NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN ALLEN DAVIS,

Defendant and Appellant.

A057027

(Alameda County Super. Ct. No. 105302)

Appellant Melvin Allen Davis was charged by information filed December 21, 1990, as amended December 27, 1990, with the murder of Daniel **Cortez** (Pen. Code, § 187),[1] personal use of a firearm (§ 12022.59, and with probation ineligibility based upon inflicting great bodily injury (§ 1203.075). On this latter date, he pled not guilty and denied the allegations of the information.

Appellant was tried three times. The first trial commenced on May 22, **1991**, and ended on June **21**, 1991, with a mistrial after the jury deadlocked at **11-1** for conviction. Appellant's second trial began September **10**, **1991**, and again ended in a mistrial on November 5, 1991, when the jury hung at ***8-4*** for conviction. Appellant's third trial began on January

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

9, 1992, and ended with a verdict of first degree murder and a finding of personal use of a firearm. On March 12, 1992, the court sentenced appellant to state prison for a term of 25 years to life, plus an enhancement term of two years which was stayed.

Appellant raises a number of substantial claims of error in the proceedings during his third trial. We conclude that the cumulative effect of several rulings by the trial court was to deprive appellant of his constitutional rights to compulsory process and to confrontation of a key witness against him. After a careful review of the record, moreover, we conclude that the trial court's errors were not harmless. Accordingly, we reverse and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Except where noted, the following evidence was adduced at appellant's third trial:

A. The Murder of Daniel Cortez.

At approximately 2:15 a.m. en Sunday, July 2, 1989, Regina Wilson, Antoinette Waugh, and India Singleton returned home to the 900 block of 106th Avenue in Oakland after visiting a cruising area known as the "Sideshow." The young women stopped to chat with Jerry Sinnamon, Eric Love, and Daniel Cortez, all sometime drug dealers, who were standing in front of Wilson's house.

A brown Oldsmobile Cutlass with grey primer spots, which the women claimed they saw earlier at the Sideshow, circled the block a couple of times and screeched to a halt near the

group. The passenger, described as a tall, skinny man, jumped out, pointed a gun at Sinnamon, and said, "Don't move." The passenger then ordered everyone to lie on the ground, and fired over Sinnamon's head when he did not obey, but rather, took off sunning. According to Waugh, she complied with the order to lie on the ground, as did Singleton, and the driver of the car stood over them holding a silver gun. Wilson and Cortez ran away, but the passenger gave chase, forced Cortez to stop, ordered him to lie on the ground, and said, "Break yourself." Apparently, this was an order to Cortez to empty his pockets and turn over whatever he had. Cortez had no money, only some papers, so the passenger told him to get up and walk away. The passenger shot at Cortez's feet twice as he walked ***away***, then aimed and shot Cortez in the back of the head. According to the coroner, Cortez was struck by a bullet that entered above and slightly behind the ear, and a bullet that wounded his forearm. Cortez also suffered numerous scrapes and bruises, which may have **been caused when,** according to Love, Cortez "crawl[ed] on his face" for several minutes after being shot. The passenger and driver got back in the Cutlass and sped away.

B. The Arrest and Interrogation of Anthony Thomas.

Anthony Thomas was arrested by Oakland police at approximately 11 a.m. on the morning of July 2, 1989, when he drove his brown Cutlass into an East Oakland gas station, When he was arrested, Thomas had a silver .22 caliber revolver in the trunk of his car. The silver gun's cylinder, which Thomas had noticed was missing, was located at the scene of the

shooting. In addition, a loaded .38 caliber revolver was found on the floorboard on the driver's side of the car, The .38 was black with a dark brown handle, and was identified as the source of the bullet that killed Cortez. Six expended .38 caliber cartridges, and a box of live .38 cartridges were found in the trunk of the Cutlass.

Thomas was transported immediately to the homicide division of the Oakland police department. At approximately 1:25 p.m., Officers Thiem and McKenna began to interrogate Thomas. After approximately one hour of questioning, the officers took the first of three tape-recorded statements. In that first statement, Thomas denied any knowledge of the shooting, and claimed that he spent the evening at a party for one of appellant's nieces. He further stated, however, that a drug dealer named "Stone" had borrowed his ear between 2 a.m. and 4 a.m. on the morning of July 2.[2] Thiem and McKenna left the room for about 20 minutes after Thomas gave his first statement,

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[2] The defense maintained, and it was later confirmed by his own attorney, Chat "Stone's" real name was Tyrone Turner. The defense subpoenaed Turner to testify at the preliminary hearing, but the prosecution objected. At the time of the preliminary hearing, Turner was in custody in Santa Rita with a release date of December 8, 1989. However, the magistrate would not permit Turner to testify until the defendants picked him out of a lineup as the person they knew as "Stone." Despite the fact that they had been informed of a court order for Turner to appear at a lineup on December 7, 1989, jail officials released Turner on December 6. Turner did not appear at the lineup and was not located until March 1990, when a defense investigator learned that he had been shot and was in a coma in an Oakland hospital. Turner subsequently died without regaining consciousness. Because the defense was thus deprived of his testimony at the preliminary hearing, the trial court granted a defense motion to set aside the information pursuant to section 995. Hovever, the charges against appellant were simply refiled and survived a second round of motions.

When the officers returned, they told Thomas that ehey did not believe him. They again interrogated Thomas with the tape recorder off for another hour and a half, then left the room again for approximately 25 minutes. When they returned, Thomas gave his second tape-recorded statement, in which he stated that "Stone" borrowed his car for approximately half an hour and returned with bullets for the .38 revolver that was in Thornas' car. Thomas said that he then left the party with "Stone" and drove to 106th Street, where "Stone" attempted to rob some drug dealers and ended up shooting one of them. At the end of this second tape, Sergeant McKenna reminded Thomas of the officers' promise that, if Thomas were truthful with them, the district attorney would be informed of that fact. Thiem and McKenna then left again, this time for 45 minutes.

When the officers came back, they interrogated Thomas for another hour and 20 minutes with the tape recorder turned off. They told Thomas they did not believe "Stone" was a real person, and that they believed the real killer was his cousin, Melvin Davis. Thiem *testified* that, after a long pause, Thomas started crying and said, "Yeah." A third tape recording was then made to memorialize this statement. In that third statement, Thomas denied that he had loaned his ear to "Stone," saying that he had dropped him off near appellant's house earlier.[3]

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[3] At the first trial, Thomas acknowledged that it would have been easy to renew his claim that "Stone" was the shooter, since "Stone" had since been murdered, but he said he knew exactly what he was doing in naming appellant. This testimony was read to the jury at appellant's third trial.

C. The Arrest and Interrogation of Appellant.

Appellant was arrested nine days later, on July 11, 1989. He had heard that the police were looking for him, but had not run or gone into hiding. Following his arrest, appellant was kept in an interrogation room for at least seven hours before Thiem and McKenna questioned him. The officers interrogated him for more than an hour with the tape recorder off, When they turned on the tape recorder at 4:21 p.m., appellant told the officers that he had nothing to do with the shooting. He claimed that he had left his niece's birthday party only once with Anthony Thomas in Thomas' car, to go home to change clothes at approximately midnight or 1 a.m. Appellant further stated that he saw the .38 revolver in Thomas' car at that time, and had picked it up briefly. On that trip, appellant claimed that three other people rode with him and Thomas and got out at a nearby market. Thomas dropped appellant off at his house, went to get gas, and returned to pick up appellant again. Appellant said he did not *see* the gun when Thomas brought him back to the pasty, but "guessed" that Thomas might nave put it in the trunk of his car. Aside from this short outing, appellant claimed that he had spent the entire night of July 1-2 at his niece's birthday party, which was held at his sister's house, and had slept there. Appellant also said that he had heard that "Stone," whom he knew casually and who had been at the party, might have been involved in the shooting.

D. The Lineup and In-Court Identifications.

On July 13, 1989, a physical lineup was organized, including appellant, Thomas, and six other men they chose themselves, as participants. Several of the men, like appellant, had no facial hair; several others, like Thomas, had facial hair, Appellant and one other man wore black clothing, while the others all wore white tops. Each of the men in the lineup was directed to say, "Break yourself." Although appellant's trial counsel, Daniel Horowitz, had been appointed earlier on the same day, a different attorney, Alex Selvin, was called in to represent both appellant and Thomas during the lineup.

The three young women who were present during the shooting simultaneously viewed the lineup, and testified at each of appellant's three trials regarding their identifications of the passenger and driver of the brown Cutlass, Although she ran behind a house and did not see Cortez get shot, Regina Wilson identified appellant both in the lineup and in court as the passenger who fired at least a warning shot. She also identified the car used in the attack, the Cutlass that belonged to Thomas, and said that the passenger had a black revolver like the one found in the car when Thomas was arrested on the morning of July 2, 1989. At the lineup, which was held approximately two weeks after the murder, Wilson recognized appellant when he came out, and also recognized appellant's voice when he said, "Break yourself." She identified appellant consistently in court thereafter.

However, despite uncontroverted evidence that appellant is left-handed, Wilson testified that the passenger held the gun in his right hand.

India Singleton, who obeyed the order to fall to the ground, also identified appellant at the lineup. After asking to hear appellant repeat the phrase "Break yourself," Singleton indicated that she was positive of her identification. However, Singleton was inconsistent about her in-court identifications of appellant, purportedly because of her fear. Although she was not asked to identify appellant in court in the third trial, Singleton did testify that she was frightened at the lineup, had been frightened ever since, and even moved her residence because of fear of retaliation for testifying. On redirect examination by the prosecutor, moreover, she broke down in tears when he elicited testimony that she had been gang-raped and that a friend who had testified at the rape trial had been shot in the head and killed.[4]

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[4] The rapes occurred sometime after Singleton testified at appellant's preliminary hearing. Apparently, she did not move until after the rapes occurred. However, there was no evidence that appellant had anything to do with the rapes, or that she moved because of any fear of appellant himself. She described her fear as more generalized to "what would happen to me on the streets of Oakland." The testimony about the rapes, and the murder of Singleton's friend was elicited by the prosecutor to explain her attitude on the witness stand in appellant's trial, which he described as "sullen and curt and borderline [sic] on disrespect."

As a result of the prosecutor's questioning, Singleton broke down and began to cry. The court told the jurors to stay in their seats and Singleton to stay on the witness stand while he and counsel conferred in chambers. Singleton, who was by that time in a "near hysterical" state, was still crying approximately 10 minutes later when the court reconvened. Over appellant's and the prosecutor's objections, the court sent the jury home for a three-day holiday weekend without giving a cautionary instruction requested by appellant. No such instruction was given until the end of trial. At that time, the court merely told the jury that evidence of the rape of Singleton and the murder of her friend were was

(Footnote continued on next page.)

Antoinette Waugh eventually picked appellant out of the lineup, but the circumstances under which she did so were hotly disputed. At a pretrial hearing and in the first two jury trials, Waugh said that she had been too scared to mark her card during the lineup but marked No. 7, appellant, after meeting with Sergeant McKenna, who told her to be truthful. At the third trial, however, Waugh backtracked on her prior testimony. On direct examination, she said she had not been sure whether appellant or the No. 1 person in the lineup looked more like the shooter, but decided to pick No. 1. When McKenna saw this, he asked her why she picked No. 1. She told him she picked No. 1 because she thought he was the one. McKenna then suggested that perhaps she was just scared and that she knew No. 1 was not the right one. After seeing McKenna's reaction and speaking with him, she picked No. 7, appellant.

On cross-examination, Waugh admitted that she had been inconsistent about prior in-court identifications of appellant at the first two trials, but that she was scared at the lineup and reluctant to testify at any of the court proceedings because of possible retaliation. She also admitted that she had told the prosecutor during an interview that the other young women at the lineup had told her who to mark, but further claimed that she said that just to get the prosecutor out of her house. Waugh further admitted that the three young women

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(Footnote continued from previous page.)
admissible "for the sole purpose of evaluating her credibility," and not for any other purpose.

had gotten together to compare notes about who they had selected at the lineup, but did not remember whether that was before or after they turned in their individual lineup identification cards.

A fourth witness, Eric Love, also viewed the lineup. At that time, he identified three men, but not Thomas or appellant, as possibly involved in the shooting. At trial, Love testified that appellant was not one of "three or four" men who got out of the car the night of the shooting, and that the passenger had a beard and moustache. This testimony was consistent with a statement he made to police three days after the shooting.[5] Love admitted, however, that he ran away as soon as he saw a gun and did not see who shot Cortez. He also admitted that he sold drugs in the area of the shooting, but that he was not: dealing that night,

Jerry Sinnamon testified that he knew a robbery was imminent as soon as the Cutlass stopped, and began to run away. He did not get a good look at the passenger, but ascribed to him a height and build that coincided with those of appellant. After being shown a picture of "Stone," he said it was possible he was the shooter.

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[5] Both Tyrone Turner ("Stone") and Anthony Thomas had moustaches and short beards. It is undisputed that appellant had no facial hair at the time of the party or the lineup.

E. Other Identification Evidence.

There was disputed evidence about the clothing worn by the driver and passenger at the time of the shooting. Apparently, Sinnamon or one of the officers at the scene in the aftermath of the shooting told the homicide detective, Officer Bowden, that the passenger was wearing blue jeans and a white sweatshirt, Regina Wilson likewise told police that the passenger/shooter was wearing blue jeans and a white T-shirt. However, India Singleton told police that the passenger was wearing dark clothing. Thomas testified that appellant was wearing red sweats and red and white Nikes at the time of the shooting,

Appellant's fingerprints were found on the back side of the rear-view mirror, and on the outside of the right front window of Thomas' car, There was no evidence presented about fingerprints on the handguns found in Thomas' car. Thomas' fingerprints were lifted from the steering wheel of the car.

F. The Trial of Anthony Thomas,

In January or February 1991, the district attorney, Gary Cummings, advised Thomas' attorney, Diane Bellas, that "if I was in her position, given the facts that we have against her client, that I would, if I were representing him, I would waive jury and have him testify truthfully." During that time period, Thomas was in pre-trial detention, housed in a unit (known as a "pod") guarded by Alameda County sheriff's deputy Joseph Martin. On February 1, 1991, Thomas reported to Deputy Martin that "due to the fact that he was taking a deal from the courts, his crime partner, Melvin Davis, who is BGF connected,[6] had sent word [to two of the inmates housed in Thomas' "pod"] that some type of hostile action should be taken against him."[7]

Appellant and Thomas first appeared in department three, the Honorable Joseph Karesh presiding, on March 28, 1991. Appellant's ease was severed from Thomas' on April 30, 1991. Two weeks later, Thomas waived a jury and submitted to a court: trial before Judge Karesh. Apparently, both Thomas and the young women eyewitnesses to the shooting testified at Thomas' court trial. After trial, Judge Karesh sealed the verdict without telling anyone except his clerk what it was. The

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6 In this regard, Deputy Martin's statement implies that appellant was connected to a prison gang known as the "Black Guerrilla Family."

7 None of the information in this paragraph was ever presented to the jury. Rather, it was excluded by the trial court based only on appellant's offers of proof, and the prosecutor's explanations of his own conduct.

sealed verdict did not contain information about the sertence Thomas was to receive. Even though Thomas' trial had already been completed, Judge Karesh explained that he sealed the verdict to avoid the appearance that his decision in Thomas' case was influenced by what he heard in appellant's trial, which began on May 22, 1991.

At appellant's first trial, his *defense* counsel, Daniel Horowitz, was not informed that Thomas would be testifying until the day before Thomas actually testified on May 28, 1991. At that time, Mr. Horowitz asked that the verdict be unsealed because he feared that Thomas' uncertainty about the outcome would put undue pressure on him to testify in accordance with what he thought the court and prosecutor wanted him to say. The trial court denied the motion, claiming that it had the right to keep the verdict secret for 60 days.[8]

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[8] Respondent concedes that there is no specific authority to support Judge Karesh's decision to keep the Thomas verdict under seal during appellant's trial. Indeed, section 1167 appears to require immediate announcement of the court's findings and entry of the court's verdict in the clerk's minutes "at the conclusion" of the court trial. There can be no serious dispute that Thomas' court trial had concluded by the time appellant's trial began. It is not clear, however, whether appellant has standing to complain if the court violated section 1167 in Thomas' trial, or whether the court has some discretion to withhold its verdict pending completion of related trials. (See People v. Cummings (1993) 4 Cal.4th 1233, 1331.) On the other hand, appellant plainly has standing to complain about the due process implications of excluding evidence of incentives--actual or perceived--that may be motivating a witness to testify for the prosecution. (See People v. Morris (1988) 46 Cal.3d 1, 32-33; People v. Phillips (1985) 41 Cal.3d 29, 47-48.)

On June 25, 1991, Judge Karesh acquitted Thomas of murder, but found him guilty as an accessory after the fact. On July 22, 1991, Thomas was sentenced to three years probation and received 724 days of credit for time served.[9]

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[9] Given that the young women eyewitnesses testified in that case as well, it is difficult to understand how, absent a "deal" of some type, Thomas--who admitted early on and consistently thereafter that he was the driver and that he was present when Cortez was shot--was acquitted in his court trial of felony murder and personal use of a firearm. For example, in the preliminary hearing, held in November 1989 before appellant's and Thomas' cases were severed, Antoinette Waugh testified that "a car came up real quick and the driver got out of the car and he said, 'Don't move if you don't want to get shot,'" and that the driver "had a gun in his hand when he got out the car because he shot the gun once [straight up] in the air when he got out and said it." (Emphasis added.) Waugh further testified that the driver had a silver revolver and, after the other youths took off running, said to her, "'Get on the ground if you don't want to get shot.'" According to Waugh, the driver then pointed a gun by her head and said, "'Don't look up if you don't want to get shot.'" When asked to describe the driver and to indicate if he was present in the courtroom, Waugh pointed out Thomas as someone who was "similarly built." Although she claimed to have come face to face with the driver, Waugh said that she did not see the driver in the lineup held shortly after the shooting. In the third trial, Waugh testified that it was the driver who got out of the car and said, "Break yourself," and that he stood over her with a silver gun, This testimony was probably sufficient to have supported a conviction of felony murder and personal use of a firearm by Thomas. (See People v. Berry (1993) 17 Cal.App.4th 332, 335-338.)

Curiously, the prosecutor in appellant's third trial, told the jury in his closing argument that--in essence--Thomas was guilty of felony murder: "Use your common sense. It's obvious that Anthony Thomas, contrary to what he told the police and what he testified to, knows they're going out to rob drug dealers, and that is something that's an extremely dangerous crime to commit. They're going out unknowing whether these people--Jerry Sinnamon's out there, Daniel Cortez, Eric Love, they do not know if they have weapons on them, and that's why the both of them are covering each other. [¶] But it's a very dangerous crime, and that's why they jump out, boom, with guns right away to get the drop on them right away, get the guns on them so that they can't shoot back at them."

G. Thomas' Testimony at Appellant's First Trial, Read to Jury in Appellant's Third Trial.

Anthony Thomas testified for the prosecution at appellant's first trial in May 1991, but "disappeared" shortly thereafter.[10] In the third trial, the court permitted his prior testimony and tape recordings of his statements to the police to be read and played to the jury. As will be discussed below, Thomas was taken into custody in San Jose toward the end of appellant's third trial, and was brought to Oakland to testify, but not until after the following first-trial testimony had been read to the jury:

Thomas said that he and appellant had been friends most of their lives, and called each other "cousin." After serving five years in CYA for burglary, Thomas was released in February 1989 on parole. At that time, he began associating with the 85th Avenue gang. Thomas claimed that a friend on his way to prison had left the .22 and .38 caliber revolvers in his custody, and that he kept the .22 and gave the .38 to

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[10] Although appellant accused the prosecution of having failed to follow up on leads he provided to help locate Thomas during the second trial, and complains about the prosecution's tactic of introducing Thomas' first-trial testimony at the third trial after obtaining a determination that he was unavailable but then committing before opening argument not to "call" Thomas as a witness, he does not appear to suggest that the prosecution secreted Thomas or facilitated his "disappearance" in any way after the court released him. However, respondent suggests, without any evidentiary support, that Thomas "disappeared" because he was afraid of appellant.

On remand, the parties should not have the same kind of difficulty locating Thomas to give live testimony. It appears that he is currently serving an eight-year sentence for an armed robbery which occurred in August 1992, and for which he was convicted in January 1993. Thomas' appeal from that conviction, A060398, is pending before Division One of this court.

appellant's brother, Terry Washington.[11] Thomas explained that the .22 was missing a pin, such that the cylinder could fall out, but it could be fired if aligned properly. Thomas said that Terry Washington was his good friend, and a member of the 85th Avenue gang, and that appellant sometimes lived with his brother, Terry.

Thomas further testified that, on July 1, 1989, he attended a birthday party for appellant's niece. Although most of the party-goers were young teenagers, a few young adults and older chaperones, including appellant and Thomas, were also present. According to Thomas, the party started at 9:30 or 10:00 p.m. Thomas said he left the party three times. First, he took several people to a liquor store to get some beer since the party was supposed to be drug- and alcohol-free, and those who wanted to drink had to furnish their own and consume it away from the house. Among those who went with Thomas on his first trip was Tyrone Turner, who was also known as "Stone." Thomas said he dropped "Stone" off at his mother's house on 98th Avenue before returning to the party. Thomas left a second time to take his girlfriend home to Berkeley, where he dropped her off at about 1:40 a.m. When he returned to the party, approximately 20 people were still there.

Thereafter, Thomas said, appellant struck up a conversation about going to San Jose. According to Thomas, appellant asked, "D[o] you want to go to San Jose?" Thomas

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[11] **Terry Washington was also** known **as Terry Todd.**

replied, "No, what's out there?" In response appellant said, ''You know what time it is." Thomas claims he understood from conversations with 85th Avenue gang members that appellant was asking if he wanted to go to San Jose to rob drug dealers, and that he responded, "I'm not into that." Nevertheless, about five minutes later, Thomas agreed to drive appellant to 106th Avenue. Thomas said he had put the .22 under the driver's seat before he went to Berkeley so the kids at the party would not come across it where it had been stored in Terry Washington's closet. He claimed that the .38 was in the trunk, and that he did not know appellant had it until he saw it on appellant's lap after they circled the block on 106th Avenue a couple of times.

According to Thomas, appellant asked him to slow down and go around the block. On the third pass, Thomas claimed that appellant jumped out while the car was still moving and fired a shot. Thomas brought the car to a screeching halt, put the gun in his pants pocket, got out of the car, took the gun out of his pocket,[12] and went over to where the girls lay on the sidewalk.[13] Thomas said that he saw appellant shoot

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12 Apparently, Thomas testified in his own court trial that he never took the gun out of his pocket until he got back into the car. On direct examination during appellant's trial, he testified that the handgun he had "was still in my pocket" when appellant got back in the car after Cortez was shot. On cross, however, he admitted that that was not true and explained, "Because I had on sweat pants and the way that the pants pocket's made, it was going to fall. So I took it out and had it by my side."

13 According to Antoinette Waugh, the driver of the car stood over her. holding a silver gun while the passenger was pursuing Cortez.

Cortez twice and saw Cortez fall down face first. Appellant then got back into the car without saying anything. Thomas, too, got back into the car after Cortez was shot. As he did so, he dropped the gun he was carrying, picked it up and threw it in the car, then drove off at a high rate of speed.

Over appellant's strenuous objections, the trial court admitted Thomas' testimony about events following the shooting of Cortez, including three other apparent robberies during at least two of which appellant shot at the victims. Thomas said that he did not abandon appellant during any of the events because he was afraid he would be harmed. Thomas also said that he was afraid to testify at appellant's trial because he would be known as a snitch, and could be killed for testifying. Thomas further testified that he been threatened while in pretrial detention, and that he had heard that there was a contract out on his life,

On cross-examination, Thomas admitted that he had loaned his car to "Stone" sometime between the start of the party and the time of the crime. Thomas also conceded that his first statement to the police was false, and that parts of his second statement were also not true. Significantly, he claimed he lied when told police he "had an idea [appellant] was going to try to take somebody's dope money," but told the truth at his own trial when he said he "didn't have no idea what was fixing to jump off, what was going to happen 'til it was too late." He claimed his story changed from his first to his third statement to the police because he realized he had been placed

at the scene because of the missing gun cylinder and, thus, had to admit what they already knew--that he was the driver. Although the second statement indicates that Thiem and McKenna assured him they would make the prosecutor aware of his truthfulness, Thomas denied that the police offered him any promises or benefits for changing his testimony.

Thomas testified that he had told the truth at his trial before Judge Karesh, and that he did not know what verdict the judge had reached since the verdict had been sealed. When asked whether he had any belief that he was going to be found not guilty, he said, "I don't know what's going to happen."[14]

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[14] The third-trial jury did not get to hear Mr. Horowitz's next question from the first trial as to whether Thomas was hoping to get probation in exchange for testifying against appellant. The trial court sustained an objection to that question--despite the fact the prosecutor stated no basis for his objection--before Thomas could answer. The court also sustained an objection to Mr. Horowitz' question in the first trial whether Thomas knew he would be testifying for the prosecution when he took the stand in his own trial. This line of questioning was one that appellant's counsel proposed to ask Thomas when he was located in the middle of the third trial.

In addition, appellant's counsel proposed to ask Thomas about: (1) Statements he reportedly made to Deputy Martin in February 1991 about "taking a deal with the courts"; (2) Statements he made to a private investigator, William Harris, in or about the spring of 1991 (but which were not discovered until after Thomas disappeared) about being pressured by his attorney to testify against appellant in exchange for lenient treatment in a court trial; (3) Statements he made at the time of the preliminary hearings, in public and in the presence of both his own counsel, appellant's counsel, and a defense investigator, that it was really "Stone" and not appellant who shot Cortez: and (4) Whether Christopher Newton, a man whose fingerprints were found on Thomas' car following his arrest in July 1989, had any involvement in the shooting of Cortez.

H. Appellant's Alibi Defense.

Appellant testified on his own behalf at all three trials. In the third trial, he admitted to numerous contacts with the juvenile justice system. Appellant testified that his family was close, and described in detail his involvement in his niece's birthday party. He claimed that he had spent most of the day on Saturday, July 1, 1989, buying records and setting up a stereo system for the party, which was held at his sister Gwen's house. Once the party started, at approximately 9:30 p.m., he acted as a disc jockey (d.j.9 and hung out with the guests. Appellant also talked to his girlfriend, Andrea Kenney by telephone, and a young teenager named Javonda Lamison. He said he talked to Kenney about four times, the last time for about 45 minutes. He spent time sitting in the hallway, visited the living room, and stayed for some time in Gwen's and Joyce's rooms. He said he intended to go home when the party was over, but ended up falling asleep there. When it was time to clean up, Javonda came in and jumped on his back, but he pretended to be asleep.

Appellant testified that he left the party only once, while it was still light outside and at a time when a few guests had started arriving, to go home to change clothes. Appellant testified that he changed from yellow pants and a black sweater to red sweats and red and white Nike shoes. Although his house was only a block and a half away, appellant said that he asked Thomas for a ride, This statement appeared to contradict his second-trial testimony that he was positive

he had walked home to change his clothes. However, appellant explained that he had been referring to two different trips home: The first time, to get speakers for the party, he had walked; the second time, to change clothes, he got a ride from Thomas.

Appellant's trial testimony about the time he left the party to change clothes conflicted with what he told police when he was arrested, i.e., that he left the party between midnight and 1 a.m.[15] It also conflicted with a statement by his girlfriend, Andrea Kenney, who told police appellant came home to change clothes at about 10 p.m. However, appellant's sister Gwen provided some corroboration for his story when she testified that it was still "early on in the party" when appellant left to change his clothes.

After changing clothes, appellant returned to the party because, he said, he was the only one who could fix the stereo if it needed fixing. He testified at both his first and third trials that he walked back to the party. However, this conflicted with what he told police when he was arrested, i.e., that Thomas had returned to pick him up and took him back to the party in his car.

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[15] Appellant testified that he was confused about details because his mind was "wasted" when he spoke to the police. He claimed that he had had only 3 hours of sleep, that he vas left in isolation for 10 or 11 hours, and that he had had no food or water.

Appellant testified that he did not know "Stone" personally but saw him at the birthday party in Thomas' company. According to appellant, "Stone" touched his niece lewdly so appellant and his brother, Terry Washington talked to "Stone" and escorted him to the door to leave. He said he saw "Stone" and Thomas leave together. Appellant denied that he talked to Thomas about going to San Jose to rob drug dealers.

One of appellant's brothers, Terry Washington, provided more detail about "Stone's" involvement in the birthday party. Washington referred to "Stone" as "my friend Stone," and claimed to be a good friend of Thomas' as well. Washington testified that he, Thomas, and "Stone" were all affiliated with the 85th Avenue gang. Washington admitted that he had been convicted of a previous robbery, but claimed that it was a case of mistaken identity.

According to Terry Washington, "Stone" arrived at the party late, and left with Thomas. When the pair left, appellant remained at the party. Washington claimed that he saw appellant throughout the party and did not believe he ever left while it was still going on. He said that between 4 and 5 a.m., while the rest of the family was cleaning up, appellant was pretending to be asleep. Washington further testified that he had heard from a mutual friend, who spoke to Thomas while he was in pre-trial detention, that Thomas had said "Stone" was responsible for the shooting but that appellant should watch out because the police believed appellant was "Stone."

Various other members of appellant's family, and other party guests, testified in support of appellant's alibi. Joyce Elliott, a family friend who was living at Gwen Todd's house on the night of the party, testified that appellant was at the party all night, acting as d.j., talking to a teenager named Javonda Lamison, and pretending to be asleep at cleanup time. Although she was unable to identify a photograph of "Stone," Elliott remembered that he was at the party because, at one point, he was harassing her and immediately thereafter Thomas approached and told "Stone" to leave the party with him.

Appellant's sisters, Gwen and Pam Todd, both testified that they believed "Stone" left the party with Thomas, but were somewhat inconsistent about the time they thought the men left. Whereas Pam testified that "Stone" and Thomas left between midnight and 1 a.m., she had earlier told police the two men left between 11 p.m. and midnight. Gwen testified that the party ended at about 3 or 4 a.m.

Appellant's best friend, Derrell Davis, said that he talked to appellant throughout the party, and that appellant was in the living room when he left the party at 2 a.m. Derrell was impeached with testimony from the second trial (held in late 1991), in which he could not recall what year the party had been held. Derrell did recall, however, that "Stone" had been at the party.

Javonda Lamison, who was 13 years old at the time of the party, gave somewhat contradictory testimony about appellant's presence at the party. On the one hand, she said that appellant was at the party when it ended at 2 a.m., and that she remembered jumping on appellant's back while he was pretending to be asleep during the cleanup. However, she also testified that the party ended between midnight and 1 a.m., and that she had not spent the night at Gwen's house but, rather, at the home of appellant's god-aunt, Ava Washington.

Appellant called Ava Washington in an attempt to clear up the confusion left by Javonda's testimony. Ms. Washington stated that the girl's memory was inaccurate and that, while Javonda often slept at her house, she did not do so the night of the party. Instead, Ms. Washington testified that Javonda stayed at Gwen's house, along with several of the younger party-goers, but under instructions to be dressed and ready for church at 8 a.m. on the morning after the party.

Appellant's mother, Elma, testified that appellant was still at the party after Thomas left for the last time, Ronnie Williams and Angie Washington, who are, respectively, appellant's cousin and niece, both testified that appellant was at the party all night and, as far as they knew, never left it. Angie also said that she, too, was harassed by 'Stone," and that he was thereafter asked to leave.

I. Thomas' In-Court "Recantation."

Thomas was arrested in San Jose during appellant's third trial. By the time he was located, on or about January 23,

1992, the prosecutor had already presented the transcripts of Thomas' direct and cross-examination from the first trial, and played the tapes of Thomas' statements to the police. Shortly after learning that Thomas was no longer "unavailable," the prosecutor rested his case and indicated that he was not interested in calling Thomas as a witness. The defense immediately stated its desire to call Thomas to give live testimony in the defense's case-in-chief. Before agreeing to bring Thomas to Alameda County, however, the court stated its belief that Thomas had been fully cross-examined at the first trial and, since the jury had already heard that testimony, there was no need for additional testimony. Accordingly, the court insisted on a preview of any new areas of questioning defense counsel hoped to pursue.

In response, Mr. Horowitz argued that his cross-examination had been seriously curtailed and that, in any event new information had come to light since the first trial regarding Thomas' motives for testifying. After a lengthy exchange, the court ordered a hold on Thomas so he could be brought to Alameda County for a determination whether he would assert a Fifth Amendment privilege precluding any further testimony.[16]

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[16] As defense counsel observed, it is difficult to imagine on what basis Thomas could validly claim his Fifth Amendment privilege against self-incrimination unless it was against a possible perjury prosecution for having testified falsely at the first trial or, possibly, at his own trial. He had already been tried, convicted, and sentenced for his role in the Cortez murder.

When Thomas finally appeared in court on January 31, 1992, Mr. Horowitz again stated his desire to reopen cross-examination or, in the alternative, to call Thomas as his own witness. Expecting him to assert his Fifth Amendment privilege, the court allowed Thomas to take the stand, outside the presence of the jury. Initially, Thomas' attorney claimed the privilege and refused to allow him to answer whether he had lied in his previous testimony about Melvin Davis' involvement in the homicide. However, Thomas was thereafter inconsistent, asserting the privilege as to some questions but answering others. Finally, to the surprise of all the participants, Thomas announced that he was electing--against the advice of his counsel--to waive the privilege and answer any questions asked. Despite Thomas' repeated assertion that he would "answer every question you got to ask me", and defense counsel's repeated requests that the jury be brought in, the court refused to allow the examination to go forward in front of the jury.

Instead, the court again demanded that defense counsel make an offer of proof as to the "questions you are going to ask him." Defense counsel asked that Thomas and his counsel be excluded during the offer of proof so the witness would not have an opportunity to rehearse his answers. The court refused, stating that it would send Thomas back to San Jose immediately if defense counsel did not comply with the court's request for a preview of the questioning.

Defense counsel thereupon began to describe the areas in which he planned to examine Thomas. Further argument ensued, primarily over Mr. Horowitz's plan to ask Thomas about the statement he made to Deputy Martin in February 1991, about "taking a deal from the courts." Finally, the court announced that it would not permit reopening of cross-examination, and that it was sending Thomas back *to* San Jose. Defense counsel objected that he did not need to reopen cross but, rather, would simply call Thomas as his own witness. The court again refused, ruling, "You are not calling him as your witness period. You had **a** right to say the last time we want him subject to recall. You didn't say it." Mr. Horowitz pointed out that Thomas was made subject to recall at the end of the first trial. The court ignored defense counsel's plea and told the witness he was excused. Before Thomas could be removed from the courtroom, however, he spoke **up** again:

The Witness: He sit **up** here and he ask me. He say he **wants** to question me in front of the jury. I set up here after my attorney's telling me--

Mr. Rogers [district attorney]: I'm going to object.

The Witness: After my attorney telling me to take the Fifth. I'm sitting **up** here taking the Fifth, which is not what I want to **do do**wn inside of here.

Mr. Rogers: Right, I'm going to object.

The Witness: It is not what I want to do in here. She *go* over to him. He sits up there, tell her to come back to me telling me, even though they can't give me for some of the other things that I mention in the taped statements back when I was arrested. **A** perjury charge can't come up. I'm not concerned about that.

You're not the one that can't sleep. You're not the one that got to live with the guilt that's in the heart because of something that you said that shouldn't have been said when there's somebody sitting over here they live on the line for somethins that they didn't do.

You're not the one that got threatened with 27 to life if you didn't do it. You're not the one that got threaten with spending the rest of your life in jail if you didn't do this to somebody. You're not the one, man.

Mr. Rogers: Your Honor, I'd ask that the witness be excused. We conduct further converstaions out of the presence of the witness.

The Court: I think this is not proper to open the cross. I know he wants to--he'd like to testify. He wants to answer. As far as this court is concerned we're not going to hear it on the state of the record. All right.

The Witness: This is the system. This is the system. They want to See somebody that didn't do nothina set sent to prison for the rest of their life and they didn't do nothing, because of people like you. You and the guy that was on the stand before you that was here before.[17] You sit up here and threaten me with 27 to life if I didn't do that.

Now you don't even want to sit up there and let me testify and tell the truth about what really happened. (Emphasis added.)

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17 As far as we are able to tell from the record, the "other guy" to whom Thomas refers is the prosecutor for the first and second trial, Gary Cummings.

The court ignored Thomas' plea for an opportunity to give live testimony and dismissed him without further comment. Subquently, defense counsel asked the court to permit the defense to present to the jury the above-quoted outburst by Thomas as a declaration against penal interest. Although its ruling does not appear on the record, the court apparently denied appellant's request and Thomas was not heard from again during the third trial.

11. DISCUSSION

Appellant's main contention on appeal is that the trial court deprived him of his constitutional rights to compulsory process and to confront a key witness against him when it refused to allow Thomas to provide any live testimony in the third trial. Respondent completely ignores the compulsory process claim asserted in this case and maintains that: (1) Appellant was afforded a full and fair opportunity to cross-examine Thomas in the first trial; (2) Because Thomas was unavailable at the start of appellant's third trial, it was proper to admit his first-trial testimony against appellant; and (3) Even though Thomas was ready, willing, and able to give live, exculpatory testimony before the close of evidence, and even though additional evidence was discovered after Thomas completed his first-trial testimony, the trial court had discretion to exclude all further testimony by Thomas.

We accept the second prong of respondent's argument. Appellant does not contend that the trial court erred, on the evidence before it at the beginning of the third trial, in concluding that Thomas was unavailable within the meaning of Evidence Code sections 240 and 1291. However, the first and third prongs of respondent's argument ignore the facts that new, exculpatory evidence came to light after Thomas' first-trial testimony and that, in several significant respects, appellant's cross-examination of Thomas during the first trial was unduly restricted.

First, the trial court's ruling precluded appellant from offering any evidence of Thomas' in-court "recantation." Significantly, this testimony would have included exculpatory evidence that appellant was not involved in the murder of Daniel Cortez. The court also excluded Thomas' own statements that he was "threatened" with a sentence of life imprisonment if he did not falsely implicate appellant as the shooter. This latter testimony would have supported appellant's theory that Thomas believed he had a "deal" when he testified for the prosecution in the first trial, i.e., that he had at least a subjective belief--if not implicit assurances--that he would be treated with leniency in exchange for his testimony against appellant.

The trial court's ruling had the further effect of limiting Thomas' "testimony" in the third trial to the reading of a transcript of the testimony he gave at the first trial on direct and cross-examination, excluding all questions as to

which there were objections and all colloquy between counsel,[18] even though he became "available" as a witness during the pendency of the proceedings. As a result, any errors in the court's evidentiary rulings in the first two trials, and in the restrictions imposed on appellant's cross-examination of Thomas in the first trial, were carried over into the third trial. Specifically, the trial court had excluded the following evidence from the first and/or second trials: (1) Testimony by Thomas as to his expectations about the sentence he might receive for his role in the Cortez murder; (2) Statements Thomas made to Deputy Martin in February 1991 about "taking a deal with the courts;" and (3) Statements Thomas made to defense investigator William Harris in early 1991 about having been "pressured" by Ms. Bellas into testifying against appellant. Thus, as respondent concedes, appellant was never permitted to ask Thomas about his "hopes and expectations in consequence of his testimony" in the first trial. All of this evidence took on heightened significance when it turned out that Thomas was, in fact, convicted of a relatively minor offense and received very light punishment for his active participation in the attempted robbery and the murder of Daniel

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[18] Appellant incorporated by reference all his previous objections and arguments in support of evidence excluded in the first trial, and was not permitted to raise any new objections to the testimony that was read to the jury in the third trial. Indeed, on several occasions, Judge Karesh indicated that he would not reconsider any of the evidentiary rulings he made in the previous trials. With respect to appellant's substantive objections to Thomas' prior testimony, this was error. (Evid. Code, § 1291, subd. (b); 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 8.2, p. 293.)

Cortez.[19]

A. Exclusion of Thomas' Recantation Deprived Appellant of His Compulsory Process and Confrontation Rights.

Appellant's principal argument on appeal is that the trial court's exclusion of Thomas' recantation implicates his Sixth Amendment right of compulsory process. The compulsory process clause of the Sixth Amendment provides that a criminal defendant shall have "the fight to . . . have compulsory process for obtaining wintesses in his favor." (U.S. Const,, 6th Amend.; see also Cal. Const., art. I, § 15 ["the right to . . . compel attendance of witnesses in the defendant's behalf"].)

As interpreted by the United States Supreme Court, this provision creates more than a right to invoke the state's subpoena powers to compel attendance of a favorable witness at trial; it also guarantees a criminal defendant "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (Washington v. Texas (1967) 388 U.S. 14, 19; see also Taylor v. Illinois (1988) 484 U.S. 400,

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19 As the prosecutor put it in his closing argument to the jury: "Use your common sense. It's obvious that Anthony Thomas, contrary to what he told the police and what he testified to, knows they're going out to rob drug dealers, and that is something that's an extremely dangerous crime to commit. They're going out unknowing whether these people--Jerry Sinnamon's out there, Daniel Cortez, Eric Love, they do not know if they have weapons on them, and that's why the both of them are covering each other. [¶] But it's a very dangerous crime, and that's why they jump out, boom, with guns right away to get the drop on them right away, get the guns on them so that they can't shoot back at them."

408-409; Pennsylvania v. Ritchie (1987) 480 U.S. 39, 56; Chambers v. Mississippi (1973) 410 U.S. 284, 298-302.) This right to compulsory process is "designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" (Taylor v. Illinois, supra, 484 U.S. at p. 411, quoting United States v. Nixon (1974) 418 U.S. 683, 709.) To establish a violation of his compulsory process rights in this case, appellant must show that (1) he was deprived of an opportunity to present evidence in his favor; (2) the excluded evidence would have been material and favorable to his defense; and (3) the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose. (Rock v. Arkansas (1987) 483 U.S. 44, 55-56.)

Appellant further asserts that the trial court's exclusion of Thomas' live testimony also implicates his rights under the federal and state Constitutions to be confronted with the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; People v. Louis (1986) 42 Cal.3d 969, 982.) The primary purpose of this constitutional guarantee is to ensure the defendant the "'. . . opportunity . . . of compelling [the adverse witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' (Mattox v. United States (1895) 156 U.S. 237, 242-243 . . . .)" (People v. Louis, supra, 42 Cal.3d at p. 982; accord, Maryland v. Craig

(1990) 497 U.S. 836, 847.) This opportunity for face-to-face confrontation may be dispensed with only "where necessary." (Maryland v. Craig, Supra, 497 U.S. at pp. 848-849.)

We conclude there is merit to appellant's dual argument based on the confrontation and compulsory process clauses. As a recanting witness who previously testified for the prosecution, Thomas was both a witness "against" appellant and a witness "in his favor." By precluding appellant's use of Thomas' in-court outburst, the trial court simultaneously excluded both affirmatively exculpatory evidence and critical impeachment evidence that had the potential to undermine virtually all of Thomas' first-trial testimony. (Cf. Chambers v. Mississippi, Supra, 410 U.S. at p. 298-302 [refusal to allow defense to cross-examine a third party about his repudiation of a confession to the murder with which defendant was charged, coupled with exclusion of testimony by other witnesses about other oral confessions by the third party, was reversible error].)

Regardless of the merits of his confrontation clause claim, however, we are persuaded that the trial court's refusal to allow Thomas to testify for the defense at the third trial deprived appellant of his right to present a defense, which is protected by the compulsory process clause. Although it is impossible to assess the weight the jury would have given to Thomas' recantation, or the ultimate judgment the jury would have made about Thomas' credibility, the information presented in Thomas' spontaneous outburst was clearly new, non-cumulative,

favorable and material to at least two central issues in appellant's case: The identity of the shooter, and Thomas' motives for testifying for the prosecution in the first trial. In his sworn statements before the court during the third trial, Thomas appeared completely to repudiate his previous testimony, asserting that appellant "didn't **do** nothing," and provided corroboration for appellant's theory that Thomas testified for the prosecution in the first trial with an expectation that he was thereby avoiding a prison term of "27 to life."

Despite respondent's efforts to down-play its role in the case, moreover, it is apparent that Thomas' first-trial testimony was the centerpiece of the prosecution's case in all three trials. Without it, the prosecution's case would have consisted only of equivocal identifications by the other eyewitnesses, thin fingerprint evidence, and appellant's statements to the police that he was in Thomas' car and handled the murder weapon an hour or two before the shooting.

Further, we find that the trial court's ruling as to Thomas' recantation was arbitrary and disproportionate to any legitimate evidentiary or procedural purpose. (Rock v. Arkansas, supra, **483** U.S. at p. 56.) As respondent acknowledges, the trial court dismissed Thomas from the stand following his outburst "without comment." Although it did not say so at the time, the court may have believed it was merely exercising its discretion by denying appellant's request to reopen cross-examination or to recall a prosecution witness for

further testimony in his case-in-chief. It may also be that a certain amount of confusion would have resulted from allowing appellant to recall Thomas after the jury had been read the transcript of Thomas' testiony in the first trial.

However, the court's ruling was much more than an attempt to control the orderly presentation of evidence. It also precluded presentation of new evidence that appellant was, in fact, innocent of the alleged offense, and that a key prosecution witness lied in his prior testimony. Despite the strong constitutional preference for live testimony, moreover, the court's ruling deprived appellant of an available "'. . . opportunity . . . of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' (Mattox v. United States (1895) 156 U.S. 237, 242-243 . . . .)" (People v. Louis, supra, 42 Cal.3d at p. 982.)

In the most closely analogous cases we have found, it was held to be reversible error to prevent a "recanting" prosecution witness from testifying about his or her change of heart. (People v. Garner (1989) 207 Cal.App.3d 935; Govt. of Virgin Islands v. Mills (3d Cir. 1992) 956 F.2d 443, 444.) In Garner, supra, the prosecution's case-in-chief consisted of an autopsy report indicating that the victim had died from multiple gunshot wounds, and preliminary hearing testimony by a rival gang member that he had seen defendant in the immediate vicinity of crime scene at the time of the shooting and that

defendant thereafter fired several rounds at the witness. (207 Cal.App.3d at p. 937-938.) After the preliminary hearing, the witness had informed the prosecutor that his testimony identifying the defendant as the shooter was a lie, and refused to testify at trial for fear of a perjury prosecution. At trial, the prosecutor presented the witness's preliminary hearing testimony and sought to have the case submitted on that basis without having the witness even appear before the jury. (Id. at p. 938.) The trial court was not willing to *go* quite that far and, apparently, allowed the witness to invoke his Fifth Amendment privilege in front of the jury as a basis for refusing to give live testimony. However, the trial court did not allow any evidence of the reason he refused to testify, an3 instructed the jury (in accordance with CALJIC No. ***2.25)*** that they were not to draw any inference as to the credibility of the witness because of the witness's invocation of the privilege. (207 Cal.App.3d at p. 938.)

The Court of Appeal held that this was reversible error in that the defendant was *precluded from questioning his sole accuser concerning a primary issue, i.e., the witness's admission of false swearing, since such admission had occurred only after [the defendant's] preliminary examination had been completed. As a consequence, as to the most basic question in controversy, [the defendant] was denied both his constitutional right to confront his accuser and to conduct a meaningful cross-examination, These deprivations, part cularly when combined with the court's repeated CALJIC No **2.25** admonitions,

effectively precluded the jury from determining when, if ever, the one witness against him was speaking truthfully." (Garner, supra, 209 Cal.App.3d at pp. 940-941.)

Although the Garner court thus rested its holding squarely on a violation of the defendant's Sixth Amendment rights, it also appeared to rely on the due process clause when it further held, as follows: "When the People wish to go forward in reliance upon the testimony of a recanting witness, fundamental fairness would require, at a minimum, that the jury (1) be advised precisely why the witness is being allowed to refuse to testify, i.e., an alleged fear of a perjury prosecution, and (2) be instructed that they should draw all reasonable and appropriate inferences therefrom concerning the witness's credibility and the guilt or innocence of the accused. [¶] In fact, in instances such as the present, we believe the truly preferable approach, as appellant urges, would have been for the trial court to condition the People's request to introduce [the recanting witness's] testimony upon its granting him immunity from prosecution pursuant to Penal Code section 1324. Respondent has suggested no reason why this procedure would have been prejudicial to it and we can conceive of none. [¶] Obviously the People could not, in good conscience, have urged that the very testimony on which they asked to have appellant imprisoned for the balance of his life, was so untrustworthy they wished to retain the right to prosecute their declarant for perjury. They already knew, of course, that [the recanting witness] claimed to have testified

falsely. Under such circumstances one might have hoped the prosecution would have been as desirous as the defense to see the truth prevail, whatever that might be. Further, of course, a grant of immunity for past perjury would not have precluded the district attorney from proceeding against [the recanting witness] if it deemed his trial testimony *to* be untrue. (Pen. Code, § 1324; see People v. Hathcock (1971) 17 Cal.App.3d 646 . . . .)" (Garner, supra, 207 Cal.App.3d at p. 941.) The benefit of this approach, said the Court, would have been that "the arbiters of appellant's guilt or innocence would actually have observed the confrontation between accuser and accused and heard each of [the recanting witness's] conflicting tales fully and fairly tested by each parties' cross-examination, before they were called upon to determine which version to credit." (Ibid.)

Even more clearly on point is Mills, supra, 956 F.2d 443. In that case, the defendant was convicted of burglary of a hotel room. The victim observed the burglar leaving the room and, picking Mills' picture out of a photo lineup, said he was the one. A hotel security guard also picked out Mills' picture, and said that it depicted the person he saw outside the hotel room moments after the burglary was reported. Subsequently, the guard had misgivings about the reliability of his identification of Mills and communicated his doubts to a defense investigator. (Id. at pp. 443-444.) At trial, the victim identified Mills as the burglar. The guard, who was by the time of trial attending college, became upset by the

prosecutor's insensitivity about his exam schedule and took the stand but refused to testify. He was, thus, held in contempt. Minutes later, however, the guard told federal marshals that he regretted his behavior on the witness stand, and wished to testify that Mills was not the man he saw outside the hotel room, a man who was much larger physically than Mills. (Id. at p. 444.) This information was communicated to the trial judge, who did not disclose the information to the parties. By stipulation, the guard's written statement to police was entered into evidence, along with impeachment evidence provided by the defense investigator. (Id. at p. 445.)

The Third Circuit reversed Mills' conviction, holding that the security guard's testimony would have been "new, non-cumulative and favorable," in that it could have cast doubt on the victim's identification. Beyond that, however, the court recognized that the guard's testimony was exculpatory in that would describe the burglar as having physical attributes different from those of appellant. (Mills, supra, 956 F.2d at pp. 446-448.) The court concluded that, "Mills' Sixth Amendment right to present favorable evidence under the Compulsory Process clause was impinged upon when the district court refused to allow [the security guard] testify in person at Mills' trial." (956 F.2d at p. 448.)

Whether couched in the language of confrontation or compulsory process or due process, the defect in the proceedings in Garner and Mills--and, a fortiori, in the instant case--was that the trier-of-fact was prevented from

learning of the existence of available material evidence, which was potentially both exculpatory and capable of undermining the credibility of a key prosecution witness on the decisive factual issue in the case, i.e., the identity of the perpetrator. (Garner, supra, 207 Cal.App.3d at pp. 940-941; Mills, supra, 956 F.2d at p. 446.) Indeed, the situation in appellant's trial was all the more problematic in that the triers of fact never even laid eyes on appellant's principal accuser, despite the fact that he became available before the case went to the jury.

The cases on which respondent relies, People v. Maxwell (1979) 94 Cal.App.3d 562, and Bagby v. Kuhlman (2d Cir. 1991) 932 F.2d 131, are inapposite. In Maxwell, the defendant was charged with kidnapping, but convicted of the lesser included offense of false imprisonment after a trial to the court. The primary evidence introduced at trial was a transcript of the preliminary hearing testimony of the victim, who was also his girlfriend. The victim appeared at trial, where she testified that she had made a police report about the alleged kidnapping. However, she also said that she was presently in love with the defendant and would refuse to give any further testimony because it would conflict in part with her previous testimony. (Maxwell, Supra, 94 Cal.App.3d at pp. 567-568.) Based on testimony elicited by defense counsel, it appears that the witness was prepared to testify that she had voluntarily met with the defendant on the night of the alleged kidnapping. (Id, at p. 568.)

available because he could not be found. In these circumstances, the ends of justice would be defeated if the judgment against appellant were to be founded on such a "'. . . partial . . . presentation of the facts.'" (Taylor v. Illinois, supra, 484 U.S. at p. 411.)

Respondent also relies on Maxwell and Bagby to argue that the trial court properly excluded Thomas' recantation because it was inherently incredible. Respondent reasons that Thomas' original testimony had been thoroughly tested by cross-examination, that he did not recant until *several years" after his original testimony, and did so only under "coercive circumstances." Respondent's argument on this point rests, in part, on an analogy to cases of post-conviction recantation by a prosecution witness, testimony which is to be "viewed with suspicion." (In re Weber (1974) 11 Cal.3d 703, 722.) This analogy is deeply flawed.

The California Supreme Court has repeatedly, and quite recently, held that the trial court must not usurp the function of the jury by deciding the question of credibility of a witness who would give exculpatory testimony, (people v. Hall (1986) 41 Cal.3d 826, 834-835; see also Peoule v. Cudio (1993) 6 Cal.4th 585, 612 [the credibility of a witness who would give exculpatory testimony "is properly the province of the jury"]; People v. Jackson (1991) 235 Cal.App.3d 1670, 1679 [*We know of no rule that excludes testimony on the ground that it could be a fabrication . . . .*].) Similarly, in Washinuton v. Texas, Supra, the United States Supreme Court ruled that it was error when, pursuant to a state evidence code provision,

the trial court refused to allow defendant to present exculpatory testimony by his alleged accomplice, who had previously been sentenced to prison for the same murder because of concerns about that witness' credibility. (388 U.S. at pp. 21-23.) Indeed, this error was held to be of constitutional magnitude, i.e., a violation of the defendant's compulsory process rights. (Ibid,)

There are, in any event, serious questions about the merits of respondent's argument about the propriety of excluding Thomas' recantation as "inherently incredible.' Most importantly, the trial court itself never indicated that it was excluding Thomas' live testimony for that reason. There are also some strong indicia of genuineness in the circumstances in which Thomas' outburst occurred. It began as anger at the legal manueverings in which Thomas apparently felt like a pawn, and culminated in an spontaneous, emotional declaration that appellant was innocent and--confirming appellant's suspicions about an informal "deal"--that he, Thomas, had lied at the first trial in order to avoid being sentenced to life in prison. Defense counsel, who had not been allowed to speak with Thomas after he was found plainly had no clue what was in the offing when Thomas took the stand. Mr. Horowitz had demonstrated time and again his skill in making a complete record. If he had known a recantation was forthcoming, it seems likely that he would have made it the centerpiece of his motions to call Thomas as a witness. Obviously, it was a surprise to everyone present when Thomas rejected his counsel's

advice to stand on the Fifth Amendment, and resisted the court's and the prosecution's efforts to preserve his privilege. In short, unlike the situation in Bagby, **supra,** there was no "overwhelming reason" to conclude that the recantation in this case was not genuine. **(932** F.2d at p. **136.)**

Moreover, it cannot fairly be said that Thomas changed his story only after "several years" had passed. The time period between Thomas' first-trial testimony and third-trial recantation was only eight months, during which time Thomas was apparently "unavailable" to both the prosecution and the defense. According to offers of proof made by defense counsel during trial, moreover, Thomas flip-flopped several times during the course of the criminal proceedings, alternately accusing and then exonerating appellant of being the shooter. Because the court did not allow appellant to present any of the evidence contained in his offers of proof, however, the jury was left with the impression that Thomas had "stuck to his guns" in identifying appellant as the shooter ever since the day he was interrogated by the police in 1989. The certainty and consistency of that identification would have been materially undercut had appellant been allowed to present the full picture to the jury. It would have then been up to the jury to determine "when, if ever" this key witness was speaking truthfully. (People **v.** Garner, supra, **207** Cal.App.3d at p. **940-941.)**

As to respondent's argument about the "coercive circumstances" surrounding Thomas' recantation, there is no

basis for believing that Thomas was in any greater danger of suffering retaliation in custody in January **1992** than he was in custody in May **1991** when he gave his original testimony against appellant, or that he was in any greater danger in custody than he was while out on the street. Indeed, the real difference in the "coercion" level may have been that during the first trial in May **1991** Thomas believed that he had something to gain by testifying against appellant whereas, by the time of the third trial in January **1992**, he had no further incentive to testify in support of the prosecution's theory of the case.

Finally, as will be discussed in section B, below, it **appears** that, at least as to Thomas' motives for testifying for the prosecution, appellant's ability to cross-examine Thomas was seriously restricted both by the court's refusal to order discovery of at least unprivileged communications between the prosecution and Thomas or his attorney, Dianne Bellas, and by certain questionable evidentiary rulings in the first and second trial that precluded inquiry into key issues bearing on Thomas' credibility. For all the foregoing reasons, we conclude that the court's refusal to allow appellant to present the live testimony of Anthony Thomas violated appellant's rights to present favorable evidence for consideration by the trier of fact, and to confront an available, live witness in the presence of the jury.

B. Exclusion Of All Evidence of Thomas' Hopes and Expectations In Consequence of His Testimony Violated Appellant's Rights to Confront a Key Prosecution Witness and to Rebut Prosecution Evidence of the Witness's Noble Motives for Testifying.

Several pieces of evidence discovered after Thomas' original testimony, but before his recantation, indicated that Thomas believed he had a "deal with the courts" or, at least, hopes and expectations that he would derive some personal benefit from testifying for the prosecution. The trial court excluded all of this evidence from the third trial. In addition, during the first trial, the trial court had denied appellant's motions for "discovery" of plea negotiations between the district attorney and Thomas, refused to unseal its verdict against Thomas, and restricted appellant's cross-examination in a manner that effectively prevented the third-trial jury from learning anything about Thomas' hopes and expectations in consequence of his testimony. As we have already discussed, moreover, the trial court excluded the portion of Thomas' recantation in which he stated that he had been "threatened with 27 to life" unless he falsely implicated appellant as the passenger who shot Daniel Cortez. Appellant argues that the net effect of these rulings was to exclude all of the evidence appellant had discovered--and to preclude him from discovering any further evidence--to support his theory that Thomas had a deeply self-interested motive to fabricate testimony favorable to the prosecution, all in violation of his confrontation, compulsory process, and due process rights.

Respondent concedes that appellant was never permitted to ask Thomas about his hopes and expectation in consequence of his testimony. Respondent further concedes that if Thomas mistakenly believed he had a deal or had some hope of leniency if he testified against appellant, testimony about such a belief or hope would be relevant to show a motive to fabricate, and/or bias. (People v. Mincey (1992) 2 Cal.4th 408, 463.) Indeed, even an unfounded, subjective expectation or hope of leniency is relevant to establish a motive to fabricate. (People v. Cover (1983) 142 Cal.App.3d 839, 843.)

Of course, there is nothing inherently improper about an arrangement under which a material witness who played a lesser part in a crime testifies for the prosecution in return for lenient treatment (e.g., a plea to a less serious crime, or even total immunity) so long as the arrangement requires the witness to tell the truth and not a previously agreed-upon story, and the witness voluntarily consents to the arrangement. (See People v. Daniels (1991) 52 Cal.3d 815, 862, and cases cited therein; but cf. § 1192.7.) However, the defendant in such a case is entitled, as a matter of due process, to discover and inquire at trial about any inducements offered to secure the testimony of the witness for the prosecution. (People v. Morris (1988) 46 Cal.3d 1, 32-33; Brady v. Marvland (1963) 373 U.S. 83, 87.) Moreover, full disclosure of any inducements or agreement between the prosecution and a witness or the witness's attorney is required, regardless of whether the witness has been fully

informed of the nature or scope of those inducements or agreements, to ensure that the jury has a complete picture of the factors affecting the witness' credibility. (People v. Morris, supra, 46 Cal.3d at p. 32; People v. Phillips (1985) 41 Cal.3d 29, 47.)

Respondent first argues that appellant cannot show that he was prejudiced by the trial court's refusal to order discovery about any inducements for Thomas' first-trial testimony. We do not agree. Before and during the first trial, appellant moved repeatedly for an order directed to the prosecution to produce information about "all discussions between the district attorney's office and Anthony Thomas' attorney," and "material relating to any incentives, threats, communications, offers made from the district attorney's office to Anthony Thomas or from the district attorney's office to Anthony Thomas' attorney." The court denied appellant's pretrial motion out of hand.

When appellant renewed his motion at the start of trial, the court invoked the attorney-client privilege on behalf of Thomas as the basis far its refusal to order discovery of any plea negotiations, even though at least a portion of those discussions--between the district attorney and Ms. Bellas--was clearly not subject to any privilege. At that point, the prosecutor represented on the record that "There's nothing I could provide. I didn't promise Mr. Anthony Thomas anything." It was not until much later, toward the end of appellant's cross-examination of Thomas, that the prosecutor finally

disclosed that he had indeed had discussions with Thomas' counsel in which he suggested that her client should proceed to trial before the court. As the prosecutor conceded, "If you want to categorize that as some kind of inducement to testify, in a way it is."

Thus, because the prosecutor was not particularly forthcoming with information about plea negotiations, and because the court refused to order any discovery from Ms. Bellas and Thomas as well, there was no way for defense counsel to conduct a meaningful cross-examination of Thomas about his self-interested motives for testifying at the first trial.[21] The possibility of prejudice from the court's refusal to order any discovery about plea discussions came to light when appellant subsequently discovered that Thomas had claimed in February 1991 to be "taking a deal with the courts." The possibility of prejudice became manifest during Thomas' outburst in the third trial when he claimed that he had been "threatened with 27 years to life" if, despite the fact that appellant "didn't do nothing," he didn't testify against appellant at the first trial. As discussed below, all of this evidence was kept from the jury.

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[21] Although respondent does not argue the point, it was theoretically possible for appellant to try to impeach Thomas, after he claimed he did *not know* what the outcome of his trial might be, by calling Ms. Bellas to testify about her own non-privileged discussions with the prosecutor. However, the trial court had made it abundantly clear that it would not allow appellant's counsel to pursue the matter with Ms. Bellas. In addition to being futile, such a strategy would probably also have drawn relevance objections if appellant were not also allowed to inquire about Ms. Bellas' privileged discussions with her client to show the effect of the plea negotiations on Thomas' state of mind at trial.

There was an even greater potential for prejudice from the trial court's refusal to unseal the verdict it had rendered following Thomas' court trial. Respondent concedes that there is no specific authority to support Judge Karesh's decision to keep the Thomas verdict under seal during appellant 's trial. **Indeed,** section 1167 appears to require immediate announcement of the court's findings and entry of the court's verdict in the clerk's minutes "at the conclusion" of the court trial. There can be no serious dispute that Thomas' court trial had concluded *by* the time appellant's trial began. It is not clear, however, whether appellant has standing to complain if the court violated section 1167, or whether the court has some discretion to withhold its verdict pending completion of related trials. (See People v. Cummings, Supra, 4 Cal.4th 1233, 1331.) On the other hand, appellant plainly has standing to cornplain about the due process implications of excluding evidence of incentives--actual or perceived--that may be motivating a witness to testify for the prosecution. (See People v. Morris, supra, **46** Cal.3d at pp. 32-33; **People** v. Phillips, supra, 41 Cal.3d at **pp.** 47-48.)

Had the court allowed evidence of the favorable outcome of Thomas' trial, as well as the lenient sentence Thomas had already received by the time of the third trial, this would have been potent evidence to support appellant's theory that Thomas believed he was testifying pursuant to some type of informal "deal" with the prosecution. Instead, the jury was left in what must have been a state of utter confusion about

Thomas' fate. They were informed, for instance, that Thomas had testified at appellant's first trial with the sealed verdict hanging over his head, but had then disappeared. As far as we are able to tell, the jury was never apprised that the sealed verdict, which had been rendered eight months earlier, was ever unsealed, It is impossible to know whether or how the jury tried to fill the vaccuum left by the court's refusal to permit discovery of the verdict in Thomas' case. It seems likely, however, that any conclusion the jurors might have drawn would not have been favorable to appellant.

Whether or not the refusal to order discovery was prejudicial error, however, we believe that the trial court deprived appellant of his right to confront Thomas when it effectively precluded all inquiry into and evidence of Thomas' hopes and expecations in consequence of his testimony.[22] As

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[22] Although respondent does not rely on it, the California Supreme Court's recently decided a case which is similar in some respects to the instant case. (People v. Pensinger (1991) 52 Cal.3d 1210.) On closer examination, however, Pensinger is readily distinguishable. In that case, the defendant claimed he was deprived of due process when the prosecution failed fully to disclose the content of negotiations to obtain the cooperation of a crucial prosecution witness. (Id. at pp. 1273-1274.) The court agreed the prosecution should have informed defendant that, at the last minute, the witness had unsuccessfully attempted to obtain certain favors in exchange for his testimony. The court also noted that the prosecution should have corrected the false impression left by the witness's subsequent testimony that he was testifying only because he abhorred the defendant's crime, and that he never requested any quid pro quo. (Ibid.; and see People v. Phillips, supra, 41 Cal.3d at p. 46.) Nevertheless, the court found these errors to be harmless, because the reward the witness sought was not actually given, and because the defendant had been able to exploit other much stronger evidence that had been disclosed regarding actual inducements given for the witness's testimony. As discussed below, the error in this case was that the trial court excluded all evidence of Thomas' self-interested motives for testifying.

the United States Supreme Court recently held, "'[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"" (Olden v. Kentucky (1988) 488 U.S. 227, 231, quoting Delaware v. Van Arsdall (1974) 475 U.S. 673, 680, and Davis v. Alaska (1974) 415 U.S. 308, 318.) "[T]he exposure of a witness' motivation in testifying" is such a form of cross-examination. (Olden v. Kentucky, supra, 488 U.S. at p. 231.) In this case, the error was especially egregious--and may have risen to the level of a denial of appellant's right to present a defense--because, when Thomas took the stand in the first trial, the prosecutor took pains to bolster Thomas' credibility (over appellant's objections) with evidence that Thomas' testimony was an act of real courage, i.e., that he was scared to testify and was risking his life by implicating appellant.

On cross-examination, defense counsel tried to show that Thomas' motives were not quite so noble, that is, that Thomas had realized early on that he was facing a life sentence for first degree murder and that shifting the blame to someone else (first "Stone," later appellant) was his way out. Mr. Horowitz approached this subject by asking whether Thomas was aware at that moment that he still "could be convicted of first degree

murder in that case . . . ?" Thomas answered, "Yes." Judge Karesh interrupted and ruled that the question was improper because the verdict, although sealed, had already been rendered. Mr. Horowitz then asked whether the district attorney had informed Thomas that he could go to prison for the rest of his life. The prosecutor objected on the grounds of relevance and a hearing was held out of the presence of the jury.[23]

During that hearing, Mr. Horowitz pointed out a portion of Thomas' testimony from his court trial in which, at the prosecutor's prompting, Thomas acknowledged that he had turned against appellant in order to save himself from a possible life sentence and that he was giving testimony adverse to appellant for the same reason. In the context of the prosecutor questioning Thomas about why he had not abandoned appellant at the scene of the shooting, Thomas said it was to avoid getting killed himself and that personal survival was still his goal. The following exchange then occurred:

[Prosecutor:]	Are you saying this. That Melvin was off on his own, and basically put you in a position that could put you in prison for the rest of your life, and you didn't want that to happen?
[Thomas:]	Yes.
[Prosecutor:]	So that's the reason why you're doing what you're doing **now** is because you feel there's no other alternative. He put you in the position to begin with?
[Thomas:I	Yes . . . .

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23 **All *of* the quoted portions of the cross-examination in this and the following paragraphs were struck from the first-trial transcript before it was read to the jury in the third trial.**

Mr. Horowitz stated that he wanted to cross-examine Thomas about those statements and explore his present motivations for testifying. Specifically, he wanted to ask, "What are you going to get out of this? Are you going to get probation? Do you think that you're going to be in prison [for] the rest of your life?" He also wanted to show that Thomas believed that his awn life sentence hung in the balance and "that's why he's lying on the stand today . . . ." In addition, Mr. Horowitz hoped to elicit evidence of a belief by Thomas that testifying effectively against appellant would work to his benefit at sentencing, i.e., that even if he were convicted of first degree murder, he knew that he was still eligible for and thought he might receive probation. However, the court repeatedly misconstrued the thrust of the cross-examination Mr. Horowitz wished to conduct and rejected his offer of proof. Apparently, Judge Karesh was concerned that counsel wanted to suggest to the jury that the court had "cut a deal" with Thomas.

When the jury returned, Mr. Horowitz resumed his efforts to establish that Thomas believed he might benefit from his testimony, but was soon confronted with a series of specious objections--purportedly on grounds of relevance and argumentativeness--to every question approaching that subject matter. Critically, when defense counsel asked Thomas whether it was true that he was "hoping to get probation in your own case if you testify for the prosecution in this case," the court sustained a groundless ("I'll object to that") objection to Mr. Horowitz's question before Thomas could answer.

These restrictions on appellant's cross-examination of Thomas were rendered all the more prejudicial by the trial court's exclusion from the third trial of additional, available evidence that Thomas had complained of being "pressured" by Ms. Bellas into implicating appellant, and that he believed he was "taking a deal with the courts." These statements may well have been admissible, despite the rule against hearsay (Evid. Code, § 1200), in that they were offered to show Thomas' state of mind in testifying against appellant. (Evid. Code, **§ 1250,** subd. (a)(1).) In any event, appellant correctly notes that, even if these statements were otherwise inadmissible hearsay, it was error to prevent appellant from using them to counter the hearsay on which the prosecution had built its case, i.e. Thomas' former testimony. (Evid. Code, **§ 1202;** People v. Farmer **(1989) 47** Cal.3d **888, 910;** People v. Marquez **(1979) 88** Cal.App.3d **993, 997-998;** and see generally, 1 Jefferson, Cal. Evidence Benchbook **(2d** ed. **1982) § 8.2, 304-305.)** After a careful review of this record, we conclude that the trial **court** unjustifiably **prevented** appellant from trying to establish Thomas' self-interested motivation in testifying and, in particular, deprived him of a meaningful opportunity to engage in "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," all in violation of the confrontation clause. (Olden v. Kentucky, **supra, 498** U.S. at **318,** 321.)

Respondent does not cite **a** single case to support such a wholesale exclusion of evidence on such an important matter of

defense. Instead, respondent merely disputes appellant's characterizations of the trial court's restrictions on his cross-examination and efforts to rebut the prosecution's evidence. Respondent also argues that it was necessary to exclude the "taking a deal" statement from the second and third trials for the same reason appellant was not allowed to question Thomas at the first trial about his "hopes and expectations": Such evidence would have forced the court to inform the jury it had found Thomas guilty as an accessory after the fact and, by implication, had found appellant "guilty" of murdering Daniel Cortez. Citing Peoule v. Proctor (1992) 4 Cal.4th 499, 541, 543, certiorari granted December 6, 1993, sub nomine Proctor v. California United States Supreme Court Docket No. 93-5161, and People v. Rodriguez (1986) 42 Cal.3d 730, respondent further asserts that defense counsel's triggering of such a disclosure would have amounted to reversible per se error for denial of effective assistance of counsel. We disagree.

In the first place, examination of Thomas (in the third trial) and/or Deputy Martin (in the second or third trial) regarding the "taking a deal" statement would not have required the court to instruct the jury that it found appellant "guilty" of murder during Thomas' trial. Obviously, appellant was not himself on trial in that case and the findings necessary to convict Thomas as an accessory after the fact, and to impose a sentence of probation, did not include an identification beyond a reasonable doubt of appellant as the passenger/shooter. The

trial court need only have believed Thomas' testimony that he was not aware of the purpose of the trip to 106th Avenue, that he did not personally use a firearm, and that his criminal involvement was limited to driving the getaway car. Even if it were necessary to name appellant as the person Thomas identified as the shooter at his court trial, a strong limiting instruction could have been fashioned to caution the jury against use of the findings from Thomas' case as evidence of appellant's guilt.

Nor would defense counsel's request for Thomas' live testimony, even with the attendant risks posited by the court, "inevitably constitute incompetence of counsel." Upon telling the jury that the court had found Thomas guilty as an accessory to murder and, after his testimony, had released him on probation, the most probable inference would be that in fact there had been some type of a deal, whether formal or informal. Indeed, by the time of the third trial, the court knew that revealing the Thomas verdict would not inexorably lead the jury to a guilty verdict. The court itself had disclosed that information to the second-trial jury, which thereafter hung eight to four. Thus, defense counsel could have been held to have made a reasoned tactical decision to pursue the issue of Thomas' motives in testifying against appellant even if it would have led to disclosure of the verdict and sentence imposed in his case.

C. The Trial Court's Refusal to Allow Thomas to Testify in the Third Trial Was Prejudicial Error.

Appellant argues that the trial court's error in refusing to allow Thomas to give any live testimony was of constitutional dimension and is, thus, subject to the prejudice analysis set forth in Chapman v. California (1967) 386 U.S. 18, 24 [reversal required unless error harmless beyond a reasonable doubt].) In its brief, respondent characterized the trial court's decision as a matter of 'discretion rather than of right," and argued that the harmless error analysis of People v. Watson (1956) 46 Cal.2d 818, 836, applies. Under Watson, the error is deemed harmless if it does not appear reasonably probable that the verdict was affected thereby. (Ibid.)

We believe appellant has the better of this argument. It may be, as the California Supreme Court recently held, that the Watson standard governs the inquiry into prejudice when a trial court erroneously applies state rules of evidence to preclude testimony by a defense witness as "unworthy of credit," (People v. Cudjo, supra, 6 Cal.4th at pp. 610-612; see also People v. Ball, supra, 41 Cal.3d at pp. 834-836.) That is not what happened in the instant case. The trial court did not purport to rely on any evidentiary or procedural rule in deciding to exclude Thomas' recantation. Nor did the court indicate in any way that it considered Thomas' recantation to be incredible. As we have already discussed, respondent acknowledges that the trial court dismissed Thomas' outburst "without comment." Furthermore, as discussed in the previous

section, we hold that the trial court's decision to exclude Thomas' recantation, and the other evidence offered by appellant in support of his theory that Thomas believed he had a "deal," violated appellant's rights of compulsory process and confrontation. In such a case, the conviction must be reversed unless this error was harmless beyond a reasonable doubt. (Crane v. Kentucky (1986) 476 U.S. 683, 691; Delaware v. Van Arsdall (1986) 475 U.S. 673, 684.)[24]

Under either standard, however, we believe that the exclusion of Thomas' live testimony was prejudicial error. After a careful review of the record, we are convinced that this was a very close case. It took three trials to obtain a conviction. The eyewitness identifications by Waugh, Wilson, Singleton, and Love were inconsistent. Physical evidence linking appellant to the crime scene was extremely weak. Basically, as respondent concedes, the case turned on the question of identification of the passenger/shooter, and on the credibility of the eyewitnesses, including Thomas. We cannot say with any certainty that testimony by Thomas that appellant was not present at the time of the shooting, or an identification by Thomas of another person as the shooter, would not have produced a more favorable outcome for appellant. (Cf. Mills, supra, 956 F.2d at p. 447-448 [where identification of perpetrator was key issue, reasonably probable that judgment of the jury would have been affected by

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[24] At oral argument respondent conceded that the Chapman standard could not be met.

admission of live testimony by eyewitness who recanted previous identification of defendant]; Pettiiohn v. Hall (1st Cir. 1979) 599 F.2d 476, 480, 482 [where central issue was one of identification, exclusion of eyewitness testimony that defendant was not the perpetrator was necessarily harmful error].) Especially if Thomas' recantation were coupled with an adequate explanation on cross-examination of his motives for having previously identified appellant as the shooter--perhaps because of some expectation, however unreasonable, of lenient treatment by the prosecutor--there is a reasonable probability that the outcome would have been affected. (Cf. Chambers v. Mississippi, supra, 410 U.S. at p. 302 [refusal to allow defense to cross-examine a third party about his repudiation of a confession to the murder with which defendant was charged, coupled with exclusion of testimony by other witnesses about other oral confessions by the third party, was reversible error]; see also U.S. v. Vargas (9th Cir. 1991) 933 F.2d 701, 709 [where confrontation clause error occurs, appellate court must assume that the damaging potential of the cross-examination would have been fully realized].)

Although we conclude that the trial court's refusal to allow Thomas to give live testimony at appellant's third trial was prejudicial error, we echo the sentiments of the Court in People v. Garner, supra, when it made the following observation: "While we recognize appellant may possibly be guilty, and we understand, appreciate and fully sympathize with the frustrations so frequently experienced in the prosecution

of gang-related killings, nevertheless, a conviction obtained in the present manner cannot be sustained." (207 Cal.App.3d at p. 944.)

III. CONCLUSION

For all the foregoing reasons, we reverse the judgment of conviction and remand for a new trial.

Phelan, J.

I concur:

Smith, Acting P. J.

Benson, J.

A057027, Peovle v. Davis