Docket No. 10-

In the

Supreme Court of the United States

KOREY HOLLINQUEST,

Petitioner,

v.

THE PEOPLE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the admission of the preliminary hearing testimony of a prosecution witness following a prosecutor's refusal to grant the witness immunity at trial constituted prosecutorial misconduct and the denial resulted in violation of Petitioner's due process rights and the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

2. Whether this Court should adopt a per se rule precluding the admission of former testimony taken from a preliminary hearing as opposed to a trial as violative of the Confrontation Clause?

3. How much cross examination is required, if this Court does not adopt a per se rule of exclusion of former testimony from a preliminary hearing, to qualify the testimony for introduction at trial.

4. Whether the Prosecutor committed a Brady violation by withholding impeachable information from the defense and by making the witness unavailable by criminally charging him after he was given immunity at the preliminary hearing?

PETITION FOR A WRIT OF CERTIORARI

Petitioner Korey Hollinquest respectfully petitions for a writ of certiorari to the Supreme Court of the State of California in *People vs. Hollinquest*, S190123.

OPINION BELOW

The judgment of the First District Court of Appeal, Division 1, of the California Court of Appeal was filed and reported on December 20, 2010, at 190 Cal.App.4th 1534 and is published. (Case No. A124613) (A1-22). The Court of Appeal modified the opinion without changing the judgment when it denied its rehearing on January 13, 2011. The order of the California Supreme Court denying review on March 30, 2011, is unpublished. (B1) The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied Petitioner review on March 30, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution requires that no person shall be... deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..."

INTRODUCTION

The primary issue is whether a prosecutor may grant use immunity to a co-defendant to testify at the preliminary examination, and then withdraw that grant of immunity at trial, causing the co-defendant to invoke the 5th Amendment, which then causes the defendant to become "unavailable" as a witness, which then causes the trial court to allow his preliminary examination testimony to be read at trial.

The Court needs to adopt a per se rule that precludes the prior testimony of an unavailable witness from a preliminary hearing on the basis that a preliminary hearing does not remotely resemble the same defense strategies, testimony one would elicit, or objectives by counsel, as in a trial. They are in legal terms as different as an apple and orange.

There is no authority in California, or elsewhere, for this stratagem, in which a prosecutor manipulates the procedure by causing a witness to become "unavailable," by first giving immunity for the purpose of a single hearing and then taking it away for the purpose of trial. If this Court allows such a stratagem to stand, there will be nothing to prevent prosecutors from using the stratagem in every case when they wish to protect a shaky witness, especially a co-defendant, from cross-examination at trial. This sleight-of-hand has never been allowed before. It should not be allowed here.

If this Court allows this newly-minted stratagem to stand as the California Court of Appeal did, it risks changing the face of every criminal trial which relies upon the testimony of a co-defendant, or potential culpable co-defendant. In this case, the co-defendant subject person was the most important prosecutorial witness. The jury

was deprived of the opportunity to examine his demeanor when testifying. If this holding is allowed to stand, no longer will cross-examination in California and other states be the greatest engine ever devised for searching for the truth. The truth-seeking function of a jury trial may never be the same again.

The published Court of Appeal opinion, allowing this stratagem, expanded the exception for an "unavailable" witness so broadly that a sharp and possibly unscrupulous prosecutor could drive a proverbial truck through it. This opinion so narrows the defendant's 6th Amendment confrontation clause rights that it violates a bedrock provision of constitutional law. *Crawford v. Washington* (2004) 541 U.S. 36. That is why the petition for certiorari should granted.

The State Supreme Courts are sharply divided as to this issue. There are claims of a majority and minority view, but the recent post Crawford decisions demonstrate one conclusion, the issue is ripe for resolution by this Court because the numerical count between majority and minority is slim. Furthermore, the better and more sound application of the Confrontation Clause is to preclude former testimony of a preliminary hearing in lieu of live, in person testimony.

In this case, there is absolutely no prejudice to the State in that the co-defendant has now been sentenced and there is no longer a 5th Amendment issue that would make him unavailable because double jeopardy has attached due to his plea bargain which will be explained below. The overriding goal of confrontation can be meet in this case with little prejudice to the People and great prejudice to the Petitioner if this conviction is allowed to stand.

STATEMENT OF FACTS

The victim, Jacque Smith, was killed around 1:00 p.m. on August 22, 2005, at 12th Street and Maine Avenue in the Coronado Santa Fe area of Richmond, CA. He suffered eight gunshot wounds, along with multiple fractures and abrasions, "all over his body." His injuries were consistent with "being run over" and "dragged along" the pavement by a car, shot, and "pistol-whipped."

The primary testimony that implicated the Petitioner in the murder of Smith came from Torry Buchanan, who, according to at least one account, had been involved for months in an intimate relationship with the victim. Shira Dennis, a close friend of the victim, testified that Smith was openly bisexual, but Buchanan was not, and "didn't want anybody to know" of his sexual relationship with the victim. According to Dennis, Smith and Buchanan lived together briefly in an apartment in Benicia, CA, and acted as "boyfriend and boyfriend."

Not long before the murder, however, victim Smith became "upset" with witness Buchanan and did not trust him after his money and some items, including a television, were appropriated and "taken out of the house." Dennis testified that Smith was "tired of Buchanan stealing from him," and was in the process of breaking off their relationship. Smith recently moved to Stockton, CA, and Dennis believed that he did not want Buchanan to know the location of his new residence and that Smith was also fearful of Buchanan. Before the murder, Smith received a message from someone that warned him Buchanan intended to rob and kill him.

At the Petitioner's preliminary hearing, Buchanan testified after receiving

"use" immunity from the prosecution. This same preliminary hearing testimony was later presented at Petitioner's trial. The preliminary hearing was on October 11, 2005. This was just 50 days after Petitioner was arrested. In a murder case, this is an insufficient amount of time to have accrued for competent preparation in a murder case. The trial did not even commence until July of 2008, three years later. By this time, trial counsel for the Petitioner had sufficient time to obtain better data, create more effective cross examination material, and would not be rushed by a busy preliminary hearing judge and a different legal objective appropriate at an abbreviated preliminary hearing which carries a different and unique legal burden.

The problem arose in that the Confrontation clause was literally eliminated from the Petitioner's trial by admitting testimony of the chief accuser through a reader by admitting the former testimony. The jury was unable to judge the credibility of this witness who had serious impeachment issues and was shielded from the cornerstone legal device of criminal trials, the right of cross examination and confrontation.

In Buchanan's preliminary hearing testimony, he denied that he had sexual relations with Smith. In fact, Buchanan acknowledged that he warned the victim he would "beat his ass" if Smith "kept telling people" they had a "homosexual relationship." Buchanan testified that he maintained a friendship with Smith to "play him" and "get as much" as he could from the victim. According to Buchanan, Smith bought him clothes and gave him money, and on one occasion provided him with bail in the amount of $45,000 to obtain his release from jail. Smith

subsequently threatened to rescind the bond he had posted, which caused Buchanan concern that his bail would be revoked. Buchanan further acknowledged that shortly before Smith's death, the decedent accused Buchanan of "stealing money from him." Buchanan denied that he stole money from Smith, but conceded Smith no longer trusted him.

A preliminary hearing in California is not a trial nor is it the functional equivalent. The standard of proof is akin to reasonable suspicion only. The standard is below that of preponderance of the evidence. The "reasonable doubt" standard has no application in a preliminary hearing. Consequently, a defendant's preliminary hearing attorney has different goals and preparation then that of a trial attorney, whom many times are different attorneys. They are vastly different and it was error to admit this testimony without it being subject to cross examination, in person, at this trial. Especially where, as is shown in this petition *infra*, the prosecution artificially manipulated the unavailability.

Buchanan testified at the preliminary hearing that two days before the murder occurred, the Petitioner, whom he had known for a couple of years, approached him with a plan to rob Smith. Petitioner said he "needed some money" and "wanted to rob" Smith, who he knew would be in Buchanan's company. Buchanan said "all right," and they exchanged cell phone numbers to remain in contact to set up the robbery.

About 9:00a.m. on the morning of the murder, Smith drove his navy blue Cadillac to pick up Buchanan in Rodeo, CA. After they stopped for food in Hercules,

CA, Buchanan began to drive. He drove the car to Oakland, CA, where they "purchased some weed." Buchanan used Smith's cell phone to call the Petitioner to report to him that they were on the way to 12th Street in Richmond, CA, a nearby suburb. During one call the Petitioner told Buchanan that he had a gun but they had not discussed using a gun during the robbery. Buchanan ultimately drove the victim's Cadillac to Richmond, where he parked as arranged with the Petitioner at 12th and Florida.

The Petitioner approached the car with a gun in his hand and ordered Buchanan to drive around the corner to 13th and Maine. Buchanan did so, and parked the car in a lot near the residence of his friend Brenda. Petitioner then struck Smith several times with his fist. Buchanan told Smith to call his mother to arrange for her to give him some money so the Petitioner "wouldn't harm" him. Buchanan heard Smith on the phone with his mother exclaim, "Torry trying to rob me." Buchanan yelled to the Petitioner not to kill Smith. After the Petitioner struck Smith, the victim jumped from the car with the cell phone in his hand and "started running" away. The Petitioner chased after Smith as Buchanan left the car and went to Brenda's house.

From inside Brenda's house Buchanan heard the sound of five or six gunshots coming from Marina Way. He asked Brenda to "see what happened." She went outside for about five minutes, then returned to the house and said that "somebody got killed outside." Buchanan went back outside and observed the Petitioner as he was walking "back towards the car." He threw the Petitioner the keys to the

Cadillac, then returned to Brenda's house to ask her to call him a cab.

Buchanan insisted that he did not want Smith killed, although he admitted that he willingly participated in the robbery. He also testified that the Petitioner did not mention to him that he planned to kill Smith. Buchanan did not realize that the Petitioner intended to kill Smith until the victim ran from the car and the Petitioner chased after him.

When questioned after the murder, Buchanan lied to the police and claimed that he also had been a victim of the robbery of Smith. Buchanan identified defendant from a photo lineup as the man who robbed and killed Smith. He referred to defendant by the "moniker of Twin or Twig."

This initial story could not be explored at the Petitioner's trial due to the prosecutorial gamesmanship by manipulating Buchanan's unavailability.

After Buchanan spoke with the police, he talked to the Petitioner on the telephone. The Petitioner asked "why the police came to his house." Buchanan replied that he had been questioned by the police. The Petitioner said that he "was going to surrender himself to the police."

At the preliminary hearing, Buchanan acknowledged that he had not been honest and lied in his interviews with the police to protect himself, but claimed that his preliminary hearing testimony was truthful. Before the preliminary hearing, Buchanan was subpoenaed to testify by an investigator for District Attorney's Office. Buchanan expressed to the investigator that he "was afraid," and at his request was placed in a hotel room for his safety. He briefly absconded to Nevada,

but voluntarily agreed to return to testify.

Buchanan was not charged with any crimes related to the murder of Smith before the preliminary hearing, and insisted that he has never been "promised anything" in exchange for his testimony. After the preliminary hearing but before the Petitioner's trial, Buchanan was charged with felony murder. He resolved his own case for 12 years after the Petitioner was sentenced. The Petitioner was sentenced to life without parole.

REASONS FOR GRANTING THE WRIT

This Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the prosecution from introducing "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination.

A preliminary hearing post the passing by the voters of 1990 California initiative Proposition 115, is many times, a rubber stamp exercise for the most part. The standard of proof in a preliminary hearing in California is founded in Penal Code section 872(a).

> (a) If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty...

It is an affront to the 6th Amendment to allow preliminary hearing cross examination to satisfy the Confrontation Clause protections at a jury trial. The

tactics, scope, and objectives are entirely different. Defense counsel has an interest in limiting facts at a preliminary hearing, the standard is far lower, and it is done without defense counsel having the required discovery. Under California law, discovery is not required until 30 days before trial. (See Penal Code section 1054.7).

Federal courts of appeals and state courts of last resort are now divided: Colorado, Wisconsin, Pennsylvania, and Florida supporting the Petitioner's view, while California, Idaho, Washington, New Mexico, Missouri, and others, supporting the Respondent's view.

I. The Admission of Torry Buchanan's Preliminary Hearing Testimony.

The Petitioner argued in the Court of Appeal that the trial court abridged his confrontation rights by admitting Buchanan's preliminary hearing testimony at trial. After Buchanan gave his testimony at the preliminary hearing, the prosecution decided to charge him with the robbery and murder of Smith. The use immunity granted to Buchanan at the preliminary hearing was withdrawn, and he asserted his Fifth Amendment privilege not to testify at trial. Over objection by the defense, the trial court then found that Buchanan was an unavailable witness and admitted his preliminary hearing testimony, which was read to the jury. Defendant complained that the procedure, whereby the prosecution granted a witness and co-defendant use immunity to procure preliminary hearing testimony, then revoked the immunity to make the witness unavailable at trial, denied him the "right to cross-examine his co-defendant before his jury."

The Court of Appeal acknowledged with recognition the unassailable constitutional premise: " '[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, ... to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538, 3 Cal.Rptr.3d 145, 73 P.3d 1137.) The "right of confrontation is not absolute, however [citations], 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [Citation.]" (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1138–1139, 99 Cal.Rptr.2d 149, 5 P.3d 203; see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 515, 194 Cal.Rptr. 431, 668 P.2d 738; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1257, 212 Cal.Rptr. 216.)

The Court of Appeal stated that the right of confrontation, "does not preclude the prosecution from proving its case through the prior testimony of a witness who is unavailable at trial, so long as the defendant had the right and the opportunity to cross-examine the witness during the earlier proceeding at which the witness gave this testimony." (*People v. Cudjo* (1993) 6 Cal.4th 585, 618, 25 Cal.Rptr.2d 390, 863 P.2d 635.) " 'If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.' [Citations.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.)

In *Seijas, supra,* the California Supreme Court analyzed Crawford in this situation. It stated that although defendants generally have the right to confront their accusers at trial, this right is not absolute. "If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial." (*People v. Smith* (2003) 30 Cal.4th 581, 609, 134 Cal.Rptr.2d 1, 68 P.3d 302; see Evid.Code, § 1291, subd. (a).)

Under these rules, "we have routinely allowed admission of the preliminary hearing testimony of an unavailable witness." (*Ibid.*) The landmark decision of *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, although changing the law of confrontation in some respects, left these principles intact. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59, 124 S.Ct. 1354.) "Where testimonial evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68, 124 S.Ct. 1354.)

What is absolutely most important to the instant petition's analysis with respect to this issue is that the defendant "must not only have had the *opportunity* to cross-examine the witness at the previous hearing, he must also have had 'an interest and motive similar to that which he has at the [subsequent] hearing.' "

(*People v. Smith, supra,* at p. 611, 134 Cal.Rptr.2d 1, 68 P.3d 302.)

A. Conflict Exists Between Various States' Courts

The California Court of Appeal view conflicts with other state court opinions. In *People v. Sisneros* (Colo. Ct. App. 1980) 44 Colo.App. 65, 66 [606 P.2d 1317, 1318] and *People v. Smith*, Colo., 597 P.2d 204 (1979), the Colorado Supreme Court and intermediate court of review, held that admission of such a transcript violated the defendant's right of confrontation under Colo. Const. Art. II, Sec. 16.

There is a direct conflict between the Colorado Supreme Court en banc in *People v. Fry* (Colo. 2004) 92 P.3d 970, 976-78 and this California intermediate court's opinion. Before the holdings of either *Roberts* or *Crawford,* Colorado noted that the admissibility of prior testimony depended on the nature of the proceeding at which the prior testimony was made. *People v. Smith,* 198 Colo. 120, 125, 597 P.2d 204, 207 (1979), *overruled on other grounds by People v. Vance,* 933 P.2d 576 (Colo.1997), *overruled by Griego v. People,* 19 P.3d 1 (Colo.2001) (*Vance* overruled *Smith on grounds that materiality is an issue that must be submitted to the jury; Griego* later overruled *Vance* on the proper standard of review for such an error).

The rationale of the Colorado Supreme Court towards preliminary hearings and the use of witnesses testimony being admitted in a subsequent trial as former testimony if the witness is unavailable is discussed below. In particular, the Colorado Supreme Court examined whether prior testimony given at a preliminary hearing provided an adequate opportunity for cross-examination. In deciding that

question, it looked to the purpose of the preliminary hearing. It concluded that due to the limited nature of the preliminary hearing, the opportunity for cross-examination was insufficient to satisfy the Confrontation Clause. In *People v. Fry* (Colo. 2004) 92 P.3d 970, 976-78, they reiterated that holding.

A preliminary hearing is limited to matters necessary to a determination of probable cause. The rights of the defendant are therefore curtailed: evidentiary and procedural rules are relaxed, and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause.

A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. The preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery. *Id.* at 125-26, 597 P.2d at 207-08 (quoting *Rex v. Sullivan,* 194 Colo. 568, 571, 575 P.2d 408, 410 (1978)). Hence, a preliminary hearing does not provide the same safeguards as a trial and a defense attorney's motives are not the same along with the defendant's motives.

Additionally, the judge's findings at a preliminary hearing are restricted to a determination of probable cause. *Id.* A judge may not engage in credibility determinations unless the testimony is incredible as a matter of law. *Hunter v. Dist. Court,* 190 Colo. 48, 52-53, 543 P.2d 1265, 1268 (1975); *People v. Ramirez,* 30 P.3d 807, 809 (Colo.2001) (Testimony is "incredible as a matter of law" if it is "in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have

happened under the laws of nature."). Aside from the exceptionally rare instance of credibility as an issue of law, defense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so. *Smith, supra,* 198 Colo. at 126, 597 P.2d at 208; *Hunter, supra* 190 Colo. at 52-53, 543 P.2d at 1268. Thus, the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances.

Because credibility is not at issue and probable cause is a low standard, once a prima facie case for probable cause is established, there is little defense counsel can do to show that probable cause does not exist. Therefore, as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination.

Thus, the Colorado Supreme Court concluded that the opportunity for cross-examination at a preliminary hearing is very limited. Further, the opportunity for cross-examination regarding the credibility of a witness, as a matter of fact, exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court.

Given the limited nature of the preliminary hearing in Colorado, the Court held in *Smith that the Colorado Confrontation Clause "precludes the admission of the transcript of a preliminary hearing at a subsequent trial when the witness*

whose testimony is sought has become unavailable." Id. at 126, 597 P.2d at 208 (compare *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (in the California case, where a preliminary hearing was more like a mini-trial in 1970, unavailable witness's prior testimony at preliminary hearing was admissible)). However, California law relating to preliminary hearings was substantially restricted by Proposition 115, approved June 5, 1990. Therefore, the *Green* case is antiquated. The Colorado Supreme Court in *Smith relied on the this Court's analysis in Barber v. Page,* 390 U.S. 719, 722, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), that "there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant."

This Court first held in *Barber* that the state did not establish unavailability. *Id.* at 724-25, 88 S.Ct. 1318. Additionally, it rejected the notion that the defendant had waived his right to confront the witness by not cross-examining him at the preliminary hearing. *Id.* at 725, 88 S.Ct. 1318. The Court noted that even if defense counsel had cross-examined the witness at the preliminary hearing, the Confrontation Clause still would not be satisfied on the facts of that case. *Id.* Citing the differences between a trial and a preliminary hearing, the Court concluded that cross-examination at the preliminary hearing would not have provided the same opportunity for exploration into the case. *Id.*

Thus, the Colorado Supreme Court has held that the preliminary hearing does not satisfy Confrontation Clause requirements. *Smith,* 198 Colo. at 126, 597 P.2d at 208; *see also Commonwealth v. Smith,* 436 Pa.Super. 277, 647 A.2d 907, 912-15 (1994) (because issue of credibility is important at trial, and because credibility is not an issue at preliminary hearing, preliminary hearing testimony is inadmissible because defendant did not have a "full and fair opportunity for cross-examination").

Furthermore, the Wisconsin Supreme Court in *State v. Stuart,* 279 Wis.2d 659, 695 N.W.2d 259 (2005) also has a per se rule of exclusion for preliminary hearing testimony being used in a trial. The *Fry and Stuart* courts relied upon specific state law which limited the nature of preliminary hearings. Both courts essentially expressed similar concerns regarding the adequacy of the opportunity to cross-examine at a preliminary hearing, including that: (1) a preliminary hearing is limited to a finding of probable cause, rather than reasonable doubt as at trial; (2) the preliminary hearing is not meant to become a mini-trial due to its limited purpose in making a determination of probable cause; and (3) the court may prohibit cross-examination into areas of credibility, trustworthiness, or motives to testify falsely due to the limited scope of the preliminary hearing. *See Fry,* 92 P.3d at 976-978; *Stuart,* 695 N.W.2d at 265-267. The *Fry court determined that public policy, based upon these practical concerns, warranted a blanket prohibition of preliminary hearing testimony where the witness is unavailable at trial. Fry,* 92

P.3d at 978.

The Idaho Supreme Court did not adopt a blanket prohibition in *State v. Mantz* (Idaho Ct. App. 2009) 148 Idaho 303, 307 [222 P.3d 471, 475]. The Court relied on the majority view post-*Crawford* holding that preliminary hearing testimony of an unavailable witness is admissible. In *State v. Mohamed,* 132 Wash.App. 58, 130 P.3d 401 (2006), the court first noted that *Crawford* did not change the well-established rule that "[w]hen a witness is unavailable to testify at trial, her testimony at a preliminary hearing or previous trial is admissible, assuming a proper opportunity for cross-examination at the previous hearing." *Mohamed,* 130 P.3d at 403. The court distinguished *Fry on the basis that Mohamed's pretrial hearing was not similarly limited since the witness's credibility was at issue and the court did not curtail Mohamed's cross-examination. Id.* at 404. The court ultimately determined that "[the unavailable witness's] sworn testimony at the pretrial hearing was subject to unfettered and properly motivated questioning about her out-of-court statements." *Id.* at 406. *See also State v. Henderson,* 139 N.M. 595, 136 P.3d 1005 (2006).

In *State v. Aaron,* 218 S.W.3d 501 (Mo.App.2007), the court noted that its state law, as in Idaho, allowed for admission of preliminary hearing testimony when subject to cross-examination. *Id.* at 507. Regarding the adequacy of the cross-examination itself, the court held that mere brevity of cross-examination did not constitute an inadequate opportunity to cross-examine. *Id.* at 507-508. The court

noted that even brief cross-examination satisfied the confrontation rights, "absent the showing of some 'new and significantly material line of cross-examination' that was not explored in the prior examination." *Id.* at 508 (quoting *Mancusi vs. Stuffs,*(1972) 408 U.S. 204, 215, 92 S.Ct. 2308, 2314).

II. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts by Having a Majority and Minority View

In *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) this Court held a defendant's confrontation rights were not violated by admitting a declarant's out-of-court statement, "as long as the declarant is testifying as a witness and subject to full and effective cross examination".

In *Pointer v. Texas,* 380 U.S. 400, 406-07, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) it was held a defendant's confrontation rights violated by admitting a witness's preliminary hearing testimony where the testimony was not tested by cross-examination at the hearing and the witness did not testify at the trial.

In Melendez-Diaz, 129 S.Ct. 2527 at 2531 (2009), it was held that under the Confrontation Clause, "[a] witness's testimony against a defendant is ... inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.")

These cases need to be harmonized as they are based upon old state laws in California relating to preliminary hearings that are completely different legal animals today. The post 1990 preliminary hearing in California would make the

same concerns expressed by the minority courts more consistent with the minority view.

In *California vs. Green, supra,* the defendant had more rights at a preliminary hearing and officers were not allowed to testify via Evidence Code section 1203.1 which allows hearsay pursuant to Penal Code section 872(b).

Penal Code section 872(b) states in relevant part,

> (b) Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted....

Both of these statutes were enacted on June 6, 1990, pursuant to Proposition 115. This Court's *California vs. Green decision, supra* allowed former testimony from a preliminary hearing when California's preliminary hearing laws were broader and more like a trial. Now, preliminary hearings in California are akin to the statutes in Colorado and Wisconsin.

III. The Questions Presented Significantly Impact the Administration of Criminal Justice and the Right to Discovery.

The administration of justice is greatly impacted because we have Supreme Courts of different states allowing former testimony to be used from preliminary

hearings which creates multiple Constitutional standards. This Court should adopt the suggested per se rule as preliminary hearings are simply not trials and it is simply unfair to have the attorney who first does the preliminary hearing be shouldered with the responsibility of conducting a cross examination that may have to last through trial.

A defendant in California has a right to a preliminary hearing within 10 court days. (See Penal Code § 859b) Most of the time, the attorney has limited discovery. This creates an unfair situation for the defendant. Most times in murder cases, they are incarcerated and have not obtained resources to contest the charges. Murder with "special circumstances" is a "no bail" offense in California while a regular murder is a very high bail, too high for most defendants. The relevance is that sometimes, preliminary hearings are rushed forward to try and ferret out groundless offenses. Most of the time, a line attorney from the public defender's office handles the cases in the beginning stages of a felony criminal case.

Preliminary hearings are simply not trials and there should be a per se bright line rule against the use of former testimony at trials.

The Confrontation Clause analysis by this Court is different than it was in 1970. The Florida Supreme Court explains it well. As it explained in *Lopez, infra,* there are a number of reasons why a discovery deposition does not satisfy the opportunity for cross-examination that is required under *Crawford. See State vs. Lopez,* (2008) 974 So.2d 340 at 347-50. The rule is used to learn what the testimony

will be and attempt to limit it or to uncover other evidence and witnesses.

A defendant cannot be "expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition." *State v. Basiliere,* 353 So.2d 820, 824-25 (Fla.1977). This is especially true if the defendant is "unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements." *Id.* at 824. Second, a discovery deposition is not intended as an opportunity to perpetuate testimony for use at trial, is not admissible as substantive evidence at trial, and is only admissible for purposes of impeachment. Third, the defendant is not entitled to be present during a discovery deposition pursuant to rule 3.220(h). *See Lopez v. State,* 888 So.2d at 700. Thus, the exercise of the right to take a discovery deposition under rule 3.220 does not serve as the functional substitute for in-court confrontation of the witness. *Blanton v. State* (Fla. 2008) 978 So.2d 149, 155

In California, discovery is FORBIDDEN at a preliminary hearing. Penal Code 866 states as follows:

> (a) When the examination of witnesses on the part of the people is closed, any witness the defendant may produce shall be sworn and examined.
>
> Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness....

(b) It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery.

(c) This section shall not be construed to compel or authorize the taking of depositions of witnesses.

On all three areas, the defendant is highly restricted. No discovery, no depositions, and must make an offer of proof for any affirmative defenses. To compare this to Penal Code section 1093 which provides the laundry list of trial rights, it becomes self evidence how restrictive a preliminary hearing is.

In *State v. Noah* (2007) 284 Kan. 608, 612-17 [162 P.3d 799, 802-05], the Kansas Supreme Court took another stab at the malaise that now exists.

Although *Crawford* requires an opportunity for cross-examination before hearsay can be admitted, it provides no guidance for how much cross-examination is required to afford the defendant an adequate opportunity. In *Crawford,* the prosecutor introduced hearsay statements made by the defendant's wife to police. The defendant's wife had not testified during any of the proceedings, so the defendant had not had any opportunity to cross-examine her.

Since *Crawford* was decided, the United States Supreme Court has not squarely addressed the issue of what constitutes an opportunity for cross-examination to satisfy the requirements of *Crawford.*

A. Federal Court Dichotomy?

Although the United States Supreme Court has not squarely addressed the issue of what constitutes an opportunity for cross-examination to satisfy the requirements of *Crawford.*, the Fifth and the Ninth Federal Circuits have addressed the issue.

In *United States v. Acosta,* 475 F.3d 677 (5th Cir.2007), a co-defendant, who had pleaded guilty, advised the court that he feared for the safety of his family if he testified at Acosta's trial. The court ordered the co-defendant to testify, but he refused to answer some of the Government's questions on direct examination. Although the co-defendant admitted that his prior statements were true, he refused to implicate Acosta in certain aspects of the crime. As a result, the Government admitted a statement that the co-defendant made during his plea. The Government also admitted testimony from a federal agent regarding the co-defendant's statements during an interrogation. Acosta was allowed to cross-examine the co-defendant. The co-defendant answered all of Acosta's questions during cross-examination. Nevertheless, Acosta claimed that the admission of the co-defendant's testimony, the co-defendant's prior statement, and the federal agent's testimony violated the Confrontation Clause because he had not been able to cross-examine the co-defendant about his prior statements. 475 F.3d at 679–80. The 5th Circuit allowed the statements finding it was a tactical decision.

In *United States v. Wilmore,* 381 F.3d 868 (9th Cir.2004), the Ninth Circuit reached the opposite result based on the facts of that case. In *Wilmore,* the

defendant's wife called 911 to report that her husband had robbed an abortion clinic and was carrying a gun. When the police responded, the defendant's wife admitted that she lied about the robbery of the abortion clinic to get the police to respond more quickly to her call, then advised the police that her husband had stolen her children's Playstation 2 video game. The police found the defendant in a nearby apartment. Lying on a chair near the defendant, police found a jacket with a gun in one of the pockets. Before a grand jury, the defendant's wife testified that the defendant had been wearing the jacket and had possessed the gun. The defendant was indicted on one count of being a felon in possession of a firearm. However, prior to the defendant's trial, his wife advised the prosecutor that she intended to disavow her grand jury testimony. 381 F.3d at 870–71.

The court then advised defense counsel to avoid questions during cross-examination that would cause the defendant's wife to invoke her Fifth Amendment privilege. After the defendant's wife invoked her Fifth Amendment rights in response to the question of whether she lied to the 911 dispatcher, defense counsel limited his questions to topics other than the grand jury testimony. On appeal, the defendant argued that the limitation of his cross-examination violated his right to confrontation. 381 F.3d at 870–71.

Acknowledging that *Crawford* requires an opportunity for cross-examination before testimonial hearsay can be admitted, the *Wilmore* court reversed the defendant's conviction. Stating that the defendant had no opportunity to confront his wife about why she testified the way she did before the grand jury or whether

the grand jury testimony was true, the *Wilmore* court concluded that the trial court's restriction prohibited the defendant from probing his wife's motivations behind her testimony. 381 F.3d at 872–73.

Both *Acosta* and *Wilmore* stand for the proposition that each case should be considered individually on the facts of the case, but neither case establishes a standard for determining when earlier cross-examination is sufficient under *Crawford.* Although the this Court has not addressed the sufficiency of cross-examination to satisfy *Crawford,* it has addressed the issue of limiting the defendant's cross-examination. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In *Van Arsdall,* the prosecutor entered into an agreement with a witness, who agreed to testify in return for the dismissal of charges against him. The trial court prevented the defendant from inquiring about the deal on cross-examination. To determine whether the trial court had prejudiced the defendant by limiting his cross-examination, the *Van Arsdall* Court evaluated the facts to determine whether the defendant "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.' " 475 U.S. at 680, 106 S.Ct. 1431 (quoting *Davis v. Alaska,* 415 U.S. 308, 318, 39 L.Ed.2d 347, 94 S.Ct. 1105 [1974]).

In *State v. Atkinson,* 276 Kan. 920, 80 P.3d 1143 (2003), this Court applied *Van Arsdall.* The *Atkinson* court concluded that the district court had erroneously

prevented Atkinson from cross-examining the complaining witness in an otherwise appropriate manner to expose facts related to the witness' reliability. 276 Kan. at 929, 80 P.3d 1143.

Van Arsdall established that limitation of cross-examination can violate a defendant's right to confrontation. The United States Supreme Court stated:

" 'The main and essential purpose of confrontation is to *secure for the [defendant] the opportunity of cross-examination.*' Of particular relevance here, '[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and an important function of this constitutionally protected right of cross-examination.' quoting 5 J. Wigmore, Evidence s 1395, p. 123 (3d ed. 1940).

The Kansas Supreme Court adopted the case-by-case approach used by the *Acosta* and *Wilmore* courts.

IV. The Prosecution's Conduct Violated *Brady vs. Maryland*

A. Brady v. Maryland Violation

Buchanan was subject to prosecution for murder and a penalty of life without parole (LWOP). Shortly after Petitioner's trial, Buchanan was allowed to plead guilty to voluntary manslaughter and robbery, with a term of 12 years. This was not a surprise gift from Santa Claus. By the stratagem of hiding Buchanan from the jury, the prosecutor was allowed to conceal both the pendency of this deal, and the result of this deal, and to conceal Buchanan's arguable bias stemming from his expectation of a deal. This was a 5th and 14th Amendment due process violation.

Brady v. Maryland (1963) 373 U.S. 83.

The fact that Buchanan testified at the preliminary examination that no one "promised" him any benefit, and that officer Jackson said the same thing at trial, did not solve the problem. The question is not merely whether someone "promised" Buchanan any leniency. The question is whether anyone in law enforcement caused Buchanan to believe, by direct or indirect statements, or by casual suggestions, or by the proverbial wink and a nod, that he would receive benefits for testifying. *People v. Morris* (1988) 46 Cal.3d 1, 32; *People v. Phillips* (1985) 41 Cal.3d 29, 46; *United States v. Aguon* (9th Cir. 1988) (en banc) 851 F.2d 1158, 1163.

By adducing this half-true testimony, and by hiding Buchanan from the jury at trial, the prosecutor caused the jury to believe that Buchanan was receiving no benefits. That was a lie. That constituted prosecutorial misconduct. It violated due process under the 5th and 14th Amendments and corrupted and distorted the truth-finding process of this trial. *Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486, *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1057; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 204, 206-207.

B. Napue v. Illinois Violation

The testimony that nothing was "promised" to Buchanan caused the jury to believe that Buchanan was receiving no benefit. This was patently false. Conviction on the basis of such false testimony violated due process under the 5th and 14th Amendments. *Giglio v. United States* (1972) 405 U.S. 150; *Napue v.*

Illinois (1959) 360 U.S. 264.

The Comment to California Evid. Code §240 by the Assembly Committee on Judiciary (West's Annotated Codes, vol. 29B, Pt. 1, p. 35) makes clear that a party may not utilize "sharp practices" to cause a witness to become unavailable.

> Subdivision (b) is designed to establish safeguards against sharp practices and, in the words of the Commissioners on Uniform State Laws, to assure "that unavailability is honest and not planned in order to gain an advantage." Uniform Rules of Evidence, Rule 62 Comment. Under this subdivision, a party may not arrange a declarant's disappearance in order to use the Declarant's out of court statement.

The prosecutor's acts of granting, and then withdrawing, immunity constituted a paradigm of the type of sharp practice barred by §240(b). Here, contrary to the Committee on the Judiciary's requirements, the prosecutor caused witness unavailability which was "planned" and not "honest."

The prosecutor similarly committed an improper "sharp practice" when he told Buchanan's lawyer that Buchanan may testify at Petitioner's trial, but then told Judge Canepa at Petitioner's trial that he was not offering Buchanan immunity because, "I don't have to . . ."

Because the prosecutor's gambit here of first offering immunity and then withdrawing immunity, and then trying to get the pre-trial testimony read to the jury constituted "wrongdoing" within the meaning of Evid. Code §240(b). It also constituted prosecutorial misconduct. The relevance of this is that it exposes the intent or purpose behind this wrongdoing and gamesmanship which was to hide

Buchanan from the jury, and to prevent cross-examination before the jury, which could only have damaged the prosecution's star witness. This gamesmanship and misconduct improperly denied Petitioner his constitutional right to confrontation before the jury. United States Constitution 6th Amendment; Calif. Const. Art I, §§15, 16.

This prosecutorial misconduct irreversibly infected the trial with unfairness as to make the resulting conviction a denial of due process under the 5th Amendment (as well as a 6th Amendment confrontation clause violation). *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *People v. Hill* (1998) 17 Cal.4th 800, 819.

In *United States v. Straub* (9th Cir. 2008) 538 F.3d 1147 (opinion by Judge Bybee) the prosecution granted immunity to several of its witnesses but refused to grant immunity to a defense witness. The Court of Appeals reversed the conviction, finding a due process violation because "the selective denial of immunity had the effect of distorting the fact finding process. . . ." 538 F.3d at 1158. Straub held it was not necessary to find prosecutorial misconduct to reverse on this ground. It was sufficient if the prosecution first caused the witness to invoke the 5th Amendment and then refused to confer immunity. 538 F.3d at 1161.

In *People v. Williams* (2008) 43 Cal.4th 584, 610 a witness was deemed unavailable when he testified voluntarily at the preliminary examination, but then took the 5th Amendment at trial. This is a common situation. It differs greatly from the instant case, because in *Williams* the prosecutor did not first grant use immunity and then take it away. Petitioner has found no case where the prosecutor obtained a witness' or co-defendant's testimony by first granting immunity at the preliminary examination, but then withholding immunity at trial, with the results (a) that the witness took the 5th Amendment at trial, and (b) that the prosecution was allowed to introduce the preliminary examination testimony at trial under §1291. There is no case allowing such procedure, because this is an improper "sharp practice," barred under Evid. Code §240.

In Williams the defendant argued on appeal that, because the prosecutor supposedly gave "informal immunity" to the witness at the preliminary examination, the witness should have been given immunity at trial, and should have testified at trial, rather than having his preliminary examination testimony read to the jury. The California Supreme Court refused to address those contentions on the merits. They were held to be waived because they were not raised at trial. Thus, the arguments made here present an open question. For all these reasons, the trial court had the authority to direct that use immunity be given to Buchanan, and it violated Petitioner's 5th Amendment due process right to a fair trial and his 6th Amendment confrontation right when it refused.

C. Prejudice

The standard of prejudice for the violation of the 6th Amendment confrontation clause right is the harmless beyond a reasonable doubt test. Delaware v. Van Arsdall (1986) 475 U.S. 673.

There are multiple aspects of prejudice which flowed from the denial of Petitioner's right to confront Buchanan before the jury. First, the prosecutor hid Buchanan from the jury's view. He denied Petitioner the opportunity to cross-examine Buchanan before the jury on all the lies he told the officers before Petitioner's preliminary examination. He also denied Petitioner the right to cross-examine the witness before the jury on all the lies which he told during Petitioner's preliminary examination. Because this was a one-witness case, in which Buchanan admittedly lied many times at the preliminary examination, Petitioner was greatly prejudiced when the jury was barred from seeing Buchanan's demeanor when he admittedly and repeatedly lied. The jury needed to compare his demeanor when he admittedly lied with his demeanor when he claimed to be telling the truth.

Indeed, the prosecutor admitted during jury argument that Buchanan had repeatedly lied.

Given how frequently Buchanan admitted to lying, it was inexcusable to deny Petitioner the opportunity to cross-examine him before the jury, and it was inexcusable to deny the jury the opportunity to examine his demeanor.

Second, the most arguable corroboration of Buchanan's testimony was the cell phone records. However, officer Jackson testified that Buchanan did not tell him about any cell phone calls until "a day or two" before he testified at Petitioner's preliminary examination. And then Buchanan only spoke about one phone call. Thus, evidence about the "series" of phone calls was not provided in discovery to Petitioner before his preliminary examination, even though the police knew about them. Therefore, Petitioner was unable to investigate them before the preliminary examination. Because defense counsel did not hear about, or have the opportunity to investigate those multiple cell phone calls before the preliminary examination, he could not cross-examine Buchanan on them at the preliminary examination. Thus, the prosecutor's stratagem denied Petitioner the opportunity to cross-examine Buchanan on telephone calls which constituted almost the sole arguable corroboration of Buchanan's testimony.

Third, still another despicable aspect of Buchanan's behavior was that he set up his former homosexual lover, to be robbed and killed, perhaps because Buchanan wanted to prevent Smith from telling people that he and Buchanan had a gay relationship. Buchanan denied, throughout his pre-trial statements to the police, and throughout his preliminary examination testimony, that he had a homosexual relationship with Smith.

However, Smith's mother, Ms. Fountaine, knew Jacque was gay. Shira Dennis, Smith's cousin, knew that Buchanan and Smith had a gay relationship.

She knew they lived together in Benicia. They stayed together overnight many nights at her home. She saw each man being affectionate toward the other. They conducted themselves in an intimate way, consistent with being boyfriend and boyfriend.

The jury should have been able to observe Buchanan's demeanor when denying he had a gay relationship. The jury should have been able to compare his demeanor, when falsely denying his gay relationship, with his demeanor in claiming that Petitioner was the other robber. Petitioner was unfairly denied the right to have the jury evaluate Buchanan's credibility in light of his demeanor.

Fourth, Buchanan's testimony presented a paradigm of why the jury needs to observe a witness' demeanor. Initially, Buchanan denied any involvement in this crime. He claimed that he was merely a victim. Later, Buchanan admitted involvement, but he claimed only partial involvement. He placed the major blame on someone else, Petitioner. He claimed Petitioner was the gunman. Few aspects of testimony are more inherently suspicious, and more inherently damaging, than the testimony of one defendant, who claims that the other defendant was the triggerman. See, e.g., *People v. Louis,* (1986) 42 Cal.3d 969, 989. If ever cross-examination was needed before the jury on any topic, it was needed here.

Fifth, and finally, Petitioner was denied the right to cross-examine on whether Buchanan was expecting or being given any benefits in his own case in exchange for his testimony in fingering Petitioner as the shooter. Petitioner could

not ask that question of Buchanan at Petitioner's preliminary examination, because Buchanan had not yet been charged.

On April 23, 2009, a month after Petitioner was sentenced, Buchanan was sentenced by a different judge, Judge Landau, in the presence of Mr. Cope, to 11 years for manslaughter, one year on robbery, for a total of 12 years. He even waived his rights to his custody-credits. Not surprisingly, no appeal has been taken.

This sequence presents a classic pattern of a witness cooperating with the prosecution in exchange for expecting, and then receiving, a reduction of his own sentence. Petitioner was prejudiced when he was denied the opportunity to cross-examine on this topic.

This was a one-witness case. The success of the prosecution totally depended upon whether the jury believed Buchanan. The prosecution's case was built totally on the testimony of one witness, plus speculation as to what was in those undescribed telephone calls. If any case ever warranted live cross-examination before the jury, where the jury could observe the witness's demeanor, this was the one.

The denial of cross-examination was prejudicial, because the prosecution's case was weak. The prosecutor had no more than a minimal amount of evidence against Petitioner, besides Buchanan's ever-changing testimony, and besides speculation as to the content of the cell phone calls. A summary of the Prosecution's

additional body of evidence is as follows:

(i) Smith's mother, Joanne Fountaine, claimed at the preliminary examination that, during the phone call from her son, reporting the robbery, she heard Buchanan say "Korey, don't kill him." However, Ms. Fountaine admitted on cross-examination that she did not tell any of several police officers, during any of their several interviews of her prior to the preliminary examination, that anyone used the name "Korey." In addition, she admitted that the first time when she mentioned Petitioner's name was only after she saw his name listed on the calendar outside the courtroom, and after she heard his name mentioned in court, at the time of the preliminary examination. Both the prosecutor and the trial judge acknowledged that the victim's mother may have made this one up.

(ii) Another of Smith's relatives, Paul Gaines, claimed that while he was in jail, in a Bible studies class, he heard Petitioner say that he wished he hadn't done what he did. However, Petitioner's alleged statement was no more specific than that. Gaines claimed that he reported this alleged statement to his and Smith's cousin, Shira Dennis, shortly after Gaines was released from jail, but Ms. Dennis denied he told her anything. Thus, this claimed evidence was similarly of minimal weight.

On the other hand, there was substantial evidence that Petitioner was not the gunman.

(i) Eyewitness Raymonde Magnier testified in court that Petitioner was not the gunman. When the police showed her several photographs, including Petitioner, shortly after the homicide, she said no one in those photographs was the gunman.

(ii) Eyewitness Crystal DeVaughn described the shooter as 5' 10" - 5' 11," 190 lbs., and heavyset. She could not tell whether the shooter was Petitioner, because she did not get a good look at him. However, Petitioner was anything but heavyset.

(iii) The evidence technicians found 16 sets of fingerprints in Smith's Cadillac. None were Petitioner's.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,
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OPINION

190 Cal.App.4th 1534, 119 Cal.Rptr.3d 551, 10 Cal. Daily Op. Serv. 15,751, 2010 Daily Journal D.A.R. 19,009
(Cite as: 190 Cal.App.4th 1534, 119 Cal.Rptr.3d 551)

H

Court of Appeal, First District, Division 1, California.
The PEOPLE, Plaintiff and Respondent,
v.
Korey HOLLINQUEST, Defendant and Appellant.

No. A124613.
Dec. 20, 2010.
Certified for Partial Publication.[FN*]

FN* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III. and IV. of the Discussion.

As Modified on Denial of Rehearing Jan. 13, 2011.

Background: Defendant was convicted following a jury trial in the Superior Court, Contra Costa County, No. 05-051554-4,Teresa Canepa, J., of first degree murder with a special circumstance and robbery, and was sentenced to life in prison without parole. Defendant appealed.

Holdings: The Court of Appeal, Dondero, J., held that:
(1) defendant had an adequate opportunity to cross-examine witness at preliminary hearing;
(2) prosecutor's refusal to grant immunity to witness was not motivated by the specific objective of preventing witness from testifying;
(3) prosecutor violated defendant's right to post-arrest silence; and
(4) error in admitting evidence of post-arrest silence was not prejudicial.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

Criminal Law 110 ⚿662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.7 k. Cross-examination and impeachment. Most Cited Cases

The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is the country's constitutional goal. U.S.C.A. Const.Amend. 6.

[2] Constitutional Law 92 ⚿4679

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4679 k. Cross-examination. Most Cited Cases

To deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. U.S.C.A. Const.Amends. 6, 14.

[3] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

The right of confrontation is not absolute, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.

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U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at preliminary examination, former trial, or other proceeding. Most Cited Cases

The right of confrontation does not preclude the prosecution from proving its case through the prior testimony of a witness who is unavailable at trial, so long as the defendant had the right and the opportunity to cross-examine the witness during the earlier proceeding at which the witness gave this testimony. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿544

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k544 k. Opportunity for cross-examination. Most Cited Cases

If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.

[6] Criminal Law 110 ⚿419(5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(5) k. Statements of persons not available as witnesses. Most Cited Cases

Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In general. Most Cited Cases

A witness, upon proper assertion of the privilege against self-incrimination, is unavailable as a witness at trial. West's Ann.Cal.Evid.Code § 240; U.S.C.A. Const.Amend. 5.

[7] Criminal Law 110 ⚿419(5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(5) k. Statements of persons not available as witnesses. Most Cited Cases

Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In general. Most Cited Cases

To be found unavailable to testify based on the assertion of the privilege against self-incrimination, a witness must not only intend to assert the privilege, but also be entitled to assert it. U.S.C.A. Const.Amend. 5; West's Ann.Cal.Evid.Code § 240.

[8] Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at preliminary examination, former trial, or other proceeding. Most Cited Cases

Murder defendant had an adequate opportunity to cross-examine witness at preliminary hearing, and thus admission of witness's preliminary hearing testimony at trial, after witness was declared unavailable to testify, did not violate defendant's right to confront witnesses, despite defendant's claim that, at the time of the hearing he lacked cellular telephone records which substantiated witness's version of the murder; preliminary hearing and trial proceedings were of the same type, the trial strategy of discrediting the witness and claiming innocence was the same, the potential penalty was the same, and the issue and parties were the same, defense counsel undertook a thorough cross-examination and explored witness's numerous prior fabrications, his motives to falsify, and his own potential culpability, defendant had a reason and opportunity to elicit cell phone conversation testimony at the preliminary hearing, and there was no evidence of any benefits given to witness in exchange for cooperation. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 538; Cal. Jur. 3d, Criminal Law: Rights of the Accused, § 278; Annot., Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial (1946) 159 A.L.R. 1240; Annot., Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine (2008) 30 A.L.R.6th 1.

[9] Criminal Law 110 ⚿662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of declarant. Most Cited Cases

Under the recognized exception to the rule that a criminal defendant has the right to confront the witnesses against him, the testimonial statements of witnesses absent from trial may be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15; West's Ann.Cal.Evid.Code § 1291.

[10] Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at preliminary examination, former trial, or other proceeding. Most Cited Cases

As long as a defendant was provided the opportunity for cross-examination, the admission of preliminary hearing testimony does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective. U.S.C.A. Const.Amend. 6; West's Ann.Cal.Evid.Code § 1291.

[11] Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at preliminary examination, former trial, or other proceeding. Most Cited Cases

A prior opportunity to cross-examine a witness who has become unavailable is considered an adequate substitute for present cross-examination at trial. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

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[12] Criminal Law 110 ⚿545

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k545 k. Identity of accusation and issues. Most Cited Cases

A defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section allowing admission at the second proceeding of testimony from the first proceeding due to the unavailability of the witness, simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[13] Criminal Law 110 ⚿544

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k544 k. Opportunity for cross-examination. Most Cited Cases

As long as defendant was given the opportunity for effective cross-examination, the statutory requirements allowing admission of that testimony in a later proceeding were satisfied; the admissibility of this evidence does not depend on whether defendant availed himself fully of that opportunity. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.

[14] Criminal Law 110 ⚿539(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k539 Admissibility
110k539(1) k. In general. Most Cited Cases

Live testimony of a witness, which grants the trier of fact an opportunity to observe demeanor, is always preferable to former testimony.

[15] Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿544

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k544 k. Opportunity for cross-examination. Most Cited Cases

The preference for live testimony gives way when the witness properly invokes the privilege against self-incrimination and a prior appropriate opportunity for cross-examination existed. U.S.C.A. Const.Amends. 5, 6; West's Ann.Cal. Const. Art. 1, § 15; West's Ann.Cal.Evid.Code § 1291.

[16] Criminal Law 110 ⚿42.4

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.4 k. Grounds or justification for grant of immunity. Most Cited Cases

Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at preliminary examination, former trial, or other proceeding. Most Cited Cases

Prosecutor's refusal to grant immunity to witness at defendant's murder trial was not motivated by the specific objective of preventing witness from testifying, and thus witness was unavailable to testify and admission of witness's preliminary hearing testimony at trial did not violate defendant's right to confront witnesses; prosecutor elected not to grant immunity in the aftermath of witness's distinctly incriminating testimony at the preliminary hearing and subsequently charged witness with murder and robbery, and there was no evidence of any threats or coercion that precluded witness from making a free and voluntary choice not to testify. West's Ann.Cal.Evid.Code § 240(b); West's Ann.Cal.Penal Code § 1324; U.S.C.A. Const.Amend. 6.

[17] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases

To establish a violation of his confrontation rights through misconduct by the prosecutor that resulted in the deprivation of testimony of a witness, the defendant must establish three elements: (1) prosecutorial misconduct that was entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify, (2) the prosecutor's misconduct was a substantial cause in depriving the defendant of the witness's testimony, and (3) the testimony defendant was unable to present was material to his defense. U.S.C.A. Const.Amend. 6.

[18] Criminal Law 110 ⚿1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient representation in general. Most Cited Cases

Defense counsel's performance cannot be considered deficient if there was no error to object to. U.S.C.A. Const.Amend. 6.

[19] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

Post-arrest silence may not be used against a defendant at trial in order to imply guilt from that silence. U.S.C.A. Const.Amend. 5.

[20] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

Witnesses 410 ⚿347

410 Witnesses
410IV Credibility and Impeachment
410IV(B) Character and Conduct of Witness
410k347 k. Conduct of witness inconsistent with testimony; silence. Most Cited Cases

The prosecutor cannot use the defendant's invocation of his right to remain silent or refusal to answer questions as evidence against him; particularly, the defendant's silence may not be used to impeach his credibility. U.S.C.A. Const.Amend. 5.

[21] Constitutional Law 92 ⚿4687

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law

92XXVII(H)5 Evidence and Witnesses
92k4684 Defendant as Witness
92k4687 k. Silence. Most Cited Cases

To establish a violation of due process under *Doyle v. Ohio*, the defendant must show that the prosecution inappropriately used his postarrest silence for impeachment purposes and the trial court permitted the prosecution to engage in such inquiry or argument; to assess whether these questions constitute *Doyle* error, the court asks whether the prosecutor referred to the defendant's post-arrest silence so that the jury would draw inferences of guilt from the defendant's decision to remain silent after arrest. U.S.C.A. Const.Amends. 5, 14.

[22] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

Even outside the context of custodial interrogations, silence remains constitutionally protected if it appears to be an assertion of the right to remain silent. U.S.C.A. Const.Amend. 5.

[23] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

The prohibition against the use of a defendant's invocation of his right to remain silent need not apply to defendant's silence invoked by a private party absent a showing that such conduct was an assertion of his rights to silence and counsel; on the other hand, when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights, then the prohibition should apply. U.S.C.A. Const.Amend. 5.

[24] Criminal Law 110 ⚿2131(3)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2131 Comments on Silence of Accused Prior to Trial
110k2131(3) k. Silence during or subsequent to arrest. Most Cited Cases

An assessment of whether the prosecutor made inappropriate use of defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument. U.S.C.A. Const.Amend. 5.

[25] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and investigatory questioning. Most Cited Cases

The principles behind the prohibition forbidding a prosecutor to use the defendant's invocation of his right to remain silent or refusal to answer questions as evidence against him apply even if a defendant does not take the stand in his own defense thereby subjecting himself to potential impeachment. U.S.C.A. Const.Amend. 5.

[26] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

A defendant is entitled to rely on the assurance when he is "*Miranda*-ized" that his silence will not be used against him; the *Miranda* warnings are deemed to have induced the silence. U.S.C.A. Const.Amend. 5.

[27] Criminal Law 110 ⚿407(1)

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k407 Acquiescence or Silence
110k407(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿2131(3)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2131 Comments on Silence of Accused Prior to Trial
110k2131(3) k. Silence during or subsequent to arrest. Most Cited Cases

Prosecutor violated defendant's right to post-arrest silence through admission of testimony by investigator who listened to conversations between defendant and family friend; evidence of defendant's silence during the conversations was offered to demonstrate that defendant did not discuss an innocent explanation for incriminating cell phone records, or any other facts related to the case, under circumstances in which he may have been expected to do so, and prosecutor on his own initiative urged the jury to draw an adverse inference of guilt from defendant's postarrest silence. U.S.C.A. Const.Amend. 5.

[28] Criminal Law 110 ⚿1169.2(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(6) k. Admissions, declarations, and hearsay; confessions. Most Cited Cases

Criminal Law 110 ⚿1169.5(5)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury
110k1169.5(5) k. Admissions, declarations, and hearsay; confessions. Most Cited Cases

Criminal Law 110 ⚿1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, admissions, declarations, and confessions of accused. Most Cited Cases

Criminal Law 110 ⚿1171.1(3)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(3) k. Particular statements, comments, and arguments. Most Cited Cases

Error in admitting evidence of defendant's post-arrest silence, as evidenced in recorded conversations between defendant and close family friend, was not prejudicial at murder trial; testimony and

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argument that defendant did not mention the facts of the case to friend had negligible probative value at best, investigator's testimony regarding the conversations was cumulative and vague, court instructed jury not to draw an inference of guilt from defendant's silence, focus of prosecutor's argument was on defendant's pre-arrest, rather than post-arrest, silence, and evidence of defendant's guilt was formidable. U.S.C.A. Const.Amend. 5.

[29] Criminal Law 110 ⚿1171.1(3)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(3) k. Particular statements, comments, and arguments. Most Cited Cases

When deciding whether a prosecutor's reference to a defendant's post-arrest silence was prejudicial, the court will consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt. U.S.C.A. Const.Amend. 5.

****555** Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Gregg E. Zywicke,****556** David H. Rose, Deputies Attorney General, for Plaintiff and Respondent.

Stephen B. Bedrick, Esq., for Defendant and Appellant.

DONDERO, J.

***1539** Defendant was convicted following a jury trial of first degree murder (Pen.Code, § 187) with a special circumstance (Pen.Code, § 190.2, subd. (a)(17)), and robbery (Pen.Code, § 211). He was sentenced to a term of life in state prison without the possibility of parole.

In this appeal he claims that the admission of the preliminary hearing testimony of a prosecution witness following the prosecutor's refusal to grant the witness immunity at trial constituted prosecutorial misconduct and resulted in a denial of his rights to confrontation and due process. He argues that the prosecutor committed additional acts of misconduct by relying on inadmissible evidence of his silence to prove guilt in violation of his privilege against self-incrimination. He also objects to the trial court's instruction on unjoined perpetrators.

We conclude that the prosecutor did not deny defendant the right of confrontation by refusing to grant immunity to a witness who testified at the preliminary hearing but was subsequently charged with murder. We conclude that the prosecutor's reference in closing argument to defendant's postarrest ***1540** silence in discussions with a friend was misconduct, but was not prejudicial to the defense. We find that no other prosecutorial misconduct was committed, and defendant's trial counsel did not afford him inadequate representation. No instructional error occurred. We therefore affirm the judgment.

STATEMENT OF FACTS

The victim, Jacque Smith, was killed around 1:00 p.m. on August 22, 2005, at 12th Street and Maine Avenue in the Coronado Santa Fe area of Richmond. He suffered eight gunshot wounds, along with multiple fractures and abrasions "all over his body." His injuries were consistent with "being run over" and "dragged along" the pavement by a car, shot, and "pistol-whipped."

The primary testimony that implicated defendant in the murder of Smith came from Torry Buchanan, who, according to at least one account, had been involved for months in an intimate relationship with the victim. Shira Dennis, a close friend of the victim, testified that Smith was openly bisexual, but Buchanan was not, and "didn't want anybody to know" of his sexual relationship with the victim. According to Dennis, Smith and Buchanan lived together briefly in an apartment in Benicia, and acted as "boyfriend and boyfriend."

Not long before the murder, however, Smith became "upset" with Buchanan and did not trust him after his money and some items, including a television, were appropriated and "taken out of the house." Dennis testified that Smith was "tired of Buchanan

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stealing from him," and was in the process of breaking off their relationship. Smith recently moved to Stockton, and Dennis believed that he did not want Buchanan to know the location of his new residence. Smith was also fearful of Buchanan. Before the murder Smith received a message from someone that warned him Buchanan intended to rob and kill him.

At defendant's preliminary hearing, Buchanan testified after receiving use immunity from the prosecution. This testimony was later presented at defendant's trial. In Buchanan's preliminary hearing testimony, he denied that he had sexual relations with Smith. In fact, Buchanan acknowledged that he warned the victim he ****557** would "beat his ass" if Smith "kept telling people" they had a "homosexual relationship." Buchanan testified that he maintained a friendship with Smith to "play him" and "get as much" as he could from the victim. According to Buchanan, Smith bought him clothes and gave him money, and on one occasion provided him with bail in the amount of $45,000 to obtain his release from jail. Smith subsequently threatened to rescind the bond he had posted, which caused Buchanan concern that his bail would be ***1541** revoked. Buchanan further acknowledged that shortly before Smith's death, the decedent accused Buchanan of "stealing money from him." Buchanan denied that he stole money from Smith, but Smith no longer trusted him.

Buchanan testified that two days before the murder occurred, defendant, whom he had known for a couple of years, approached him with a plan to rob Smith. Defendant said he "needed some money" and "wanted to rob" Smith, who he knew would be in Buchanan's company. Buchanan said "all right," and they exchanged cell phone numbers to remain in contact to set up the robbery.

About 9:00 on the morning of the murder, Smith drove his navy blue Cadillac to pick up Buchanan in Rodeo. After they stopped for food in Hercules, Buchanan began to drive. He drove the car to Oakland where they "purchased some weed." Buchanan used Smith's cell phone to call defendant to report to him that they were on the way to 12th Street in Richmond. During one call defendant told Buchanan that he had a gun.[FN1] Buchanan ultimately drove the victim's Cadillac to Richmond, where he parked as arranged with defendant at 12th and Florida.

FN1. Buchanan testified that he and defendant had not discussed a gun when they planned the robbery.

Defendant approached the car with a gun in his hand and ordered Buchanan to drive around the corner to 13th and Maine. Buchanan did so, and parked the car in a lot near the residence of his friend Brenda. Defendant then struck Smith several times with his fist. Buchanan told Smith to call his mother to arrange for her to give him some money so defendant "wouldn't harm" him. Buchanan heard Smith on the phone with his mother exclaim, " 'Torry trying to rob me.' " Buchanan yelled to defendant not to kill Smith. After defendant struck Smith, the victim jumped from the car with the cell phone in his hand and "started running" away. Defendant chased after Smith as Buchanan left the car and went to Brenda's house.

From inside Brenda's house Buchanan heard the sound of five or six gunshots coming from Marina Way. He asked Brenda to "see what happened." She went outside for about five minutes, then returned to the house and said that "somebody got killed outside." Buchanan went back outside and observed defendant as he was walking "back towards the car." He threw defendant the keys to the Cadillac, then returned to Brenda's house to ask her to call him a cab.

Buchanan insisted that he did not want Smith killed, although he admitted that he willingly participated in the robbery. He also testified that defendant ***1542** did not mention to him that he planned to kill Smith. Buchanan did not realize that defendant intended to kill Smith until the victim ran from the car and defendant chased after him.

When questioned after the murder, Buchanan lied to the police and claimed that he also had been a victim of the robbery of Smith. Buchanan identified defendant ****558** from a photo lineup as the man who robbed and killed Smith. He referred to defendant by the "moniker of Twin or Twig."

After Buchanan spoke with the police, he talked to defendant on the telephone. Defendant asked "why the police came to his house." Buchanan replied that he had been questioned by the police. Defendant said that he "was going to surrender himself to the police."

Buchanan acknowledged that he lied in his inter-

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views with the police to protect himself, but claimed that his preliminary hearing testimony was truthful. Before the preliminary hearing, Buchanan was subpoenaed to testify by an investigator for District Attorney's Office. Buchanan expressed to the investigator that he "was afraid," and at his request was placed in a hotel room for his safety. He briefly absconded to Nevada, but voluntarily agreed to return to testify.

Buchanan was not charged with any crimes related to the murder of Smith before the preliminary hearing, and insisted that he has never been "promised anything" in exchange for his testimony. After the preliminary hearing but before defendant's trial, Buchanan was charged with felony murder.

Smith's mother, Joanne Fountaine, corroborated some of Buchanan's testimony. She was aware that her son was acquainted with Buchanan. Fountaine had heard Buchanan's voice over the telephone, and seen his photograph when a bail bondsman visited her house "looking for him." The day before the murder, she also heard Smith tell Buchanan, " 'You better give me my money. I want my money.' "

On the day of the murder, Fountaine loaned Smith her cell phone. Around 1:00 p.m., Smith called her on the cell phone, crying, and "said, 'Momma, they killing me and beating me.' " She heard an unidentified voice, not Buchanan's, order Smith to have his mother bring money. The same voice, which Fountaine identified only as "Black" and "young," said, " 'I'm gonna kill your ass,' " and " 'I'm gonna kill this motherfucker.' " She also recognized Buchanan's voice exclaim, " 'Korey, don't kill him' " a couple of times, before the other man yelled, " 'This guy's gonna run.' " Fountaine was "positive" that *Buchanan* used the name "Korey" to refer to the man beating the victim, although in an interview with an investigator she stated that she ***1543** heard *Smith* mention the name "Torry" on the phone. Fountaine then heard "a lot of rattling" sounds, like Smith "was trying to run away," before the phone was thrown or dropped.

Fountaine immediately called the police, then "went looking" for Smith's blue Cadillac. She found her son's car near a school at the corner of 9th Street and Maine. The car had "blood all over the driver's side" and on the wheels.

Smith's body was located on the curb at the corner of 13th Street and Maine. "Lots of blood" was found nearby, and "a tire track" was detected across the body, as though Smith had been run over by a vehicle. The "blood-stained tread marks" on the asphalt where Smith's body was found were consistent with the pattern of the Cadillac tires. Expended .44-caliber shell casings were discovered close to the victim and in his clothing. Numerous fingerprints were taken from the Cadillac, but none belonging to defendant were identified.

Witnesses who were present near the scene of the murder heard or observed some of the incident, but none of them identified any of the principals. Juan Trujillo, Wanda Parker, and Crystal DeVaughn were in a house on 13th Street ****559** and Maine the day of the murder.[FN2] They heard screaming outside that sounded like a frightened woman pleading "stop" or "let me go," and a "male voice" that sounded angry. A few seconds later a Black person with "dreads" was chased by another, heavier Black person, then numerous gunshots fired in quick succession were heard. The "person who had the dreads" was then seen lying in the street, twitching, before a blue Cadillac ran over his body and "kept going." Trujillo also told the police that he observed a "Black male," around "5 foot 9," walk along Maine Street and toss car keys to another person.

> FN2. Trujillo testified at the preliminary hearing, but was unavailable at trial. His preliminary hearing testimony was read into the record at trial.

Raymonde Magnier, who lived on the corner of 13th Street and Maine, heard shots outside her house. She looked through a window and observed "something down on the ground," which was "covered up," and a man walking past her house with a "gun in his hand." He was a "Black man," about 5 feet 10 inches tall, medium build, around 25 years old, wearing dark clothes. She did not identify defendant as the man with the gun.

Robert Jones, a landscape contractor "working at 15th and Florida that day," observed the shooting from three blocks away. He described the shooter as Black, 18 to 20 years old, with hair that was perhaps two and a half inches ***1544** long and may have been braided, wearing a hooded sweatshirt. The shooter was stand-

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ing with his arm extended, about five feet from the victim, who was sitting on the ground. The shooter was angry and walked around in a circle after he repeatedly shot the victim.

Brenda Murry lived at her grandmother's apartment on Marina Way near 13th Street and Maine when the shooting occurred. Buchanan was a family friend who came to the back door of Murry's residence on the day of the shooting, and mentioned that he was meeting her cousin there.[FN3] About two or three minutes later, gunshots were fired nearby, followed by police cars "flying down the street." Murry walked outside a minute or two later. Buchanan asked to use her phone and stayed in the apartment. Murry was only outside for "a couple of seconds" before she returned to the apartment. Buchanan was still inside, on the phone. Buchanan made a total of 23 calls on Murry's cell phone between 1:03 and 1:24 p.m., the last one to a taxicab company. He then left the apartment.

> FN3. Murry's cousin never appeared at the apartment that day.

Considerable evidence of cell phone use on the day of the shooting was presented, much of it from Philip Venable, a "high tech investigator" with the Contra Costa County Sheriff's Office, who qualified as an expert in cell phone records and call origins. Venable analyzed the records of calls made and received on the day of the murder for cell phones that belonged to defendant, the victim-who had Joanne Fountaine's phone the day of the murder-and Brenda Murry-whose phone was used by Buchanan. Multiple calls between Buchanan, using Fountaine's phone in the victim's possession, and defendant, initiated from both parties, began at 11:52 a.m., with a call from Buchanan in Oakland to defendant in Richmond, followed by a call from defendant to Buchanan one minute later. The calls between the two phones continued thereafter, and culminated in a call from Buchanan to defendant at 12:56 p.m., just before the murder occurred, during which a voice mail message was left. Some of the calls did not go ****560** through, others resulted in conversations or voice mail messages that lasted up to nearly three minutes. As time passed, the locations of the two phones, as revealed by the cell sites or towers where the calls originated, grew increasingly close, until the last call was registered "at the same cell site" on Harbour Way in Richmond, which indicated that the two phones were then in very close proximity to each other and to the scene of the murder. At 12:59 p.m., the victim's phone called Fountaine's home phone from the same cell site for a duration of just over one minute. Thereafter, no calls were registered between defendant's phone and the victim's phone.

Of the numerous calls made by Buchanan on Murry's phone immediately following the murder, seven attempted calls of two seconds or less in duration ***1545** were made to defendant's phone between 1:03 and 1:20 p.m. A connected call of very brief duration was made from defendant's phone to Murry's phone at 1:26 p.m. A total of 85 calls were made to the victim's cell phone after the murder from nearby cell phone sites, but none were answered.

Testimony was also received from witnesses who were with defendant on the day of the murder. His girlfriend, Jessica Stitts, recalled that defendant was "very withdrawn" that day due to the death of a friend. Stitts drove defendant in her car to Fairfield, then to the south side of Richmond. Defendant directed her to drive to 9th Street in Richmond, near the location where the victim's vehicle was found. She stopped the car, whereupon defendant got out of her car and "into another car" that "never moved," and talked to a friend. Stitts testified that defendant was out of her car for 10 to 15 minutes, although she "wasn't even paying attention." He then returned and they drove back to Fairfield.

Maritza Vande Voorde, a counselor at Contra Costa College, testified that defendant had a counseling appointment with her around 2:00 p.m. the day of the murder. He missed the appointment, so Voorde called defendant, and he subsequently returned her call. Defendant sounded "upset," and mentioned that a "friend of his was shot and killed" the day before.

Don Heidary was "very close" with defendant and his twin brother Karey since they were five years old. He regarded his relationship with defendant as similar to a godparent or uncle. In the days after the murder, Heidary learned that the police were looking for defendant in connection with the crime. Defendant said he had "nothing to hide," so Heidary advised him to "go to the police." Heidary and defendant's brother Karey then facilitated defendant's "surrender" to the police on the afternoon of August 25, 2005.[FN4] De-

fendant did not say anything to Heidary about the murder of Smith.

> FN4. Defendant was the subject of an arrest warrant for murder at the time, although no evidence was presented that he was aware of the warrant.

Heidary also testified that in numerous recorded telephone conversations during defendant's incarceration, they discussed some of the details of the case-particularly the nature of the evidence, the prosecution's witnesses, and defendant's relationship with Buchanan-but defendant did not refer to the murder or the calls that came to his cell phone from Buchanan. Investigator Daryl Jackson, an investigating officer in the case, interviewed Heidary and reviewed the numerous recorded phone conversations between him and defendant that took place following defendant's arrest. Heidary disclosed to Jackson that defendant "never told him of any relationship" with Buchanan, and did not give "an explanation" for the cell phone ****561** contacts with him on the day of the murder.

***1546** Paul Gaines considered the victim his "cousin," and was close to him. After the murder of Smith, Gaines was briefly incarcerated for a domestic violence charge that was subsequently dismissed. While he was in jail, he was in the same module with defendant and they were often in contact. On one occasion, in the context of a discussion of the consequences of crimes and incarceration, defendant stated, "I wish I never did what I did to be in here," and expressed that he was sorry. Defendant also mentioned that he "always kept" a handgun with him in his neighborhood, and had chased someone down in a park with his gun. While Gaines was incarcerated, he was not aware that defendant was associated with Smith's murder. When Gaines told defendant and other inmates the story of Smith's murder, however, and mentioned his name, defendant got a strange look on his face and thereafter no longer had any contact with Gaines during their joint incarceration. Gaines learned that defendant was accused of Smith's murder only after he was released. He then told his cousin Shira Dennis that "he was in custody with the guy" who killed Smith.

DISCUSSION

I. The Admission of Torry Buchanan's Preliminary Hearing Testimony.

Defendant argues that the trial court abridged his confrontation rights by admitting Buchanan's preliminary hearing testimony at trial. After Buchanan gave his testimony at the preliminary hearing, the prosecution decided to charge him with the robbery and murder of Smith. The use immunity granted to Buchanan at the preliminary hearing was withdrawn, and he asserted his Fifth Amendment privilege not to testify at trial. Over objection by the defense, the trial court then found that Buchanan was an unavailable witness and admitted his preliminary hearing testimony, which was read to the jury. Defendant complains that the procedure whereby the prosecution granted a witness and codefendant use immunity to procure preliminary hearing testimony, then revoked the immunity to make the witness unavailable at trial, denied him the "right to cross-examine his co-defendant before his jury."

[1][2][3][4][5] We begin our analysis with recognition of an unassailable constitutional premise: " '[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, ... to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538, 3 Cal.Rptr.3d 145, 73 P.3d 1137.) The "right of confrontation is not absolute, however [citations], 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [Citation.]" ***1547**(*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1138-1139, 99 Cal.Rptr.2d 149, 5 P.3d 203; see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 515, 194 Cal.Rptr. 431, 668 P.2d 738; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1257, 212 Cal.Rptr. 216.) In particular, the right of confrontation "does not preclude the prosecution from proving its case through the prior testimony of a witness who is unavailable at trial, so long as the defendant had the right and the opportunity to cross-examine the witness during the earlier proceeding at which the witness gave this testimony." (*People v. Cudjo* (1993) 6 Cal.4th 585, 618, 25 Cal.Rptr.2d 390, 863 P.2d 635.) " 'If a witness is unavailable at trial and has testified at a ****562** previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.' [Citations.]" (*People v. Seijas* (2005) 36 Cal.4th

291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.)

[6] Also indisputable is the principle that a witness, upon proper assertion of the privilege against self-incrimination, is unavailable as a witness at trial. (*People v. Duarte* (2000) 24 Cal.4th 603, 609-610, 101 Cal.Rptr.2d 701, 12 P.3d 1110.) "Evidence Code section 240, subdivision (a) defines unavailable witnesses as any of five types of witnesses. A witness who is exempted from testifying on the ground of privilege is defined as one type." [FN5] (*People v. Williams* (2008) 43 Cal.4th 584, 625, 75 Cal.Rptr.3d 691, 181 P.3d 1035.) "A witness who successfully asserts the privilege against self-incrimination is unavailable to testify for these purposes." (*People v. Seijas, supra*, 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.) Here, Buchanan successfully asserted the privilege at trial. The fact that he did not assert the privilege at the preliminary hearing did not foreclose him from doing so at trial. (*Id.* at p. 303, 30 Cal.Rptr.3d 493, 114 P.3d 742; *People v. Malone* (1988) 47 Cal.3d 1, 23, 252 Cal.Rptr. 525, 762 P.2d 1249.)

> FN5. Evidence Code section 240, subdivision (a) provides in full: "(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is any of the following: [¶] (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant. [¶] (2) Disqualified from testifying to the matter. [¶] (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity. [¶] (4) Absent from the hearing and the court is unable to compel his or her attendance by its process. [¶] (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

[7] We recognize that " '[t]o be found unavailable on this ground, a witness must not only intend to assert the privilege, but also be entitled to assert it.' [Citation.]" (*People v. Seijas, supra*, 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.) The witness in the case before us had been charged with murder before trial, and his use immunity had been revoked by the prosecutor. The trial court correctly concluded that Buchanan "reasonably apprehended danger if he testified." (*Id.* at p. 306, 30 Cal.Rptr.3d 493, 114 P.3d 742.) Also indisputable is that Buchanan asserted he would refuse to ***1548** testify as to any matter to which he had testified at the preliminary examination. (*People v. Farmer* (1983) 145 Cal.App.3d 948, 951, 193 Cal.Rptr. 788.) We find, as did the trial court, that Buchanan was entitled to assert the privilege, and defendant does not suggest otherwise.

More difficult issues related to admissibility of Buchanan's preliminary hearing testimony remain: whether defendant had an adequate opportunity to cross-examine Buchanan at the preliminary hearing; and whether the prosecutor acted improperly by procuring the unavailability of the witness. The facts pertinent to the witness's assertion of the privilege are essentially undisputed, so we independently review the trial court's ruling that declared the witness unavailable. (*People v. Seijas, supra*, 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.)

A. Defendant's Opportunity to Cross-Examine the Witness.

[8][9] Defendant objects that he was not given an "adequate opportunity to cross-examine" Buchanan at the preliminary hearing. Under the recognized exception****563** to the rule that a criminal defendant has the right to confront the witnesses against him (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), the testimonial statements of witnesses absent from trial may be " 'admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' [Citations.] Evidence Code section 1291 codifies this traditional exception. [Citation.] When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]' [Citation.] [¶] Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is 'unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' " (*People v. Wilson* (2005) 36 Cal.4th 309, 340-341, 30 Cal.Rptr.3d 513, 114 P.3d 758; see also *People v. Gonzales* (2005) 131 Cal.App.4th 767, 774, 32

Cal.Rptr.3d 172.)

[10][11] "The recent decision of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], although changing the law of confrontation in some respects, left these principles intact." (*People v. Seijas, supra,* 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.) " '[A]s long as a defendant was provided the *opportunity* for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective.' [Citations.]" ***1549**(*People v. Carter* (2005) 36 Cal.4th 1114, 1173-1174, 32 Cal.Rptr.3d 759, 117 P.3d 476; see also *United States v. Owens* (1988) 484 U.S. 554, 559 [108 S.Ct. 838, 98 L.Ed.2d 951].) "[A] prior opportunity to cross-examine a witness who has become unavailable is considered an adequate substitute for present cross-examination at trial." (*People v. Jones* (1998) 66 Cal.App.4th 760, 766, 78 Cal.Rptr.2d 265.)

"Under these rules," the California Supreme Court has " 'routinely allowed admission of the preliminary hearing testimony of an unavailable witness.' [Citation.]" (*People v. Seijas, supra,* 36 Cal.4th 291, 303, 30 Cal.Rptr.3d 493, 114 P.3d 742.) Here, the preliminary hearing and trial proceedings were of the "same type, i.e., criminal, the trial strategy (discredit the witness and claim innocence) was the same; the potential penalty (incarceration) was the same; and the issue and parties were the same." (*People v. Gonzales, supra,* 131 Cal.App.4th 767, 775, 32 Cal.Rptr.3d 172; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 850-851, 64 Cal.Rptr.2d 400, 938 P.2d 2.) Our review of Buchanan's preliminary hearing testimony also reveals that defense counsel undertook a thorough and effective cross-examination of the witness. Buchanan's numerous prior fabrications, his motives to falsify, and his own potential culpability for the murder, were comprehensively explored at the preliminary hearing.

Defendant nevertheless complains that several factors demonstrate the inadequacy of his opportunity to cross-examine Buchanan at the preliminary hearing. First, he points out that the cell phone records so consequential to the prosecution's effort to ****564** substantiate Buchanan's version of the murder were not available to the defense until after the preliminary hearing. He maintains that without prior discovery of the cell phone records his counsel "was unable to investigate them before the preliminary examination," and therefore could not properly cross-examine Buchanan on a matter "which constituted almost the sole arguable corroboration of Buchanan's testimony."

[12][13] We are not convinced that the cross-examination of Buchanan by the defense at the preliminary hearing was compromised by the lack of prior access to cell phone records. " '[A] defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars....' [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 293-294, 74 Cal.Rptr.3d 605, 180 P.3d 351.) At the preliminary hearing the defense was aware that the victim's cell phone was found in the car after the murder, and on cross-examination defense counsel probed Buchanan's testimony that he used the victim's cell phone to contact defendant. Thus, the defense had a reason and at least the opportunity to elicit testimony from Buchanan about the extent of his cell phone conversations with defendant at the preliminary ***1550** hearing. We also do not think any cross-examination of Buchanan on the subject of cell phone records by the defense at trial would have resulted in a more successful challenge to the reliability of his testimony.[FN6] (See *People v. Wilson, supra,* 36 Cal.4th 309, 345-346, 30 Cal.Rptr.3d 513, 114 P.3d 758.) " 'As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity.' [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 611-612, 134 Cal.Rptr.2d 1, 68 P.3d 302.) Further, at trial the defense had the cell phone records, and managed to engage in cross-examination and argument as to their import in the case.

> FN6. We also note that in light of the circumstances we can at least speculate that for tactical reasons the defense did not want to engage in questioning Buchanan about the number and content of his phone conversations with defendant before or after the

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murder.

We also disagree with defendant's assertion that cross-examination of the witness at trial was necessary to bring out "whether Buchanan was expecting or being given any benefits in his own case in exchange for his testimony." The defense had the opportunity to cross-examine Buchanan at the preliminary hearing about any advantage he expected to receive from his testimony at that proceeding. When circumstances changed at trial the defense fully explored the matter of any promise of leniency through the cross-examination of officers at trial. By that stage of the proceedings the prosecution elected not to grant Buchanan immunity, and thus had no reason to offer him leniency. Nothing in the record suggests any sort of preexisting arrangement, either explicit or implicit, between Buchanan and the prosecution. Additionally, defendant does not allude to any evidence of favors offered the witness by the government. Cross-examination of Buchanan at trial about his cooperation with law enforcement would not have significantly altered the jury's view of his credibility. (See **565*People v. Wilson, supra,* 36 Cal.4th 309, 345, 30 Cal.Rptr.3d 513, 114 P.3d 758.)

[14][15] Nor are we receptive to defendant's claim that "the jury should have been able to observe Buchanan's demeanor" at trial, particularly in light of his fabrications to the police and denial of a "gay relationship" with the victim. Live testimony of a witness, which grants the trier of fact an opportunity to observe demeanor, is always preferable to former testimony, but no more so in the present case just because the witness may have falsely denied complicity in the crime or had some form of intimate relationship with the victim. The preference for face-to-face cross-examination at trial has been found to be outweighed by recognized competing interests that warrant dispensing with the right of confrontation under circumstances where the defense had the opportunity to cross-examine the witness at the previous hearing with an interest and motive similar to that which he has at the subsequent hearing. (*Ohio v. Roberts* (1980) 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597; *1551*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1434, 105 Cal.Rptr.2d 504.) "[I]t is settled that the preference for live testimony gives way when the witness properly invokes the privilege against self-incrimination and a prior appropriate opportunity for cross-examination existed." (*People v. Williams, supra,* 43 Cal.4th 584, 623, 75 Cal.Rptr.3d 691, 181 P.3d 1035; see also *People v. Reed* (1996) 13 Cal.4th 217, 225-226, 52 Cal.Rptr.2d 106, 914 P.2d 184.) The inability of the jury to view Buchanan's demeanor at trial did not negate his status as an unavailable witness.

B. The Refusal of the Prosecution to Grant the Witness Immunity.

[16] We move to defendant's contention that the prosecutor committed misconduct by failing to grant Buchanan immunity at trial, and the trial court therefore erred by finding that he was an unavailable witness. He relies on Evidence Code section 240, subdivision (b), to argue that where the unavailability of a witness is procured by the proponent for the purpose of preventing the witness from testifying, the witness is not unavailable. The definitions of an unavailable witness specified in subdivision (a) of Evidence Code section 240, are expressly subject to an exception "provided in subdivision (b)." Subdivision (b) of Evidence Code section 240 (section 240), provides: "A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying." Defendant claims that the "prosecutor's acts of granting, and then withdrawing, immunity" to Buchanan constituted "wrongdoing" that "procured" the unavailability of the witness. He asserts that the evidence shows the prosecutor "intentionally" withheld immunity from the witness "simply for the purpose of keeping Buchanan unavailable, so he could read Buchanan's former testimony to the jury. This testimony establishes the purpose prong in [section] 240(b), namely, that the prosecutor withdrew the immunity grant in order to prevent Buchanan from testifying" at trial.

Our inquiry proceeds from the established premise that neither the prosecution nor the trial court was obligated to confer immunity upon Buchanan at trial. The courts have "recognized that the power to confer immunity is granted by statute to the executive, that is, to the prosecution (see [(Pen.Code,] § 1324)), and have questioned whether a trial court possesses inherent authority to grant such immunity." **566(*People v. Stewart* (2004) 33 Cal.4th 425, 468, 15 Cal.Rptr.3d 656, 93 P.3d 271.) In fact, the California Supreme Court has definitively declared: "The

grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant. [Citations.] Similarly, we have expressed reservations concerning claims that trial courts possess inherent authority to grant immunity [citation], and even assuming ***1552** the court possesses such authority, it has been recognized only when the defense has made a showing that a *defense* witness should be afforded immunity in order to provide clearly exculpatory testimony." (*People v. Williams, supra,* 43 Cal.4th 584, 622-623, 75 Cal.Rptr.3d 691, 181 P.3d 1035.)

The federal due process test, which essentially mirrors the California standard delineated in section 240, subdivision (b), also recognizes the " 'exclusive authority and absolute discretion' " vested in the prosecution to grant immunity to a witness, and intrudes upon that discretion only where the prosecution violates the defendant's right to a fair trial by refusing to grant use immunity to a witness whose testimony would have been relevant " 'with the deliberate intention of distorting the fact-finding process.' " (*United States v. Straub* (9th Cir.2008) 538 F.3d 1147, 1156; see also *Williams v. Woodford* (9th Cir.2004) 384 F.3d 567, 600; *Woods v. Adams* (C.D.Cal.2009) 631 F.Supp.2d 1261, 1279-1280.) *Intentional* distortion of the fact-finding process requires government action that amounts "to something akin to prosecutorial misconduct." (*United States v. Straub, supra,* at p. 1157.)

[17] We therefore focus on the prosecutor's motives for withholding immunity from Buchanan. In so doing, we do not find that the unavailability of the witness was procured by the prosecutor's misconduct for the wrongful purpose of preventing his testimony at trial. To establish a violation of his confrontation rights through misconduct by the prosecutor that resulted in the deprivation of testimony of a witness, the defendant must establish three elements: first, prosecutorial misconduct that was entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify; second, the prosecutor's misconduct was a substantial cause in depriving the defendant of the witness's testimony; and third, the testimony defendant was unable to present was material to his defense. (*People v. Lucas* (1995) 12 Cal.4th 415, 457, 48 Cal.Rptr.2d 525, 907 P.2d 373; *People v. Woods* (2004) 120 Cal.App.4th 929, 936, 16 Cal.Rptr.3d 174.)

The record before us demonstrates only that the prosecutor elected not to grant Buchanan immunity in the aftermath of his distinctly incriminating testimony at the preliminary hearing. In response to argument by the defense that Buchanan was not unavailable, the prosecutor merely expressed that he was not required to grant the witness immunity and did not intend to do so. Nothing in the record indicates that the prosecutor acted for the improper purpose of intentionally rendering Buchanan an unavailable witness at trial. And in fact, other legitimate reasons are explicable for the prosecutor's decision to decline to extend Buchanan's use immunity to testimony at trial. No charges were pending against Buchanan when he testified at the preliminary hearing, and he had previously given false statements to the police that ***1553** did not implicate him in the murder.[FN7] In ****567** light of Buchanan's conflicting versions of the incident and the lack of any testimony from him before the preliminary hearing, a grant of immunity at that point in the proceedings was at least understandable to obtain some testimony from him. Once Buchanan's testimony at the preliminary hearing firmly established his own guilt as well as that of defendant, the prosecutor may have justifiably concluded that the witness was no longer a worthy candidate for a grant of immunity. He was then charged with the robbery and murder before defendant's trial. A reasonable person simply cannot argue that after the testimony at the preliminary hearing, the prosecutor was precluded from charging Buchanan, or, alternatively, awarding him use immunity at trial. Denial of a grant of immunity or leniency to Buchanan in exchange for his testimony at trial was not "wholly unnecessary to the proper performance" of the prosecutor's duties, but rather was an appropriate tactical decision and exercise of executive discretion. (*People v. Woods, supra,* 120 Cal.App.4th 929, 937-938, 16 Cal.Rptr.3d 174.)

> FN7. We realize that Buchanan also made a statement just before the preliminary hearing that incriminated him in the murder. However, he was not charged before his preliminary hearing testimony was given.

Also, the record here is devoid of any evidence suggesting to us in any way that threats, intimidation or coercion was exerted upon Buchanan by the pros-

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ecution that precluded him from making a free and voluntary choice not to testify. (See in *Woods v. Adams, supra,* 631 F.Supp.2d 1261, 1281-1282; *Davis v. Straub* (6th Cir.2005) 430 F.3d 281, 287.) The prosecution did not intentionally distort the fact-finding process by taking affirmative steps to prevent Buchanan from testifying or grant immunity to other witnesses while denying immunity to him.[FN8] (*United States v. Whitehead* (9th Cir.2000) 200 F.3d 634, 640, cert. denied, 531 U.S. 885, 121 S.Ct. 202, 148 L.Ed.2d 141.)

> FN8. The failure of the prosecution to continue the trial to resolve the charges against Buchanan was not in our view an affirmative step to prevent him from testifying.

In the absence of any evidence before us of the prosecutor's improper motive or other misconduct that resulted in Buchanan's assertion of his privilege against self-incrimination, we cannot conclude that the prosecutor acted with the specific objective of preventing the witness from testifying within the meaning of section 240, subdivision (b). Nor did the admission of Buchanan's prior testimony violate defendant's rights to confrontation and due process. (*People v. Woods, supra,* 120 Cal.App.4th 929, 938-939, 16 Cal.Rptr.3d 174.) Therefore, Buchanan was an unavailable witness and his preliminary hearing testimony was properly admitted at trial without any statutory or constitutional violation. (See *People v. Smith, supra,* 30 Cal.4th 581, 612, 134 Cal.Rptr.2d 1, 68 P.3d 302.)

1554 II. The Admission of Evidence that Defendant Failed to Explain the Telephone Contacts with Buchanan.

Defendant also argues that evidence of his "post-arrest silence" was admitted without objection by his counsel. (*Doyle v. Ohio* (1976) 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (*Doyle*).) The evidence challenged by defendant is testimony from investigator Daryl Jackson, who interviewed Don Heidary. Jackson also listened to the more than one hundred recorded telephone conversations between defendant and Heidary after defendant was arrested. Jackson testified that he discussed with Heidary the incriminating cell phone records of calls between defendant and Buchanan. Heidary stated to Jackson that defendant "never had an explanation" for ****568** the cell phone contacts with Buchanan on the day of the murder, and "never told him of any relationship" with Buchanan. Jackson asked Heidary about defendant's relationship and phone contacts with Buchanan to determine if he "had an innocent explanation for some of the facts in this case," but defendant "never gave [Heidary] that information." [FN9] Defendant claims that the inquiry into his postarrest silence was improper, and his attorney provided ineffective assistance by failing to object to investigator Jackson's testimony.

> FN9. Heidary similarly testified that defendant told him Buchanan was perhaps a "distant relative," but "that there wasn't a close relationship" between the two of them. In conversations with Heidary, defendant also did not mention any cell phone conversations with Buchanan. Heidary testified that he did not "remember specifically" any conversation with defendant in which he explained the use of his cell phone on the day of the murder, or provided a reason for calling the victim's cell phone. According to Heidary, he and defendant never discussed "any facts" related to the day of the murder. No objection to Heidary's testimony was made by the defense.

Defendant forfeited any challenge to the admission of the evidence by failing to object at trial, so we proceed to his claim of ineffective assistance of counsel. (*People v. Huggins* (2006) 38 Cal.4th 175, 198, 41 Cal.Rptr.3d 593, 131 P.3d 995; *People v. Hughes* (2002) 27 Cal.4th 287, 332, 116 Cal.Rptr.2d 401, 39 P.3d 432.) "The standards for ineffective assistance of counsel claims are well established. 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations] or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 261, 133

Cal.Rptr.2d 18, 66 P.3d 1123; see ***1555** also *People v. Frye* (1998) 18 Cal.4th 894, 979, 77 Cal.Rptr.2d 25, 959 P.2d 183.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215, 66 Cal.Rptr.2d 123, 940 P.2d 710; see also *In re Jones* (1996) 13 Cal.4th 552, 561, 54 Cal.Rptr.2d 52, 917 P.2d 1175.) Further, " 'When ... the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons.... Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729, 97 Cal.Rptr.2d 871, 3 P.3d 248.)

[18] Counsel's performance must be evaluated by determining whether the testimony elicited by the prosecutor from investigator Jackson violated the principles in *Doyle*. "Defense counsel's performance cannot be considered deficient if there was no error to object to." (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520, 275 Cal.Rptr. 810 (*Eshelman*).)

[19] "In *Doyle*, the United States Supreme Court held that it was a violation of due process and fundamental fairness to ****569** use a defendant's postarrest silence following *Miranda*[FN10] warnings to impeach the defendant's trial testimony. (*Doyle, supra*, 426 U.S. at pp. 617-618 [96 S.Ct. 2240].)" (*People v. Collins* (2010) 49 Cal.4th 175, 203, 110 Cal.Rptr.3d 384, 232 P.3d 32; see also *People v. Earp* (1999) 20 Cal.4th 826, 856, 85 Cal.Rptr.2d 857, 978 P.2d 15.) "Post-arrest silence also may not be used against a defendant at trial in order to imply guilt from that silence." (*Stone v. United States* (6th Cir.2007) 258 Fed.Appx. 784, 787.) "The Supreme Court has explained the rationale of this holding in these terms: '[The] use of silence for impeachment [is] fundamentally unfair ... because " *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him.... *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." ' [Citation.]" (*People v. Evans* (1994) 25 Cal.App.4th 358, 367, 31 Cal.Rptr.2d 20; see also *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1092, 73 Cal.Rptr.2d 203.)

FN10. *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*).

[20][21] "The prosecutor cannot use the defendant's invocation of his right to remain silent or refusal to answer questions as evidence against him. [Citations.] Particularly, the defendant's silence may not be used to impeach his credibility. [Citations.] [¶] To establish a violation of due process under *Doyle*, the defendant must show that the prosecution inappropriately used his postarrest silence for impeachment purposes and the trial court permitted the prosecution to engage in such inquiry or argument." ***1556**(*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448, 37 Cal.Rptr.3d 122.) "To assess whether these questions constitute *Doyle* error, we ask whether the prosecutor referred to the defendant's post-arrest silence so that the jury would draw 'inferences of guilt from [the] defendant's decision to remain silent after ... arrest.' [Citation.]" (*Smith v. Jones* (6th Cir.2009) 326 Fed.Appx. 324, 330.)

[22][23] The Attorney General argues that the *Doyle* rule does not compel "suppression of statements to *private parties* not involved in official interrogation." (Italics added.) The mere fact that defendant's silence was exhibited to a private party rather than in response to police questioning does not necessarily preclude a constitutional violation. "[E]ven outside the context of custodial interrogations, silence remains constitutionally protected if it appears to be an assertion of the right to remain silent." (*People v. Jennings* (2003) 112 Cal.App.4th 459, 473, fn. 2, 5 Cal.Rptr.3d 243.) Rather, we must examine "the circumstances surrounding defendant's post- *Miranda* silence. *Doyle* need not apply to defendant's silence invoked by a private party absent a showing that such conduct was an assertion of his rights to silence and counsel. [Citation.] On the other hand, when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights, then *Doyle* should apply." (*Eshelman, supra*, 225 Cal.App.3d 1513, 1520, 275 Cal.Rptr. 810; see also *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842, fn. 2, 13 Cal.Rptr.2d 703.)

The distinction is demonstrated by two cases. In

Eshelman, supra, 225 Cal.App.3d 1513, 1520, 275 Cal.Rptr. 810, after the defendant was released on bail he refused to respond to his girlfriend's questions, in part expressly because his attorney told him not to speak to the witness before the trial. The court concluded that the defendant's silence exhibited his "reliance****570** on his constitutional rights to silence and counsel," and thus *Doyle* error occurred. (*Eshelman, supra,* at p. 1521, 275 Cal.Rptr. 810.) Importantly, the defendant in *Eshelman* expressly advised his girlfriend that he could not discuss the case based on legal advice.

In contrast, in *People v. Medina* (1990) 51 Cal.3d 870, 889, 274 Cal.Rptr. 849, 799 P.2d 1282, not long "after defendant's arrest his sister ... visited him in jail," and asked, " 'why did you have to shoot those three poor boys?' Defendant initially made no response," but "later indicated he did not wish to talk about the matter." The "record fail[ed] to show that defendant was given *Miranda* warnings prior to his conversation with his sister." (*Id.* at p. 890, 274 Cal.Rptr. 849, 799 P.2d 1282.) The court concluded that "in the context of the present case, where defendant was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims. [¶] The record does not suggest that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right." ***1557** (*Ibid.*) The court added: "We are not here concerned with, and do not address, the situation in which an in-custody, *Mirandized,* suspect is confronted with an accusatory statement in circumstances where he may be presumed to suspect the monitoring of his conversation." (*Id.* at p. 891, 274 Cal.Rptr. 849, 799 P.2d 1282.)

Without an objection by defense counsel to the admission of investigator Jackson's testimony, the record in the present case is a bit ambiguous. In contrast to *Eshelman,* no evidence was adduced that directly reflects upon defendant's motivation for declining to discuss the case with Heidary. Nothing indicates that in his conversations with Heidary defendant expressed his intent to invoke his constitutional rights, as did the defendant in *Eshelman.* Heidary and investigator Jackson both merely testified that defendant did not mention any facts related to the case, and specifically did not offer any explanation of his relationship or cell phone contacts with Buchanan. Apparently, these were not topics of conversation. However, the perspective of the conversations suggests that defendant may have at least been aware of his right to silence. He was speaking with Heidary while he was incarcerated, and during their conversations institutional warnings were repeated that "everything you say here is being recorded." Although Heidary could not recall if defendant's attorney advised him "never to discuss the facts" of the murder, he acknowledged "that very well could have happened" because he had not "done that." While defendant did not adduce explicit evidence that his silence was induced by his counsel's advice, as did the defendant in *Eshelman,* the context of defendant's recorded phone conversations with Heidary are indicative of an exercise of his constitutional rights to silence and counsel.

[24][25][26] Assuming that defendant's failure to discuss the facts of the case with Heidary was an assertion of his right to remain silent, we must determine if *Doyle* error was committed. "An assessment of whether the prosecutor made inappropriate use of defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument." (*People v. Champion, supra,* 134 Cal.App.4th 1440, 1448, 37 Cal.Rptr.3d 122.) Defendant did not make any statements to the police or testify at trial, so investigator Jackson's testimony was not offered for impeachment purposes. "But the principles of *Doyle* apply even if a defendant does not take the stand in his own defense ****571** thereby subjecting himself to potential impeachment. A defendant is entitled to rely on the assurance when he is ' Miranda-*ized*' that his silence will not be used against him. The *Miranda* warnings are deemed to have induced the silence." (*United States v. Fambro* (5th Cir.2008) 526 F.3d 836, 841, fns. omitted.) The United States Supreme Court has " 'consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him.' *Fletcher v. Weir,* 455 U.S. 603, 606 [102 S.Ct. 1309, 71 L.Ed.2d 490] (1982) (*per curiam*). The *Miranda* warnings had, after all, specifically given the defendant both the ***1558** option of speaking and the option of remaining silent-and had then gone on to say that if he chose the former option what he said could be used against him. It is possible to believe that this contained an implicit promise that his choice of the option of silence would *not* be used against him." (*Portuondo v. Agard* (2000) 529 U.S. 61, 74-75,

120 S.Ct. 1119, 146 L.Ed.2d 47.)

[27] The evidence of defendant's silence during conversations with his friend Heidary was offered to demonstrate that defendant did not discuss an innocent explanation for the incriminating evidence of the cell phone records-or, for that matter, any other facts related to the case-under circumstances in which he may have been expected to do so. During closing argument, the prosecutor mentioned that defendant's discussions of the case with Heidary, particularly "when the preliminary hearing was going on," presented him the "opportunity to explain the evidence" to his "dear friend." The prosecutor then argued that if the jury found defendant's "[s]ilence in the face of that" indicated a "consciousness of guilt," "it's something you can consider." The prosecutor added: "In the face of an accusation, silence or lies or feigned unawareness can show a consciousness of guilt, [as] it does in this case." Also, investigator Jackson's testimony was not presented in an effort to rebut other statements made by defendant or any claim that he was not given the opportunity to explain his failure to discuss the matter. (Cf. *United States v. Ross* (9th Cir.2005) 149 Fed.Appx. 670, 673; *Hall v. Scribner* (N.D.Cal.2008) 619 F.Supp.2d 823, 844; *People v. Champion, supra,* 134 Cal.App.4th 1440, 1451-1452, 37 Cal.Rptr.3d 122.) Rather, with the investigator's testimony the prosecutor on his own initiative urged the jury to draw an adverse inference of guilt from defendant's postarrest silence. [FN11] By drawing attention to the fact that defendant never explained the phone calls to Buchanan or mentioned the other facts of the case to Heidary, the prosecutor violated the precepts of *Doyle.* (See *United States v. Whitehead, supra,* 200 F.3d 634, 639; *United States v. Lopez* (9th Cir.2007) 500 F.3d 840, 845.)

> FN11. In *United States v. Robinson* (1988) 485 U.S. 25, 32, 108 S.Ct. 864, 99 L.Ed.2d 23, the United States Supreme Court explained: "Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, ... the privilege against compulsory self-incrimination is violated. But where ... the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege."

[28][29] We turn our focus to an examination of the prejudicial impact of the admission of evidence in violation of *Doyle,* and the prosecutor's associated misconduct by arguing that defendant's silence exhibited consciousness of guilt. The test of prejudice is the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705: we must reverse the judgment unless beyond a reasonable doubt the error complained of did ****572** not contribute to the verdict. (*United States v. Williams* (9th Cir.2006) 435 F.3d 1148, 1163; *People v. Waldie* (2009) 173 Cal.App.4th 358, 366, 92 Cal.Rptr.3d 688***1559** (*Waldie*); *People v. Champion, supra,* 134 Cal.App.4th 1440, 1453, 37 Cal.Rptr.3d 122.) " 'When deciding whether a prosecutor's reference to a defendant's post-arrest silence was prejudicial, this court will consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt.' [Citation.]" (*United States v. Lopez, supra,* 500 F.3d 840, 845.)

Testimony and argument that defendant did not mention the facts of the case to Heidary had negligible probative value at best. The admission of investigator Jackson's testimony that briefly recounted his interviews with Heidary was even less significant, as it was merely cumulative to the much more comprehensive testimony on the same subject by Heidary.[FN12] The United States Supreme Court has observed that "In most circumstances silence is so ambiguous that it is of little probative force." (*United States v. Hale* (1975) 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99; see also *Doyle, supra,* 426 U.S. 610, 617, 96 S.Ct. 2240 [silence is often "insolubly ambiguous"].) "[T]here may be several explanations for the silence that are consistent with an exculpatory explanation or the silence may be nothing more than the arrestee's exercise of his or her *Miranda* rights...." (*People v. Sutton* (1993) 19 Cal.App.4th 795, 799-800, 23 Cal.Rptr.2d 632.) In the present case, investigator Jackson's testimony was especially vague and unpersuasive as a form of adoptive admission or consciousness of guilt. Defendant was not confronted with any specific accusations or inquiries. Heidary did not ask defendant about the facts of the murder at all. He testified that in his conversations with defendant, they simply did not "bring it up." We are not evaluating evidence that the jury was likely to consider as incriminating silence in the face of an accusation. Instead, the testimony was that defendant never discussed the case in a setting where his conversations were recorded, and at a time

after his attorney advised him "not to talk about the facts." No perceptible probative value may be attributed to defendant's silence where he was not asked about any facts of the case or was otherwise placed in a position where his silence manifested an implied admission of guilt.

> FN12. Heidary was presented as a prosecution witness. He had several conversations with the defendant before he was arrested. On direct and on cross-examination, the attorneys questioned Heidary regarding any factual information defendant provided concerning the homicide. Defendant has not challenged the admission of Heidary's testimony in this appeal, or claimed that his counsel was incompetent for failing to object to it.

The trial court's instructions did not exacerbate the effect of the error. Quite the opposite is true. The jury was not directed to draw an inference of guilt from defendant's *silence.* (*People v. Medina, supra,* 51 Cal.3d 870, 890-891, 274 Cal.Rptr. 849, 799 P.2d 1282.) The consciousness of guilt instruction advised the jury: "*If* you find that before this trial the defendant made a *willfully false* or *deliberately misleading statement* concerning the crimes for which he is now being tried, ***1560** you may consider that statement as a circumstance tending to prove a consciousness of guilt." [FN13] (Italics added.) The court also ameliorated the impact of the evidence and misconduct with an instruction that defendant****573** had a constitutional right "not to be compelled to testify," and the jury must draw no inference of guilt from his silence to diminish the prosecution's burden to prove guilt beyond a reasonable doubt without his testimony. Thus, reliance by the jury on the instructions to consider defendant's silence for any purpose was extremely unlikely.

> FN13. As we view the record, the consciousness of guilt instruction was directed at defendant's pre- *Miranda* statements, not to his silence following his arrest.

While the prosecutor committed misconduct by asserting to the jury that defendant's "[s]ilence in the face" of discussions with Heidary could be considered as evidence of guilt, the focus of the prosecutor's argument of consciousness of guilt was upon defendant's silence *before* his arrest, both when speaking to "family and friends," and "in the face of an accusation" from a police officer. The prosecutor further stated that he was not "relying" on defendant's silence to establish the "whole case." The court also gave an instruction that statements made by attorneys during trial are not evidence, and must be disregarded to the extent they conflict with the instructions on the law.

Finally, the evidence of defendant's guilt was formidable, and was not based in the least on his failure to provide an innocent explanation of the charged crimes to Heidary. Identity of the murderer was the only seriously contested issue in the case. Buchanan's testimony, although inconsistent with his prior statements and laced with confusion, at least convincingly identified defendant as the perpetrator of the murder. Buchanan's account of the murder, when corroborated with the cell phone records, the physical evidence of the murder scene which indicated that the manner in which the murder occurred matched his description, and to a lesser extent the testimony of other witnesses-particularly the victim's mother-was credible to establish identity. The defense did not claim an innocent explanation for the cell phone calls to Buchanan. Instead, the defense challenged the credibility of the prosecution's cell phone record evidence with expert testimony in opposition that sought to dispute the accuracy of the records. Therefore, testimony that defendant failed to explain the cell phone calls did not contradict or damage his defense.

In view of the argument, instructions and the totality of the evidence, we conclude that beyond a reasonable doubt the admission of evidence of defendant's silence and the prosecutor's improper reference to it in closing argument did not influence the jury verdict. (See *United States v. Lopez, supra,* 500 F.3d 840, 846; ***1561***People v. Delgado* (2010) 181 Cal.App.4th 839, 853, 104 Cal.Rptr.3d 495; *Waldie, supra,* 173 Cal.App.4th 358, 367, 92 Cal.Rptr.3d 688.) Therefore, the error was harmless, and we find no prejudicial incompetence of counsel. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241, 69 Cal.Rptr.2d 784, 947 P.2d 1321.)

III.-IV. [FN**]

> FN** See footnote *, ante.

DISPOSITION

Accordingly, the judgment is affirmed.[FN16]

FN16. We have denied defendant's petition for writ of habeas corpus, A129565, by separate order filed this date.

We concur: MARGULIES, Acting P.J., and BANKE, J.

Cal.App. 1 Dist.,2010.
People v. Hollinquest
190 Cal.App.4th 1534, 119 Cal.Rptr.3d 551, 10 Cal. Daily Op. Serv. 15,751, 2010 Daily Journal D.A.R. 19,009

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PETITION DENIAL

Court of Appeal, First Appellate District, Division One - No. A124613

S190123

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KOREY HOLLINQUEST, Defendant and Appellant.

The petition for review is denied.
The request for an order directing depublication of the opinion is denied.

CANTIL-SAKAUYE
Chief Justice

S190124

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re KOREY HOLLINQUEST on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

KOREY HOLLINQUEST,

Petitioner,

v.

CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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KOREY HOLLINQUEST

The Petitioner, Korey Hollinquest, requests leave to file the annexed Petition for Writ of Certiorari to The Supreme Court of the United States of America without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39. The California Court of Appeal, 1st Appellate District, previously appointed counsel, Stephen Bedrick, to represent the Petitioner on an indigent basis. Petitioner has remained incarcerated since the commencement of his case and, on information and belief, is still indigent serving a life without parole sentence.

Date: June 23, 2011

Respectfully submitted,

The Law Offices of
Ronald Richards & Associates, APC

By:_____
RONALD RICHARDS, Esq.
Counsel of Record for Petitioner,
KOREY HOLLINQUEST

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
✓ Federal Express

I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 06/24/2011 declarant served the within: Petition for a Writ of Certiorari **upon:**

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San Francisco, California 94102-7004

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Washington, DC 20543-0001

I declare under penalty of perjury that the foregoing is true and correct:

Signature: Stephen Moore