOR CROSS-EXAMINATION

Once it has been determined that the proffered hearsay statement of a witness not appearing at trial is testimonial, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.)

In the present case, Miller appeared at trial, insisted on invocation of his Fifth Amendment privilege despite advice of counsel and rejection of his claim by the trial judge, and was eventually found in contempt when he refused to answer questions. The trial judge ruled Miller unavailable. (RT 7:1240.) This ruling was consistent with Evidence Code section 240, subdi-

---

[35] The witness in *Cage* was subject to the provisions of section 148.5, subdivision (a), making it a misdemeanor to falsely report to a police officer that a crime has been committed. (*People v. Cage*, *supra*, 40 Cal.4th at p. 986, fn. 17.) Miller would have been subject to those same provisions.

vision (a)(1), which provides that invocation of a valid privilege renders an otherwise available witness unavailable.

"[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Id.* at p. 59, fn. 9.) If the witness is forced to testify but refuses to answer any questions on privilege grounds, this does not suffice to make his prior testimonial statement admissible in the absence of a prior opportunity for cross-examination. (*Douglas v. Alabama* (1965) 380 U.S. 415, 416-417, 419; *People v. Seijas* (2005) 36 Cal.4th 291, 303; *People v. Duarte* (2000) 24 Cal.4th 603, 609-610.)

In *People v. Sul* (1981) 122 Cal.App.3d 355, a witness who had been immunized against prosecution refused to testify. Recognizing that the provisions of Evidence Code section 240 did not apply to a witness improperly invoking a privilege (*id.* at p. 362), the Court posited the following question: "[W]hether a court faced with a contumacious witness who refuses to testify, without expressly giving as his reasons threats of violence or actual violence, has the duty to adjourn proceedings for a reasonable time in order to determine if the witness will change his mind and testify as a result of coercive incarceration." (*Id.* at p. 363.) Relying on *Mason v. United States* (10th Cir. 1969) 408 F.2d 903, 906, the court "adopt[ed] the *Mason* standard of permitting former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing." (*People v. Sul*, *supra*, at pp. 364-365; see also *Fowler v. State* (Ind. 2005) 829 N.E.2d 459, 465-470 [confrontation claim valid but rejected because trial judge did not make witness answer questions on pain of contempt]; *State v. Johnson-Howell* (Kan. 1994) 255 Kan. 928, 944 [881 P.2d 1288, 1300] [confrontation rights violated because wit-

ness held in contempt]; 1 Witkin, Cal. Evidence, Hearsay, § 23, pp. 703-704 [*Sul* establishes a "Contumacious Witness" rule, under which a witness' intractable refusal to answer questions may, without more, establish his unavailability so as to justify resort to certain forms of hearsay, or at least prior testimony when the opportunity for prior cross-examination exists].)

In *People v. Smith* (2003) 30 Cal.4th 581, 620-625, the question was whether, in the penalty phase of a capital case, the trial court properly allowed the prosecution to introduce the former testimony of a victim of another crime who refused to testify in the capital case so long as she was barred from voicing her opposition to the imposition of a death sentence. The trial court found the witness unavailable based upon her statements under oath that nothing the court might do, including sanctions for criminal contempt, would cause her to testify. (*Id.* at p. 621.) After rejecting a contention that the witness should have been permitted to express her opposition to the death sentence, the court turned to the question whether she was unavailable so as to justify the admission of her prior testimony. Relying on *Sul*, this Court stated:

> The circumstance that Mary G. was physically present in the courtroom and merely refused to testify does not preclude a finding of unavailability. Evidence Code section 240, which defines when a witness is unavailable, does not specifically describe this situation, but that statute does not "state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291." [Citation.] Courts have admitted "former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing." [Citations.]

(*Id.* at pp. 623-624.)

Here, the trial judge did everything possible to induce Miller -- a prosecution witness -- to testify before finding him unavailable. Miller always had independent counsel present. Use immunity was offered Miller by the prosecutor. Defense impeachment on prior convictions was precluded by the trial judge. The court threatened, and eventually imposed, a finding of contempt. Through it all, Miller refused to testify.

There was nothing else that the trial judge could do to induce Miller's testimony. The court properly found that Miller was unavailable to testify and because there was no prior opportunity for cross-examination, admission of Miller's statement to Officer Romero was violative of appellant's Sixth Amendment right to confront witnesses. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.)

D. FAILURE TO OBJECT IN THE TRIAL COURT DID NOT WAIVE THIS CLAIM

Defense counsel's failure to object to this evidence at trial on the grounds here raised does not preclude appellant from raising these issues on appeal. The introduction of this evidence violated appellant's right to confront witnesses, as guaranteed by the Confrontation Clause. Where an important federal constitutional right is sought to be preserved, the lack of an objection does not waive the issue. (*People v. Matteson* (1964) 61 Cal.2d 466, 468-469; *People v. Underwood* (1964) 61 Cal.2d 113, 126; *People v. Hinds* (1984) 154 Cal.App.3d 222, 237.)

Generally, appellate courts will not insist upon an objection in a lower court where such an objection would have been futile at the time. This exception is applicable where the statutory or case law binding the lower court at the time would have precluded the claim. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) The first trial in this case occurred in 2000 and

the penalty phase retrial occurred in 2001. *Crawford* was decided in 2004 and prior to the holding in *Crawford*, it would have been pointless to object on Confrontation Clause grounds relating to testimonial statements, unavailability, and prior opportunity to cross-examine when Miller's statement was properly admitted as a spontaneous statement and complied with the then current requirements of *Ohio v. Roberts* (1980) 448 U.S. 56. "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.)

E. PREJUDICE

Because the error involved a federal constitutional violation, reversal is required unless respondent can demonstrate beyond a reasonable doubt that the error is harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cage*, *supra*, 40 Cal.4th at p. 991.)

Miller's improperly admitted statement was highly important to the prosecution because it was taken within a very short time after the incident and Miller maintained both that one of the perpetrators was wearing a black shirt with numerous white stripes -- a shirt similar both to one observed in the Eddie's Liquor Store videotape and one found a week later at appellant's house -- and that the two perpetrators ran to a location where other witnesses placed the waiting van. While he could not identify either person that he observed, the statement inferentially pointed to appellant and helped to corroborate Marcia Johnson's otherwise shaky accomplice testimony tying appellant to the killing.[36]

---

[36] In Argument X, *post*, appellant separately argues that there was insufficient evidence to corroborate Marcia's testimony.

The prosecutor exploited Miller's statement at length in her opening argument to the jury:[37]

> You hear, through the testimony of Officer Romero, that the individuals seen in the video tape at Eddie's Liquor Store is (sic) a person identified as Steven Miller. The person who points out the body, the person you see going in three times to look over the counter, that's Steven Miller. The person who was excited upon the arrival of the officers. The person who was with the female, who we know made the 911 call from a pay phone. The female, Ms. Williams. That was Steven Miller.¶ And Officer Romero tells you that he made contact with the two individuals standing in front of the liquor store upon his arrival. First officer on scene. He tells you he was excited. He was excited throughout the interview. And it's obvious why he was excited. We see him looking over the counter. You see him excited. He's pointing to the body. And he tells the officers that he was seated across the street. He saw two males enter the liquor store, and then he saw those same two males running away from the liquor store.¶ It was after that point that he entered, because he heard a gunshot. He heard a popping sound that alerted him to the fact there was something amiss, something went awry inside of the liquor store. And he tells you that from across the street he sees these two males, and he says that one of them or both of them are approximately the same height, 5-8 to 5-9. Both of them are thin. He describes the stripe on the shirt, the shorts, the long pants. He tells you that they both have short curly hair.¶ We know from the video that his observations are not quite accurate as to the guy with the Nike shirt. We know that because you can see clearly in the stills he has no hair.¶ Another thing to remember about the stills is that they show more of the frame than the actual video. The video, when played on the V.C.R., will show from the neck down. These are stills of the entire frame. But you'll be able to see that.¶ But Mr. Miller gives you something extremely important. An important piece of information about the persons

---

[37] For purposes of clarity, appellant will refer throughout this brief to the prosecutor's first summation to the jury as her "opening argument" and her second summation following defense argument as her "closing argument."

> who perpetrated the crime inside of Eddie's Liquor store. He sets them on the path. The flight path.¶ He tells you they ran northbound on Butler approximately two blocks and they disappeared on Marker Lane. He provides important information that relates to the flight of the two individuals. The path that they took.

(RT 10:2060-2062.)

In her closing argument, the prosecutor emphasized the importance of Miller's testimony to a conviction:

> What's very clear about these three witnesses, Miller, Motta and Stephanie Johnson, is that they are describing the same two people, the same two people in flight.¶ Miller sets them in motion, and you know he's talking about the same two people, because even though he doesn't give you a clear description of a face, and he's mistaken as to the hair of one of them, he gives you actually the most detailed. You know it's the most detailed, because he can describe specifically the detail in clothing.¶ He has the greatest opportunity to see, but his focus is generally on the clothing, and he gives you one piece of identifiable information, the curly hair.¶ You know he's accurate in terms of the clothing, because the video tells us the accuracy and shows the top -- dark colored top, the shorts, the distinctive stripe on the black T-shirt, the long, dark pants.¶ We can look at something independent of Miller to gauge the accuracy of his observation.

(RT 10:2188-2189.)

A prosecutor's argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) When a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Brady* (1987) 190 Cal.App.3d 124, 138; *People v. Hannon* (1977) 19 Cal.3d 588, 603; *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 777.)

Clearly, the improperly admitted statement was important to the prosecutor. (*People v. Lee* (1987) 43 Cal.3d 666, 677; *People v. Louis* (1986) 42 Cal.3d 969, 994.) And, it was critical to the jury. While other evidence supported the facts asserted in Miller's statement, that evidence did not provide the clarity and detail found in the erroneously admitted out-of-court statement of Miller. Miller, unlike the other witnesses, was not driving a vehicle. He was stationary and observed the alleged perpetrators both go in and depart the store. He gave detail about stature and clothing. He told where the two men ran.

Because Miller was not subject to confrontation, the jury never heard numerous impeaching facts. It was known that, at the time of trial, he was a defendant in a "Three Strikes" case. Both the underlying felonies and a willingness to curry favor with the prosecutor in this case to achieve a better result in his "Three Strikes" case would have been proper fodder on cross-examination. Because he did not appear to testify, the jury never heard that impeachment and his credibility remained unchallenged -- to the benefit of the prosecution as a direct result of the error in admitting his hearsay statements.

On its face, this case appears to be heavily weighted in favor of the prosecution. There were a number of witnesses to the aftermath of the crime. An accomplice described the planning, events leading up to and after the crime; there was an adoptive admission on appellant's part based on a failure to respond to a writing; appellant took part in a robbery a month before the Eddie's Liquor Store killing; and the gun used to kill Richard Moon was taken by appellant at Rite Way Market a month earlier and found in appellant's house a week after the killing.

Appellant asserts, however, that the case was far closer than it appears on a cursory glance. In addition to errors addressed elsewhere in this brief, there was no eyewitness identification of appellant. The videotape

from Eddie's Liquor Store, and the enhanced still photographs from the videotape, do not clearly show appellant as a perpetrator. Marcia was a weak witness, offering many different versions of what occurred in both prior statements to the police and on the witness stand. More importantly, because of her own criminal liability and her stated desire to protect her brother, she was compelled to parrot Detective Edward's suggestions about appellant's involvement. Similarly, the so-called admission, distorted by the prosecutor to create an inference of guilt, was based on appellant's alleged silence in response to a document regarding which there was no proof that appellant ever read. The robbery at Rite Way bore little or no similarity to the incident at Eddie's and access to a weapon at some point in time is not tantamount to proof that appellant used it in a killing.

Miller's erroneously admitted out-of-court statement presented the jury with an easier route to identify appellant as a perpetrator and as one of the assailants who ran to the van allegedly parked on Marker Lane. The error not only simplified issues in a case of complex facts, but definitively lessened the prosecution's burden of proof.

The legal issues to be decided by the jury were few. There were three defendants, two who had three counts averred against them, one with two counts. There was one special circumstance allegation alleged against all three defendants, along with firearm allegations. During deliberations, the jury requested a readback of Marcia Johnson's testimony, together with that of Detective Edwards relating to Marcia Johnson, suggesting that the jury was stuck on an issue relating to Marcia's veracity. (CT 3:611.) In addition, the jury viewed the videotapes of both the Rite Way and Eddie's Liquor Store incidents. (CT 3:615.) Despite the relative simplicity of the case, the jury deliberated for 3½ days after a trial of moderate length, indicating that the jury was having trouble convicting despite the prosecution

having the benefit of the evidentiary error. (*People v. Bennett* (1969) 276 Cal.App.2d 172, 176.)

It is clear that admission of Miller's out-of-court statement violated appellant's constitutional right to confront the witnesses against him and directly contributed to the verdict of guilt. Respondent cannot demonstrate that Steven Miller's improperly admitted statement was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's conviction is mandated.

IV. ALLOWING DETECTIVE CHAVERS TO TESTIFY THAT EITHER CO-DEFENDANT MARCUS JOHNSON OR ANOTHER PERSON THREATENED ZONITA WALLACE WAS REVERSIBLE ERROR

A. PROCEDURAL HISTORY

Zonita Wallace testified that after she spoke with Detective Reynolds on June 12, 1997, a female police officer accompanied her in Wallace's van. Wallace testified she did not recall if they stopped at a gas station in Compton, if they saw co-defendant Marcus Johnson, or if she told the police officer that she was afraid. (RT 5:747-749.)

During the testimony of Detective Reynolds, the prosecutor sought to introduce evidence of inconsistent statements made by Wallace when she claimed not to remember the statements. Attempting to demonstrate that Wallace was being evasive in her testimony,[38] the prosecutor referenced Detective Chavers' testimony, which she eventually would seek to introduce, stating:

> But I believe that there is sufficient foundation to establish that her evasiveness and her lack of memory was due to other than a (sic) actual lack of memory.¶ I will establish through this witness that she advised Detective Reynolds that she did not want to go to court because she's afraid.¶ I believe that I attempted to get into that with her testimony with respect to whether or not a (sic) Detective Chavers accompany (sic) her in the vehicle, whether or not she identified Marcus Johnson to Detective Chavers, whether or not Marcus Johnson accused her of going to the police when they met in a gas station in the company of Detective Chavers, and whether

---

[38] The prosecutor was attempting to demonstrate that the testimony would be admissible pursuant to *People v. Green* (1971) 3 Cal.3d 981, 989, holding that inconsistency may be implied when the trial court finds that a witness falsely claims a failure to recall facts in order to deliberately avoid testifying as to those facts.

> or not she told police officers that she was afraid.¶ I asked her all of those questions, and I believe her responses were, "I don't remember, I don't remember, I don't remember."

(RT 7:1351.)

Prior to Detective Chavers' testimony, co-defendant Johnson's counsel raised an objection:

> Thank you, Your Honor.¶ Your Honor, I was going to inquire as to an offer of proof from the People.¶ Yesterday, counsel indicated that she wanted to elicit a statement made by Marcus Johnson showing consciousness of guilt that he confronted Zonita Wallace at the gas station, and that he accused Wallace of telling the police on them, and made this accusation of telling the police on them, and that is what she intends to introduce as a consciousness of guilt.

(RT 1431-1432.)

Johnson's counsel stated that the statements sought to be elicited were all hearsay and that a question about Johnson accusing Wallace of talking to the police would be improper as a prior inconsistent statement because Wallace was not asked that question while on the witness stand. (RT 8:1433.)

The prosecutor responded, referring to Detective Chavers:

> She will say that while in the company of Miss Zonita Wallace, Miss Zonita Wallace a pointed -- to a vehicle and said, 'There's Marcus.'¶ Later, they stopped at a police -- at a gas station where she had conversation with two individuals, Detective Chavers will say both individuals were speaking.¶ She'll say that Miss Zonita Wallace identified the two individuals as Marcus and his cousin, Michael.¶ She'll also testify that at that point she was visibly afraid, and I believe that that directly impeaches her testimony.¶ Detective Reynolds has already testified that she told him she was afraid and she did not want to come to court.¶ All of that directly impeaches Zonita Wallace, and I think that it clearly demonstrates a reason for not being completely forthcoming during the trial in this case.¶ But all of that is in that transcript.

(RT 8:1436-1437.)

Johnson's attorney responded:

> Counsel is correct, all of that is.¶ But what's not in that transcript is Marcus Johnson telling Zonita Wallace and accusing her of telling the police on them. That's not the transcript.¶ I don't have any problem with everything counsel said, because she asked her specifically about identifying him, seeing him in the car, meeting at the gas station, but asking her about whether or not they accused you of telling the police on them was never asked on cross-examination, and it's not inconsistent, and she didn't say, "I don't remember that." And I don't believe that's appropriate. I think it's hearsay.

(RT 8:1437.)

The prosecutor continued:

> Well, I believe that Detective Chavers can testify as to the things that she personally observed. It was a personal observation.¶ I think that it reflects the state of mind of the listener, who, in this case, was Zonita Wallace.¶ It's not going to be a hearsay statement that Zonita Wallace told Detective Chavers that this occurred.¶ I believe Detective Chavers is going to say that she overheard this conversation while the two men or the two young men in the gas station were speaking to Zonita Wallace.¶ She overheard the statement, so it's not a question of whether or not --

(RT 8:1437-1438.)

> She heard both individuals speaking, and one of the individuals accusing Zonita Wallace of speaking to the police.¶ She cannot attribute it to any -- either one of the individuals, but I think that it has the effect on the mind of the listener.¶ It will indicate why she's afraid.¶ One of those individuals that is in the gas station is Marcus, identified to Detective Chavers as Marcus.¶ So the two of them have confronted Zonita Wallace in the gas station.¶ She's fearful as a result of that.¶ It goes to the effect on the mind of the listener, what is causing her to be fearful.¶ Clearly, it's the encounter with Marcus Johnson in the gas station.¶ Now, Marcus Johnson is on trial, and she -- most of her testimony was, 'I don't recall, I don't recall.' I think that the jury is entitled to understand why it is that she does not recall.

(RT 8:1438-1439.)

The following ensued:

The Court: Mr. Glaser, if she's offering it not as some hearsay, but as you heard that the officer allegedly heard one or the other Mr. Johnson state that.

Mr. Glaser: Then it's hearsay.¶ She can't even attribute the statement to a declarant, yet she wants to get a consciousness of guilt instruction, and she wants to admit this evidence.

The Court: Let me stop you on hearsay.¶ The threat is hearsay?

Mr. Glaser: Well --

The Court: Or an accusation is hearsay?

Mr. Glaser: The accusation -- accusing Wallace of telling the police on them is hearsay.

The Court: It's not offered for the truth of it.

Mr. Glaser: I understand the Court's position is that it's being offered to show the state of mind of why Zonita Wallace three years later is reluctant to testify.

The Court: Right.

Mr. Glaser: Well, I think that engaged -- the Court at that point is engaging in and the D.A. is really stretching in terms of a tremendous amount of speculation three years later why she's fearful.¶ I would also note that there is nothing that I see in the report that's indicating that she's afraid of any of these defendants nor that she will not -- or was unclear with counsel [regarding] what Detective Reynolds' testimony [was] when she said anything about being afraid of coming to court, but I don't see anything in the reports about her being fearful, and in fact, at the time the statements are made, she's very forthright.¶ She identifies Marc. She identifies him out at (sic) the video. She says that's the guy in the video, and she is very cooperative, and in fact, takes it a step further and has the police go back to another defendant's home and retrieve a weapon.¶ She's riding in a police car.¶ So to bring in a statement so that counsel can argue consciousness of guilt when you don't even know who the declarant is I think is highly prejudicial. I think the statement is hearsay.¶ I don't think that her state of mind when the statement's made is what's at issue at this point since she's very forthright and

> very cooperative and makes these identifications.¶ I think that the critical time in terms of state of mind is when she comes into court and testifies and she was never asked and confronted with this statement, and I think that would have been the appropriate procedure.¶ Counsel neglected to ask her about that statement, and now is trying to get it in through the back door with an officer who doesn't even know who made the statement.

(RT 8:1439-1442.)

Appellant's counsel later joined the objection based on an earlier colloquy "on the *Aranda* issue" and the trial judge overruled the objection. (RT 8:1442.)

On direct examination, Detective Chavers testified that she spotted the vehicle at a gas station with two African American males inside. Wallace told her their names were Marcus and his cousin, Michael. Chavers observed the two males speaking with Wallace. (RT 8:1449-1450.) Johnson's counsel objected that the prosecutor was using the term "they" instead of referring to each of the males, but the objection was overruled. (RT 8:1450.) Chavers testified that she heard one of the men say that Wallace had spoken to the police and then heard Wallace respond that she had not done so. Wallace appeared uncomfortable, then looked frightened. (RT 8:1451-1452.) According to Chavers, Wallace still seemed frightened when they later spoke with Detective Reynolds. (RT 8:1452.) On cross-examination by Johnson's attorney, Chavers testified that she did not know which of the men asked Wallace if she had spoken with the police. Chavers did not put anything in her police report about the incident stating that Wallace appeared frightened. (RT 8:1454.) On redirect examination, Chavers testified that she heard two voices coming from the car. (RT 8:1457.)

Co-defendant Marcus Johnson did not testify at the trial.

There was no showing by the prosecutor that appellant was connected with or authorized the contact in any way. The trial court erroneously allowed this highly prejudicial testimony which was irrelevant to any issue in front of the court and reversal of appellant's conviction is mandated. Admission of evidence that a prosecution witness received threats not connected to the defendant, sanctioned by a state court on the theory that it was relevant to explain the witness' nervousness, is violative of the Due Process Clause of the Fourteenth Amendment. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.)

Because rules preventing admission of highly prejudicial evidence are designed to prevent conviction upon suspect evidence, admission of Chavers' testimony about co-defendant Johnson's implied threat enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under these principles is an improper denial of a state-created right and thus constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally-protected liberty interest of "real substance" in his ability to exclude evidence and inferences of guilt unsupported by the evidence. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may

create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

This error was prejudicial and requires a reversal of appellant's conviction.

B. IT WAS IMPROPER TO ALLOW INTRODUCTION OF THE EVIDENCE TO INFER CONSCIOUSNESS OF GUILT

Chavers' testimony regarding statements ostensibly made to Wallace in Chavers' presence was permitted to show Wallace's alleged nervousness while testifying and co-defendant Johnson's consciousness of guilt.

Because the evidence was permitted to explain Wallace's demeanor on the witness stand, it arguably had marginal relevance pursuant to Evidence Code section 780.[39] But because the described event occurred more

---

[39] Evidence Code section 780 states:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
>
> (a) His demeanor while testifying and the manner in which he testifies.
>
> (b) The character of his testimony.
>
> (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
>
> (d) The extent of his opportunity to perceive any matter about which he testifies.

than three years prior to Wallace's testimony, it was unlikely to have influenced her demeanor while testifying, and thus, was far more prejudicial than probative on the issue of her demeanor.

The prosecutor's effort to justify the proffer of Chavers' testimony was really pretext for her true objective -- to create the inference of consciousness of guilt pointing to Marcus Johnson and, by extension, to appellant. Because there was no proof whatsoever that appellant had knowledge of or was involved with the alleged threat, this was reversible error.

Whether or not a witness has been threatened, the fact that the witness experiences fear while on the witness stand or is otherwise afraid to testify is relevant to the jury's determination of the credibility and weight to be afforded the witness's testimony. (*People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Avalos* (1984) 37 Cal.3d 216, 232.) Generally, "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated (*People v. Hannon* (1977) 19 Cal.3d 588, 600 []; *People v. Weiss* (1958) 50 Cal.2d 535, 554 [])". (*People v. Warren, supra*, 45 Cal.3d at p. 481.) However, if the conduct did not occur in the presence of the defendant, it is inadmissible unless evidence demonstrates that the third person

---

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

acted on behalf of the defendant or that the defendant authorized the conduct. (*People v. Caruso* (1959) 174 Cal.App.2d 624, 640-641 ; *People v. Perez* (1959) 169 Cal.App.2d 473, 477.) Mere relationship between the defendant and the third person, in itself, is legally insufficient to demonstrate that the third person acted on the defendant's behalf or with the defendant's authority. Additional evidence connecting the defendant with the effort to tamper with the witness is necessary. (*People v. Perez*, *supra*, 169 Cal.App.2d at p. 478.) Moreover, "proof of a criminal defendant's 'mere opportunity' to authorize a third person to attempt to influence a witness 'has no value as circumstantial evidence' that the defendant did so. (*People v. Terry* [57 Cal.2d. 538, 566].)" (*People v. Williams* (1997) 16 Cal.4th 153, 200.)

Threats to a witness which are not connected to the defendant in some manner are irrelevant. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 808, fn. 5; *People v. Benjamin* (1975) 52 Cal.App.3d 63, 81.) "There is no discretion vested in a court to admit irrelevant evidence." (*People v. Kitt* (1978) 83 Cal.App.3d 834, 849; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Although there was no relationship between appellant and Johnson's cousin, Michael, it was largely undisputed that appellant and Johnson were acquainted. There was evidence that both took part in the earlier Rite Way robbery, they were alleged to have committed the Eddie's robbery together, and there was a good deal of other testimony tying them to each other. However, there was no evidence whatsoever that appellant had knowledge of or involvement in the alleged threat made to Wallace or that he ever had the actual opportunity to authorize Johnson or his cousin to threaten Wallace. Not only did the prosecution fail to show that appellant had anything to do with the threat, its proof did not establish that such a threat even oc-

curred. Chavers did not know whether Johnson or Michael accused Wallace of speaking with the police or precisely what was said.

People v. Williams, *supra*, 16 Cal.4th at p. 201, makes clear that the facts in evidence in this case do not support allowing Johnson's or his cousin's alleged threat as evidence of appellant's consciousness of guilt. Moreover, there was no showing of any contact between appellant and these persons in connection with this encounter. *Williams* demonstrates that the prosecution could have presented this evidence through Johnson's cousin, but there was no effort to elicit this testimony. As such, the prosecution demonstrated a mere opportunity to authorize a third person to attempt to influence a witness and that effort falls short of the proof required before third party threats may come in to show consciousness of guilt on the part of appellant. There are coincidences of timing, but that is far from the actual contact required to authorize conduct. Allowing it in as such was error.

Not only was the evidence largely irrelevant, but the trial judge's rulings were erroneous under Evidence Code section 352 because they created a substantial danger of undue prejudice. As recognized in *People v. Warren*, *supra*, 45 Cal.3d at p. 481, evidence of threats to witnesses is by its nature highly prejudicial. In this instance, the inherent prejudice was that it implied appellant's consciousness of guilt when he was unconnected to the incident, an error exacerbated by evidence that he was allegedly connected with Johnson in the commission of the crime at Eddie's a week before.

To the extent that Chavers' testimony was admitted for the purpose of demonstrating appellant's consciousness of guilt, it was error to do so.

C. THIS ISSUE AND THE FEDERAL CONSTITUTIONAL CLAIM WAS NOT WAIVED BY A FAILURE TO OBJECT

Defense counsel offered a truncated objection based on *People v. Aranda* (1965) 63 Cal.2d 518, 528-530, and did not specify the ground urged nor a federal constitutional ground for exclusion of the statement of either co-defendant Johnson or his cousin Michael's statement to Wallace. Nevertheless, the factual and legal basis for the requested exclusion -- that the statement was not properly admissible as consciousness of guilt -- was properly before the trial court based on the argument of Johnson's counsel. Because other counsel set forth the factual basis for exclusion and sought the same result urged here and appellant's counsel did otherwise seek to exclude the evidence, but neither counsel correctly identified the federal constitutional basis for the remedy sought, appellant's Fifth and Fourteenth Amendment rights to due process of law and to present a defense, and the requirement of a reliable determination in a capital case under the Eighth Amendment are not forfeited despite failure to specifically urge them in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Guerra* (2006) 37 Cal.4th 1067, 1085, fn. 4.)

D. PREJUDICE

As argued above, the introduction of this evidence violated appellant's right to due process of law. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt.

This evidence was important to the prosecution because it both demonstrated that Zonita Wallace, allegedly the unknowing provider of the van

used by the perpetrators, had reason to be evasive in her testimony because she was scared. Despite a substantial passage of time between her testimony and the alleged threatening incident, the prosecutor sought to play up her alleged fear. In addition, the lack of a limiting instruction tying this evidence solely to Marcus Johnson allowed the jury to infer consciousness of guilt attributable to appellant based on the behavior of Johnson or a relative of Johnson.

As discussed in Argument III(E), *ante*, this was a close case, consisting largely of disputed accomplice testimony and involving in significantly long jury deliberations. In such a case, prejudicial evidence inferentially adding importance to the testimony of a witness and improperly imputing consciousness of guilt to one unconnected to the incident, can easily tip the scales, leading jurors to improperly resolve their reasonable doubts based on erroneously admitted and irrelevant evidence. The improperly admitted testimony eased the prosecution's burden of proof, impacting all evidence relating to the Eddie's Liquor Store incident because less evidence was mandated to find appellant guilty beyond a reasonable doubt.

Finally, the error was also prejudicial under *People v. Watson*, (1956) 46 Cal.2d 818, because of the closeness of the case, the inflammatory nature of the evidence and the improper inferences drawn from the evidence. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law principles. (See *People v. Poggi* (1988) 45 Cal.3d 323.)

Appellant's conviction must be reversed.

V. ALLOWING DETECTIVE EDWARDS' TESTIMONY ABOUT A STATEMENT MADE BY APPELLANT TO MARCIA JOHNSON AS A PRIOR INCONSISTENT STATEMENT WAS REVERSIBLE ERROR

A. PROCEDURAL HISTORY

During the direct examination of Detective Edwards by the prosecutor, Detective Edwards testified that during his interrogation of Marcia Johnson, he told her that he believed some of the second story she told him, but that he knew she had been with the other people involved in the Eddie's incident, planning it the night before it occurred. (RT 9:1746.) After Marcia told him that the four participants, including herself, had been at her house the night before to plan the robbery, the following occurred:

> Q [by the prosecutor]: And what else did she say at that point?
>
> A Then she went into what was said at the planning.¶ She said that Chism had told her, or told them that he watched the store in Long Beach, and he had been in the store in Long Beach and there's just one clerk in the store.
>
> Mr. Herzstein: Excuse me, your Honor.¶ I object on this on the basis of hearsay.
>
> The Court: Overruled.¶ Exception applies.¶ Proceed.
>
> By Ms. Lopez: Did she say whether or not Chism described the person inside the store?
>
> A Chism described him as being one old man in the store.
>
> Q What did he say?
>
> Mr. Herzstein: Your Honor, I'm sorry. I object, again.¶ I have to ask to approach. I apologize to the Court.
>
> The Court: Side bar." (RT 9:1746-1747.)

At side bar, the colloquy continued:

"The Court: Back at side bar.¶ Let me preface this.¶ I give broad definition of what an inconsistent statement is. If what's coming out now is inconsistent with her trial testimony was said that they got together the morning of the incident and were told by Chism what to do, if what he is about to say now is inconsistent with that, she can get into it. It an inconsistent statement.

Mr. Herzstein: The questions were not asked of her regarding these specific statements by Chism. It was not asked, 'Did Chism tell you about who was in the store and what he looked like?' She is eliciting hearsay. The proper person to ask that statement of is Marcia Johnson. I didn't ask her, I skipped over that area in my cross because I knew she hadn't gone into it. And now she is going into it through this officer. This officer is not -- if she wants to recall Marcia Johnson and go into that area, and if it's different than what allegedly Chism said, that's fine. She is now eliciting statements which were not brought out on the direct of Marcia Johnson with regard to statement that allegedly Chism said at this planning phase. She's not doing it to show what time. It came out the evening before, but she is more interested in pulling out what was said to him regarding the quote, unquote, plan and who said it, which I have no problem with, but then he did what was said, which I do have a problem with, because that was not gone into on direct or cross.

The Court: So you're saying that because it wasn't gone into with her that she can't go into it now.

Mr. Herzstein: It's hearsay. She can do it through her witness. She is available.

Ms. Lopez: I asked the witness what was said. She gave a statement of what was said.¶ If this statement is inconsistent with that statement, I can ask what did she tell you was said.

The Court: So your position is that the witness was indeed asked about this.

Ms. Lopez: I asked her what was said. I can't lead her into specifies. I got a leading objection. I had to ask her what was said.

The Court: I thought she did testify as to this interview with the Detective.

Mr. Herzstein: Well, the question isn't what was said to the Detective, the question is what did Chism say, that she heard. And then if he said nothing, or he said blah, blah, blah, blah, blah, and then the question here to impeach that is that she told the officer that Chism said something different. But this isn't what's happening. This is hearsay. It's being offered for purpose of impeaching -- actually, for rehabilitating, I guess, her testimony. I'm not sure.¶ But what it is is hearsay, and it's going into statements that were allegedly said by Chism in her presence, which would have been admissible as an admission or as statements against his interests, his legal interests, but she is trying to do it through a second witness. She did not get into the specifics of what Chism said. If she said, 'Did he say anything else,' and she says, 'no,' then at that point in time. I don't think that question was asked.¶ So the point is, there's now testimony on the night before, she said on the night before Chism said blah, blah, blah, blah, blah, blah, blah, blah. She is offering his statements through a hearsay declarant. That's not the way to do it.

Ms. Lopez: That is not the way I'm doing it?

Mr. Herzstein: Why doesn't she offer them through Marcia Johnson?

Ms. Lopez: Several things occurred at trial.¶ First, I asked her what was said. Any time I went in more directly or more pointedly, I got leading objections. The Court asked me not to lead. I didn't lead, I asked her what was said.¶ Second, I believe it was both Mr. Glaser and Mr. Herzstein went into the officer suggesting things to her. I think that the officer now is entitled to go into the content of the conversation on that basis. She was asked what was said.

The Court: Just a moment.

The Court: Under 770 the witness can be recalled. She is not been excused from giving further testimony in the action. She is subject to being recalled.

Mr. Herzstein: Well, then she should be recalled by the prosecutor to go into this area. Because it's their burden of proof, not mine, Your Honor.¶ She did not do it in her direct. And, therefore, I did not do certain cross based upon

that. And now she is trying to do through a second source.¶ She has her witness still available to her.

The Court: Also, 770 says, 'The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement.'¶ She she did not include this in her account, so this, I believe, is inconsistent.

Mr. Murphy: Your Honor, I believe 770 refers to the proponent recalling of the witness. Not opponent.¶ That's what it means, I think.

The Court: I don't think so. The pro-examiner can recall a witness.

Mr. Murphy: Yeah, but basically it says that the prior inconsistent statement basically is okay, unless -- unless there is extensive evidence, made by a witness, that is inconsistent by any part of his testimony --¶ Oh, okay.¶ 'The prior inconsistent statement is inadmissible shall be excluded unless it's inadmissible -- unless the witness has had an opportunity to, was given an opportunity to deny the statement.' Which hasn't happened. 'Or the witness has not been excused from giving further testimony in an action.'¶ I think that means the witness can be recalled by the proponent of the witness and given an opportunity to explain or deny the statement. That's how I have always read that section.

The Court: I disagree.¶ Mr. Herzstein can recall her.¶ Overruled.¶ Proceed.

(RT 9:1747-1751.)

The trial judge next permitted a standing objection by appellant's counsel on the grounds discussed. (RT 9:1751.)

Trial resumed and Edwards testified that Marcia told him that appellant said during the pre-incident meeting that he had been to the store, he was planning to rob it, and there was one old man inside. (RT 9:1752.)

Because Edwards testimony lacked the proper foundation for admission as a prior inconsistent statement, permitting it into evidence was error.

Because rules preventing admission of hearsay not subject to an exception are designed to prevent conviction upon suspect evidence, improper

admission of Edwards' testimony about out-of court statements allegedly made by appellant to Marcia enhances the possibility that an innocent person may be unjustly convicted and sentenced to death, in violation of the Eighth and Fourteenth Amendments which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally-protected liberty interest of "real substance" in his ability to exclude evidence and inferences unsupported by the evidence. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)[40]

---

[40] Appellant set forth the factual basis of his objection and raised foundational grounds for his objection in the trial court. Accordingly, his

This error was prejudicial and requires a reversal of appellant's conviction.

B. ADMISSION AS A PRIOR INCONSISTENT STATEMENT WAS IMPROPER BECAUSE MARCIA JOHNSON WAS EXCUSED AS A WITNESS AND WAS NEVER ASKED FOUNDATIONAL QUESTIONS

The question here is whether Detective Edwards' testimony was properly admitted by the prosecutor to impeach her own witness' testimony. Appellant submits that while numerous statements noted by Edwards were inconsistent with Marcia's testimony, the statements attributed to her relating to appellant making out-of-court statements about his prior visit to Eddie's Liquor Store and his description of the clerk inside failed to meet the foundational requirements for admission as prior inconsistent statements under an exception to the hearsay rule.

As previously noted, the hearsay rule is codified in Evidence Code section 1200, providing that out-of-court statements, offered to prove the truth of the matter asserted, are inadmissible unless subject to an exception to the rule. "A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule." (Evid. Code, § 1201.)

In *People v. Lew* (1968) 68 Cal.2d 774, the defendant made admissions to a friend and the friend relayed them to other friends that testified.

Due Process Clause and Eighth Amendment claims are not forfeited despite failure to specifically urge them in the trial court. (*People v. Partida*

The court held that while the statements were competent as admissions of the defendant, because they were not proved by the person that heard them, the double hearsay precluded admission under the admissions exception to the hearsay rule. (*Id.* at p. 778.) Similarly, while appellant's statements to Marcia would have been admissible if testified to by Marcia, she did not do so. Thus, it was necessary for the prosecutor to qualify Marcia's out-of-court statements to Edwards as an exception to the hearsay rule. In this instance, admission of Marcia's statement to Edwards was sought as a prior inconsistent statement.

The hearsay exception provided in Evidence Code section 1235 allows the trial judge to admit prior statements of a witness to prove the truth of their content when the prior statements are inconsistent with the testimony of that witness at trial:

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

(Evid. Code, § 1235.) "Under this provision, prior inconsistent statements are admissible to prove their substance as well as to impeach the declarant." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Evidence Code section 770 sets forth the foundational requirement for admission of an inconsistent statement:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

---

(2005) 37 Cal.4th 428, 433-439; *People v. Guerra* (2006) 37 Cal.4th 1067, 1085, fn. 4.)

(b) The witness has not been excused from giving further testimony in the action.

(Evid. Code, § 770.) The proponent of hearsay evidence has the burden of proof that a statement comes within an exception to the hearsay rule. (Jefferson, California Evidence Benchbook, (1972) § 1.3, p. 5.) The prosecutor failed in that burden.

Here, neither of the alternate foundational mandates was met. First, the trial judge's memory of what occurred at the conclusion of Marcia's testimony was wrong. Marcia was excused as a witness at the end of her testimony.[41] (RT 9:1725.)

Secondly, Marcia was not given an opportunity to explain or deny the statement to the police. On direct examination, Marcia responded to the prosecutor's questions on the subject of what appellant said about Eddie's Liquor Store during the meeting at her house, as follows:

Q What did you talk about?

A A lot of stuff.

Q Did you talk about anything that you were going to do that day?

A Yes.

Q What did you talk about?

A The store.

Q When you say 'the store,' what store are you referring to?

A Eddie's Liquor Store.

Q Had you ever been to Eddie's Liquor Store before that day?

---

[41] After all counsel passed on the opportunity to further examine Marcia, the trial judge stated:

Thank you, ma'am. You are excused. The bailiff will escort you.

(RT 9:1725.)

A No.

Q Had you ever heard of Eddie's Liquor Store ?

A No.

Q Who brought up the subject of Eddie's Li quor Store?

A Chism.

Q Tell me what he said about Eddie's Li quor Store?

A He just wanted us to go check this liquor store out.

Q Did he say why he wanted you to go check the liquor store out?

A So we could rob it.

. . . .

Q What else was said at the time about Eddie's Liquor Store?

A Just what to do.

Q And what was discussed in terms of what to do?¶ Describe what was said.

The Court: And who was speaking.

The Witness: Chism was speaking.

Q By Ms. Lopez: What did he say?

A Tell us he wanted me to go look inside the liquor store.

Q Did he say what you were suppose to look for inside the liquor store?

A Cameras, clerks.

. . . .

Q By Ms. Lopez: Was there any other discussion as to anything else that was suppose to take place?

A My brother was suppose to go in with them, and Junior was suppose to drive the car.

Q Did he discuss, or tell or make any statements about why your brother was supposed to go in with him?

A No.

(RT 9:1554-156.)

Marcia was neither asked what appellant said about his alleged prior visit to Eddie's Liquor Store and the clerk he observed inside nor given an opportunity to either explain why her testimony was different from Edwards' anticipated testimony or deny that she made the statement.

The foundational requirements required before a prior inconsistent statement may be utilized were discussed in *People v. Garcia* (1990) 224 Cal.App.3d 297. After reviewing numerous cases discussing the foundational requirements, the Court of Appeal summarized their holdings:

> The foregoing cases all demonstrate essential aspects missing from the circumstances here -- that the "realistic opportunity" which must be afforded the witness to explain or deny the statements under section 770 requires reference to *more than one* of the following, 1) the people involved in the conversation, 2) its time and place, or 3) the specific statements that were made during it. The foundational question here, "Did you ever tell anyone that unless Mr. Garcia gave you a certain amount of money, you would get him in trouble?" completely misses the first two categories. Under these circumstances, we believe the trial court acted properly in refusing to allow defense counsel to introduce the prior inconsistent statement.

(*Id.* at pp. 304-305, italics in original.)

The rule should apply no differently to the prosecution. Marcia should have been asked if appellant said he had been to the store and that there was one old man acting as a clerk inside. Had Marcia answered that appellant did not say those specific things, she could then be impeached by asking if she stated to Edwards that appellant made the comments. At that point, her out-of-court statements to Edwards would fall into an exception to the hearsay rule and become admissible as an inconsistent statement. But, she was asked nothing about the specific statements appellant allegedly made regarding his prior visit to the store -- short of a question calling

for a narrative -- nor was she asked whether she told Edwards that appellant spoke certain comments. This is the critical consideration for admission of her statements as prior inconsistent statements.

Without the proper foundation for admission of Edwards' testimony as a prior inconsistent statement of Marcia Johnson, permitting it into evidence was error.

C. PREJUDICE

As argued above, the introduction of this evidence violated appellant's federal right to due process of law. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt.

Here, appellant's defense was adversely impacted by improperly admitted substantive evidence that appellant had previously scouted the location and had found only an old man working inside. The statements attributed to appellant and erroneously admitted at trial served to make him look more culpable and his cohorts less culpable in the eyes of the jurors. Indeed, this erroneously admitted evidence incriminated appellant far more than the other statements he allegedly made at Marcia's house before the incident because they indicated to the jurors he had thought this out beforehand.

If the jury believed these statements, it made it more likely they would also believe the prosecutor's assertion that appellant led the robbery attempt and was the actual shooter, despite a lack of evidence regarding exactly what occurred in the store. This evidence was extremely prejudicial, making it easier for the jury to convict appellant of both the attempted robbery and to find the robbery-murder special circumstance true. Admission

of this evidence obviated the need to find that the actual killer either intended to kill or acted with reckless indifference to life and as a major participant in the underlying crime. (§ 190.2, subds. (b) & (c).)

As discussed in Argument III(E), *ante*, this was a close case, resulting in unduly long jury deliberations. Here, prejudicial evidence further implicating appellant's culpability level in a capital crime led jurors to improperly resolve their reasonable doubts in favor of the prosecution. This lessened the prosecution's burden of proof across the board, impacting all evidence relating to the Eddie's Liquor Store incident.

Finally, the error was prejudicial even under *People v. Watson*, *supra*, 46 Cal.2d 818, based on the miscarriage of justice, because of the close nature of the case, the prejudicial nature of the evidence and the questionable nature of the inferences. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even under state law. (See *People v. Poggi*, *supra*, 45 Cal.3d 323.)

Appellant's conviction must be reversed.

VI. ALLOWING THE PROSECUTOR TO INTRODUCE AN ADOPTIVE ADMISSION ON THE GROUND THAT APPELLANT NEVER RESPONDED WAS FACTUALLY UNTRUE, LEGALLY INSUPPORTABLE, AND WAS PREJUDICIAL ERROR

A. PROCEDURAL HISTORY

The trial judge admitted as an alleged adoptive admission appellant's silence when confronted with a letter he was given by Iris Johnston.[42] This was error for several reasons. First of all, an admission in a criminal case may not be implied from the failure to respond to a writing. Here, there was no evidence that appellant read the letter admitted into evidence against him. Secondly, an admission may not be implied from silence in the face

---

[42] Exhibit 2, which reads:

6-12-97¶ Dear Dein,¶ What's up? Nothing much this way, just chillin in my room being bored, I want to tell you a little something! First of all I wanted to say I have a little idea that you guys did that little rubbery in Long Beach, because ya'll ran to the T.V. to watch the news and than when ya'll seen the helicopters ya'll was like, 'yeah, we know the niggas that did that. So I had a little ideal that ya'll did something and than when we was walking home ya'll was getting all nervous when a police car would pass by. Another ideal I have is when we was on the phone together warching the news, you was all telling me to talk, until they showed that part about the rubbery. I was like hello, you was like 'you can't talk while I'm watching the news. I was saying to my self they must of did it, that's why I got off the phone with you. And then when we was on the phone (Marcia, me, you) and ya'll was like ya'll need to tell each other something and ya'll didn't want me to hear.¶ Will all I am trying to say is that I don't want us going any further than what we already are, because if we go to gether and you get caught doing what ever the fuck you be doing, I'm just going to be ass out! Will just get back at me whenever!¶ P.S. Don't be afriad to tell me

of a narrative statement. Moreover, an entire writing may not be admitted when the alleged admission only relates to a small portion of the writing. In addition, because there was no properly admitted evidence of an adoptive admission, instruction with CALJIC No. 2.71.5 on adoptive admissions was error. These errors violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process and a reliable determination of guilt. The error was prejudicial and requires a reversal of appellant's conviction.

During the testimony of Iris Johnston, but prior to her testimony about a letter written by her to appellant, the prosecutor was questioning her about the statement allegedly made by appellant in the van. When the prosecutor asked Iris if she "also wrote a letter to Dion" (RT 5:771), defense counsel for Taylor raised an objection based on *People v. Aranda*, *supra*, 63 Cal.2d 518. (RT 5:771-772.) Taylor's counsel stated that the comment in the letter, "you guys did a little robbery in Long Beach," was conjecture. (RT 5:773.) The prosecutor stated that she was not seeking to introduce the letter, but wanted to use the letter as a prior inconsistent statement as to whether appellant allegedly said "we know the niggas that did it," as opposed to Iris' testimony that appellant said "they know the niggas that did it." The prosecutor said that she only intended to have the witness testify that she wrote the letter, not that she wrote it to anyone in particular. (RT 5:773-774.) The prosecutor continued:

> At some juncture, Your Honor, I will identify the letter, which I will ask to be received as to Mr. Chism, only where she accuses him or having committed the crime.¶ She will say he never responded, he never denied the accusation contained in this letter and what I'll do is I will redact it appropriately, but at this juncture I think that we're most concerned with this quotation that she's going to attribute or she

---

something!¶ Much ♥,¶ Iris

has attributed to Dion Chism whether or not they speculate the police know who did it or whether or not it's we know who did it, and that's what I'm driving at, the "we" statement in here, and I'd like to note with the letter she does have it in quotation marks.

(RT 5:774-775.)

Colloquy continued on use of the letter as a prior inconsistent statement. (RT 5:775-777.) After conclusion of the objection on that basis, the following transpired:

Mr. Herzstein [appellant's counsel]: She said something in the form of adoptive admission now or later, and she said because the defendant never ever denied it after being used by her in the letter.

The Court: Mr. Murphy's example of accusing someone and silence.

Mr. Herzstein: And I'm saying that he's not required to answer it.¶ If you read the last of the letter, she's kissing him off, basically. Let's stop our relationship. He may never had (sic) a chance to rebut.¶ But the point is that because someone accuses you, you have many choices, and by not answering doesn't mean you have adopted the accusation.¶ I did not agree with Mr. Murphy's example that he give (sic).¶ Adoptive admission is a situation where somebody says something and not accusatory. We were running down the street, and we saw this fellow, and I'm standing next to him, and I a (sic) don't say a word --

Mr. Murphy [co-defendant Taylor's counsel]: That was my example.

Mr. Herzstein: That wasn't your example Mr. Murphy, but --

Ms. Lopez [the prosecutor]: Well, to follow up.

The Court: No, no.¶ He's still talking about the adoptive admission by Mr. Chism.

Mr. Herzstein: Yeah.¶ Example I may have if a person next to me makes a statement and I'm not disagreeing so I don't say a word, that's an adoptive admission.¶ Like the guy next to me, Mr. Glaser, says we saw this guy running down the street. I'm standing right next to him, and I was

standing next to him at the time of his observation, I don't say a word, then we say I adopted what he said.¶ But if Mr. Glaser turned to me and he said you committed that crime, the fact that I don't respond means therefore that it's an adoptive admission.¶ I may decide very well it's best to keep my mouth shut for one reason or another, and that's not an adoptive admission, Your Honor, and this is the kind of situation -- ¶ This letter says, 'I think you guys' -- or I think your involved in this thing, and I'm kissing you off because of it. That's what he said a little more eloquently than I say it.¶ The idea by not responding to the letter and by after they broke up -- looks like they broke up, therefore, it's an adoptive admission, and that's ridiculous.

Ms. Lopez: I think what's very pertinent about this letter is she says I'm -- "Will you just get back at me whenever," and "P.S. Don't be afraid to tell me something."¶ And basically, she's asking him did you do this, and if you did this, I want to know about it, but I think what's really pertinent is the "P.S. Don't be afraid to tell me something," and that what's saying --¶ Well, you would have to read the entire letter in context, but this was a situation where he would have clearly responded or at least issued a denial had he not been involved, because she's basically saying if you are involved in this, then I'm going to pretty much be on the losing end if you're involved in this and please get back to me and don't be afraid to tell me, and signs it "much" heart "Iris."¶ "Heart" I assume means "Love, Iris," so it was clearly a letter that was giving him an opportunity and requested that he respond and he doesn't deny it and in fact no response.

Mr. Herzstein: I might as well give the quote:¶ "Will, all I am trying to say is I don't want us going any further than what we already are, because if it go together and you get caught doing whatever the fuck you will be doing, I am just going to be ass out. We'll just get back whenever. P.S. Don't be afraid to tell me something."¶ Your Honor, very honestly, if I was an innocent person and I got a statement -- letter from a girlfriend, and I was innocent, and she's absolutely nuts, and I certainly wouldn't call back and respond. I'm saying I'm staying a arm's length.¶ He adopted this, but it wasn't a letter sent presumably received, so that's it, Your Honor. I mean, it's hearsay. It's speculation, and his not responding is not an adoptive admission.

> The Court: Overruled.¶ It's sufficiently accusatory to prompt a response which apparently was not given, and we'll proceed.

(RT 5:777- 781.) It was subsequently agreed to redact the letter so that it applied only to appellant and did not explicitly or impliedly refer to statements made by Johnson and Taylor. (RT 5:781.)

The letter was used to refresh Iris' recollection of the exact words used in the van (RT 5:5:784-785), appellant's nervousness when they went to the store (RT 5:795-797), and Iris' concern that something was going on between Marcia Johnson and appellant during a conversation (RT 5:799-800). Iris testified that she hand-delivered the letter to appellant the night of June 12, 1997, and that appellant neither responded nor discussed the contents with her.[43] Appellant did not read the letter in Iris' presence. Iris stated that she did not remember if she saw appellant the same night after delivery of the letter and she did not speak to him again until approximately 1½ months prior to her testimony. (RT 5:801-802, 825-826, 834.)

Following Iris' testimony, appellant's counsel sought to exclude the letter as evidence of an adoptive admission:

> Mr. Herzstein: Now that Miss Johnston is off the stand, the Court had made a ruling regarding that letter, and I elicited statements from her that in fact she -- the letter was handed to him.¶ He did not read it in her presence. ¶ She never heard from him again until a month ago, and therefore, the question of this being an adoptive admission is just not an adoptive admission.¶ We don't know when and if he ever read the letter or if he read it six months later.¶ The thing is that it was not a statement that was said where a person under those circumstances -- or presented it in person if they hadn't done it would immediately deny.¶ He didn't read it in her presence, and she never talked to him after that, according to

---

[43] During the second penalty phase trial, there was evidence that the letter was seized at appellant's house inside an envelope addressed to appellant. The envelope was marked as Exhibit 2B. (RT 21:4706.)

her testimony.¶ This is not an adoptive admission. It should never be.

Ms. Lopez: Your Honor --

Mr. Herzstein: I don't think the letter should be admitted.

Ms. Lopez: Perhaps --

The Court: Overruled.¶ That can be possibly argument, maybe a good argument to the jury.¶ There is sufficient evidence that the jurors could conclude that he did in fact read the letter that was handed to him under the circumstances here, but I can understand your point of view, and the jurors may conclude he never bothered opening the letter, and if he did, he didn't care about whether he was accused in a crime or not.¶ Those are all good arguments, but there's legally (sic) sufficiency for it.

Mr. Herzstein: Your Honor, I also raise the 352 objection on this matter.¶ Now we're concluding -- you say I have a good argument here.¶ The idea is that this was not stated or given to him at that -- where he responded or could respond to that.

The Court: I've heard your points.

Mr. Herzstein: Okay.¶ The other --

The Court: It's a point --

Mr. Herzstein: But I just --

The Court: Listen.

Mr. Herzstein: Sorry, sorry, sorry.

The Court: When I make a point of view, I'm not the jury, so, in real life, I'm agreeing with you.¶ It's a weak adoptive admission. There's no more I can say.¶ It's legally sufficient.

Mr. Herzstein: 352 objection to that, Your Honor. The probative value is so weak compared to the prejudice to the defendant, which is a very accusatory letter, that under 352 it should not be presented to the jury, the letter.

The Court: No, because I'm not a juror.¶ The jurors reasonably could believe that he indeed read the letter and

had been accused of this formal crime, would have denied it if he were that innocent.¶ I'm not saying I as a juror would concluded that, but a reasonable juror could, so 352 does not apply here.¶ It's very strong probative evidence if believed by the jurors to adopted admission or adoption by silence.

(RT 5:886-888.)

Subsequently, Detective Reynolds testified that he recovered a letter dated August 11, 1997, at Iris' house that was addressed to Iris from appellant. (RT 7:1371.) According to Reynolds, the letter was booked into property at the Compton police station. Reynolds attempted to obtain the letter prior to his testimony, but he could not find it. Reynolds testified that he originally read the letter, but did not note the contents in a report. (RT 7:1380-1381.)

Appellant's attorney requested a sidebar conference and the following took place:

Mr. Herzstein: As the Court knows, there has been a ruling on the letter written to Chism from Iris Johnston as an adopted admission.¶ This letter, which was not in any discovery that I've received, and according to -- I just talked to counsel, they said they had been trying to get it for weeks. It may very well be of some import to this case. Particularly the Court's ruling on adoptive admission because he never responded to the letter. This may be the response.¶ I would like to be able to ask the officer in a session without the jury as to what are the contents of the letter.¶ I would better like to have the letter to be able to read it myself. This is discovery and it does relate to a point of the ruling of the Court.

The Court: Well, they are looking for the letter.

Mr. Herzstein: Yes.

The Court: Do you want the witness to come in here?

Mr. Herzstein: That's the thing, he says he knows it. I would like to explore it a little more without the jury, obviously. Even though counsel thought I was going to ask that question with the jury.

The Court: Could we finish up and then -- we're almost at noon, and then during the recess you can speak with the witness.

Mr. Herzstein: That will be fine.

Ms. Lopez: Yes.

The Court: Let's proceed.

Ms. Lopez: The letter is referenced in a property report that's been provided.

Mr. Herzstein: I know the reference, but I don't have the letter.

(RT 7:1381-1382.)

The following day, the prosecutor started to question Sergeant Cisneros about showing Iris the letter she wrote to appellant. Appellant's counsel objected and the following took place at sidebar:

The Court: We're at side bar.¶ The objection to the letter?

Mr. Herzstein: Originally I objected to the letter and the Court allowed it in on the basis of adoptive admission. And then subsequent to that I had established, after the first ruling, that in fact the letter was given and not opened in the presence of Iris Johnston. And the Court still ruled it was an adoptive admission, because she hadn't responded to it.¶ We now have a responding letter or a letter which was found in her bedroom which had been mailed, her being Iris Johnston, I believe is the testimony, which had been mailed which Detective Reynolds testified -- from Compton Police Department testified to yesterday. This is the missing letter.¶ And at this point to be ruling there is an adoptive admission when there is a letter to the first letter which made the accusatory statements is wrong. We don't have that letter. We have -- and we have no evidence of the contents of that letter.¶ And on that basis, I think the Court's ruling in terms of using that letter, we now have additional information to show again it may very well have been this response to the accusatory nature of the letter from Iris Johnston.¶ Therefore, I renew my motion at this point, until the People either come up with that letter or something similar.¶ I renew my objection, Your Honor, on the basis that it's not an adoptive admission. That,

in fact, it's hearsay and in fact it was given to him and the evidence is that he may very well have responded in writing.

The Court: Overruled.¶ Speculative at this point.¶ We'll proceed.

Ms. Lopez: Also, I want to make clear on the record that I'm also offering this letter as a prior inconsistent statement of the witness given her testimony.¶ Just for the record, so the record can be clear, I have spoken to Detective Reynolds and Mr. Herzstein had spoken to Detective Reynolds, the content of the letter was completely a love letter with no references to any crime.

Mr. Glaser: I will correct that. He said it was a love letter. I asked for the details, he knew none of the details. Some of the details were like 'you are wrong,' or 'you misunderstood' or anything of that kind of stuff in this love letter, and he said he didn't recall. He just remembers it as a love letter. That doesn't mean it wasn't a response.¶ Again, the Court under 352, if nothing else, she's offering it now to consistent statements of Iris Johnston. This is an accusatory letter. And I -- ¶ Well, I made my motion. I made my record.

The Court: Overruled.

(RT 8:1477-1479.)

During discussion on the admission of exhibits after the close of the evidentiary portion of the prosecution's case, the following transpired relative to admission of Exhibit 2:

Mr. Herzstein: While they are checking, I did have an objection to People's 2, Your Honor. That's the Iris' letter written to Mr. Chism.

The Court: Yes.¶ Anything knew (sic)?

Mr. Herzstein: I argued already as to that letter. As I said, lacking -- now people have concluded their case and lacking any evidence before the Court, we know that there was a letter written to her. We don't know what was on it. We represented to the Court what we were told was on it, but that shouldn't be the basis of the motion since we don't have the burden of proof.¶ The Court based the fact that it was adoptive admission, because there was no response to the letter, and claiming if you have a letter written to you, and the

response would tend to be, certainly, a letter written back. And, in fact, I have never seen that letter. They can't find the letter. The letter is lost. The prosecution has not produced it, and to just presume that it was not a response to the allegations in the letter, I don't think is proper.¶ We're talking about exceptions to the hearsay rule. And in this particular instance, he did not look at the letter in her presence. He was not seen by her afterwards. He had written her a letter, we don't know what the letter said.¶ Just to rule that's an adoptive admission because of those circumstances I think is a stretch, Your Honor, and I don't think it's in the interest of justice.

The Court: Overruled on the ground stated before.

(RT 9:1791-1792.)

Appellant's counsel shortly after renewed his objection:

Mr. Herzstein: Yes, Your Honor.¶ Is the Court basically indicating that all of the statements within that letter amount to a form of a admission?¶ Because there's some things there that that letter -- there's some things there that I don't think are before the jury, some hearsay things, and can I have an opportunity to try and redact the letter somewhat?

The Court: There's a reason --¶ Put your hand down. She's having trouble reporting.¶ If there's something prejudicial, there may be a reason to redact.¶ I don't think it's appropriate to redact just willy-nilly, because then there's a question as to what things are taken out of context, the tone of the letter.¶ If there's a reason not to have it, tell me and maybe we'll exclude it.

Mr. Herzstein: What I'd like to do is have a little time to go over that letter and we can talk about it again on Monday.

Ms. Lopez: Your Honor, the other reason why the people are offering it is that it contains statements that are inconsistent with Iris Johnston's testimony at the trial.¶ Most of her testimony at the trial was, 'I don't recall, I don't recall."¶ I would go specifically into statements that she had in a letter and did this happen, I don't recall.¶ Would looking at this letter refresh your recollection.¶ If it's in the letter, but I don't really recall.¶ I think the letter -- most of the letter

comes in as prior inconsistent statement given what she did at trial.¶ She did state that she did in fact write the entire letter.

The Court: It's a short letter.¶ Why don't you take a moment and tell me what's prejudicial.

(RT 9:1795-1796.)

After a brief discussion about cutting off the border of the letter, the dialogue continued:

Mr. Herzstein: One of the things on People's 2 is if you go the --¶ "I wanted to say I have a little idea that you guys did that little robbery in Long Beach because," now, that's her conclusion, her idea.¶ It's nothing that he says, and I think that is prejudicial.¶ She can say you ran -- in other words, you blank that out, and you said, "ya'll ran to the TV set to watch the news and then when you seen the helicopter like 'yeah.'"¶ I mean, that's talking about things that allegedly Mr. Chism did, but 'I wanted to say I have a little idea that you guys did that little robbery,' that is her conclusion, and that is, in my opinion, is not admissible, and it's not an adoptive admission.

The Court: Isn't that an accusation if someone were to tell you, "Mr. Herzstein, I have a little idea that you committed a robbery," wouldn't you feel incumbent to say, 'No, I didn't judge?'

Mr. Herzstein: But I'm talking about prejudice, too, 352, Your Honor.¶ The point is the things that are coming in here, which is he went to the TV to watch the TV set, he made a statement when the helicopters flew by, she's accusing him of making a statement.¶ She's accusing him of going to the TV.¶ She's accusing him of getting nervous when a police car would come by, et cetera.¶ That's one thing, and according to the Court, by the Court's ruling, he has not denied that, therefore, it's an adoptive admission.¶ But if you go a step further, and it's a little more prejudicial, 'I want to say I have a little idea that you guys did that little robbery,' I think under 352 that doesn't add anything, because the accusation is still there based upon what she said he did, which he didn't deny.¶ He didn't deny going to the TV set.¶ He didn't deny getting nervous when a police officer walked by.¶ So at least that portion I would ask under 352 be deleted, what she said what her idea was.

The Court: Overruled.

(RT 9:1797-1799.)

Exhibit 2 was admitted into evidence. (RT 9:1807.) It was later agreed that a redacted copy of Exhibit 2 -- marked as Exhibit 2A -- that had the border removed without changes to the text, would be provided to the jury. (RT 9:1859, 1861.)

Prior to instructions being read to the jury, appellant's counsel objected to instruction with a modified version of CALJIC No. 2.71.5 on adoptive admissions, but the trial judge overruled the objection. (RT 10:1951-1952.) The jury was so instructed.[44] (CT 3:673; RT 10:2015-2016.)

Admission of the letter and instruction on it was error. Because the hearsay rule is designed to prevent conviction upon suspect evidence, improper admission of a letter as an adoptive admission and instruction thereon enhances the possibility that an innocent person may be unjustly

---

[44] A modified version of CALJIC No. 2.71.5, was read to the jury, as follows:

> If you should find from the evidence that there was an occasion when a defendant: one, under conditions which reasonably afforded him an opportunity to reply; two, failed to make a denial in the face of an accusation expressed directly to him, or in his presence charging him with the crime for which this defendant now is on trial, or tending to connect him with this commission, and; three, that he heard the accusation and understood its nature, then the circumstance of his silence on that occasion may be considered against him as indicating an admission that the accusation thus made was true.¶ Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to a silence of the accused in the face of it.¶ Unless you find that a defendant's silence at the time indicated an admission that the accusatory statement was true, you must entirely disregard his statement.

convicted and sentenced to death in violation of Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

In addition, the police lost a letter written by appellant to Iris Johnston which likely was a response to her letter. Law enforcement's intentional destruction of, or failure to preserve, material evidence favorable to the defense violates a defendant's Fifth and Fourteenth Amendment rights to due process of law and to present a defense. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.) Defense counsel's request to exclude Iris' letter to appellant because there was no proof he ever read it was no more speculative than the court's conclusion that appellant' letter to Iris was merely a love letter and not a denial of Iris' accusations.

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to exclude evidence and inferences unsupported by the evidence and to preclude jury instruction on those issues. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to

---

(RT 10:2015-2016.)

the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)[45]

B. GENERAL PRINCIPLES OF ADOPTIVE ADMISSIONS

The hearsay rule is codified in Evidence Code section 1200, subdivision (a), defining hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Hearsay is inadmissible unless it qualifies under an exception to the rule. (Evid. Code, § 1200, subd. (b).) The proponent of the evidence has the burden of proof that a statement comes within an exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.)

Each hearsay exception has its own foundational requirements that must be met before the statement may be admitted. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 57, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The adoptive admission exception to the hearsay rule is set out in Evidence Code section 1221, as follows:

> Evidence of as statement offered against a party is not made inadmissible by the hearsay rule if the statement is one

---

[45] Appellant set forth the factual basis of his objection and raised foundational and Evidence Code section 352 grounds for his objection in the trial court. Accordingly, his Due Process Clause and Eighth Amendment claims are not forfeited despite failure to specifically urge them in the trial court. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 433-439; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1085, fn. 4.)

> of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or belief in its truth.

It has long been established that when a person is accused of having committed a crime, the circumstances fairly afford him an opportunity to reply, and he fails to reply, both the statement and his failure to reply are admissible as an implied admission of guilt.

The theory behind admission is either that silence is an admission of the truth of the statement or that the failure to deny is unnatural and an indication of a guilty conscience. (See *People v. Yeager* (1924) 194 Cal. 452, 486; *People v. Davis* (1954) 43 Cal.2d 661, 670.) "If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, . . . , and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*People v. Preston* (1973) 9 Cal.3d 308, 313-314; see *People v. Roldan* (2005) 35 Cal.4th 646, 710.)

"To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.) Thus, the trial court must decide whether there is evidence sufficient to sustain a finding that: (1) the defendant heard and understood the statement under circumstances that normally would call for a response, and (2) by words or conduct, the defendant adopted the statement as true. (*People v. Davis* (2005) 36 Cal.4th 510, 536.)

A trial court is vested with broad discretion in making its determination of admissibility (*People v. Karis* (1988) 46 Cal.3d 612, 637) and its

determination will be reversed only upon a finding of abuse of that discretion (*People v. Edwards* (1991) 54 Cal.3d 787, 820). In the present instance, the trial court clearly abused its discretion in admitting Iris Johnston's letter because there was an insufficient foundation for admitting the letter as an adoptive admission.

C. AN ADMISSION IN A CRIMINAL CASE MAY NOT BE IMPLIED FROM THE FAILURE TO RESPOND TO A WRITING

The long-adopted general rule is that an adoptive admission cannot be implied from a failure to respond to a letter because there can be many reasons not to do so other than an adoption of the matters stated as true. (*Security-First Nat. Bank of Los Angeles v. Spring Street Properties* (1937) 20 Cal.App.2d 618, 626.) "Silence, under such circumstances, is never the equivalent of consent; such a doctrine would place the whole world at the mercy of letter writers." (*Ibid*; see *Hughes v. Pacific Wharf & Storage Co.* (1922) 188 Cal. 210, 225.) "A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove." (*A. B. Leach & Co. v. Peirson* (1927) 275 U.S. 120, 128.)

In the context of civil litigation, failure to respond to a writing can imply adoptive admission of the writing where an answer normally would be required denying an untrue statement. (*Simpson v. Bergmann* (1932) 125 Cal.App. 1, 8; *Kelly-Springfield Tire Co. v. Sischo* (1933) 136 Cal.App. 38, 42-43.) "[T]he instances in which such letters have been admitted have usually been cases where they were part of a mutual correspondence, or referred to an existing contract." (*Simpson v. Bergmann*, *supra*, 125 Cal.App. at p. 8.)

Few cases in California reference an adoptive admission premised on a writing in a criminal case. To the extent that they do, those cases are

far different than the present case because they involve a response or non-response to the verbal reading of that which is in writing.

In *People v. Rollins* (1910) 14 Cal.App. 134, the Court of Appeal permitted introduction of a letter written to the defendant as an adoptive admission of its contents because the evidence demonstrated that the contents were read to the defendant and he failed to respond. "These letters were competent evidence--not to establish the truth of their contents, but to prove an admission against interest on defendant's part by showing his conduct with reference to them when they were read to him. His action under the circumstances of this case amounted to an implied acquiescence in the truth of the statements contained in the letters, and certainly for this purpose they were admissible." (*Id.* at p. 138.)

In *People v. Mechler* (1925) 75 Cal.App. 181, two co-defendants were individually interrogated by the police and transcripts of the interrogations were prepared. The police read the transcript of each defendant to the other defendant and noted the responses. This procedure was found to be properly admissible. (*Id.* at pp. 186-187.)

Similarly, in *People v. Porter* (1923) 64 Cal.App. 4, the confession of a co-defendant and the statements of two other people were reduced to writing. The writings were read to the defendant by the police and the defendant's conduct in relation to the readings was testified to in addition to admission of the writings themselves. The Court of Appeal held that the evidence in the documents and the defendant's responses were properly received in evidence. (*Id.* at p. 11.)

As noted earlier, appellant's counsel repeatedly argued that there was nothing in the letter that required a response from appellant. Specifically, counsel argued that the letter itself was meant to break off the relationship with appellant, so it was self-executing and did not mandate a response. Finally, defense counsel argued the letter was handed to appellant

under circumstances that did not require an immediate response and, further, there was no evidence appellant read the letter at any time.

Unlike the three California cases cited above admitting a letter as an adoptive admission, here there was no evidence whatsoever that appellant ever saw the contents of the letter or had it read to him. Iris Johnston testified that she gave the letter to appellant, they departed from each other, and she did not see him read the letter. There was nothing verbal to which appellant failed to respond.

There is also nothing here that compels extending the limited civil case exception to this criminal case. There was neither a contract nor a history of mutual correspondence. (*Simpson v. Bergmann*, *supra*, 125 Cal.App. at p. 8.) Applying the civil case exception here would not only be inapplicable, but would improperly extend a very limited civil law exception to criminal cases where such an exception has never been applied.

The problem in the present case is that, unlike a verbal accusation, Iris Johnston could not testify that she saw appellant read the letter. The prosecution offered no proof that he read it or ever became aware of its contents. Nor was there any evidence that she read the letter to him or that there was a history of written communication between them from which his knowledge of the letter's contents could be inferred. Thus there is no logical or analytical basis for extending or broadening the civil exception into the criminal realm, generally, or on the specific facts of this case.

It was error to admit Iris Johnston's written letter to appellant as an adoptive admission of appellant premised on silence, in violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process, and a reliable guilt determination.

D. AN ADMISSION MAY NOT BE IMPLIED FROM SILENCE IN THE FACE OF A NARRATIVE STATEMENT

As previously noted, Iris Johnston's letter contained many different subjects. Iris stated that: (1) she had an idea appellant and his friends committed the robbery; (2) appellant ran to the television to watch the news; (3) appellant made a comment when he saw a helicopter; (4) appellant was nervous when he saw a police car; (5) appellant told Iris not to talk while he watched the news; (6) Marcia Johnson and appellant did not want Iris to hear what they were saying to each other; and (7) Iris did not want her relationship with appellant to go any further than it already had.

Iris' narrative statements were not admissible as adoptive admissions, pursuant to Evidence Code section 1221. "It is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences — particularly where the statements are not in question form." (*People v. Sanders* (1977) 75 Cal.App.3d 501, 508.) Iris' letter was precisely the type of narrative described in *Sanders*.

In *Williamson v. United States* (1994) 512 U.S. 594, the United States Supreme Court explained that in the adoptive admission context, examination of each hearsay statement contained in the adoptive admission is the touchstone of admissibility. In *Williamson*, the trial court had admitted the entire confession of an accomplice, on the theory that the entire confession was a declaration against penal interest. On appeal, the defendant argued that only some portions of the confession were statements against penal interest and the remainder was inadmissible hearsay. In addressing the admissibility of declarations against penal interest, the court held that the lower court should have made a "fact-intensive inquiry" to determine whether "each of the statements made" in a larger narrative confession was

truly self-inculpatory, so as to qualify as a declaration against penal interest. (*Id.* at p. 604.)

Agreeing, the Supreme Court looked first at the definition of "a statement" and concluded that in the context of the hearsay exception, a statement meant "a single declaration or remark" rather than a longer narrative declaration or report. (*Id.* at p. 599.) Further, the Court decided that parts of a generally self-inculpatory statement may actually be self-exculpatory, and should not be deemed admissible simply because they are contained in a generally self-inculpatory narrative. (*Ibid.*) This was "especially true when the statement implicates someone else." (*Id.* at p. 601.) The Court held that portions of the accomplice's confession were clearly admissible, but because other portions just as clearly were not, the defendant's conviction was vacated and the case was remanded so that an inquiry could be made as to whether each of the individual statements in the confession fit within the hearsay exception. (*Id.* at p. 604.)

Williamson teaches that when a trial court rules on the admissibility of a lengthy hearsay narrative, it may not simply look at the document as a whole, as the trial judge did in the present case. Instead, as in *Williamson,* Iris' letter as a whole could not be admitted without individual analysis of each statement in the letter.

In this case, the prosecutor sought introduction only of the inference that through silence, appellant adopted an accusation by Iris that he committed the crime because she specifically told him to get back to her on the subject. Agreeing with the prosecutor, the trial judge ruled that this small portion of the narrative was sufficiently accusative to render the entire letter admissible in light of appellant's silence. (RT 5:777-781.) Defense counsel sought to redact elements of the letter that were not related to adoptive admissions, but the trial judge overruled the objection, finding that the entire letter was necessary for context. (RT 9:1795-1799.)

The trial court committed error in admitting the entire letter on the ground that it was necessary to give context to the lone admission the prosecution sought to introduce. The court failed to conduct the "fact-intensive inquiry" set forth in *Williamson*, and required by Evidence Code section 1221, in determining whether particular statements qualified as exceptions to the hearsay rule. The trial judge's failure to do so, especially in light of his own observation that the evidence was "weak" resulted in the admission of improper hearsay evidence, argued to great prejudicial effect by the prosecution. Because the trial court made a collective ruling, rather than ruling on each portion of the letter, legally insufficient and extremely prejudicial evidence was submitted to the jury.

Having proffered Iris' letter, the prosecutor had the burden of presenting the evidence necessary to establish the "preliminary facts" upon which admission of the exhibit depended, to wit, that appellant actually read or had knowledge of the letter's contents. Because the prosecutor failed to meet this burden, no portion of the letter should have been admitted.

E. EVEN IF SOME PORTIONS OF THE LETTER WERE PROPERLY ADMITTED, THIS DOES NOT NEGATE THE PREJUDICIAL ERROR ARISING FROM ADMISSION OF THE ENTIRE LETTER

Iris Johnston's letter was used to refresh Iris' recollection of the exact words used in the van (RT 5:5:784-785), appellant's nervousness when they went to the store (RT 5:795-797), and Iris' concern that something was going on between Marcia Johnson and appellant during a telephone conversation (RT 5:799-800).

Evidence Code section 771, subdivision (a), provides that "[s]ubject to subdivision (c), if a witness, either while testifying or prior thereto, uses

a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." The term "a writing" is used without limitation and means that any writing can be used to refresh the recollection of a witness. (See *People v. Hess* (1970) 10 Cal.App.3d 1071, 1080.) However, because the writing may be used only to assist the witness in testifying and has no other evidentiary value, the party calling the witness cannot introduce the writing into evidence. (*People v. Lee* (1990) 219 Cal.App.3d 829, 940.) Indeed, it is only the adverse party that may choose to introduce portions of the writing. (Evid. Code, § 771, subd. (b).) Iris Johnston's letter was properly used to refresh her recollection by the prosecutor, but admission of the contents of the letter itself into evidence on this ground was improper unless sought by appellant. Because appellant did not seek admission -- indeed, defense counsel strenuously sought to exclude the letter -- admission on this basis was error.

The prosecutor also sought introduction of Iris' letter as a prior inconsistent statement during Iris' testimony as to whether appellant allegedly said "we know the niggas that did it," as opposed to Iris' testimony that appellant said "they know the niggas that did it." (RT 5:773-774.)

The hearsay exception provided in Evidence Code section 1235 allows the trial judge to admit prior statements of a witness to prove the truth of their content when the prior statements are inconsistent with the testimony of that witness at trial:

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

(Evid. Code, § 1235.) Taken in context, Iris' testimony and the content of her letter were not inconsistent. Iris' testimony that appellant said "they

know" was a statement by Iris to the court, not quoting appellant, in which the pronoun referred to appellant as both the speaker and part of a larger group. Hence, what appellant said is that the group, including appellant, knew "the niggas that did it."

On the other hand, Iris' letter was directed to appellant and *quoted* appellant's statement that "we know," a reference to a group that included appellant that knew "the niggas that did it." Within that framework, both Iris' testimony and her letter are identical. Trial testimony that is ambiguous, as opposed to inconsistent with the witness' prior statement, does not qualify for admission as a prior inconsistent statement. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220; *People v. Arias* (1996) 13 Cal.4th 92, 153.) The prosecutor's position that the one statement was inconsistent was but a pretext for improperly putting the extremely prejudicial letter before the jury. More significantly, the trial court's erroneous ruling facilitated the prosecutor's disingenuous overreaching in getting the improper evidence admitted.

Even if, arguendo, this sole portion of the letter was properly admitted as a prior inconsistent statement, the remainder of the letter was not otherwise inconsistent with Iris' testimony. Although a prior inconsistent statement of a witness is admissible for the truth of the matter asserted as an exception to the hearsay rule under Evidence Code section 1235, here, large portions of the letter were not materially inconsistent with Iris' testimony about the conversation, despite the prosecutor's claim that the letter was offered to impeach Iris' testimony. Accordingly, admission of any portion of the letter beyond that necessary to establish Iris' prior inconsistent statement was error. (*People v. Arias*, *supra*, 13 Cal.4th at p. 153; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1220.)

Similarly, Evidence Code section 356[46] precludes introduction of any portion of the letter beyond the prior inconsistent statement the prosecutor sought to establish. Evidence Code section 356 provides that when one party introduces part of a conversation, the opposing party may admit any other part required to place the original in context. (*People v. Pride* (1992) 3 Cal.4th 195, 235; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) "The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.'" (*People v. Arias*, *supra*, 13 Cal.4th at p. 156, citations omitted.) Under Evidence Code section 356, only the defense could have put the remainder of the letter into evidence. Here, defense counsel opted not to do so.

In addition to the errors arising from the improper rulings related to refreshing recollection and prior inconsistent statements, the letter in its entirety was inadmissible as an adoptive admission through appellant's silence. Throughout the letter Iris speculated that appellant had committed

---

[46] Evidence Code section 356 provides:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

the crimes at issue in this case and was guilty of those crimes.[47] The question presented is whether the witness' opinion is admissible as evidence. The law is clear that it is not, for a witness may neither express an opinion concerning the guilt or innocence of the defendant (*People v. Brown* (1981) 116 Cal.App.3d 820, 829; see also *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47), nor express an opinion as to whether a crime has been committed (*People v. Torres*, *supra*, 33 Cal.App.4th at pp. 47-48). Appellant's alleged silence notwithstanding, Iris' opinion regarding appellant's involvement or his guilt was not admissible evidence.

Even if, arguendo, it is conceded that the letter purported to contain statements made by appellant -- which otherwise might have been admissible as admissions -- they were improper double hearsay because the letter itself did not qualify as an exception to the hearsay rule. (Evid. Code, § 1201.) Mere relevance -- not conceded by appellant -- does not transmogrify otherwise inadmissible double hearsay statements into something admissible.

Finally, Evidence Code section 352 prohibits introduction of this highly prejudicial evidence.[48] The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against one party and which has very little effect on the issues. Thus, the balancing process mandated by Evidence Code section 352 respecting

---

[47] "I have a little idea that you guys did that little rubbery in Long Beach". "I was saying to my self they must of did it." "[Y]ou get caught doing what ever the fuck you be doing." (Exhibit 2A.)

[48] Evidence. Code section 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of

probative value and undue prejudice requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case. (*People v. Wright* (1985) 39 Cal.3d 576.) Even if there is some possible legitimate inference, Evidence Code Section 352 requires the probative value to substantially outweigh the danger of undue prejudice. If there is any doubt about the evidence it must be excluded. (*People* v. *Thompson* (1980) 27 Cal.3d 303, 317; *People* v. *Kelly* (1967) 66 Cal.2d 232, 239; *People* v. *Sam* (1969) 71 Cal.2d 194, 203.) In this case, because the letter could not be used as the basis for an adoptive admission, it had no relevance to issues in dispute and thus its probative value was outweighed by its highly prejudicial nature. Exclusion was required even under the broad discretionary standard of Evidence Code section 352.

Clearly, the prosecutor's only purpose in proffering the entire letter was to get in through the back door what she could not get in through the front -- various inadmissible hearsay statements offered for the truth of the hearsay statements themselves and not for the purpose of providing meaning and context to the proffered admission.

Iris' letter and her testimony about its delivery to appellant did not meet the foundational requirements of the adoptive admissions exception because it was ambiguous, not clearly accusatory, and there was no proof that appellant was afforded a fair opportunity to read, understand, and reply to its contents. Indeed, the letter was a pretext for the prosecutor to introduce the hearsay statements that created an inference of appellant's guilt.

---

time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The evidence proffered by the prosecutor was far different from statements which have consistently been held to be proper adoptive admissions. Without exception, an adoptive admission is properly found when the defendant stands mute in the face of statements within his hearing that clearly communicate an accusation. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 73-74 [defendant responded to his name in a telephone conversation, then made no response to assertions that he threatened and shot the victim]; *People v. Fauber* (1992) 2 Cal.4th 792, 851-853 [witness overheard three people, including defendant, talking about "get[ting] rid of his body," but could not identify which person said it]; *People v. Medina* (1990) 51 Cal.3d 870, 889-891 [defendant silent in face of sister's question about why he shot three boys]; *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1010-1012 [friend confronted defendant with stealing the friend's shotgun and killing victim with it]; *People v. Silva* (1988) 45 Cal.3d 604, 623-625 [accomplice described the murder and defendant remained silent].

Here, appellant was never given a fair opportunity to hear, understand, and reply to Iris' letter. Iris acknowledged that she did not see appellant read her letter and had no way of knowing if he ever read it, and if he did, whether appellant understood that a reply was required.

> But where there is some doubt as to whether the defendant was in a position to hear the statements, understand them, or make reply, the question of whether his failure to respond gave rise to an inference of acquiescence or guilty conscience is a matter for the trial court to determine, before admitting the testimony. Here, defendant called this very fact to the attention of the court by his objection in which he stated that there was no showing that he had either heard or understood Mrs. Nilson's statements, but the court did not take any evidence then or at all on that subject before admitting the hearsay. Even if we accept the prosecution's unproved theory that defendant was feigning his mental and physical condition, that is not a showing that he heard the portion of the conversation which took place outside of the ambulance, or

was listening to that portion which took place inside but was addressed to a person other than himself.

(*People v. Briggs* (1962) 58 Cal.2d 385, 408-409, citations omitted.) Appellant is similarly situated to the defendant in Briggs. There was no showing that appellant ever read the letter from Iris and thus no proof that he had the opportunity to reply prior to his arrest. Consequently, his failure to reply did not amount to acquiescence or guilty conscience. The trial court's conclusion that the average person would have replied rested first on a speculative assumption that appellant read the letter and, in turn, on speculation about what an average person would do. These conclusions were not based on any evidence or facts and the trial judge violated his duty of impartiality in ruling the letter was admissible.

Because there was an insufficient evidentiary foundation for the prosecutor's proffer of Iris' letter as an adoptive admission, the trial court clearly abused its discretion in admitting this evidence. Accordingly, the trial judge's ruling allowing admission was in error.

F. LAW ENFORCEMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BY LOSING OR DESTROYING THE LETTER APPELLANT WROTE TO IRIS JOHNSTON

1. INTRODUCTION

A letter addressed to Iris Johnston from appellant, dated August 11, 1997 -- approximately three months after the incident at Eddie's Liquor Store -- was found by the police in a search of Iris' house and booked into evidence. The letter was read by Detective Reynolds at the time, but he did not include a reference to the contents in any subsequent police report. While existence of the letter was disclosed to the defense, the contents of

the letter were not disclosed[49] and the letter was either lost or destroyed by the police and was never seen by the defense.

As noted by appellant's counsel, the missing letter was likely a response to Iris' letter to appellant. Given the prosecutor's argument that appellant's silence in the face of Iris' written accusation was an adoptive admission, appellant's letter to Iris was an important piece of evidence critical to the defense case. It was the only means available to appellant to refute the prosecutor's argument that he failed to deny Iris' accusations and therefore effectively admitted his guilt. The prosecutor's failure to disclose the contents of the letter to the defense and its subsequent loss or destruction violated appellant's rights to present a defense and to due process pursuant to *Arizona v. Youngblood* (1988) 488 U.S. 51, 58, and *California v. Trombetta*, *supra*, 467 U.S. at pp. 488-489.) The failure to preserve evidence enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Failure of the trial judge to afford the relief requested by defense counsel is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.) To uphold appellant's conviction, in

---

[49] While the contents of the letter remain unknown, Detective Reynolds testified during the penalty phase retrial that he saw the letter and it was written by appellant as a reply to Iris Johnston's letter. (RT 21:4723.)

light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.) Finally, the error so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

2. THE FAILURE TO PRESERVE MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE VIOLATES THE RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE

Under the Due Process Clauses of the state and federal Constitutions, "criminal prosecutions must comport with prevailing notions of fundamental fairness." (*California v. Trombetta*, *supra*, 467 U.S. at p. 485; see also *People v. Nation* (1980) 26 Cal.3d 169; *People v. Hitch* (1974) 12 Cal.3d 641.) The United States and California Supreme Courts have long held that fundamental fairness "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense," including the right of access to exculpatory evidence. (*California v. Trombetta*, *supra*, 467 U.S. at p. 485; *People v. Hitch, supra*, 12 Cal.3d at p. 652.) Law enforcement's intentional destruction of, or failure to preserve, material evidence favorable to the defense violates a defendant's Fifth and Fourteenth Amendment rights to due process of law and to present a defense. (*California v. Trombetta*, *supra*, 467 U.S. at pp. 488-489; *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at p. 867.)

In this context, material evidence is evidence which possessed an exculpatory value that was apparent before the evidence was destroyed and

was of such a nature that the defendant could not obtain comparable evidence by other reasonably available means. (*California v. Trombetta*, *supra*, 467 U.S. at pp. 488-489.) The government has "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58; *United States v. Wright* (6th Cir. 2001) 260 F.3d 568, 571.)

Where law enforcement has failed to preserve evidence which was only potentially useful to the defense, a criminal defendant must show bad faith on the part of the government in order to establish a due process violation. (*United States v. McClelland* (10th Cir. 1998) 141 F.3d 967, 971.) However, where the evidence had apparent exculpatory value at the time of its destruction, bad faith need not be shown. (*Bullock v. Carver* (10th Cir 2002) 297 F.3d 1036, 1056; *United States. v. Wright*, *supra*, 260 F.3d at p. 571; *Cooper v. Calderon* (9th Cir. 2001) 255 F.3d 1104, 1114; *United States v. Gomez* (10th Cir. 1999) 191 F.3d 1214, 1218-1219; *United States v. McClelland*, *supra*, 141 F.3d at p. 971; *United States v. Parker* (10th Cir. 1995) 72 F.3d 1444, 1451-1452; *United States v. Bohl* (10th Cir. 1994) 25 F.3d 904, 909-910; *United States v. Richard* (10th Cir. 1992) 969 F.2d 849, 853; *United States v. Sullivan* (10th Cir. 1991) 919 F.2d 1403, 1426-1427.) This Court has held that held that the duty to preserve evidence applies with equal force to evidence relevant to proving "official wrongdoing," as it does to evidence which is directly relevant to the defendant's guilt or innocence. (*People v. Zapien* (1993) 4 Cal.4th 929, 964.)

If the exculpatory value of the lost evidence was apparent to the police before its loss and the police acted in bad faith, then the defense is entitled to have the trial court impose appropriate sanctions against the prosecution. (*People v. Zamora* (1980) 28 Cal.3d 88, 99-104.) Appropriate sanctions range from instruction to the jury, suppression of evidence, or

dismissal of the charges. (*Ibid*; *People v. Moore* (1983) 34 Cal.3d 215; *People v. O'Hearn* (1983) 142 Cal.App.3d 566.) Even if the defense fails to prove apparent exculpatory value or bad faith, with proof of a loss of material evidence, the trial court retains "discretion to impose appropriate sanctions, including fashioning a suitable cautionary instruction." (*People v. Medina*, *supra*, 51 Cal.3d at pp. 893, 894.)

It is well-settled that both the guilt and penalty phases of a capital trial require heightened reliability. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Gilmore v. Taylor*, *supra*, 508 U.S. at p., 342; *White v. Illinois* (1992) 502 U.S. 346, 363-364; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 646.) Even if this Court should conclude that appellant did not satisfy the requirements of *Trombetta* and *Youngblood* as applied in noncapital cases, the heightened capital case reliability requirements of the Eighth and Fourteenth Amendments nevertheless compelled the imposition of sanctions in this case by the trial court and its failure to do so warrants reversal by this court.

3. LOSS OR DESTRUCTION OF APPELLANT'S LETTER TO IRIS JOHNSTON VIOLATED THE FEDERAL CONSTITUTION AND SANCTIONS SHOULD HAVE BEEN IMPOSED

Defense counsel unsuccessfully sought to have Iris Johnston's letter to appellant excluded from evidence as an adoptive admission premised on, among other grounds, the loss or destruction of the letter written to Iris by appellant, likely in response to Iris' letter. Despite Detective Reynolds' self-serving trial testimony characterizing appellant's letter as a "love letter" three years after he allegedly read the letter, this court is not required to

adopt that depiction as dispositive, accurate or true. Indeed, given the circumstances, his testimony is highly suspect.

Without question, the letter recovered at Iris Johnston's house constituted material evidence. The prior letter -- written by Iris Johnston to appellant -- was proffered and admitted as an adoptive admission premised on appellant's silence in the face of an accusation contained in the letter. Unknown, based on Iris' testimony, was whether appellant ever looked at the letter. Known, based on Iris' testimony, is that appellant did not respond to the letter in the short period after he received it. Three months later, during a search of Iris' house, police discovered a letter written by appellant to Iris. Detective Reynolds allegedly read the letter, but failed to note or record its contents. The letter was booked into evidence at the police station, then lost or destroyed, apparently before anyone else saw it, including the defense.

Detective Reynolds' characterization of appellant's letter as a "love letter" is not entitled to deference because of the prosecution's failure to preserve the evidence. Because no one else saw the letter before it mysteriously disappeared from the police evidence locker, it is unknown whether the letter was merely a love letter or a love letter containing point-by-point rejoinders of the details in Iris' letter. In any event, the letter was material and exculpatory because it likely was the reply to Iris' letter and would have negated the prosecution's proffer of the letter as an adoptive admission based on appellant's alleged silence.

The exculpatory value of the evidence was apparent before the evidence was destroyed. Detective Reynolds was the investigating officer in this case. Of necessity, he was aware of the evidence in the case against appellant. He knew of the contents of the letter written by Iris to appellant and knew that it would be offered into evidence. The mere fact that he read the letter written by appellant and chose to seize it strongly indicates that he

knew it had evidentiary value. Reynolds also knew he had a duty to preserve the letter at the time it was seized. Accordingly, it is reasonable to conclude the letter itself was favorable evidence, the exculpatory value of which was apparent at the time of its destruction.

Since the evidentiary value of the letter was apparent at the time that law enforcement lost or destroyed it, bad faith is not required. The letter was favorable to the defense in that it could have refuted the prosecutor's assertion that appellant's failure to reply was an adoptive admission by which he conceded guilt. Although appellant argued that the letter was not an adoptive admission, the state's loss or destruction of his letter rendered him unable to challenge the prosecution's claim that appellant did not reply. Without his letter, he was unable to challenge the court's ruling that the issue of admitting Iris' letter became one of weight rather than admissibility. Without being able to establish what was in appellant's letter, appellant was unable to refute the prosecution's claim that appellant's failure to respond transformed Iris' letter into his adoptive admission.

Reynolds' failure to record the nature or contents of the letter in a police report is itself bad faith. Failure to maintain what was potentially an exculpatory reply to an accusation after it is recovered and booked into evidence at the police station -- in what at the time was known to be a murder prosecution and which subsequently became a death penalty prosecution -- can only have been intended to prevent appellant from establishing that he replied in writing and denied Iris' written accusation. On the facts presented here, appellant is just as entitled to the supposition that his letter was exculpatory as the prosecutor was entitled to argue that Iris' letter was an adoptive admission.

Law enforcement's failure to collect and preserve the letter written by appellant to Iris Johnston violated appellant's constitutional rights to due process and to present a defense. (*Arizona v. Youngblood*, *supra*, 488 U.S.

at p. 58; *California v. Trombetta*, *supra*, 467 U.S. at p. 485; *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1120; see *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 236 F.3d 1083, 1089-1090.) Once it was established that the police lost appellant's letter to Iris, the trial court exacerbated the violation of appellant's constitutional rights by denying appellant's request to exclude Iris' letter to the extent that it was admitted as the foundational basis for an implied admission premised on appellant's silence.

G. LACKING AN EVIDENTIARY BASIS, IT WAS ERROR TO INSTRUCT THE JURY WITH CALJIC NO. 2.71.5 ON ADOPTIVE ADMISSIONS

"The trial court's duty in a criminal case to instruct on the general principles of law relevant to the issues raised by the evidence includes a correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10.) Before the trial court instructs the jury that it may draw a particular inference, there must be evidence in the record supporting the proposed inference. (*People v. Hannon*, *supra*, 19 Cal.3d at p. 597; *People v. Carmen* (1951) 36 Cal.2d 768, 773.)

Over defense objection, the trial judge instructed the jury with CALJIC No. 2.71.5 on adoptive admissions. As appellant has argued, Iris Johnston's letter to appellant was improperly admitted to demonstrate that his failure to respond was an adoptive admission premised on silence. In the absence of any evidence of an adoptive admission, instructing with CALJIC No. 2.71.5 on adoptive admissions was error.

Moreover, because the error impacts the prosecution's burden of proof of all elements of the charges beyond a reasonable doubt, it is violative of appellant's state and federal constitutional rights to trial by impartial jury and due process pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. (*Yates v. Evatt* (1991) 500 U.S. 391; Cal. Const., art. I, §§ 15 & 16.) Permitting the jury to be instructed on an inference not supported by the record enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

H. PREJUDICE

As argued above, the introduction of this evidence violated appellant's right to due process of law. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt. The error here was admitting Iris' letter to appellant as proof of his lack of response to an accusation that he was a perpetrator of the crimes committed at Eddie's Liquor Store.

The prosecutor twice exploited the error in argument. During her opening argument, she told the jurors:

> Also, consider their behavior after they arrive in Compton. You'll see this clearly from the letter that Iris Johnston writes that day. Her observations. Her recollection of what was said in that van. The nervousness when they see a police officer. Their need to monitor news broadcasts. The

> fact that Marcia Johnson has to speak privately to Mr. Chism in a three-way call.¶ *All of that is important, extremely damning information. That supports a conclusion that they are the group that did it.*

(RT 10:2069, italics added.)

Similarly, in her closing argument, the prosecutor stated:

> That is clearly demonstrated by her letter. Her letter dated June 12th, 1997, speak (sic) of all of her concerns and all of her observations as she suspects that they participated in the crime in Long Beach.

(RT 10:2201-2202.)

The prosecutor's argument made clear that Iris' letter was important to her case -- whether it was considered an implied admission by appellant or substantive evidence of what occurred. (*People v. Lee*, *supra*, 43 Cal.3d at p. 677; *People v. Louis*, *supra*, 42 Cal.3d at p. 994.) She clearly offered the letter as proof of the ultimate fact. As she told the jury, the letter provided a critical link to appellant as one of the perpetrators. "[I]mportant, extremely damning information." (RT 10:2069.) "[S]upports a conclusion that they are the group that did it." (RT 10:2069.) These are words of priority, of significance. These are the prosecutor's own words describing how important she considered the improperly admitted evidence to the proof of her case against appellant. This Court should deem the improperly admitted letter at least as important as the prosecutor treated it at trial. (*People v. Cruz* (1964) 61 Cal.2d 861, 868; *People v. Powell* (1967) 67 Cal.2d 32, 57.)

A prosecutor's argument is an especially critical period of trial. (*People v. Alverson*, *supra*, 60 Cal.2d at p. 805.) Since it comes from an official representative of the People, it carries great weight and must be reasonably objective. (*People v. Talle*, *supra*, 111 Cal.App.2d at p. 677.) When a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People*

v. Woodard, *supra*, 23 Cal.3d at p. 341; *People v. Brady*, *supra*, 190 Cal.App.3d at p. 138; *People v. Hannon*, *supra*, 19 Cal.3d at p. 603; *Garceau v. Woodford*, *supra*, 275 F.3d at p. 777.)

The improperly admitted letter also lessened the prosecutor's burden of proof by filling in holes in the prosecution case -- the identity of the perpetrators and corroboration of Marcia Johnson's testimony.[50] There were no independent eyewitnesses to the crime at Eddie's Liquor Store and the people who observed the perpetrators either entering or leaving the store were all unable to identify anyone. The videotape and still photographs from the scene did not adequately show the perpetrators to permit their identification. Marcia Johnson described the other three perpetrators. Other than Iris Johnston, no one else saw them together. While the gun used in the crime was taken by appellant in the Rite Way Market robbery and was later found in his house, his possession of the weapon does not unequivocally place him at the scene of the capital offense. Although the shirt found at appellant's house was similar to one worn by a perpetrator, a black T-shirt with a Nike swoosh on it is generic and readily available in the marketplace.

If the jurors believed that appellant's silence in the face of Iris' letter proved his involvement in the crime, the error in admitting this evidence is manifest. Inasmuch as the evidence lacked the foundational basis required to permit admission, it should never have been presented to the jury.

This error was not harmless and clearly impacted the jury's determination of guilt. As previously noted,[51] this was a close case and the jury deliberations over an extended period made that clear. Errors are not created

---

[50] Failure to corroborate Marcia Johnson's testimony is fully discussed in Argument X, *post*.

equal. Some errors, such as the erroneous admission of the adoptive admission in this case, so infect the proceeding with unfairness that reversal is virtually always required. (See *Arizona v. Fulminate* (1991) 499 U.S. 279, 295-302 [erroneous admission of defendant's confession required reversal even though a second confession was properly admitted].)

The error was also prejudicial under *People v. Watson*, *supra*, 46 Cal.2d 818, because of the weakness of the case, the prejudicial nature of the evidence, the questionable nature of the inferences, and the reliance by the prosecution on these errors during argument to the jury. But for these errors, the outcome would have been more favorable to the defense. (See *People v. Poggi*, *supra*, 45 Cal.3d 323.)

Reversal is required.

---

[51] Argument III(E), *ante*.

VII. IMPROPER ADMISSION OF TWO ENHANCED STILL PHOTOGRAPHS TAKEN FROM THE VIDEOTAPE AT EDDIE'S LIQUOR STORE WITHOUT A PROPER FOUNDATION MANDATES REVERSAL

A. PROCEDURAL HISTORY

The trial court violated appellant's rights to fair trial, due process, and a reliable determination of guilt under the Fifth, Sixth, Eighth, and Fourteenth Amendments when it erroneously admitted two enhanced photographs created from the videotape recovered from Eddie's Liquor Store.[52] No foundation was laid to establish the authenticity of the photographs as exact and accurate copies of the images contained on the videotape. As a result of this error, appellant's defense was prejudiced.

Sergeant Cisneros testified that he responded to the crime scene at Eddie's Liquor Store and was given a videotape that had been taken from a video recorder in the store. (RT 8:1459.) On direct examination, the following then occurred:

> Q Later, did you do anything with that video tape?
>
> A Yes.
>
> Q What did you do?
>
> A On a later date, we took it to the Aero Space Corporation, part of the Air Force base subsidiary, and we took it there to have it enhanced and still photographs to be used.
>
> Q Thank you.¶ Now when you requested that the -- that the video be enhanced and that still photographs be

---

[52] Sergeant Cisneros testified that Exhibits 41 and 42 were enhanced and received by him from Aerospace Corporation. Exhibits 43A, 43B, and 44 were unenhanced and created earlier at the Long Beach Police Department. (RT 8:1538-1539.)

made, did you wait until those still photographs were given to you?

A Yes.

Q Did you wait at that location?

A Yes.

Q Thank you.

Mr. Herzstein: Your Honor, may we approach?

The Court: Yes. At side bar.

(RT 8:1459-1461.) At side bar, appellant's counsel stated his objection:

Mr. Herzstein: Okay. Apparently, she has some still photographs taken from the second video tape which she is going to -- I have copies of these. They are not as good as these, but I have copies. And I'm not sure what she is going to try, but I have a problem with the photographs for two reasons.¶ First is the video itself is the original, as before, which the jury can see and look at any time they want to, including that information on it.¶ Secondly, these videos have been enhanced. Enhanced for one person can be doctoring for another. And I used to work at an aerospace corporation, but it was a long time ago and a different thing, but an enhancing process does not necessarily mean a true copy thereof. It means things have been added.¶ Therefore, I object on that basis, unless she wants to bring in some expert to testify as to the enhancing process.¶ My objection is first on that.¶ Secondly, the best evidence is the original video itself, if she is going to start talking about identity.¶ For example, on the original photographs it's not at all clear in my mind, or the video tape, not necessarily clear that there is a swoosh on the chest of the one person on the shirt that he's wearing. It becomes more clear with these still pictures. Though not really clear, but more so. And I just don't think that without getting into the process that was done to enhance, that those should be admissible. And I think they should stick with the original video tape.

The Court: So what's the specific objection to the these stills?

Mr. Herzstein: The objection is first that they have been processed or doctored. We don't know anything about the process or the doctoring, and there's no foundation

established as to what kind of a process was used and what it did to the originals.¶ In fact, I understand now that they even enhanced the video tape. I think he said the video tape was enhanced and the stills were made. And I have a problem with that also. It's a late objection, but if in fact the video tape was enhanced, I also believe the video tape was doctored. I think before it's shown to the jury again or allowed to go into the jury, we should have some information to the jury as to what process was done. It's just like --¶ And the second is that the -- assuming for a moment the video is not doctored or enhanced, the stills are redundant with the video.

The Court: The concern with the other stills was that he had this gun being pointed and whether this is prejudicial.¶ Here there is nothing prejudicial happening. We just have people, apparently, walking into the store. So I'm inclined to allow it.¶ As far as the enhancement, there's not enough information now for me to exclude the video tape which has already been shown. Enhancement is a vague term. I can't say that it's inaccurate at this point.

Mr. Herzstein: Well, it's not my job to turn around -- the word 'enhanced' was used by her witness at that point. And that means something was done to the video.¶ Okay, Your Honor. I feel that --

(RT 8:1461-1463.)

Co-defendant Johnson's counsel joined in the objection, adding that the objection was based on foundation, authenticity, best evidence, and chain of custody, noting a computer generated photograph required an adequate foundation to be laid by the prosecutor. (RT 8:1463.)

When the trial judge asked the prosecutor if she knew what the enhancement consisted of, she replied:

No. But I think that looking at the video in court can fairly determine that there is no real enhancement. What it does is that when you view the video on the machine or on the V.C.R., the video player, the machine doesn't pick up the top portion of the film itself. But when you make the stills from the film, the film, the stills capture from the neck up, whereas when it's played in a machine the machine doesn't have, I guess, a large enough eye to capture the entire body.¶

> So what you have of these that is absented from the others is you have a portion from the neck up that will clearly show the shape of the head, it shows some elements of the profile. But looking at the video itself, it's very clear nothing was added into it, and you can just compare it. And you will see nothing was added into it.

(RT 8:1464.) Appellant's counsel countered that whether or not the videotape was enhanced, the still photographs produced from it may have been, and requested an opportunity to question Cisneros on voir dire to determine what occurred. Co-defendant Taylor's counsel joined in the objection. (RT 8:1464.) Following a discussion about discovery of the disputed photographs, the side bar conversation concluded:

> The Court: The witness has not testified that an enhancement occurred. He said he transported them for enhancement and stills.¶ We don't know what, if anything, was done.
>
> Mr. Glaser: He waited to pick them up.
>
> The Court: We don't know that the enhancement occurred. We can only speculate.
>
> Mr. Herzstein: If you bring it there for enhancement, it's like bringing it there for analysis. There's an inference made they were enhanced.¶ What I'm saying is this has to be pursued further. This is late discovery. I would have objected to the video, if I had understood that originally. I though it was a raw video that we were seeing.
>
> The Court: Overruled.¶ We'll proceed.

(RT 8:1465-1466.) During cross examination by appellant's counsel, Cisneros testified that he took the videotape to Aerospace Corporation to have it enhanced. Specifically, Cisneros sought to have them "clear the video tape." (RT 8:1517-1518, 1520.) Cisneros testified that after they

were finished, he received his videotape back and also received a second tape. He did not know which one was in evidence.[53] (RT 8:1518.)

According to Cisneros, the original tape was a standard VCR tape, but for surveillance purposes it had different timing than a normal tape and the image moved very quickly if viewed on a standard VCR video player. (RT 8:1519.) After the original tape was put in the machine at Aerospace Corporation, still photographs were created and given to Cisneros. (RT 8:1524.) According to Cisneros, he gave them the original tape, "I asked them if they could make it more clearer. They did a process, and then they did some stills." (RT 8:1525-1526.) Cisneros described the device used by the technician for the process as "some kind of machinery." (RT 8:1526.) The machine had a computer terminal and the video tape picture appeared on the monitor. (RT 8:1527.)

On redirect examination, Cisneros described the difference in the two videotapes:

> The difference was I could see their faces on -- I could see, from the original I could see the faces of the subjects that had entered. As where with the machine that we had at our office, I could not.

(RT 8:1529.) After all counsel finished questioning Cisneros, the trial judge asked a few questions:

> The Court: Just a minor point.¶ Assuming that the Aerospace tape and the Aerospace stills are, quote, superior quality. Do you know if that is because the video equipment is superior, perhaps more sensitive, the paper that they use to print the imagine on is of superior quality, or they made adjustments, quote, enhancements to the image.¶ If you know.
>
> The Witness: From what I recall from that meeting was that they could not do any enhancements to the video. But we did get, like I said, we could see more of the film, I

---

[53] The videotape of the Eddie's Liquor Store incident is Exhibit 36.

believe because of the machinery we were using.¶ And in regards to the paper, I believe it's just photo quality paper.

(RT 8:1542.) In response to follow up questions from appellant's counsel, Cisneros testified that he was told at Aerospace Corporation that they could not enhance the videotape or still photographs. (RT 8:1542.)

During the discussion on admission of exhibits prior to the close of the prosecution case, appellant's counsel objected to admission of Exhibit 41:

> Mr. Herzstein: That is on the basis that insufficient foundation as to what was done to the photograph.¶ She is indicating, counsel has indicated it's because it shows a different portion of the person.¶ However, that can be easily corrected from running a still from the video tape without having to use a process that enhances. And, in fact, there was a process that was submitted to, and there's no foundation as to the enhancement or lack of, through the Aerospace Corporation process. And I object on that basis.
>
> The Court: Didn't Sergeant Cisneros testify he was told enhancements could not be performed? In fact, we talked about spy satellites and Russian equipment. And it seems like Aerospace equipment can show the whole frame, and the Long Beach Police Department can only show a portion of the frame.
>
> Mr. Herzstein: I would say that he made that statement after we finished and the Court asked the question, as I recall.¶ However, I think he is speaking as a lay person and it was hearsay what he was told. I think there wasn't any foundation at that time. He also --

(RT 9:1785-1786.) Finding that there was no evidence of an enhancement being performed, the trial judge overruled the objection. (RT 9:1786.)

Because the prosecutor failed to lay a proper foundation for introduction of Exhibits 41 and 42, it was error to admit them into evidence. This error was prejudicial and requires reversal of appellant's conviction.

B. ADMISSION OF THE "SILENT WITNESS" PHOTOGRAPHS WAS IMPROPER BECAUSE THERE WAS NO SHOWING THAT THE PHOTOGRAPHS HAD NOT BEEN TAMPERED WITH

A photograph showing relevant subject matter is normally admissible so long as the proponent makes a foundational showing that the picture faithfully represents the objects or persons depicted. (See *Berkovitz v. American River Gravel Co.* (1923) 191 Cal. 195, 202.) Under this test, Exhibits 41 and 42 would have been properly admitted if they were simply taken from the original videotape as the other photographs were.

In the case at bar, however, the prosecutor could not refute the defense assertion that the videotape was computer-manipulated to produce the still photographs admitted as Exhibits 41 and 42, and thus, that the photographs were not accurate depictions of the images on the videotape. Sergeant Cisneros first testified that he sought enhancement to make the pictures "clearer." (RT 8:1517-1518, 1520.) He then testified that the photographs produced were either "enhanced" or "not enhanced." He had no clue how the "machinery" into which the original videotape was placed worked or what it did, though he admitted that he sought enhancement of the videotape to make the images on it "clearer." He testified that the machine used had a computer terminal and a monitor. While he observed the person at the controls, Cisneros was not the person that worked the machine, and did not know what the person did to the videotape. Although Cisneros was given Exhibits 41 and 42, he had no idea how they were produced, and thus, could not testify to their accuracy as replicas of the original images.

For evidentiary purposes, a photograph is treated as a writing. (Evid. Code, § 250.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the

proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Although a writing is relevant and not otherwise subject to exclusion, before it can be admitted into evidence, its foundation must be laid through authentication. (Evid. Code, § 1401, subd. (a); *Ten Winkel v. Anglo Calif. Sec. Co.* (1938) 11 Cal.2d 707, 720.) As the proponent of the evidence, the prosecutor "has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact." (Evid. Code, § 403, subd. (a).) Here, the preliminary fact the prosecutor was required to establish was that the photographic product was a reliable representation of what it depicted, true to the original and unchanged. This she failed to do and, as a result, Exhibits 41 and 42 should have been excluded.

In *People v. Doggett,* (1948) 83 Cal.App.2d 405, a photograph was admitted into evidence showing the defendant committing a crime. There was no evidence that the picture accurately depicted what it purported to show and the picture was the only evidence of the crime. On appeal, the court held that the photograph was properly admitted into evidence once a foundation was laid demonstrating when and where the picture was taken, together with expert testimony that the picture was neither a composite nor faked, but was a true representation of a "pure" negative. (*Id.* at pp. 410-411.) In *People v. Mitman* (1954) 122 Cal.App.2d 490, 495, decided six years later, the Court of Appeal added the proviso that a proper foundation also required a showing that the photograph had not been tampered with in any way.

In *People v. Bowley* (1963) 59 Cal.2d 855, 861, this Court cited the *Doggett* foundational requirements with approval in what is known as a "silent witness" photograph case. "Under this doctrine, commonly referred to

as the 'silent witness' theory of admission, photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed on film, but from other evidence which supports the reliability of the photographic product." (McCormick, Evidence (4th ed. 1992) § 214.) In other words, once a proper foundation is laid authenticating the evidence, the photograph effectively becomes an independent "silent witness" and is probative evidence of the facts depicted independent of testimony to those facts by a witness. (*People v. Bowley*, *supra*, 59 Cal.2d at pp. 859-861.) This concept of authentication has been adopted by an overwhelming majority of federal circuits. (*See e.g. United States v. Clayton* (5th Cir. 1981) 643 F.2d 1071; *United States v. Bynum* (1st Cir. 1978) 567 F.2d 1167; *United States v. Stearns* (9th Cir. 1977) 550 F.2d 1167; *United States v. Taylor* (5th Cir. 1976) 530 F.2d 639; *United States v. Gray* (8th Cir. 1976) 531 F.2d 933; *United States v. Pageau* (N.D.N.Y. 1981) 526 F.Supp. 1221.)

In appellant's case, Exhibits 41 and 42 did not depict the images on the original videotape, but images that were enhanced or otherwise altered. Thus, in order to be admissible under the "silent witness" doctrine, it was necessary for the prosecutor to lay a foundation with evidence demonstrating the reliability of the photographs. In order to meet this threshold of admissibility, the prosecutor needed to show that the photographs had not been tampered with and were neither composite nor faked. The prosecutor failed to meet her burden to produce that evidence.

Although the prosecutor established that the video camera and recorder properly functioned, that the videotape was removed from the camera, and a proper chain of custody as between the videotape and the still photographs produced and proffered as Exhibits 41 and 42, what she could not show was that those photographs depicted the images in the original videotape. The foundational problem arose because Cisneros took the

original videotape to Aerospace Corporation for the purpose of enhancing the image, but could not authenticate the photographs produced as depicting what was on the original videotape. His inability to do so should have alerted the trial judge that no foundation was laid to show that the videotape and resultant photographs were true to the original and unchanged. Similarly, because Cisneros had no personal knowledge of what was done to obtain the photographs, he was also unable to lay a proper foundation for the changes that were made.

While the trial court has broad discretion to determine the admissibility of evidence, it must exercise its discretion in accord with the rules of evidence. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1105.) Unfortunately, the trier of fact cannot distinguish between a legitimate, properly authenticated photograph and evidence that has been digitally manipulated without proper authentication. It is the trial court's duty to ensure that only competent, properly authenticated evidence is presented to the jury. Because the prosecutor failed to lay a proper foundation for introduction of Exhibits 41 and 42, the trial judge abused his discretion in admitting the exhibits. Doing so was error.

Because rules preventing admission of evidence without a proper foundation are designed to prevent conviction upon suspect evidence, admission of the enhanced photographs enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes

a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to exclude evidence and inferences unsupported by the evidence. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the error described herein so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

C. PREJUDICE

As argued above, the introduction of this evidence violated appellant's rights to fair trial, trial by impartial jury, right to a reliable guilty determination, and due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments. When a trial court error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt.

While arguing about admission of prior crime evidence before the start of the evidentiary portion of the trial, the prosecutor let it be known

just how powerful the erroneously admitted photographs were in lieu of the original videotape:

> I want to remind the Court that there was no percipient witness to the killing of Mr. Moon.¶ The videotape captures two individuals coming in.¶ I indicated in my moving papers that the picture of each individual was cropped off at the head.¶ I've since that time seen stills, and it's been brought to my attention that the stills are in fact of the same video, and the still does have a depiction of a face at least as to the person with the distinctive shirt, who the People maintain is Mr. Chism.¶ So there in fact is at least a recordation of the face of the individual with the distinctive shirt as he walks in.¶ The video does not capture the conduct of the either of the individuals and does not capture how the killing occurred.¶ In fact, all the video shows is that two individuals walked in and two individuals ran out, and then a person then comes in, looks over the counter, That person, we believe, is Mr. Miller.¶ It does not capture what exactly happened inside the Eddie's Liquor Store.

(RT 4:665-666.) Indeed, the improperly admitted enhanced still photographs showed something that was not in the videotape or other still photographs from Eddie's Liquor Store: enough of the area above the neck of the perpetrators to enable the prosecutor to argue that appellant was one of the perpetrators and to urge the jurors to convict him on that basis.

In her opening argument, the prosecutor relied on the enhanced still photographs to prove that appellant was one of the perpetrators in the Eddie's Liquor Store incident. In differentiating the videotape from the photographs, the prosecutor made clear that the photographs were critical to appellant's conviction:

> First and foremost, you have the video itself. The video tells you that on June 12th, 1997, two African American males entered that liquor store. They went outside of the eye of the camera, and one of them, before he leaves the camera's eye, is displayed wearing a shirt with a distinctive emblem, that is a Nike shirt. You'll see that clearly on the stills and you'll see it in the video. You'll see the Air Nike symbol

> right on the shirt.¶ That's what you know based on the video tape alone. These are the two individuals who are later seen running out prior to the discovery of Mr. Moon lying on the floor. You'll see them enter. You'll see them exit running.¶ You'll also see that the person who is not wearing the short pants. You'll see the second person wearing the short pants. You'll also notice they are wearing baggy clothing. You'll see that upon exit the person wearing the short pants is the first person to leave. The second person to leave will be the person in the long pants, who is the person in the distinctive T-shirt with the Air Nike emblem.¶ You will also note, based on the video tape alone, something about their body builds. They are not exceedingly short or exceedingly tall. They are average height, and they are both thin. Notwithstanding the baggy clothes, you can tell in the stills they are thin.¶ In addition to that, you know something about the face structure of the person with the Air Nike shirt. The structure of the face, the head, how the upper part of the head is larger, a distinctive ear that you'll be able to compare with the photograph of Mr. Chism that was identified by Mr. Lipkin.¶ Mr. Lipkin tells that you in this photograph, the single photograph, People's Exhibit number 4, Mr. Chism looked like this on June 19, 1997, when a search of his room occurred. The day that the murder weapon was discovered, this is what defendant Chism looked like.¶ *In these stills you'll see that very distinctive ear. The size, the shape, the way that it protrudes slightly away from the skull. And you'll see, based on the face structure, the cheek bones, the upper lip that protrudes slightly, the facial hair, that the person in the video is the defendant Chism. The person with the distinctive shirt with the Air Nike emblem is the defendant Chism.*¶ Those are the things that you learn from the video.¶ *You also learn that that person is bald. Again, the defendant Chism.*

(RT 10:2058-2060, italics added.)

Outside of Marcia Johnson's accomplice testimony, which was given pursuant to an agreement with the prosecutor's office, there was no other identification of appellant as one of the perpetrators. Not only did these photographs allow the prosecutor to identify appellant as one of the perpetrators, they also served to corroborate Marcia's accomplice testimony

by connecting appellant to the commission of the offense. Admission of Exhibits 41 and 42 severely prejudiced appellant.

Significantly, the jury requested -- at the same time -- a viewing of the videotape and readback of Marcia Johnson's testimony, together with a readback of Detective Edwards' testimony regarding Marcia. With reference to the videotape, the jury requested the enhanced version, if it was available. (CT 3:611-612; RT 11:2219-2220.) The following day, the jury requested a viewing of the videotape again. (CT 3:615.) The very next day day, verdicts were returned. (CT 3:737-738.) While the jurors already had the enhanced photographs in the jury room because they did not require special viewing equipment, they were seeking more information from the enhanced media. However, as explained by the prosecutor, the only person reasonably identifiable from the enhanced photographs was appellant. Hence, the jurors clearly were attempting to identify appellant from the enhanced videotape or photographs that they were seeking to view or already were viewing.

The proverb "one picture is worth a thousand words" expresses the power of the photographs. An image carries far more influence than testimony, especially when the bulk of that testimony comes from an accomplice biased in favor of the prosecution and with a tendency to tell very different versions of the same story. But, who can argue with a picture? To the extent that the prosecutor argued that the picture placed appellant at Eddie's Liquor Store, it was critical to her presentation of the case. But for the improperly admitted enhanced photographs, she could not have made this assertion, except through the biased accomplice testimony of Marcia Johnson. When a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People v. Woodard*, *supra*, 23 Cal.3d at p. 341; *People v. Brady*, *supra*, 190 Cal.App.3d at p. 138; *People v. Hannon*, *supra*, 19 Cal.3d at p.

603; *Garceau v. Woodford*, *supra*, 275 F.3d at p. 777.) This Court should deem the improperly admitted enhanced photographs as important as the prosecutor treated it at trial. (*People v. Cruz*, *supra*, 61 Cal.2d at p. 868; *People v. Powell*, *supra*, 67 Cal.2d 32, 57.) Admission of the enhanced photographs cannot be shown by respondent to be harmless beyond a reasonable doubt.

The error was also prejudicial under *People v. Watson*, *supra*, 46 Cal.2d 818. But for the error, the result would have been more favorable to appellant. (See *People v. Poggi*, *supra*, 45 Cal.3d 323.)

Appellant's conviction must be reversed.

VIII. THE ERRONEOUS INTRODUCTION OF HIGHLY PREJUDICIAL PRIOR CRIME EVIDENCE TO PROVE IDENTITY, COMMON PLAN, KNOWLEDGE, AND INTENT TO ROB AT EDDIE'S LIQUOR STORE REQUIRES REVERSAL

A. PROCEDURAL HISTORY

The trial court violated appellant's rights to fair trial, due process, and a reliable determination of guilt under the Fifth, Sixth, Eighth, and Fourteenth Amendments when it erroneously admitted highly prejudicial evidence of the prior crime at Rite Way Market to prove identity, common plan, knowledge, and intent to rob at Eddie's Liquor Store despite an offer by the defense to enter an open guilty plea to the Rite Way count and to stipulate that appellant obtained the gun at Rite Way that was later used at Eddie's. As a result of this error, appellant's defense was prejudiced.

Appellant was charged with attempted robbery and murder on a robbery-murder theory arising from the incident at Eddie's Liquor Store. In addition, appellant was charged in Count 3 with the Rite Way robbery one month earlier.

In the midst of jury voir dire, on July 28, 2000, appellant's counsel offered an open guilty plea to Count 3 of the information -- the alleged robbery of the Rite Way Market. The prosecutor stated that she intended to offer evidence of the Rite Way robbery to prove intent to rob in the subsequent Eddie's Liquor Store robbery, pursuant to Evidence Code section 1101, subdivision (b), and that she would be filing points and authorities on that subject. Defense counsel stated that the plea on Count 3 was offered independent of the evidentiary issues. The trial judge delayed consideration of the subject to a later point in time. (RT 2:177-178.) Later that day, the subject was taken up again. When it was indicated that the issue was

complex and would require briefing, discussion and resolution was again deferred. (RT 2:221-223.)

On August 3, 2000, the prosecution filed its "Motion in Limine on Admissibility of 'Other Crimes' Evidence.'" (CT 2:557-572.) In the motion, the prosecutor argued that evidence of the Rite Way robbery was admissible under Evidence Code section 1101, subdivision (b), in the Eddie's Liquor Store prosecution to prove "'common design or plan' and/or 'intent'." (CT 2:563.)

Discussion of the issue resumed on August 10, 2000, prior to opening statements. (RT 4:650.) Appellant's counsel advised the court that appellant would plead guilty to Count 3 if the prosecution's motion was denied. (RT 4:651.) Defense counsel argued that if a defendant stipulates to an issue no longer in dispute, the prosecutor is precluded from introducing uncharged misconduct and added that appellant would stipulate he obtained the gun used in the Eddie's killing a month beforehand. (RT 4:651-652.) In objecting to the prosecutor's Evidence Code section 1101, subdivision (b), proffer, defense counsel pointed out the dissimilarities between the two incidents: (1) at Riteway, appellant went in without a weapon whereas he allegedly had a weapon when he entered Eddie's; and (2) at Riteway, appellant went into the store beforehand and returned later, while at Eddie's, Marcia Johnson went in beforehand and appellant only went in afterward. Defense counsel argued there was no distinctive mark as between the two robberies that would permit evidence of the Rite Way robbery to come in under Evidence Code section 1101, subdivision (b).

According to defense counsel, the clothing worn at the two incidents was not the same and the common scheme alleged by the prosecutor would fit almost all robberies. He argued that the prosecutor was merely attempting to demonstrate propensity to rob because the similarities were insufficient to demonstrate identity. (RT 4:652-654.) After the trial judge

queried about whether the evidence showed association between appellant and Marcus Johnson because they were allegedly involved in both incidents, defense counsel noted that if appellant were to plead guilty to Count 3, the point would be made because Johnson had already done so. (RT 4:654-655.) Defense counsel added that the videotape[54] of the Rite Way robbery was highly prejudicial, cumulative and its relevance would be stripped by a guilty plea. (RT 4:655.)

After argument by counsel for Johnson and Taylor, the trial judge observed that the prosecutor needed to demonstrate that Johnson and appellant were involved at Rite Way and that the gun used at Eddie's was obtained at Rite Way. Defense counsel offered to stipulate to both of those facts. (RT 4:664-665.) Johnson's counsel offered to join in the stipulation. (RT 4:665.)

In an obvious attempt to avoid the limitations of appellant's proffered stipulation, the prosecutor argued that there was no percipient witness to the Eddie's incident and that the videotape showed only people coming in and leaving. Thus, she argued, she sought to introduce the Rite Way videotape to show intent because it was necessary to corroborate the testimony of Marcia Johnson on the underlying robbery of the robbery-murder special circumstance allegation. The prosecutor thus refused to stipulate to intent and argued that she was entitled to prove every element of her case. (RT 4:665-668.) The prosecutor argued that, "In this case, we have, absent Marcia Johnson's testimony, no other information as to what their intention is." (RT 4:668.) The prosecutor added: "The fact that they are willing to stipulate is not only inappropriate, but it's not required that the People engage in that stipulation nor is the penalty for our failure refusal to stipulate

---

[54] Exhibit 3.

a ruling by the Court that the evidence should not come in.¶ It is extremely relevant on the issue of intent." (RT 4:670.)

Following additional argument on points raised by Johnson and Taylor, appellant's counsel again argued that there were inadequate distinctive characteristics tying the two crimes together, asserting:

> There were four or five black men involved in the first robbery.¶ There were two in the second.¶ The People's case alleges that Mr. Chism according to Marcia Johnson, who is their key witness, that Mr. Chism, according to Marcia Johnson, at least at the preliminary hearing, Mr. Chism is the one who kind of dragged everyone else along with it.¶ Yet, on the Rite Way robbery, which goes in beforehand, Mr. Johnson, he was the man with the gun, and that Mr. Chism found the gun at the scene.¶ These are distinctly different situations, and there are only two people at the Eddie's Liquor, and there are five at the Rite Way, and I am saying that if you remove everything about it is standard robbery, and there is something really distinctive here to allow to core it from one to the other.¶ As I said before, the plea itself allows her to raise the inference of the armed robbery of the fact of the intent at the time performed.¶ If she refuses the stipulation, the stipulation is still there.¶ If the Court rules against her, she can then accept it if she wants to.

(RT 4:678.)

The lunch recess was taken and the trial judge reviewed the videotapes during the recess. (RT 4:678-680.) After argument about the other defendants, the trial judge asked whether the theft of a gun at one incident that is used at the second incident is a signature element of both offenses, then noted that perhaps that similarity is ambiguous because there were other potential explanations for the gun being at both crime locations. (RT 4:683-684.) Appellant's counsel added that there are other ways for the prosecutor to demonstrate the gun being taken from Rite Way, including appellant's statement to the police. (RT 4:684.) The trial judge added that

having viewed the Rite Way videotape, he did not find it particularly inflammatory. (RT 4:684.)

Defense counsel argued that, but for the issue of the gun and possible impeachment if appellant testified, the prior robbery would not be admissible pursuant to Evidence Code section 1101, subdivision (b), because of substantial prejudice with slight probative value. (RT 4:684-686.) Following additional argument on behalf of the other defendants, the trial judge ruled as follows:

> The People's motion on admissibility of other crimes is granted.¶ Whether or not Mr. Chism pleads or does not plead guilty or no contest, his plea or a stipulation regarding the Rite Way robbery is no substitute for evidence of his conduct and Mr. Johnson's conduct in the Rite Way incident, which is *relevant to issues in this case involving an overall plan and their intent*, which I do believe is at issue.¶ There are similarities sufficient to warrant its admissibility. Particularly, presence of a firearm stolen in one and used in a robbery in the second.¶ There is no undue prejudice to any defendant, particularly as to Mr. Johnson where he is shown pointing the gun in the Rite Way, and no direct evidence that he is using a gun at Eddie's. There will be a limiting instruction.¶ As I said before, there's nothing inflammatory in my mind in the Rite Way robbery or in the video tape as to Mr. Taylor. The Court, obviously, will instruct the jury that the Rite Way incident *goes only to the intent and knowledge* of Mr. Chism and Johnson at Eddie's and is not evidence of what Mr. Taylor's intent was. Although, it can be used to show the underlying felony, and then for purposes of establishing felony murder and liability. That remains viable.¶ The quality of evidence that the People are entitled to present requires that they be allowed to prove up the Rite Way robbery, and a stipulation or court records involving pleas of guilty or non contest are not adequate. They bear the burden of proof of beyond a reasonable doubt, and the jurors are entitled to see the degree of participation of Mr. Chism and Mr. Johnson in that prior incident.¶ And there is no undue prejudice. I've looked at it carefully. I was initially of the mind to prohibit the People from introducing this evidence, but I do believe that it is appropriate. So her motion is granted.

(RT 4:688-689, italics added.) In light of the trial court's ruling, appellant withdrew his offer to plead guilty to Count 3. (RT 4:692.)

During discussion of jury instructions, the trial judge erroneously stated that he had previously allowed introduction on an identity theory -- that use of a weapon stolen in one crime and used in another is a signature piece of evidence showing the people involved -- and stated that was an additional ground for introduction of the prior crime evidence.[55] (RT 10:1946, 1948-1949.)

---

[55] Following the close of the evidentiary portion of the guilt phase, the trial judge instructed the jury with CALJIC No. 2.50, modified so that it only referred to co-defendant Marcus Johnson:

> Evidence has been introduced for the purpose of showing that the defendant Johnson committed a crime other than that for which he is on trial.¶ This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:¶ A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused or a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offenses defendant also committed the crimes charged in this case;¶ For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.¶ You are not permitted to consider such evidence for any other purpose.

(CT 3:667-668; RT 10:2012-2013.)

B. GENERAL PRINCIPLES OF LAW

1. EVIDENCE CODE SECTIONS 210, 350, 352, AND 1101

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence having "any tendency in reason to prove or disprove . . . any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) "While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. . . . Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891.) "There is no discretion vested in a court to admit irrelevant evidence." (*People v. Kitt*, *supra*, 83 Cal.App.3d at p. 849; see also *People v. Babbitt*, *supra*, 45 Cal.3d at p. 681.) A trial court has discretion to exclude relevant evidence if its probative value is outweighed by the probability that its admission will "create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Evidence Code section 1101, subdivision (a), bars evidence of a person's character, including evidence of specific acts by that person, to prove the conduct of that person in committing the charged offense, when the other crimes evidence is offered to prove a person's propensity to act in a particular manner or to show that the person acted in conformity with that character on the occasion in question. Despite this limitation, Evidence Code section 1101, subdivision (b), allows such evidence when it is rele-

vant to establish some fact other than the person's predisposition to commit the crime, including intent, knowledge, or common plan.[56]

This Court clearly explained when evidence of other crimes is admissible under Evidence Code section 1101 in *People v. Ewoldt* (1994) 7 Cal.4th 380 ("*Ewoldt*") and *People v. Balcom* (1994) 7 Cal.4th 414 ("*Balcom*"). First, *Ewoldt* and *Balcom* restate the caveat that this type of evidence is extremely prejudicial when improperly admitted. (*Ewoldt*, at p. 404; *Balcom*, at p. 422.) The prejudicial effect of such evidence has long been recognized as creating the danger that a jury will convict because of past or other criminality, rather than substantial evidence of guilt of the charged offense. (Jefferson, California Evidence Benchbook (3d ed.) § 33.23, p. 709.)

Secondly, because of the potential prejudice, this Court reiterated the principle that admission of this type of evidence "requires extremely careful analysis." (*Balcom*, at p. 422; *Ewoldt*, at p. 404, citing *People v.*

---

[56] Evidence Code section 1101 states:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Smallwood (1986) 42 Cal.3d 415, 428 & *People v. Thompson* (1988) 45 Cal.3d 86, 109.) Consequently, this type of evidence should only be admitted with "caution." (*Balcom*, at p. 426.)

In ruling on the admissibility of Evidence Code section 1101, subdivision (b), evidence, a trial court must carefully and properly identify exactly what inference the proponent seeks to establish:

> The court "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong."

(*People v. Thompson*, *supra*, 27 Cal.3d at p. 316, citation omitted.): Indeed, the failure of courts to properly determine the actual desired logical inference to be drawn from the uncharged offense leads to what has been called "an invitation to specious reasoning." (*People v. Valantine* (1988) 207 Cal.App.3d 697, 704.)

Ewoldt explained that differing degrees of similarity are required for different uses of uncharged evidence. Proof of intent requires the least degree of similarity between the charged and uncharged offenses to justify admissibility. A greater degree of similarity is required to prove common design or plan. Proof of identity via other crimes evidence demands the greatest degree of similarity before such evidence is admitted. (*Ewoldt*, at pp. 402-404.)

Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*Ewoldt*, at p. 403;

> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a wit-

People v. Kipp (1998) 18 Cal.3d 349, 370; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 122.) In order to prove a common plan the uncharged act must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Ewoldt*, at p. 402, citation omitted.)

Both *Ewoldt* and *Balcom* are replete with references to the requirement that uncharged crimes evidence proffered to show common plan or scheme must bear a substantial degree of similarity to the crime charged. *Ewoldt* holds that the proffered incidents be "markedly similar" and bear "striking similarities" to the crime charged. (*Ewoldt* at 394-396, 399; see also *Balcom*, at pp. 421, 427 ["in a manner quite similar," "probative value . . . stems from the similarity"].)

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' (*People v. Robbins, supra,* 45 Cal.3d 867, 879, 248 Cal.Rptr. 172, 755 P.2d 355.)" (*Ewoldt*, at p. 402.)

Furthermore, it is important to note that in applying the "extremely careful analysis" required for this type of evidence, this Court indicated that the trial court should examine what issues are actually in dispute:

> For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evi-

---

ness.

> dence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose.

(*Ewoldt*, at p. 406.) This Court went on to state:

> Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation].

(*Ewoldt*, at p. 405-406.)

In *Balcom*, this Court noted that although the defendant's not guilty plea placed "intent" in issue, "because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue." (*Balcom*, at pp. 422-423.) Hence, although the defendant did not "concede" intent, *Balcom* held other crimes evidence not admissible to prove that issue.

Trial court error in the admission of prior crime evidence pursuant to Evidence Code section 1101, subdivision (b), is considered under an abuse of discretion standard on appeal. (*Ewoldt*, at p. 405.) As discussed below, the risk of unfair prejudice in this case greatly outweighed the probative value, if any, of the disputed evidence. Likewise, the evidence did not meet the levels of similarity required for its proffered uses. Therefore, admission of this evidence was an abuse of discretion and it was error to admit it.

2. INTRODUCTION OF THE EVIDENCE IS PROHIBITED BY DUE PROCESS

In addition, introduction of this evidence violated appellant's right to due process of law protected by the Fourteenth Amendment to the United States Constitution because its only true relevance was to show that appellant acted in conformity with his prior bad acts. "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044)

The United States Supreme Court has indicated, without expressly deciding, that the use of other crimes evidence to prove criminal propensity violates due process. In *Spencer v. Texas* (1966) 385 U.S. 554, a bare majority of the Supreme Court held that the introduction of the defendant's prior convictions in a non-bifurcated capital proceeding did not violate due process, but only because the jury was expressly instructed that the evidence could not be considered in assessing the defendant's guilt and because the evidence was of a less inflammatory documentary nature. (*Id.* at pp. 561-562.; accord, *Marshall v. Lonberger* (1983) 459 U.S. 422.)

The Due Process Clause, as interpreted by the United States Supreme Court, demands that inferences be based on a rational connection between the fact proved and the fact to be inferred. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *Leary v. United States* (1969) 395 U.S. 6, 46.) In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the Ninth Circuit explained that the use of "other acts" evidence to prove conforming conduct "is contrary to firmly established principles of Anglo-American jurisprudence." (*Id.* at p. 1380.) The court referred to *Brinegar v. United States* (1949) 338 U.S. 160, in which the United States Supreme Court stated:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

(*Brinegar v. United States*, *supra*, 338 U.S. at p. 174, quoted in *McKinney v. Rees*, *supra*, 993 F.2d at p. 1381.)

Noting that the rule against the use of character evidence to prove conduct in conformity with character is an established rule in every jurisdiction in the United States, and has been a rule of evidence since the 1600s, the Ninth Circuit concluded that this rule "is one such historically grounded rule of evidence." (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381.) In considering the evidence in question, the Ninth Circuit "subject[ed] it to close scrutiny" to determine whether the inferences that could be drawn from the evidence were relevant to a material fact in the case or whether it led only "to impermissible inferences about the defendant's character." (*Id.* at p. 1381.)

Upon review of the evidence, the *McKinney* court concluded that although one of the items of evidence complained of was "faintly relevant" to a material issue (*id.* at p. 1384), several of the items of evidence introduced were not relevant to any fact other than the defendant's character and the inference that he acted in conformity with that character. (*Id.* at pp. 1381-1884.) Because the other acts evidence gave rise to no permissible inferences and because the exclusion of such evidence is "an historically grounded rule of Anglo-American jurisprudence," the admission of such evidence may result in a violation of due process. (*Id.* at p. 1381, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, and *Dowling v. United States* (1990) 493 U.S. 342, 352.)

The *McKinney* court found a violation of due process in that case because it determined that the evidence in question was "emotionally charged." This was found in the "image" of the defendant as created by this evidence. (*Id.* at p. 1385.) Concluding that "it is part of our community's sense of fair play that people are convicted because of what they have done, not who they are," the court held the admission of character evidence not relevant to a disputed issue violated due process. (*Id.* at p. 1386.) Similarly, this Court has assumed, without deciding the issue, that the utilization of character evidence to prove propensity violates the federal due process clause. (*People* v. *Garceau* (1993) 6 Cal.4th 140, 185-187.)

The only relevance of the other crimes evidence in this case was for the purpose of urging the impermissible inference of conduct in conformity with character. The resulting portrait of appellant was utilized by the jury to convict appellant of attempted robbery and murder, together with enabling the true finding on the special circumstance allegation. Due process was violated.

C. EVIDENCE OF THE RITE WAY ROBBERY WAS ERRONEOUSLY ADMITTED TO DEMONSTRATE IDENTITY, COMMON PLAN, INTENT OR KNOWLEDGE AT EDDIE'S LIQUOR STORE

As previously noted, prior to consideration of the prosecution motion to allow introduction of the Rite Way robbery as proof of appellant's involvement in the Eddie's Liquor Store incident, appellant's counsel stated that appellant would change his not guilty plea on Count 3 and enter an open guilty plea to that count. Defense counsel also stated that appellant

would stipulate that he obtained the gun at Rite Way that was later used at Eddie's.[57]

"A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) "A plea of guilty is the equivalent of a conviction of the crime." (*People v. Jones* (1959) 52 Cal.2d 636, 651.) A guilty plea is the legal equivalent of a guilty verdict. (*People v. Valladoli* (1996) 13 Cal.4th 590, 601.)

Section 1016 requires neither court approval nor a showing of good cause for a change of plea from not guilty to guilty. (*People v. Reza* (1984) 152 Cal.App.3d 647, 652.) In *Reza*,

> the defendant sought to enter the plea of guilty in the face of very strong evidence in order to avoid prejudice on a much weaker but more serious accusation. The prosecution's opposition to the plea was a candid assertion of the desire to use the evidence on one count to help prove another. We hold the court should have accepted the plea, despite its tardiness. The prosecution's opposition could have been considered as a possible basis for a reasonable continuance, if requested, since Reza waited some 10 months before offering to plead guilty to the attempted burglary on the trial date, probably hoping to catch the prosecution napping with naught but an uncorroborated fingerprint on the burglary charge and no time to investigate further or even prepare a memorandum in support of the admission of the attempted burglary as other crimes evidence (Evid. Code, § 1101, subd. (b)).

(*Id.* at p. 653.) Concluding that it was error to reject the offer of an unconditional open guilty plea in a noncapital case premised on a factual basis, the Court nevertheless found the error harmless because evidence relating to the charge to which appellant sought to plead guilty was otherwise ad-

---

[57] The identity of the person or people armed and using the weapon

missible pursuant to Evidence Code section 1101, subdivision (b). (*Id.* at pp. 654-656.) Still, *Reza* makes clear that it is improper for the prosecutor to oppose a defendant's guilty plea for the express purpose, not of doing justice, but of using one charge to convict on another.

Similarly, the mere fact that multiple charges are alleged in the same case against one defendant does not automatically make evidence about one offense cross-admissible as to the other offense. (§ 954.1.) Indeed, evidence of prior misconduct is so inflammatory that if the defense stipulates to the fact desired to be proven, the prosecution should be prevented from introducing such evidence to prove an otherwise relevant fact. (*People v. Guzman* (1975) 47 Cal.App.3d 380, 389-390; *People v. Perry* (1985) 166 Cal.App.3d 924, 931-932.)

The principle enunciated in *Reza*, *supra*, is instructive in considering appellant's claim that the trial court erred in admitting evidence of the Rite Way robbery. Evidence inculpating appellant in the Rite Way robbery was very strong. There was a videotape in which appellant clearly appears, showing appellant stealing a gun from behind the counter, pointing the gun at the proprietor, and making statements demonstrating intent to rob. The inculpatory evidence relating to Eddie's Liquor Store was far weaker. Other than the accomplice testimony of Marcia Johnson, none of the evidence definitively linked appellant to the murder. Appellant may have been shown in still photographs taken from the videotape at the store, but these were far from dispositive on the issue of identity or intent. The gun stolen at Rite Way was used at Eddie's and recovered a week later at appellant's house, although this also fails to place him at the scene. Police also seized a shirt similar to one worn by a perpetrator and the prosecution introduced an alleged adoptive admission through Iris Johnston's letter. Still, none of

---

or other weapons at Eddie's Liquor Store remained an open question.

this evidence definitively placed appellant at the scene. No witnesses identified appellant as a perpetrator. When the prosecutor made clear she wanted to use the evidence from Rite Way against appellant in the Eddie's prosecution, appellant sought to plead guilty to the Rite Way robbery and admit that the gun used at Eddie's was stolen from Rite Way. However, the prosecutor refused to accept appellant's offer to plead guilty to the Rite Way robbery or to otherwise stipulate to the offense because she sought to introduce that robbery against appellant in order to get a conviction in the capital case. The trial court erroneously permitted her to do so.

In analyzing the trial court's ruling on the prosecutor's Evidence Code section 1101, subdivision (b), proffer, it is necessary to consider the grounds upon which the prosecutor sought admission. To the extent that the trial judge failed to do so, admission of the Riteway evidence was error.

The trial judge admitted the evidence of the Rite Way robbery for four purposes pursuant to Evidence Code section 1101, subdivision (b): identity, common plan, intent, and knowledge. (RT 4:688-689, 10:1946, 1948-1949.)

This evidence was first allowed to prove identity. For prior crime evidence to be used to prove identity, *Ewoldt* requires a very high degree of similarity -- a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*Ewoldt*, at p. 403.) The rationale for this threshold of identity evidence is that the charged crime and the uncharged crime should have unusually distinct traits rendering it more likely that the same person committed both offenses.

Here, the admitted evidence of the Rite Way robbery did nothing to demonstrate the identity of the perpetrator of the attempted robbery and murder at Eddie's. There was nothing distinctive in the commission of these two robberies that made the Rite Way robbery admissible as proof of

identity. Both of the crimes were armed robberies. The similarities end there.

At Riteway, appellant acted as the scout and at Eddie's, Marcia Johnson did so. In the earlier incident appellant entered unarmed, but allegedly was armed at Eddie's. The number of perpetrators was different, as was the cast of characters involved. Moreover, at Rite Way, appellant acted to prevent a shooting while, according to the prosecutor's version of the capital case, appellant shot without cause.

In other words, the great degree of similarity needed to prove identity -- one basis urged by the prosecutor for use of this evidence -- was sorely lacking. (*Ewoldt* at pp. 402-404.) Indeed, the lack of similarity involved between the prior robbery and the one in this case would potentially make almost any armed robbery committed within a short radius of Eddie's fodder for a prosecutor seeking to prove identity in a later robbery. Here, that lack of similarity exposed the perpetrator of the earlier robbery -- appellant -- to both attempted robbery and murder charges at Eddie's. However, because the evidence did not have this "signature like" similarity, it was not admissible for this purpose.

The evidence also ostensibly was proffered to prove "common plan." This theory of admissibility requires a high degree of similarity between the acts involved in the charged and uncharged offenses. While both offenses were robberies, they lacked the "concurrence of common features" required to admit this evidence under *Ewoldt*. *Ewoldt* and *Balcom* both require a "concurrence of similar features." In *Ewoldt*, the fact that the defendant's two wives, both maintaining life insurance policies, drowned in bathtubs after receiving injuries in unrelated incidents was "markedly similar." (*Ewoldt* at 394-395, 399.) *Balcom* featured two crimes in which the defendant wore similar clothing, went to an apartment complex in the early morning, sought out a lone woman unknown to him, and gained control

over her at gun point. In both crimes, the defendant initially professed only an intention to rob the victim, waited until he moved her to a remote location before expressly announcing an intent to rape her, and then committed a single act of intercourse. He stole the victim's ATM card, demanded her PIN, and escaped in her automobile. (*Balcom*, at p. 424.) This Court stated, "These similarities support the inference that defendant committed the Michigan rape and robbery pursuant to a design or plan that he either employed or developed in committing the charged offenses." (*Ibid.*)

In the present case, the similarities between the two crimes consisted of sending in a scout beforehand, followed by the commission of an armed robbery. There was nothing about either crime that was so distinctive as to support an inference that whoever committed the Rite Way robbery clearly and undeniably was the person who robbed Eddie's Liquor Store. Not only did this fact fail to prove, logically or inferentially, that appellant committed the robbery at Eddie's Liquor Store, but the stipulation offered by appellant removed that issue from the jury's consideration. In any event, his possession of the weapon a week after the Eddie's Liquor Store robbery is not proof of guilt. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

On the other hand, the dissimilarities between the two crimes were numerous and striking. The Rite Way robbery involved five assailants; Eddie's involved only two. Appellant admitted his involvement in the Rite Way robbery and denied his involvement in the Eddie's robbery. The clothing worn by appellant and Marcus Johnson at Rite Way was different from the clothing worn by the perpetrators at Eddie's. At Rite Way, there was a robbery and no shooting, while at Eddie's nothing was taken and someone was shot.

These facts lack "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations" necessary to demonstrate common plan. (*Ewoldt*, at p. 402, citation omitted.) Here, it is the dissimilarities, not the similarities, that are striking. In addition, the only similarity stressed and relied on by the trial judge was the fact that the gun stolen at Rite Way was used at Eddie's Liquor Store.

It was undisputed that crimes occurred at both Rite Way and Eddie's. Whether appellant was one of the perpetrators and the intent to rob were both issues in dispute that needed to be established by the prosecutor in the Eddie's Liquor Store incident. Mere similarity in the class of crime committed is not sufficient to permit other crimes evidence under a common plan theory. Therefore, this evidence did not have the degree of similarity required to be admitted as proof of a common scheme or plan.

The trial judge also admitted the evidence as proof of intent to rob at Eddie's. To demonstrate intent, the incidents must be "'sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]"' (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402, 27 Cal.Rptr.2d 646, 867 P.2d 757.) The incidents need not have the greater degree of similarity required to show the existence of a common plan or the shared distinctive pattern required to show identity. (*Id.* at pp. 402-403, 27 Cal.Rptr.2d 646, 867 P.2d 757.)" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) However, the incidents must have some nexus that logically or rationally shows that appellant harbored the same intent in each one.

The analysis by this Court in *Demetrulias* is instructive in understanding why admission of the Rite Way Market robbery in this case to prove intent was error. At the capital murder trial in *Demetrulias*, the prosecutor sought to use evidence that later the same evening as the homi-

cide of Miller, the defendant entered the home of Wissel, an older man, confronted him alone, and stabbed him several times in the chest. The defendant claimed he was attacked or threatened by the older man and acted in self-defense. The defendant made similar self-defense assertions regarding the killing of Miller, except in the Wissel assault, appellant robbed him and ransacked his home, and he did not appear to take anything from Miller. (*Id.* at p. 16.) The trial court ruled that the evidence was not sufficiently distinctive to use on the issue of identity, but permitted admission to show intent, motive, common design or plan. (*Id.* at p. 13.) Despite striking similarities in the crimes that tended to prove identity, this Court held that the evidence was relevant to show motive and intent to rob in the murder prosecution. (*Id.* at p. 14.) This Court reasoned:

> The jury could rationally find it unlikely that defendant had the extremely bad luck to be attacked within a short period of time by two older solitary men in ways that required him to use potentially deadly force against the older men to repel the attacks. Especially given the evidence that defendant's assault on Wissel went far beyond any conceivable need for self-defense and that defendant then ransacked Wissel's house and stole from him, the jury could rationally infer instead that defendant probably attacked both men with the same criminal intent--robbery.
>
> Defendant points to several factual differences between the two incidents, some of which we acknowledge were shown by the evidence: though both victims were older than defendant, Wissel was significantly older than Miller; Wissel lived in a single-family house, Miller in a boarding house; whereas defendant stayed at Wissel's house for hours, ransacked it, and stole Wissel's property, the evidence he took anything from Miller was weak at best, and no evidence showed he disturbed Miller's furnishings before fleeing, which he did immediately after stabbing Miller; defendant, in the words of his brief, 'degraded' Wissel in a "bizarre" crime, while he simply stabbed Miller several times with a knife.
>
> Especially in light of the close proximity in place and time between the two incidents, we disagree that these dis-

> similarities vitiated the inference that defendant had the same intent in each incident. Given the evidence that immediately after his fatal stabbing of Miller, defendant walked or ran less than a mile to Wissel's house, where he stabbed and otherwise assaulted that victim, and given the other similarities outlined above, a jury could rationally reject the coincidental explanation for the two events--that defendant just happened to have assaulted somewhat similar victims in somewhat similar ways on the same night--and conclude instead that he harbored the same criminal intent in both cases. "[W]hen the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive." (*People v. Nible* (1988) 200 Cal.App.3d 838, 848-849, 247 Cal.Rptr. 396.)

(*Id.* at pp. 16-17, italics in original.)

As appellant has already argued, in the present case it is the dissimilarities between the two crimes, not the similarities, that drive the analysis. The similarities are merely that both incidents were armed robberies, a scout entered beforehand, and the gun taken by appellant at Rite Way Market was the murder weapon at Eddie's Liquor Store. Indeed, appellant conceded his involvement in the Rite Way incident, where he was unarmed and no one was injured or killed. None of these facts prove that appellant was the assailant at Eddie's.

In terms of differences, there are many and not merely the incidental factors found in *Demetrulias*. The number of perpetrators entering the store at Rite Way was four or five, at Eddie's it was two. Appellant and Johnson were dressed differently in the Rite Way robbery than the perpetrators at Eddie's. At Rite Way, proof of appellant's involvement was evident from the video and established by his offer to stipulate, while his alleged in-

volvement at Eddie's rested on the testimony of an accomplice who cut a deal with the prosecution. At Rite Way, appellant sought to prevent others from shooting and there was no shooting. At Eddie's, one of the assailants shot the victim, apparently without cause. At Rite Way, money and a gun were taken, while at Eddie's, nothing was taken or disturbed.

Additionally, appellant's case is distinguishable from *Demetrulias* in terms of the close proximity in both time (minutes) and place (walking distance) between the two crimes admitted against the defendant in *Demetrulias*. This time and proximity factor was decisive in finding that the inference that Demetrulias harbored the same intent to rob in each crime was not vitiated by the dissimilarities between the two offenses. (*Id.* at p. 18.) In reaching this conclusion, this Court distinguished *People v. Harvey* (1984) 163 Cal.App.3d 90, 104-105, in which the Court of Appeal found a prior robbery in the same general area insufficiently connected to a homicide to demonstrate intent to rob. Noting a six month gap between the two crimes, the Court of Appeal reasoned that the time difference between the two crimes was the major disparity between the cases countervailing against a finding that the robbery established the defendant's intent to rob in the subsequent homicide.

In the present case, there was a one month gap and approximately a three mile distance between the Rite Way Market robbery and the Eddie's Liquor Store killing. These significant and crucial dissimilarities vitiated the inference that appellant was involved in the Eddie's Liquor Store robbery or that there was any proof of intent to rob based on his involvement in the Rite Way robbery.

Use of the evidence to prove intent without sufficient similarity between the crimes merely substitutes predisposition as proof -- a clear violation of appellant's rights to fair trial, reliable determination of guilt, and due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments. There

simply was nothing in the evidence related to the robbery at Rite Way that tended in reason, fact or logic to prove appellant's intent to commit a robbery at Eddie's. As such, evidence of the Rite Way robbery was inadmissible to prove intent to rob at Eddie's Liquor Store.

The fourth ground specified by the trial judge for admission was knowledge, although it is hard to understand exactly what the knowledge was supposed to be. To the extent that it was Johnson's knowledge of something -- for example, that appellant possessed a firearm -- that was neither a basis for admission of the prior crime nor an issue in the capital case against appellant.

To the extent that the knowledge is to demonstrate that appellant and Marcus Johnson had a pre-existing relationship, it does not appear that this Court has discussed the requisite degree of similarity required to prove the relationship of the parties in the other crimes context. Appellant submits that the use of this evidence should depend on the precise inference that the prosecution wishes to establish. Thus, if the prosecution only wishes to show that the parties knew each other, a very low degree of similarity should be required.

However, in this case the specific inference that the prosecution wished to prove was that appellant and Johnson had a specific relationship and that they acted together in a specific way on this occasion. Appellant submits that this use is similar to common plan and therefore should meet the "substantial similarity" standard mandated for those uses. Indeed, appellant's offered plea of guilty to the Rite Way robbery and Johnson's entry of the same plea in a separate proceeding sufficiently enabled the prosecutor to demonstrate their prior relationship, thereby obviating the "other crime" proffer.

Even if there is some possible legitimate inference, Evidence Code Section 352 requires the probative value to substantially outweigh the dan-

ger of undue prejudice. If there is any doubt about the evidence it must be excluded. (*People* v. *Thompson*, *supra*, 27 Cal.3d at p. 317; *People* v. *Kelly*, *supra*, 66 Cal.2d at 239; *People* v. *Sam*, *supra*, 71 Cal.2d at p. 203.) In this case, the weakness of the logical inference leads to a conclusion that its probative value is outweighed by its prejudicial impact.

In conducting an Evidence Code section 352 analysis in *Demetrulias*, this Court acknowledged that the probative value of the evidence "was attenuated to some extent by dissimilarities between the incidents, . . ." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 19.) The Court again relied on the closeness in time of the two incidents to strengthen the probative value of the evidence. (*Ibid.*) While appellant was charged in this case with both crimes and proof relating to acquisition of the gun in the Rite Way robbery may have been cross-admissible in the Eddie's Liquor Store counts, appellant's counsel did offer to stipulate to the facts surrounding appellant's acquisition of the gun. The mere fact that both crimes were charged in the same Information does not give the prosecutor free license to offer evidence of the earlier crime to draw improper inferences.

Here, to appellant's great prejudice, she did just that with respect to the Rite Way robbery, arguing repeatedly to the jury that there was a distinctive method of robbery between the two crimes. (RT 10:2059, 2066, 2073.) She used the Rite Way robbery to demonstrate appellant's identity, purpose, and intent to rob at Eddie's Liquor Store (RT 10:2196-2198) though it contained no distinctive marks, patterns or similarities that definitively established that appellant was the perpetrator at Eddie's nor that he had the intent to commit robbery.

In contrast, appellant's counsel admitted to the jury that appellant was guilty of the Rite Way robbery and that he stole the gun in that incident. (RT 10:2163-2164) He argued strenuously that Marcia Johnson's accomplice testimony was unbelievable, subject to the control of Detective

Edwards, and that if they rejected her testimony, the jury could not assume that appellant was present or that what occurred at Eddie's was a robbery. (RT 10:2164-2169.) Defense counsel argued that the Rite Way incident was similar to most robberies, but Eddie's was not because the money was in plain sight, available to be taken if the perpetrators wanted it, but it was not disturbed. (RT 10:2170-2171.) In sum, the defense argued that the prosecution's evidence of appellant's involvement was weak at best, and rested upon unbelievable testimony and insufficient proof. Alternatively, appellant's counsel argued that if they believed appellant was at Eddie's Liquor Store, there was no proof of an attempted robbery.

It was the usage of the Rite Way evidence beyond mere proof of the crime that was prejudicial. The prosecutor's use of the evidence to draw improper inferences allowed the jury to find that appellant possessed the intent to rob at Eddie's Liquor Store In summary, the evidence of the Rite Way Market robbery failed to meet the standards of admissibility under Evidence Code sections 352 and 1101, subdivision (b), to prove the inferences for which it was used.

Not only did this evidence fail to prove, logically or inferentially, that appellant committed the robbery at Eddie's Liquor Store, but its admission did precisely what the law proscribes: it showed propensity through the specious inference that because he stole the gun from Rite Way, he must have committed the robbery at Eddie's. This is exactly what the law does not permit -- a showing that because he behaved in a certain way on a prior occasion, he acted in conformity with that and committed the Eddie's robbery.

Because Evidence Code section 1101 is designed to prevent the conviction upon suspect evidence, admission of prior crime evidence to prove elements of the crime charged enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of Eighth

and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Depriving appellant of the protection afforded under the principles discussed in this argument is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in his ability to exclude evidence and inferences unsupported by the evidence. To uphold his conviction, in light of the improperly admitted evidence, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Moreover, allowing the jury to consider this evidence when it fails to meet the requirements of admissibility violates due process under *Ulster County Court v. Allen*, *supra*, 442 U.S. 140, which requires a rational connection between the fact proved and the fact to be inferred.

This error described infected the trial with unfairness as to render appellant's convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

D. PREJUDICE

There was an insufficient nexus of similarity between the robberies at Rite Way Market and Eddie's Liquor Store to prove the inferences sought to be drawn by the prosecution. The introduction of this evidence was prejudicial error violating appellant's right to due process of law. Because appellant's federal constitutional rights were compromised, reversal is required unless the error is harmless beyond a reasonable doubt.[58] (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

As noted previously, the case against appellant was very weak -- especially in terms of proving an intent to rob at Eddie's Liquor Store -- to the extent that it was premised on the testimony of Marcia Johnson, an accomplice testifying pursuant to a plea agreement who had given multiple statements to the police, each markedly different from the one before. Marcia also repeatedly changed her testimony on the witness stand. Without the inference that appellant's involvement in the Rite Way Market robbery proved appellant's intent to rob at Eddie's Liquor Store, there was no other evidence of that intent. And whether appellant harbored that intent to rob was one of the cornerstones of his defense.

The prosecution exploited the erroneously admitted evidentiary inference at length in argument to the jury. In her opening argument, the prosecutor characterized the method of operation at both crime scenes as exactly the same -- brazen because there was no attempt to conceal identity. (RT 10:2056-2058, 2066-2067.) The prosecutor also stated that both incidents were "in the nature of a take-over robbery" (RT 10:2058), an argument not supported by the evidence in either incident. She emphasized and

---

[58] Appellant contends that the same result is mandated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring reversal

told the jury that use of the Rite Way robbery was "important" in its consideration of whether an attempted robbery occurred at Eddie's Liquor Store. (RT 10:2058.) In closing argument, the prosecutor explicitly told the jurors they could use the Rite Way robbery to prove the identity of the perpetrators, their purpose, goal, motivation, and intent to rob at Eddie's Liquor Store. (RT 10:2196-2197.)

The prosecution's use of the improper evidence during closing argument both to prove identity and an intent to rob at Eddie's and to help convict appellant of those crimes makes the error far more likely to be prejudicial to the defendant. (*People v. Woodard*, *supra*, 23 Cal.3d at p. 341.)

The error was exacerbated by the charge given to the jury on other crimes evidence, CALJIC No. 2.50, which was modified so it only referred to co-defendant Marcus Johnson. This left the jury free to give whatever inference they desired to the Rite Way evidence in the case against appellant.[59] (CT 3:667-668.)

---

if it is reasonably probable that in the absence of the error a result more favorable to appellant would have resulted.

[59] CALJIC No. 2.50, as modified, read:

> Evidence has been introduced for the purpose of showing that the defendant Johnson committed a crime other than that for which he is on trial.[¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:[¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused or a clear

The inherently prejudicial nature of other crimes evidence – its tendency to sway the jury and create an overwhelming urge to convict notwithstanding reasonable doubt -- is exactly the reason behind Evidence Code section 1101 and its counterparts in every Anglo-American jurisdiction. As noted above, the introduction of propensity evidence rendered appellant's trial fundamentally unfair in violation of the right to due process of law. Similarly, the fact that this type of character evidence "is contrary to firmly established principles of Anglo-American jurisprudence" (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1380), is based on the fact that such evidence is universally viewed as highly prejudicial.

In *People v. Gibson* (1976) 56 Cal.App.3d 119, the court analyzed prejudice resulting from the admission of uncharged crimes into evidence concluding:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals . . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*Id.* at pp. 129-130; see *People v. Karis*, *supra*, 46 Cal.3d at p. 636.) If other crimes evidence is wrongfully admitted, even proper jury instructions can fail to cure the harm. A proper instruction was not given here, aggra-

---

> connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offenses defendant also committed the crime charged in this case; [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.[¶] You are not permitted to consider such evidence for any other purpose.
> (CT 3:667-668.)

vating the error in admitting the evidence. The only prophylactic measure that prevents this type of evidence from violating due process -- exclusion pursuant to Evidence Code section 1101, subdivision (b) -- failed in this case because the court improperly admitted this erroneous other crimes evidence.

The use of prior crime evidence of the most innocuous type has long been regarded as inherently prejudicial. (*People* v. *Bean* (1988) 46 Cal.3d 919, 938.) If a prior act of forgery of a bad check may be considered prejudicial (*People* v. *Long* (1970) 10 Cal.App.3d 586), it must be concluded that prejudice flows from the videotaped image of appellant robbing another store, holding a gun on the proprietor, as the jury erroneously was permitted to see in the Rite Way videotape.

The inherently prejudicial nature of this evidence makes it impossible to conclude that the presumption of prejudice can be rebutted and respondent will be unable to show otherwise. Furthermore, the trial court's failure to properly examine the evidence introduced in this case and to properly determine its correct use led to "specious reasoning" (*People v. Valantine*, *supra*, 207 Cal.App.3d at p. 704) that violated due process and undermined the reliability of the jury's verdict in violation of the Eighth Amendment, thereby requiring reversal of the instant case.

Appellant's conviction must be reversed.

IX. INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1 WAS STRUCTURAL ERROR

As part of the guilt phase jury instructions, the trial judge instructed the jury with a modified version of CALJIC No. 17.41.1, instructing them to advise the court if another juror disregards or expresses an intention to disregard any jury instruction during deliberation:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case in this guilt phase based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(CT 3:726; RT 10:2209.)[60] The instruction is constitutionally defective because it infringes upon a defendant's federal and state constitutional rights to trial by jury and his state constitutional right to a unanimous verdict. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.)

The instruction intrudes unnecessarily on the deliberative process, and thereby affects it adversely -- both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors. Directing the jury immediately before deliberations commence that jurors are expected to police the reasoning and arguments of their fellow jurors during deliberations, and to immediately advise the court if it appears a fellow juror is deciding the case upon an "improper basis," curtails and distorts deliberations, interfering unreasonably with the proper functioning of the deliberative process and impairing the free and private exchange of views that is an essential

---

[60] CALJIC No. 17.41.1 was requested by the prosecutor. (CT 3:726.)

feature of the right to a jury trial guaranteed by the federal and California Constitutions.

The instruction should not be given in any trial because it undermines the independence of the jury. By improperly compromising the private and uninhibited character of jury deliberations and permitting the judge to assist the majority improperly to impose their will on a hold-out juror or jurors, such an instruction denies a defendant's right to the independent judgment of each juror. The instruction also infringes on the jury's inherent power of nullification. As such, it violated appellant's rights to due process and a fair jury trial. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15 & 16.)

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment and article I, section 16, of the California Constitution. (*People v. Oliver* (1987) 196 Cal.App.3d 423, 429.) The purpose of these guarantees is to encourage the frank and uninhibited discussion necessary to perform the jury's search for truth. (See *United States v. Thomas* (2d Cir. 1997) 116 F.3d 616, 618-619; *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 [quoting Justice Cardozo in *Clark v. United States* (1933) 289 U.S. 1, 13 ["Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."].)

CALJIC No. 17.41.1 tells jurors that deliberations are neither private nor secret, because they can be interrupted at any time and a juror's words repeated to the judge as a reported impropriety. This prospect will cause jurors, especially "sensitive" ones in the minority, to abandon their independence and conceal legitimate concerns they may have about the strength of the state's case. Where jurors are encouraged to conceal concerns from one another, they will not interact and try to persuade others to accept their viewpoints. Soliciting jurors to inform on fellow jurors in advance is un-

wise and undermines the deliberative, truth-seeking function of the jury. The instruction "tend[ed] to impose such pressure on jurors to [conform] that we are uncertain of the accuracy and integrity of the jury's stated conclusion." (*People v. Gainer* (1977) 19 Cal.3d 835, 850.) Because the instruction assures jurors their words may be used against them, it discourages the "free and uninhibited discourse" in a forum where it is most needed (*Attridge v. Cencorp* (2nd Cir. 1987) 836 F.2d 113, 116), and virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268 [59 L.Ed. 1300, 35 S.Ct. 783].) The right to a unanimous verdict is violated when a court dismisses a deliberating juror if the dismissal occurred because that juror had doubts about the sufficiency of the evidence. (*United States v. Symington*, *supra*, 195 F.3d at p. 1085; *United States v. Thomas*, *supra*, 116 F.3d at p. 621.)

The instruction encroached on appellant's state constitutional right to a unanimous jury verdict, including the right to the independent and impartial decision of each juror. (Cal. Const., art. I, § 16; *People v. Gainer*, *supra*, 19 Cal.3d at pp. 848-849.) The intrusion on these state created rights also constitutes a violation of appellant's federal constitutional right to due process by arbitrarily depriving him of a state entitlement. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851; *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.) Nor can such restriction withstand scrutiny under Eighth Amendment principles mandating the heightened reliability of death sentences. (*California v. Ramos*, *supra*, 463 U.S. at pp. 998-999; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v.*

DeChristoforo, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

The error is of federal constitutional dimension, and, although the record does not expressly reflect that any juror felt intimidated or coerced, this error cannot be deemed harmless. Indeed, the impact of such an instruction inherently militates against any juror acknowledging that he or she felt intimidated and coerced. Jurors who ordinarily would not budge from a minority position may quietly abandon it if other jurors are likely to report them to the judge. In addition, jurors not sharing their minority views would probably not admit it to avoid a report and possible confrontation with the judge. The prejudice to appellant is that such an instruction adversely impacts the deliberative process and unfairly inclines the jury to find the defendant guilty and to impose death.

Though appellant's conviction and death sentence are ample proof of its impact, review should focus on the instruction's potential effects, rather than actual consequences. Juror perceptions of their freedom to speak openly and disagree with other jurors is clearly impacted by this instruction, coming as it does from the judge, and requiring jurors to report directly to the judge. Such an instruction invades juror privacy, reducing independent decision-making and depriving defendants of their right to unanimous verdicts and to jury nullification. No juror who understood this instruction could or would have taken a position conflicting with strongly held views of the majority without fear of being reported to the judge. The full consequences of being reported to the judge were unknown, but if they were reported, jurors could reasonably anticipate a subsequent discussion with the judge concerning their position. CALJIC No. 17.41.1 effectively put the judge physically in the jury room during deliberations as a thirteenth juror rendering each juror an extension of the judge should any perceived impropriety occur. A judge's actual or constructive intrusion into deliberations

could easily inhibit jurors, especially potential holdout jurors, from expressing their views.

Appellant recognizes that this Court has held that although CALJIC No. 17.41.1 does not per se infringe on any federal or state constitutional right to trial by jury or state constitutional right to a unanimous verdict, it should no longer be given because it "creates a risk to the proper functioning of jury deliberations and . . . it is unnecessary and inadvisable to incur this risk." (*People v. Engelman* (2002) 28 Cal.4th 436, 449.) Because under *Engelman* a substantial likelihood exists in any case in which CALJIC No. 17.41.1 was given that the jury trial right was substantially yet undetectably impaired, it is impossible to conclude the giving of the instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Any error that causes the risk of a substantial yet undetectable disruption of jury deliberations is surely among those "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309.) Followed to its inevitable logical conclusion, CALJIC No. 17.41.1 creates a structural defect in the most critical aspect of trial mechanisms, that of jury deliberations. That error, affecting the whole trial by compromising deliberations, defies analysis by harmless error standards, rendering it reversible per se. (*Ibid.*)

Appellant seeks reconsideration of *Engelman* to the extent that it holds that the error in instructing the jury with CALJIC No. 17.41.1 is not structural error mandating reversal per se.[61]

Accordingly, the judgment should be reversed.

---

[61] This issue is briefed in abbreviated form in accordance with *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.

X. BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE ACCOMPLICE TESTIMONY, THE FIRST DEGREE MURDER AND ATTEMPTED ROBBERY CONVICTIONS AND THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE ALLEGATION MUST BE REVERSED

A. INTRODUCTION

Appellant was found to have committed the first degree special circumstance murder of Richard Moon. Viewed most favorably to the verdict, the evidence demonstrated that appellant met with Samuel Taylor, Marcus Johnson, and Marcia Johnson sometime prior to the attempted robbery at Eddie's Liquor Store. According to Marcia, appellant told everyone what to do. The four of them then drove to the store, a robbery was attempted in which appellant was armed with a gun, and Moon was shot in the process. Afterward, they drove away, picking up other friends as they headed to appellant's residence. During the drive, appellant made a potentially incriminating statement. According to the prosecutor, appellant made an adoptive admission to a letter by failing to respond.

The only direct evidence that appellant was the organizer, intended to rob the store, and may have been the shooter came from Marcia, an accomplice testifying pursuant to a grant of immunity and a plea agreement. Later, the gun used in the shooting and a shirt possibly worn by one of the perpetrators were found in appellant's residence. Evidence of a prior robbery at Rite Way Market was offered to prove identity of the perpetrators, common plan, and the intent to rob at Eddie's Liquor Store. Because there was insufficient corroborating evidence connecting appellant to the offense itself, as required by the rules governing accomplice testimony, there was insufficient evidence to sustain appellant's conviction of murder and reversal is mandated.

B. SUFFICIENCY OF THE EVIDENCE STANDARD

The presumption of innocence and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that the prosecution prove every element of the crime charged beyond a reasonable doubt. (Pen. Code, § 1096; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520; *In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307.)

The federal standard for sufficiency of evidence is set out in *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

The standard set out in *Jackson* is applicable to California cases. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In *Johnson*, this Court stated:

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence." [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett* (1968) 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record* -- i.e., the entire picture of the defendant put before the jury -- and may not limit our

> appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'"

(*Id.* at pp. 576-577.) On appeal, the court must review the entire record in a light favorable to the judgment below and determine whether substantial evidence supports the conclusion of the trier of fact that the prosecution sustained its burden of proving each element of the crimes charged. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) To be "substantial," the evidence must reasonably inspire confidence. (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds, *In re Sassounian* (1995) 9 Cal.4th 535, 544, fn. 5.) "[T]he more serious the charge -- and murder is considered the most serious charge of all -- the more substantial the proof of guilt should be in order to reasonably inspire confidence." (*People* v. *Blakeslee* (1969) 2 Cal.App.3d 831, 837.)

The prosecution's evidence must be capable of convincing the trier of fact to a "near certainty." (*People v. Hall* (1964) 62 Cal.2d 104, 122.) The prosecution must present "evidence so complete as to overcome reasonable theories of innocence" (*People v. Alkow* (1950) 97 Cal.App.2d 797, 801), such that the trier of fact has "reasonably rejected all that undermines confidence." (*People v. Hall*, *supra*, 62 Cal.2d at p. 112.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond*, *supra*, 71 Cal.2d at p. 755.) Mere speculation cannot support a conviction. (*People v. Reyes* (1974) 12 Cal.3d 486, 500.) The substantial evidence test neither requires nor permits the reviewing court to take incriminating evidence at face value. A conviction cannot rest on incredible, false, or unreliable evidence. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 735.)

"There are exceptions, however, to the substantial evidence test. The Legislature has determined that because of the reliability questions posed by certain categories of evidence, evidence in those categories by itself is insufficient as a matter of law to support a conviction. Thus, the Legislature has required that the testimony of an accomplice (Pen. Code, § 1111), and the testimony of a single witness in a perjury case as to the falsity of the defendant's perjurous statement (Pen. Code, § 118, subd. (b)), must be corroborated before a conviction can be based on them." (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

C. LEGAL PRINCIPLES GOVERNING ACCOMPLICE TESTIMONY

Accomplice testimony has historically been viewed with great suspicion. Although the rules of evidence generally provide that the testimony of any one witness is sufficient proof of any fact, there is an exception for accomplice testimony. Section 1111 states:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . .

The purpose of section 1111 is to prevent convictions based solely on untrustworthy evidence. (7 Wigmore, Evidence, (1978 Chadbourn ed.) § 2056.)

> The requirement of section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that such evidence is to be regarded as untrustworthy and not to be believed unless fortified by other evidence tending to connect a defendant with the commission of the offense charged.

(*People v. Dail* (1943) 22 Cal.2d 642, 655.) The distrust of accomplice testimony is particularly well-placed when the accomplice testifies in the expectation of immunity. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Coffey* (1911) 161 Cal. 433, 438.)

Accomplices are distrusted because they have an overwhelming motive to shift blame to their co-perpetrators to save themselves. (*People v. Guiuan* (1998) 18 Cal.4th 558, 574-575 (conc. opn. of Kennard, J.); *Williamson v. United States*, *supra*, 512 U.S. at p. 601 [accomplice's strong motivation "to implicate the defendant and to exonerate himself," makes his "statements about what the defendant said or did . . . less credible . . ."]; see also *People v. Duarte*, *supra*, 24 Cal.4th 603.) Statements made by an accomplice at the time of her arrest are particularly untrustworthy because that is when the desire to exonerate herself and the motive to fabricate arises. It is for this reason that confessions casting most of the blame on others are considered to be highly unreliable.[62] (See e.g., *Lilly v. Virginia* (1999) 527 U.S. 116, 117.)

In her concurring opinion in *People v. Guiuan*, *supra*, 18 Cal.4th 558, Justice Kennard explained:

> A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From the Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony.

(*Id.* at p. 570, quoting *Phelps* v. *United States* (5th Cir. 1958) 252 F.2d 49, 52.) Because accomplices are liable to prosecution for the same offense, they have a powerful motive to aid the prosecution in convicting a defen-

---

[62] Marcia gave her first statement -- of many, with wildly different descriptions of what allegedly occurred -- to the police after being arrested, handcuffed, and taken to the police station in a police car.

dant, with the hopeful expectation that the prosecution will reward the accomplice's assistance with immunity or leniency. (*Id.* at p. 572, Kennard, J., conc.) Accomplices are rarely persons whose veracity is above suspicion; their participation in the charged offense is itself evidence of bad moral character. (*Id.* at p. 574, Kennard, J., conc.) Moreover, an accomplice's firsthand knowledge of the details of the crime allows for the construction of plausible falsehoods not easily disproved. (*Id.* at p. 575, Kennard, J., conc.)

The danger of obtaining crucial testimony from criminals was similarly noted in *Commonwealth of the Northern Mariana Islands v. Bowie*, *supra*, 236 F.3d 1083, where the court noted that "because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government." (*Id.* at p. 1124.)

Testimony from accomplices and "snitches" who receive a deal for their testimony has been a frequent cause of wrongful convictions, as the Innocence Project has illustrated in its study of cases in which the defendant was later exonerated by DNA tests. (*Id.* at p. 1124, fn. 6.) The longstanding rule that a conviction must not rest on accomplice testimony alone is thus supported by empirical evidence and the law properly requires corroboration to sustain a conviction.

In the present case, there was a lack of corroboration of the testimony of Marcia Johnson, an accomplice as a matter of law. Marcia, who was initially charged along with appellant, gave her first statement of many -- with wildly different descriptions of what allegedly occurred -- to the police after being arrested, handcuffed, and taken to the police station in a police car. In each statement, appellant's role and conduct became more and

more embellished. Indeed, without her testimony, the prosecutor could not establish the most critical elements of the offense -- intent to rob and a connection of appellant to the murder. As a result, there was insufficient evidence to support appellant's conviction of the murder or attempted robbery at Eddie's Liquor Store and the true finding on the attempted robbery-murder special circumstance allegation.

Because section 1111 is designed to prevent conviction upon suspect evidence, lack of corroboration enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 334; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) Depriving appellant of the protection afforded under these principles is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1117; *Ballard* v. *Estelle*, *supra*, 937 F.2d at p. 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in section 1111 because it provides that "no conviction shall be had" on uncorroborated accomplice testimony. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold appellant's conviction, when there was no proper corroboration for the accomplice testimony, would be arbitrary and capricious, thus violating due process. (*Vitek v. Jones*, *supra*, 445 U.S. at p. 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Additionally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.)

Finally, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States* (1978) 437 U.S. 1, 11.)

D. DETERMINATION OF ACCOMPLICE STATUS

Section 1111 defines an accomplice as ". . . one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"Liable to prosecution" means "properly liable," requiring that there is "probable cause" to believe that the person has committed the offense in issue. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 759; *People v. Cowan* (1940) 38 Cal.App.2d 231, 242.) Even a person who has been tried and acquitted of the same offense as the defendant may be an accomplice for purposes of section 1111: "The test is not whether she (the alleged accomplice) was subject to trial and conviction at the time she testified, but whether, at the time the acts were committed, and as a result of those acts, she became 'liable to prosecution for the identical offense charged against the defendant.'" (*People v. Gordon* (1973) 10 Cal.3d 460, 469, citation omitted).

Under the narrowest view, an accomplice must have "guilty knowledge and intent with regard to the commission of the crime." (*People v. Gordon*, *supra*, 10 Cal.3d at pp. 466 -467.) To be charged with an identical offense, the witness need not be the actual perpetrator, but may be a princi-

pal under section 31; that is, the direct perpetrator or an aider or abettor. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 833.) At common law, an "accomplice" includes all *particeps criminis*, whether they be principals or accessories before or after the fact. (*People v. Coffey*, *supra*, 161 Cal. at p. 439.)

Section 31 takes an expansive view of who is subject to prosecution for an offense: a principal in the offense includes "all persons concerned in the commission of a crime . . . , and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." This has been the definition of an accomplice for almost a century. (*People v. Coffey*, *supra*, 161 Cal. at p. 440.)

Because a person who is an accomplice to one crime may be properly convicted of any offense that is a foreseeable result of the crime that the accomplice intended to aid, that person is "liable to prosecution" even if it could ultimately be proven that he did not have the pre-knowledge and specific intent needed for the charged offenses ultimately committed.

> [A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, is sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator.

(*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

In *People v. Solis* (1993) 20 Cal.App.4th 264, the defendant drove around an area where a confrontation had occurred with some rival youths. As they drove past some youths, appellant's accomplice, whom appellant knew was armed, leaned out the window and fired shots, killing one person. Solis admitted knowing that the shooter had a gun, but denied knowing that the shooter would use it for any purpose other than to shoot in the air to

scare the opposing gang. (*Id.* at pp. 267-269.) Solis was convicted of second degree murder, based on a theory of aiding and abetting. Hence, if it is reasonably foreseeable that a serious crime may result from what commences as another offense, even if that offense is merely a misdemeanor, then the criminal accessory may be held responsible for the eventual felony, including murder. (*Id.* at p. 273.)

E. MARCIA JOHNSON WAS AN ACCOMPLICE AS A MATTER OF LAW

Marcia Johnson must be regarded as an accomplice as a matter of law. Marcia was arrested for the attempted robbery and murder of Richard Moon and received a plea agreement for the reduced charge of voluntary manslaughter and immunity in return for her testimony against appellant and his two co-defendants. Her testimony made clear that she was aware that a robbery was going to take place and she acted as a scout, going into the liquor store moments before the robbery to check out the placement of cameras and employees. In addition, Marcia believed that appellant was armed when the crime occurred. Marcia was therefore liable for the identical crimes until she reached an agreement to testify.

To the extent that the test of accomplice status requires that the witness had "guilty knowledge and intent with regard to the commission of the crime" (*People v. Gordon*, *supra*, 10 Cal.3d 460, 466-467), Marcia qualifies as an accomplice because she was well aware of what was going to occur and helped to advance that occurrence by her actions immediately preceding the crime. Being liable for and assisting with the crime, with knowledge that it was going to occur, Marcia was an accomplice as a matter of law.

Finally, the trial judge acknowledged that Marcia was an accomplice as a matter of law by so instructing the jury on the attempted robbery and

murder counts with CALJIC No. 3.16. (CT 3:664; RT 10:2012.) That Marcia may have been afraid of appellant is not relevant because it is well-established that duress is not a defense to murder. (*People v. Son* (2000) 79 Cal.App.4th 224, 233.)

Therefore, she must be regarded as an accomplice as a matter of law.

F. MARCIA JOHNSON'S TESTIMONY WAS NOT SUFFICIENTLY CORROBORATED

1. GENERAL PRINCIPLES RELATING TO CORROBORATION

The prosecution has the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Perry* (1972) 7 Cal.3d 756, 759, *People v. Cooks* (1983) 141 Cal.App.3d 224, 258.) The accomplice's testimony must be sufficiently substantiated so as to establish her credibility and satisfy the jury that she is telling the truth. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Szeto* (1981) 29 Cal.3d 20, 27; *People v. Martinez* (1982) 132 Cal.App.3d 119, 132.)

The corroborative evidence "must relate to some act or fact which is an element of the crime" so that it directly connects the defendant to the charged offense. (*People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1128; *People v. Zapien*, *supra*, 4 Cal.4th at p. 982; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1206). It must be sufficient, without aid from the testimony of the accomplice, to implicate the defendant. If the remaining evidence requires interpretation and direction by the accomplice's testimony to give it value, the corroboration is not sufficient. (*People v. Reingold* (1948) 87 Cal.App.2d 382, 392-393; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

Corroboration of an accomplice's testimony as to non-inculpatory facts is also insufficient because "if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." (*People v. Lohman* (1970) 6 Cal.App.3d 760, 766, quoting *People v. Morton* (1903) 139 Cal. 719, 724.).

Evidence that only gives rise to a suspicion, even a "grave" suspicion, of guilt will not corroborate an accomplice's testimony. (*People v. Szeto*, *supra*, 29 Cal.3d at p. 43; see CALJIC Nos. 3.10-3.13, 3.18.) Extrajudicial statements of accomplices are also insufficient to corroborate accomplice testimony because, although the out-of-court statement is not part of the testimony, it still "comes from a tainted source." (*People v. Andrews* (1989) 49 Cal.3d 200, 214; *People* v. *Belton* (1979) 23 Cal.3d 516, 524-526.) Therefore, Marcia's prior statements may not be considered as corroboration. (*People v. Andrews*, *supra*, 49 Cal.3d 200, 214, citing *People v. Bowley*, *supra*, 59 Cal.2d at p. 859.);

"The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986.)

2. EXAMPLES OF INSUFFICIENT CORROBORATION

Association with other people involved in the crime is not sufficient corroboration. "It is not with the thief that the connection must be had, but with the commission of the crime itself." (*People v. Robinson* (1964) 61 Cal.2d 373, 400; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111.)

People v. Falconer, *supra*, 201 Cal.App.3d 1540, illustrates the key requirement that evidence merely connecting the defendant to the perpe-

trators is not enough. There, several intruders attempted to steal marijuana plants from the victim. One of the intruders testified that the defendant had planned the raid, bought stockings ahead of time, went with the others to view the property, and did several acts in furtherance of the plan, returning with the others to commit the robbery. One of the intruders wore a Halloween mask, and the accomplice assumed it was the defendant. (*Id.* at p. 1542.) The corroborating evidence established that the defendant was the father of one of the intruders, that he visited the victim's residence before the robbery, and knew the victim grew marijuana. (*Id.* at p. 1543.) This evidence was held insufficient as a matter of law to corroborate the accomplice's testimony because it only connected the defendant with the perpetrators, not with the crime. The showing of what amounted to suspicious circumstances was not enough to connect the defendant to the crime. (*Id.* at pp. 1543-1544.)

Similarly, in *People* v. *Robinson*, *supra*, 61 Cal.2d 373, the only evidence inculpating the defendant were his fingerprints on a car involved in the offense, the fact that he gave conflicting and evasive replies when accused of involvement in the offense, and an adoptive admission implicating him. This Court held that those three items, neither independently nor cumulatively, were sufficient to corroborate the statements of the accomplice. (*Id.* at p. 398.)

"Evidence of mere opportunity to commit a crime is" also "not sufficient corroboration." (*People v. Boyce* (1980) 110 Cal.App.3d 726, 737; see also *People v. Robbins* (1915) 171 Cal. 466, 474-476.) In *Boyce*, the accomplices testified about the defendant's involvement in the offenses of selling, concealing, and withholding stolen property. The corroborating evidence established that a burglary occurred, that the defendant knew the victims, their schedules, and where they lived, that he was a friend of one of the participants in the scheme, and that he had been to his home at about

the same time that the stolen goods were delivered was not sufficient corroboration, because it established only that he had the opportunity to commit the offenses. (*People v. Boyce*, *supra*, 110 Cal.App.3d at pp. 736-737.) "Corroboration must be more than just a casting of suspicion on a defendant." (*Id.* at p. 737.)

Nor is it enough to show merely the commission or the circumstances of the offense. Thus, in *People v. Martinez*, *supra*, 132 Cal.App.3d at pp. 132-133, where no witness other than the accomplice identified the defendant as one of the robbers, the corroborating testimony about the type and color of the motorcycle involved, the number of participants in the robbery, the racial identification of the defendant, and the number and type of guns was insufficient to corroborate the testimony.

3. EXAMPLES OF SUFFICIENT CORROBORATION

Accomplice testimony may be corroborated by "direct physical evidence that does not rely on witness credibility." (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.) In *Narvaez,* there was evidence that the defendant had no apparent source of money and had gone on a spending spree in Las Vegas. Because the defendant was found to be in possession of large amounts of cash bundled in the same manner as money stolen in the robbery, it was held that there was sufficient corroboration. (*Id.* at p. 1305.)

Although *Narvaez* stated that the relationship of the parties may be considered in determining whether there is sufficient corroboration for accomplice testimony, it did not say that such evidence was sufficient by itself. *Narvaez* cited two cases, *People v. Henderson* (1949) 34 Cal.2d 340, and *People v. Williams* (1954) 128 Cal.App.2d 458, for the proposition that evidence concerning the relationship of the parties "may be taken into consideration by the jury in determining the sufficiency of the corroboration of

an accomplice's testimony." (*People v. Narvaez*, *supra*, 104 Cal.App.4th at p. 1305.) However, in both cases there was other corroboration beyond the relationship of the parties. In *Henderson*, witnesses testified that the defendant and accomplice were together most of the day preceding the attempted robbery and a few hours before the robbery. A non-accomplice witness testified that she sold the defendant the type of gun used in the robbery and it was taken from her home shortly before the robbery. (*People v. Henderson*, *supra*, 34 Cal.2d at p. 343.) Thus, Henderson was connected to facts relating to the offense -- the weapon used. In *Williams*, the defendant's car, loaded with stolen goods, was found at the scene of the burglary, he attempted to avoid detection, gave an assumed name when apprehended, and he was in possession of other stolen goods. (*People v. Williams*, *supra*, 128 Cal.App.2d at pp. 461-463.)

In *People v. Andrews*, *supra*, 49 Cal.3d 200, 211, sufficient corroboration was found where the defendant's fingerprints were found on the floor of the murder scene an inch from the body, and the defendant admitted his guilt to other people. (*Ibid.*) Similarly, in *People v. Zapien*, *supra*, 4 Cal.4th 929, 982 corroborating evidence included the fact that the defendant was seen shortly after the murder with blood on his person, he left town on a bus, the victim's car was found abandoned at the bus station, and the defendant's fingerprint was found on the gearshift lever, indicating that he was the last person to drive the vehicle. (*Id.* at pp. 982-983.)

Recently, in *People v. Boyer* (2006) 38 Cal.4th 412, this Court held that there was "ample corroboration" connecting the defendant to the crime where, along with other evidence, the defendant made a comment hinting he had been involved in the murder and blood from pants recovered from the defendant's house contained stains that matched both of the victims' blood.

Sufficient corroboration thus generally consists of physical evidence -- such as possession of stolen property or fingerprints -- or admissions that connect the defendant to the particular crime. The evidence presented in this case allegedly corroborating Marcia Johnson's testimony fell short of what the law requires.

G. THE ACTS RELIED ON TO CORROBORATE MARCIA JOHNSON'S TESTIMONY ARE INSUFFICIENT TO SUPPORT THE FIRST DEGREE MURDER CONVICTION

As explained above, the sufficiency of corroborative evidence is determined by viewing the case without the accomplice testimony. If the remaining testimony does not implicate the defendant in the murder of Richard Moon, the corroborative evidence is insufficient and appellant's conviction must be reversed.

Here, the corroborating evidence did not implicate or connect appellant to the killing at Eddie's Liquor Store in which Moon perished. Instead, it merely tended to connect him to the other alleged perpetrators or to show that he had the opportunity or motive to commit the crime. While the evidence arguably may have created a suspicion of guilt, the corroborating evidence was insufficient as a matter of law to support appellant's conviction of first degree murder.

Other than Marcia's accomplice testimony, no evidence connected appellant to the shooting. No witness positively identified appellant as being at the crime scene.

Iris Johnston testified that Marcia, Johnson, Taylor, and appellant arrived together to pick her up shortly after the time ascribed to the crime at Eddie's Liquor Store. They rode in the van Taylor borrowed from Zonita Wallace. Peter Motta observed a similar van under what he described as

suspicious circumstances indicative of involvement in the crime, but could not identify the van itself. There was no other evidence about the van's possible involvement in the crime or at the crime scene. Hence, this portion of Iris' testimony only demonstrates that the four people in the van -- people who admittedly knew each other well prior to that date -- were connected to each other but does not show a connection to the crime. Mere connection to other perpetrators is insufficient corroboration of accomplice testimony to uphold a conviction. (*People v. Falconer*, *supra*, 201 Cal.App.3d at pp. 1543-1544; *People* v. *Robinson*, *supra*, 61 Cal.2d at p. 398.) Similarly, proximity in time between the van ride and the crime shows but mere opportunity to commit the crime and is insufficient corroboration to support a conviction. (*People v. Boyce*, *supra*, 110 Cal.App.3d at pp. 736-737.)

Iris testified that while driving helicopters were spotted in the air above the van and appellant made a comment that they knew the people who did the robbery. The statement allegedly made by appellant did not connect appellant to the crime because all that it demonstrated was potential knowledge about people who committed an unspecified robbery. Appellant neither said anything more definite about the crime he was speaking of nor did he say that the people in the van were the ones who committed the robbery. In contrast, Marcia testified that she saw the helicopters, but she did not testify that she heard this statement from appellant, so on one level, Iris' testimony did not corroborate anything testified to by Marcia and, on another level, it worked against one of the purposes of corroboration because it served to disprove Marcia's credibility.

Iris also testified that she wrote appellant a letter[63] in which she accused him of committing an unspecified crime and that appellant never re-

sponded to the letter. Thus, the prosecution argued, appellant's silence in the face of the letter acted as an adoptive admission. The letter from Iris reveals a different story. Iris wrote about things she observed during the day that caused her concern and mentioned matters spoken of in the van. Critically, she did not accuse anyone of doing anything, writing that she thought they might be involved in the Long Beach robbery because of the helicopters, their statements, and their comments while watching the news. Because there was no accusation, there was nothing to respond to so that silence could be construed as an admission. Even the trial judge believed that the letter was a weak adoptive admission. (RT 5:888.) Again, nothing in the letter or his lack of response thereto connected appellant to the crime. Finally, the alleged adoptive admission should not be used to corroborate Marcia's testimony because it was improperly admitted.[64]

The various descriptions of the perpetrators made by drivers in the neighborhood were vague and could not be connected to appellant. In addition, Steven Miller's out-of-court description of the perpetrators should not be used to corroborate Marcia's testimony because it was improperly admitted.[65] More importantly, Miller also was unable to identify appellant.

---

[63] Exhibit 2.

[64] In Argument VI, *ante*, appellant argues that the letter was improperly admitted as an adoptive admission both because there was no demonstration that appellant read it and had the opportunity to respond, and because a letter was recovered, addressed to Iris from appellant, which could have been a response to the letter, but it was lost by the police prior to discovery disclosure to the defense. If the letter should have been excluded, the lack of response to the letter should not be considered for corroborative purposes. (*People v. McDermott* (2002) 28 Cal.4th 946, 986.)

[65] In Argument III, *ante*, appellant argued that Miller's statement to the police was inadmissible as violative of the Confrontation Clause. Be-

Similarly, the evidence that one of the perpetrators wore a black T-shirt with a Nike swoosh does little to connect appellant to the crime. The fact that a similar shirt was found in his closet adds little to the calculus because of the widespread, generic nature of the shirt. Far too many persons are likely to have this same shirt to afford it evidentiary value corroborating an accomplice.

Did appellant, prior to the incident at Eddie's Liquor Store, possess and utilize the gun ultimately used in the shooting at Eddie's Liquor Store? Possibly, although the evidence also gave rise to an inference that while he obtained it in the Rite Way Market robbery a month earlier and it was found among his belongings at his grandmother's house one week after the shooting, someone else was present with the gun at the time of the shooting. There was no evidence demonstrating that appellant was the shooter -- from Marcia Johnson or anyone else -- or that he was in possession of the gun used in the shooting. Possession of a weapon before and after a crime -- without more -- demonstrates only opportunity and does not prove that appellant was present at the scene of the Eddie's robbery.

The videotape of the scene inside Eddie's Liquor Store -- and the still photographs made from the videotape -- were inconclusive. The original videotape and photographs did not show faces, so they did not connect anyone to the crime. The enhanced videotape and photographs allegedly showing appellant were of very poor quality and could be interpreted to show almost any African American male. Finally, the still photographs

---

cause it should have been excluded, it should not be considered for corroborative purposes. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

should not be used to corroborate the testimony of an accomplice because they were improperly admitted.[66]

Finally, the prior crime evidence from Rite Way Market was ostensibly used to demonstrate identity and common plan. There was little in common between the two crimes, thus vitiating the inference sought to be drawn from that evidence.[67] Indeed, like the factual scenario in *People v. Falconer*, *supra*, 201 Cal.App.3d 1540, where evidence showing only a relationship between the parties was deemed to be insufficient corroboration, the evidence presented in appellant's case established only that the parties charged knew one another. Again, because this evidence was improperly admitted, it cannot be used to corroborate Marcia's accomplice testimony.

It is clear why the prosecution sought Marcia's testimony. Without it, the case against appellant was weak and circumstantial. Appellant's conviction was far less likely to occur without her testimony. She was sought out despite the fact that Taylor arguably was less culpable -- he was only the driver without any other connection to the crime whereas she was a scout, going into the liquor store prior to the alleged robbery -- because of the impact and significance of her testimony and her eagerness to cut a deal. Predictably, she was not the world's best witness, having given numerous versions of the incident to the police and constantly contradicting herself on the witness stand as she sought to save herself from the inculpa-

---

[66] In Argument VII, *ante*, appellant argues that the enhanced videotape and the still photographs made from it were improperly introduced into evidence for lack of foundation. To that extent, they should not be considered for corroborative purposes. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

[67] In Argument VII, *ante*, appellant argues that the prior crime evidence was improperly introduced to demonstrate identity and common

tory burdens leveled on the three defendants in the trial. This only serves to underscore the wisdom and importance of requiring independent corroboration of accomplice testimony. Viewing the case without Marcia's testimony and the mass of improperly admitted evidence that the jury heard or observed, there was insufficient corroborative evidence to convict appellant.

Lacking corroboration, there was a dearth of that type of evidence "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value'" required by *People v. Johnson*, *supra*, 26 Cal.3d at p. 576, for this court to find that appellant committed a first degree murder. Viewing the case without Marcia's testimony, there was insufficient evidence to convict appellant.

Accordingly, appellant's conviction of the first degree murder count arising from the crime at Eddie's Liquor Store must be reversed.

H. THE ACTS RELIED ON TO CORROBORATE MARCIA JOHNSON'S TESTIMONY ARE INSUFFICIENT TO SUPPORT THE ATTEMPTED ROBBERY CONVICTION

Whether or not this Court finds that there was sufficient corroboration to support the first degree murder conviction, as argued *ante*, a different analysis is mandated in considering whether there was sufficient corroboration of Marcia's accomplice testimony to support the attempted robbery count arising at Eddie's Liquor Store.

Key to this discussion is the fact that nothing was taken at Eddie's Liquor Store, despite the obvious availability of visible cash. The cash drawer on the register was found closed. Nothing was disturbed. Although

---

plan. To that extent, it should not be considered for corroborative purposes.

Richard Moon was killed, there was no evidence inside the store that a robbery was attempted other than Marcia's accomplice testimony. This is a crucial and dispositive fact because Marcia was two blocks away, sitting in the van, when the robbery was allegedly attempted and she could not testify about what happened inside the store.

Culpability for robbery is defined by section 211, which states:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

"To secure a robbery conviction, the following elements must be proved: (1) A person had possession of property of some value however slight; (2) the property was taken from that person or from his immediate presence; (3) the property was taken against the will of that person; (4) the taking was accomplished by either force or fear; and (5) the property was taken with specific intent permanently to deprive that person of the property." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057, citation omitted.)

"The crime of attempt occurs when there is "a specific intent to commit a crime and a direct but ineffectual act done towards its commission." (§ 21a.) "To '"constitute an attempt, there must be (a) the specific intent to commit a particular crime, and (b) a direct ineffectual act done towards its commission. ... To amount to an attempt the act or acts must go further than mere *preparation*; they must be such as would ordinarily result in the crime except for the interruption."' (*In re Smith*, 3 Cal.3d 192, 200 [90 Cal.Rptr. 1, 474 P.2d 969], quoting from 1 Witkin, Cal. Crimes (1963) § 93, p. 90.)" (*People v. Welch* (1972) 8 Cal.3d 106, 118, italics in original.) "Where the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even

---

(*People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

though that same act would be insufficient if the intent is not as clearly shown." (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764, citation omitted.)

To provide corroboration of Marcia's testimony about the attempted robbery, a connection is needed to more than the mere fact that there was a killing. As previously noted, the corroborative evidence "must relate to some act or fact which is an element of the crime" so that it directly connects the defendant to the charged offense. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128.) The two elements of an attempted robbery are the intent to commit a robbery and an act in furtherance of the robbery. Hence, while arming might corroborate a killing, in contrast, it does nothing to specifically show that a robbery was attempted at the same time. Similarly, demonstrating that appellant may have been present at the scene of a shooting does not demonstrate that a robbery was attempted. Without more, the fact that the shooting occurred in a liquor store is mere happenstance.

Indeed, robbery cases in which accomplice testimony is deemed corroborated largely focus on the discovery of proceeds from the robbery. (See, e.g., *People v. Narvaez*, *supra*, 104 Cal.App.4th at p. 1303 [evidence of defendants' possession of stolen jewelry corroborated accomplice]; *People v. Jenkins* (1973) 34 Cal.App.3d 893, 899-900; *People v. Harris* (1948) 87 Cal.App.2d 818, 822-823.) Where testimony is adequately corroborated by evidence other than the discovery of proceeds, this has been deemed sufficient corroboration to support a conviction. the (See, e.g., *People v. Tewksbury* (1976) 15 Cal.3d 953, 971-972 [second non-accomplice witness described all aspect of planning and aftermath the same as accomplice witness]; *People v. Johnson* (1973) 33 Cal.App.3d 9, 22-23 [police observations immediately after robbery of the defendant acting suspiciously and of rifle found on floor of car corroborated accomplice testimony]; *People v. Davis* (1962) 210 Cal.App.2d 721, 728-730 [extrajudicial statement of co-

conspirator corroborated accomplice]; *People v. Ray* (1962) 210 Cal.App.2d 697, 703-704 [fingerprints found at scene and admissions corroborated accomplice].) Each of these cases demonstrate corroboration relating to a robbery far greater than present here.

Similarly, cases where courts have found sufficient evidence corroborating an attempted robbery present much more evidence than is present here. (See, e.g., *People v. Jackson* (1963) 222 Cal.App.2d 296, 298 [corroborative evidence showed defendant entered store, pointed a gun at store operator, and said, "This is it."]; *People v. Gilbert* (1963) 214 Cal.App.2d 566, 567-568 [where two armed men appeared in market after closing time, displayed their weapons at proprietor near cash drawer and moved others to rear room, failure to verbally demand money did not bar inference of attempted robbery].) In the case against appellant, there was no evidence inside the store indicating that anything was taken. There was no evidence of proceeds being found afterwards, no evidence of prior planning or anything else connecting appellant to what happened in the liquor store. Appellant did not admit that he took part in a robbery attempt. Other than the accomplice testimony of Marcia Johnson, the prosecution could not prove appellant's involvement in a robbery.

The extremely weak state of corroboration of Marcia's testimony on the attempted robbery count was articulated early in the trial by the prosecutor. Arguing that evidence of the earlier Rite Way Market robbery was admissible in the Eddie's Liquor Store incident, she stated that the showing sought from the Rite Way videotape was intent to rob because it was necessary to corroborate the testimony of Marcia Johnson on the underlying robbery of the robbery-murder special circumstance allegation.[68] (RT 4:665-

---

[68] Specifically, the prosecutor argued:

666.) In allowing use of the evidence, the trial judge joined in this assessment. (RT 4:688-689.)

The videotape of the incident at Eddie's Liquor Store shows nothing of what occurred.[69] Two people are seen arriving and two people are seen leaving. Beyond that, nothing else that occurs during the incident, including the killing of Richard Moon, is shown on the videotape.

Appellant has previously argued that the evidence from the Rite Way robbery was inadmissible to prove intent to rob at Eddie's Liquor Store and that erroneous use of the evidence should not be permitted to corroborate Marcia's testimony that appellant harbored an intent to rob. Similarly, no other items of evidence found inadmissible by this Court should be so considered.[70] (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

Viewing the case without Marcia's testimony and other evidence found inadmissible by this Court, there was insufficient corroborative evidence to support her testimony, as the evidence outside of accomplice testimony fails to "do more than raise a conjecture of suspicion of guilt." (*People v. Szeto*, *supra*, 29 Cal.3d at p. 27.)

> Also, in footnote three, I've also noted the additional requirement under *People versus Hamilton* that we should corroborate the underlying felony where we use an accomplice to establish that the special circumstances.¶ Marcia Johnson's testimony standing alone is not sufficient to establish the underlying robbery aspect for the purposes of the special circumstances allegation.¶ It is not sufficient to establish the case in this particular case.¶ The issue is really one of intent, what was the reason why they entered the market.

(RT 4:666.)

[69] Exhibit 36.

[70] Argument VIII, *ante*.

Lacking corroboration, there was a dearth of that type of evidence "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value'" required by *People v. Johnson*, *supra*, 26 Cal.3d at p. 576, for this court to find that appellant committed an attempted robbery.

Accordingly, appellant's conviction of the attempted robbery count arising from the crime at Eddie's Liquor Store must be reversed.

I. INSUFFICIENT EVIDENCE TO SUPPORT THE ATTEMPTED ROBBERY COUNT REQUIRES REVERSAL OF THE FIRST DEGREE MURDER COUNT BECAUSE IT WAS PREMISED ON A THEORY OF ATTEMPTED ROBBERY-MURDER

Lack of substantial evidence to support the attempted robbery also undermines the verdict of first degree murder to the extent it rests on the theory of felony-murder, also requiring independent corroboration of the underlying felony. (See *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1129-1130.)

Felony-murder was only one of the theories of first degree murder presented to the jury. The jury was instructed that it could find appellant guilty of first degree murder on either a theory of attempted robbery-murder or premeditated murder.[71] (CT 3:697-699.) The factually unsupported theory of attempted robbery-murder should not have been presented to the jury. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.)

Traditionally, reversal is required where it is unknown whether the jury relied upon an erroneous instruction which states an improper legal theory. (*People v. Green* (1980) 27 Cal.3d 1, 69-70.) *People v. Guiton*,

---

[71] The jury was instructed with CALJIC No. 8.20 on deliberate and premeditated murder and CALJIC No. 8.21 on first degree felony-murder. (CT 3:697-699.)

supra, 4 Cal.4th 1116, limited the *Green* rule regarding the standard of prejudice to be utilized by a reviewing court when the jury has been instructed with both correct and incorrect theories upon which it can premise culpability. Predicating its determination on the distinction between legal theories and factual theories, the Court found that where the jury is instructed on an unsupported factual theory, it is prejudicial only if "a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130.) Thus, when "the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Id.* at p. 1129) "The error is therefore one of state law subject to the traditional *Watson* test applicable to such error. Under *Watson,* reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred."[72] (*Id.* at p. 1130.)

In *Guiton*, this Court defined the difference between a factual and legal theory. If the jury is simply faced with a question of what the defendant did or intended to do, the issue is factual. (*Id.* at p. 1129, fn. 1, citing *People v. Houts* (1978) 86 Cal.App.3d 1012 [insufficient evidence that the defendant attempted to sodomize the victim].) In *Guiton*, the factual theory was whether or not the defendant sold cocaine. However, when an appellate court makes a determination whether or not the defendant's act is sufficient to satisfy the elements of the statute, the insufficiency is a legal theory. (*Id.* at p. 1129, fn. 1, citing *People v. Green*, *supra* [insufficient evidence of kidnapping asportation based on distance moved].)

---

[72] *People v. Watson*, *supra*, 46 Cal.2d at p. 836.

Appellant submits that the insufficiency in the present case is a legal issue. The question presented is the failure to present sufficient evidence to corroborate accomplice testimony. It does not depend upon appellant's intent. Instead, the issue presented requires a solely legal conclusion -- whether there is uncorroborated accomplice testimony. (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 261.)

Because the jury in appellant's case was misinstructed on the unsupported theory of attempted robbery-murder, the question before this Court is legal in nature. Thus, a different standard of prejudice is mandated, and reversal is required "unless it is possible to determine from other portions of the *verdict* that the jury necessarily found the defendant guilty on a proper theory." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1131, italics added.) In other words, does the *verdict* reveal that the jury necessarily found *appellant* guilty of *premeditated* first-degree murder?

Appellant asserts that it does not. The verdict merely states that appellant is guilty of first degree murder with a finding of true on the attempted robbery-murder special circumstance allegation. The concurrent verdict finding him guilty of attempted second degree robbery, if anything, demonstrates that the jury relied on a felony-murder theory to convict of first degree murder, not premeditation and deliberation. The true findings on the special circumstance and gun use allegations likewise demonstrate that the jury relied on a theory of felony-murder, rather than premeditation and deliberation, to convict. (CT 3:734-736.)

Based on the evidence adduced at trial, the verdict clearly demonstrates that the jury did not find appellant guilty on a proper theory. Because there was insufficient factual and legal evidence to establish the underlying attempted or completed felony, reversal is mandated because the jury clearly relied on a felony-murder theory to convict.

In her opening argument to the jury, the prosecutor argued that appellant was the actual killer and could be found guilty of first degree murder on both an express malice with premeditation and deliberation theory and a felony-murder theory. (RT 10:2080-2086.) After arguing to the jury in abbreviated fashion that they could find appellant guilty of first degree murder based on premeditation and deliberation (RT 10:2082-2083), the prosecutor stated:

> Now, I want to tell you about felony murder, and *I want to tell you to stay on the road to felony murder.*¶ But I think it's important that you understand the distinctions between all forms of murder.¶ *Felony murder includes murders with implied malice. It includes murders that have an intent to kill.*¶ *They include intentional killings that are performed with premeditation deliberation.*¶ *Felony murder includes all these types of murder.*¶ The felony murder rule is what I like to say is a no fault insurance plan that the Legislature has taken out on each one of its citizens, and under that plan, what the Legislature has said, what the law says is, Mr. Robber, you embark on a robbery, you attempt to rob somebody, we don't care whether or not at the point you killed it was intentional, we don't care if it's unintentional, we don't even care if it's accidental, if a person dies during the commission of a robbery or an attempted robbery, we say it's murder in the first degree.¶ We don't assess fault or blame. We don't engage in the decision as to whether or not this was intentional, unintentional or accidental.¶ A person dies during the commission of an attempted robbery, that is automatically murder in the first degree.¶ You are -- your victim's insurer.¶ If your victim dies, you are guilty of murder in the first degree, and it goes further than that.¶ It says, Mr. Aider and Abettor, not only will the actual killer be the insurer of your victim's life, but you, too, must ensure the continuing life and safety of your victim.¶ Because if anyone killed, any one of the confederates, anyone who is participating n this robbery kills, every person who either directly, indirectly or as an aider and abettor participated in that robbery is guilty of murder in the first degree.¶ And we're not going to set out to decide whether or not it's intentional, unintentional or accidental, we don't even care which one of you pulled the trigger.¶

> If one of you pulls the trigger, everyone is guilty-- is responsible to that victim in the tune of murder in the first degree.¶ *In this case, stay on the road to felony murder.*¶ You must first acquit the defendants of murder in the first degree under the felony murder rule before you can convict of a lesser offense of second degree.¶ You must find there is no felony in progress. In this case, clearly, the felony was in progress.¶ Everyone of them is guilty of murder in the first degree, regardless of who pulled the trigger, regardless of the intent.

(RT 10:2084-2086, italics added.) A minute later, while discussing the attempted robbery-murder special circumstance allegation, the prosecutor stated:

> *If they participate in a robbery, all [are] guilty of murder in the first degree.*¶ *First degree.*

(RT 10:2087, italics added.) Shortly after, the prosecutor finished her opening argument:

> In this case, *I ask you to bring back a verdict of guilt as to each of these defendants under the felony murder rule, to find that it is murder in the first degree*, to find that the defendant Chism personally used a firearm, and to find that they all participated in a robbery as active participants and with reckless disregard for life, to find that special circumstances allegation to be true.¶ Thank you.

(RT 10:2088, italics added.)

During her closing argument, the prosecutor made the following comment:

> This is a case where an attempted robbery is clear. A person was killed. The robbery was still in progress at the time that that attempted robbery or Mr. Moon was killed.¶ *That makes it felony murder, although, as I've described, felony murder contains some of the components of other types of murder.*¶ *If you find that there was an attempted robbery, you are dutybound to convict every person who participated in that attempt of murder in the first degree.*

(RT 10:2181, italics added.) The prosecutor finished her closing argument by stating:

> They went in there, with one purpose, one goal in mind, to rob Eddie's Liquor Store. And things went awry. Mr. Moon is dead. *He was killed during the commission of an attempted robbery.*¶ *You should find each of these defendants guilty of that crime and find them guilty of murder in the first degree under the felony murder rule.* They were each major participants in that crime. They acted with reckless disregard for life. You find the specials circumstances to be true as well.¶ Thank you.

(RT 10:2207, italics added.)

With the exception of the short reference to premeditation and deliberation in her opening argument, the prosecutor did not urge the jurors to convict appellant of first degree murder on that theory. Indeed, there was little to demonstrate premeditation and deliberation in this case. Assuming appellant was armed, he had shown a clear disinclination to use a weapon at the earlier Rite Way robbery, counseling his fellow perpetrators not to turn a robbery into a murder. No evidence established that appellant made pre-crime comments indicating a willingness to use the gun. And, there was nothing in evidence demonstrating what occurred inside the liquor store.

The prosecutor repeatedly urged the jury to find appellant guilty of first degree murder solely based on a felony-murder theory. The prosecutor's argument makes clear that she viewed felony-murder as a far stronger, more straightforward, and trouble-free theory on which to obtain the desired conviction. There is no reason to treat this issue as less crucial than the prosecutor repeatedly did in her argument. (*People v. Cruz*, *supra*, 61 Cal.2d at p. 868; *People v. Powell*, *supra*, 67 Cal.2d at p. 57.)

Appellant was found guilty of the attempted second degree robbery at Eddie's Liquor Store. (CT 3:735.) The first degree murder verdict in this case was accompanied by a true finding on the attempted robbery-murder special circumstance (CT 3:734), which could be reached only if the jury believed someone had committed an attempted robbery.

Here, the jury must have considered the felony-based murder theory as a first order of business, determining defendant was the actual killer. Although inadequacy of proof of felony-murder may have been a factual matter that the jury was presumed to be "fully equipped to detect" (*People v. Guiton, supra,* 4 Cal.4th at p. 1129), such detection was rendered extremely difficult here because the inadequacy involved the more subtle legal question of whether there was sufficient evidence independently corroborating accomplice testimony regarding the charged crime of attempted robbery rather than the murder itself.

The record affirmatively demonstrates a reasonable probability that the jury found appellant guilty of first degree murder based solely on an insufficient felony-murder theory and appellant's conviction of first degree murder must be reversed.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States*, *supra*, 437 U.S. at p. 11.) When a crime -- such as first degree murder -- can be based on multiple theories, failure of the prosecution to present sufficient evidence to support one of the theories -- such as felony-murder -- forecloses retrial on that theory. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1741; *People v. Young* (1987) 190 Cal.App.3d 248, 254-259.)

Accordingly, appellant's conviction of first degree murder must be reversed and, if the prosecution should choose to retry appellant on that charge, retrial on a theory of felony-murder must be precluded.

J. INSUFFICIENT EVIDENCE TO SUPPORT THE ATTEMPTED ROBBERY COUNT REQUIRES REVERSAL OF THE TRUE FINDING ON THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE ALLEGATION

"When the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1177.) Here, the crime was attempted robbery and, as previously argued, Marcia Johnson's accomplice testimony about that crime was uncorroborated.

Given the lack of evidence independent of accomplice testimony to support the crime of attempted robbery, the attempted robbery-murder based special circumstance must be reversed for insufficient corroborating evidence. (*Ibid.*)

Because any further proceedings on a special circumstance are barred under the principles of double jeopardy when substantial evidence of the special circumstance is lacking, the special circumstance of murder during the commission of an attempted robbery must be dismissed. (*Burks v. United States*, *supra*, 437 U.S. at pp. 14-15; *People v. Morris*, *supra*, 46 Cal.3d at p. 22, disapproved on another point in *In re Sassounian*, *supra*, 9 Cal.4th at pp. 543-544, fn. 5; *People v. Green*, *supra*, 27 Cal.3d at p. 62; *People v. McDonald* (1984) 37 Cal.3d 351, 378.)

XI. THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND MANDATES REVERSAL

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill* (1998) 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, requiring reversal unless respondent can demonstrate that the error was harmless beyond a reasonable doubt. In *People v. Williams* (1971) 22 Cal.App.3d 34, the Court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error. (*Harrington v.*

> *California*, 395 U.S. 250, 255 [23 L.Ed.2d 284, 288, 89 S.Ct. 1726]; *Fontaine* v. *California*, 390 U.S. 593, 596 [20 L.Ed.2d 154, 157, 88 S.Ct. 1229]; *Chapman v. California*, 386 U.S. 18, 24 [17 L.Ed.2d 705, 710, 87 S.Ct. 824, 24 A.L.R.3d 1065]; *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 [11 L.Ed.2d 171, 172-174, 84 S.Ct. 229]; Cameron and Osborn II, *When Harmless Error Isn't Harmless*, 1 Law & The Social Order, Ariz. State U.L.J. 23.)

(*Id.* at pp. 58-59; see also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390; *In re Rodriguez* (1981) 199 Cal.App.3d 457, 469-470.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. This is so because of the recognition that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and be a factor in an analysis of cumulative prejudice. (*United States* v. *Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

The numerous errors in the guilt phase of this case individually require reversal. Additionally, appellant suffered prejudice based on a cumulative assessment of the errors. This is especially so because the prejudice is geometrically multiplied where the errors were so inter-related.

> Defendant's trial, as seen, was far from perfect. In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. [Citation.].

(*People v. Hill*, *supra*, 17 Cal.4th at p. 845.) Therefore, the errors must be evaluated together and the prejudicial effect of each should not be considered separately from the prejudicial effect of the others.

Appellant has previously argued that the following individual evidentiary errors occurred during the guilt phase of the trial:

- Admission of an out-of-court statement made by Steven Miller, who did not testify, to Officer Romero describing the perpetrators as they departed Eddie's Liquor Store immediately after the shooting, used to identify appellant and to connect the van to the killing.
- Admission of Detective Chavers' testimony that she observed co-defendant Marcus Johnson or another person ask Zonita Wallace if she had spoken to the police, improperly proffered and admitted to create a factually and legally insupportable inference of appellant's consciousness of guilt.
- Admission of Detective Edwards' testimony about a statement made by Marcia Johnson -- that appellant told her he had previously been inside Eddie's Liquor Store finding only one old man inside as a clerk -- improperly admitted as a prior statement inconsistent with the testimony of Marcia Johnson.
- Admission of a letter written by Iris Johnston to appellant in which she broadly accused him of committing the crime at Eddie's Liquor Store as the basis of an improperly admitted and legally erroneous adoptive admission premised on appellant's failure to reply.
- Admission of two improperly authenticated enhanced still photographs taken from the videotape at Eddie's Liquor Store showing the heads of the two perpetrators not shown in the original videotape and the other still photographs made from it.
- Admission of the evidence from the Rite Way Market robbery to prove identity, common plan, and intent to rob at Eddie's Liquor Store.

Appellant has previously argued the prejudicial impact of these individual errors and will not repeat that assessment here.

In this case, there was surprisingly little evidence against appellant that was properly admitted. Marcia Johnson testified as an accomplice, pursuant to a very favorable plea agreement. There was an abundance of forensic evidence from Eddie's Liquor Store, but there were no witnesses to the crime. The videotape, together with the properly admitted still photographs from it, showed little. Other than Marcia Johnson, there were no witnesses who allegedly saw appellant prior to the crime. Only Zonita Wallace testified about the period prior to the crime and that was merely to state that she loaned her van to Samuel Taylor and that he later returned it. No money was taken at Eddie's Liquor Store and nothing was disturbed to indicate robbery or attempted robbery. Appellant acquired the murder weapon a month before the killing and it was in his possession a week after the shooting. Appellant owned a shirt -- non-distinctive and widely available -- similar to a shirt worn by one of the perpetrators of the killing. Appellant allegedly acted suspiciously according to Iris Johnston and ostensibly made a statement in Iris' presence that they knew who did a robbery shortly after the incident at Eddie's Liquor Store, though appellant's accomplice and the prosecution's primary witness, Marcia Johnson, did not hear the statement.

The strongest part of the prosecution's case was the testimony of charged accomplice Marcia Johnson. Marcia gave numerous different statements to the police, some implicating appellant, others not implicating him. In each statement, Marcia's descriptions of appellant's involvement changed as Detective Edwards made suggestions to her -- at least she understood them that way -- about what he wanted her to say. Granted, Marcia tied appellant to the crime as the ringleader, but her testimony was

weak and inconsistent. She repeatedly contradicted herself, admitting that she lied on the witness stand.

In the present case, the properly admitted evidence was in short supply, but the uncorroborated improper evidence of appellant's involvement was powerfully incriminating. The prior crime evidence was used to prove intent to rob when there was no other independent evidence of that intent. The so-called adoptive admission through a failure to respond was offered to create the inference that appellant committed the charged crimes. Enhanced still photographs were introduced ostensibly showing appellant entering and leaving Eddie's Liquor Store, as was a witness' description of a perpetrator superficially matching appellant enter and leave the store. Evidence of an alleged threat attributable to co-defendant Marcus Johnson was allowed to show consciousness of guilt, an inference the jury undoubtedly imputed to appellant. An additional statement purportedly made by appellant to the group assembled before the incident permitted the jury to infer that appellant had been to the store at least once before in preparation, another effort by the prosecution to bolster its insufficient proof of intent to rob. Individually or cumulatively, these were all powerfully incriminating pieces of the prosecutor's puzzle, all necessary to the final picture.

The repeated and numerous errors in this case require an assessment of prejudice based on a cumulative impact of the errors. Because some of the errors are of federal constitutional magnitude, the cumulative impact of the errors must be reviewed under the *Chapman* standard requiring reversal unless the prosecution can demonstrate beyond a reasonable doubt that no change in the verdict would have occurred in the absence of the errors. Appellant asserts that is an impossible burden for the prosecution in this case because the errors were overwhelming and pervaded all aspects of the case.

"We take defendant's claim to be a call not for a 'perfect' trial, but for one in which his guilt or innocence was fairly adjudicated." (*People v. Hill*, *supra*, 17 Cal.4th at p. 844.) This Court continued: "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid.*)

While appellant considers numerous errors here to require reversal individually, if this Court believes otherwise, appellant notes the following language from *Hill*:

> The sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. Considering the cumulative impact of Morton's misconduct, at both the guilt and penalty phases of the trial, together with the *Carlos* error and the other errors throughout the trial, we conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects.

(*Id.* at p. 847.) All of the errors complained of here combined to taint the prosecution case. "Here, the jury heard not just a bell, but a constant clang of erroneous law and fact." (*People v. Hill*, *supra*, 17 Cal.4th at p. 846.)

Even with the numerous errors in this case, the jury still took almost 3½ days to deliberate. Certainly, the jurors were having trouble convicting despite the benefits inuring to the prosecution because of the errors. (*People v. Rucker* (1980) 26 Cal.3d 368, 391; *People v. Anderson* (1978) 20 Cal.3d 647, 651; *People v. Bennett*, *supra*, 276 Cal.App.2d at p. 176.) Appellant was severely prejudiced because the multiple errors allowed the jury to consider Marcia Johnson's testimony corroborated and to convict in the absence of other evidence. The jury seemingly was fixated on the enhanced

photographs, requesting the Eddie's videotape on two occasions and emphasizing that they wanted the enhanced videotape if it was available. (CT 3:612, 615.) In addition, the jury's request for a full readback of Marcia Johnson's testimony demonstrates that jurors were clearly concerned about the need to determine not only whether Marcia Johnson was truthful, but whether her testimony was corroborated. (CT 3:611.) Clearly, the jury was connecting the dots between Marcia's testimony and its corroboration. Unfortunately, the improperly admitted evidence and the prosecutor's overreaching and reliance on it for corroboration improperly skewed that determination in the state's favor.

Appellant was deprived of the fair trial to which he was entitled. Respondent will not be able to demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Because the numerous errors cumulatively stripped from appellant his right to due process and a fair trial, appellant respectfully requests that this Honorable Court reverse his judgment of conviction.