SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent. vs. STANLEY BRYANT, DONALD FRANKLIN SMITH and LEROY WHEELER, Defendants and Appellants.	No. S049596 (Related Cases Los Angeles County Superior Court Nos. A711739 and A713611)

SUPREME COURT
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APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES

Honorable, Charles E. Horan, Judge

APPELLANT LEROY WHEELER'S OPENING BRIEF

(Volume 1, Pages 1-208)

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b)[1].)

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 97,548, not including tables, and thus is over the

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[1] All references are to the Penal Code, unless otherwise noted.

limit of 95,200 words of California Rules of Court, rule 36, subdivision (b). Appellant's request to exceed that limit is submitted for filing herewith.

INTRODUCTION

Appellant Leroy Wheeler, an adolescent, short-term, bit player in the Bryant organization, was forced to stand trial for multiple homicides with the organization's founders and key lieutenants. Their defenses were antagonistic to his. He was willing to stipulate that the organization was in the drug sales business. His codefendants were not. The latter provided justification for the prosecution to put on approximately 100 witnesses that described six years of criminal activity of the organization involving murder, attempted murder, assault, and witness intimidation as well as the business' core, all occurring long before Appellant Wheeler was employed by them.

The prosecution was permitted to construct a motive for the homicides on the fruits of an interrogation that denied appellant of his Sixth Amendment right of confrontation.

The extraordinary security precautions used throughout the trial created an aura of guilt over all the defendants that was reinforced by the prosecution's constant reminder of how dangerous Appellant Wheeler's employers were. Exacerbating the impact of these precautions, appellant was forced to endure the

five month trial strapped to a stun belt with 50,000 volts ready to be sent to his kidney if activated intentionally or by accident.

In the end, he was convicted solely upon the uncorroborated testimony of an accomplice, James Williams, with this outcome furthered by the prosecution's assertion of facts it knew or should have known were false.

STATEMENT OF THE CASE

By information, appellants and Codefendant Jon Settle were charged in five counts with the following:

Count one—murder (§ 187) of Chemise English,
Count two—murder of Loretha Anderson,
Count three—murder of Andre Armstrong,
Count four—murder of James Brown, and
Count five—attempted murder of Carlos English.

It was alleged in counts one through four that the murders were committed with malice aforethought and in count five that the attempted murder was committed with premeditation and deliberation. It was further alleged that counts one through four were special circumstances within the meaning of section 190.2, subdivision (a), (3). (CT2[2] 832-835.)

Appellant Wheeler pled not guilty and denied the allegations. (CT 5722, 5735.)

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[2] The record on appeal consists of the Clerk's Transcript and Supplements one through eight to the Clerk's Transcript. These are designated CT and CT1 through CT8 respectively.

On November 10, 1994, the court granted Settle's request for self-representation. (CT 13756, RT 6071-6088.) Thereafter, counsel for Bryant moved to sever Settle's case. Counsel for appellant joined in this motion. (RT 6129, 6144.)

Jury selection began on January 25, 1995 and a jury was impaneled on February 2, 1995. (CT 14398, 14429.) Jury deliberations on the guilt phase began at 9:05 a.m. on Thursday, May 11, 1995. (CT 15206.) On Wednesday May 17, 1995, the jury found Appellant Bryant guilty of counts three and four and found true the allegations that the murders were in the first degree. (CT2 837-838.) Three weeks later on June 8, 1995, the jury found Appellant Bryant guilty on the remaining counts and found Appellant Wheeler guilty as charged. The jury found that the murder counts were in the first degree and that the attempted murder was committed with premeditation and deliberation. Similar verdicts were returned for Appellant Smith with the exception that counts one and two were found to be murder in the second degree. (CT 15403-15437, RT 17070-17081.) The jury was unable to reach a decision on Codefendant Jon Settle and the court declared a mistrial. (CT 15443, 15454; RT 17137-67 to 17137-69, 17137-70.)[3]

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[3] On January 9, 1996, Settle pled guilty to four counts of manslaughter and one count of attempted murder. Settle admitted a special allegation pursuant to section 12022.5. (CT 16171.) On January 31, 1996, Settle was sentenced to state prison for a term of 21 years, 4 months, comprised of the following:

The penalty phase of the trial began on June 21, 1995. (CT 15604.) Jury deliberations began at 9:00 a.m. on Friday, July 7, 1995. (CT 15778.) On Friday, July 14, 1995, the jury fix the penalty at death for Appellant Wheeler on counts one through four. (CT 15256-15259, 15793-15794.) On July 24, 1995, the jury also fixed the penalty at death for Appellants Bryant and Smith. (CT 15851-15859.)

On October 19, 1995, the court denied Appellant Wheeler's motion for a new trial, declined to modify the verdict, and imposed the death sentence. (CT 16132-16135.)

STATEMENT OF FACTS

A. Guilt Phase

In the late afternoon of August 28, 1988, four homicides and an attempted homicide were committed at a residence at 11442 Wheeler Avenue, Lake View Terrace and are the basis for the convictions that are the subject of the instant appeal. The victims were Andre Armstrong, James Brown (also known as Tommy Hull), Loretha Anderson, and her daughter and son, Chemise and Carlos English.

Count 3, eleven years in prison, the principal term;
A consecutive term of two years pursuant to section 12022.5;
A consecutive term of two years for each of counts 1, 2, and 4, being, one-third of the mid-term sentence; and

However, the prosecution's case began with events that took place more than six years earlier that involved only Appellant Wheeler's codefendants.

1. PROSECUTION'S CASE FOR CODEFENDANTS' MOTIVE AND PROPENSITY

a. Jeff and Stanley Bryant's Relationship With the Victims

It was the prosecution's theory that the Bryant organization was involved in cocaine sales, and had employed Andre Armstrong in 1982 to kill Reynard Goldman and Kenneth Gentry in retribution for separate disputes the Bryants' had with Goldman and Gentry in the Bryants' cocaine sales business. Armstrong served a short prison service for his role in the homicide of Mr. Gentry. When he was released, he joined James Brown in Salinas, California, who was a friend he had met in prison. Brown had been selling cocaine in the Salinas area supplied by the Bryant organization. Shortly after Armstrong's arrival, Armstrong and Brown moved their operation to the Los Angeles area and Armstrong apparently made financial demands on Stanley Bryant for the services Armstrong had earlier provided the Bryants. Those services are described below.

GOLDMAN ATTEMPTED HOMICIDE: Reynard Goldman had been in the same grade as and went to school with John Bryant, Stanley Bryant's younger

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A consecutive term of two years and four months for count 5, being one-third of the mid-term sentence. (CT 16179, 16233, CT2 7108, CT4 143.)

brother. (RT 9243-9244.) Goldman starting smoking cocaine in his early twenties and quickly became addicted. (RT 9244.) When he first started using, he was employed at Lockheed, Burbank. Stanley Bryant also worked there. (RT 9245.) Goldman carpooled with Goldman's friend John Allen, who also worked there. (RT 9227-9228, 9245-9246.) Most of Goldman's wages went for cocaine. (RT 9246-9248.) Allen introduced Goldman to Jeff Bryant, and Goldman started buying his cocaine from him. (RT 9246.) He went to Bryant's house on Louvre Street, Pacoima to get it. (RT 9247-9250.) The house had a security cage at the entryway. (RT 9249.) Jeff Bryant drove a green Cadillac then. (RT 9251.)

When Goldman tried to quit using cocaine, he owed Jeff Bryant $50 (RT 9250-9251) and in early 1982 the debt was eight or nine months old (RT 9250-9251, 9289-9290.) Jeff asked him about it, and Goldman said he would pay him on his next payday. (RT 9251-9252, 9289-9290.) A week or two later, Jeff thought Goldman was dodging him and confronted him. (RT 9252.) Jeff told him to either pay him or his brothers or he had better get himself a gun. (RT 9253, 9291-9292.)

John Allen played baseball with Stanley Bryant. (RT 9229, 9340, 9344.) In March 1982, Stanley approached him and informed him that if Goldman did not

pay his brother the $50, his brother was going to get violent.[4] (RT 9228-9231, 9340.)

On April 23, 1982, shortly after 6:00 a.m., Goldman walked out of his house and saw a man he had not seen before sitting on the curb in front of his yard reading a newspaper. (RT 9253-9254, 9284-9285.) He later identified the man as Armstrong. (RT 9255-9256, 9325.) Goldman turned to get in his car and Armstrong started shooting at him. (RT 9257, 9262.) Two bullets passed his head, a third hit his arm, and a fourth hit him in the head after he had fallen to the ground. (RT 9257.)

At some time before Armstrong's preliminary hearing, Jeff Bryant's girlfriend, Rochelle, came to Goldman's house in the green Cadillac Goldman had seen Jeff drive. (RT 9261.) She offered to pay him $500 not to go to court. (RT 9262, 9299.) Goldman refused to take the money. (RT 9262.) John Allen told Goldman that he should take the money, because he might get hurt. (RT 9267-9268.)

GENTRY HOMICIDE: Michael Flowers told Officer Tucker that on May 22, 1982 he, Winifred Fisher, and Kenneth Gentry went to a house on Louvre Street in Pacoima and purchased an eighth ounce of coke from either John or

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[4] Allen told one of the prosecutors that he would not testify because he liked living. At trial, he denied this statement and denied telling Officer Tucker about

Roscoe Bryant. (RT 8860.) They later became dissatisfied with their purchase and returned to the house and asked for their money back. (RT 8860.) Roscoe Bryant informed them that he would have to consult with Jeff, and the three left. (RT 8860-8861.) Later on that evening, Flowers said they saw Jeff and followed him to Jeff's house. Jeff ran them off. (RT 8861.) They went to Roscoe's house on Willis Street and saw his van. They forced entry into it, tore out the dash board, and about that time Stan drove up and yelled at them. (RT 8862, 8873-8874.)[5] Gentry told his step-sister, Sofina Newsom, about the bad dope deal and being involved in vandalizing Roscoe Bryant's van. (RT 9170, 9185.) Winifred Fisher, who died the following year, affirmed similar facts to Detective Stachowski, when he interviewed her in June of 1982. (RT 8640-8645, 8647-8648, 8851.)

At about 4:30 in the afternoon of May 27, 1982, Gentry was working on his car in the parking lot of a large apartment complex on Pierce Street between Glenoaks and Borden in Pacoima. (RT 8789-8791, 8924, 8931, 9009-9010, 9148.) His car was backed into a parking stall and the hood was up. (RT 9010-9011.) Benny Ward was there and later told Officer Alfred that a brown Cadillac

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the threat. (RT 9228-9233, 9337-9339, 9348-9350.)

[5] Michael Flowers provided similar testimony at Armstrong's preliminary hearing. (RT 8841-8846.) At trial, Michael Flowers denied knowing any of the

drove by and Gentry said to him, "There goes those Niggers that I got a beef with. I ain't got my shit but I'd get down with them." (RT 8939, 8986-8987, 8991, 9001-9005, People's exh. 216, CT3 10619.) Gentry told Ward that Stanley was in the car. (RT 8987, People's exh. 216, CT3 10619-10620.)[6]

Sofina Newsom also lived in the apartment complex. Her living room window faced Pierce Street, and she saw Stanley Bryant drive slowly by in the Cadillac followed by a brown Volkswagen with a single occupant. (RT 9147-9150, 9155-9159, 9160-9161, 9172-9173, 9187-9188, 9199-9200.)

Barron Ward, Benny Ward's brother, as well as 30 or 40 others were also in and around the parking lot, which was not unusual for this apartment complex. (RT 9009-9010, 9031, 9036.) Shortly after Stanly Bryant had driven by (RT 8924, 8939), a tan Volkswagen drove in off of Pierce Street and rolled a little past Gentry's vehicle. (RT 8934-8935, 9011-9012, 9162.) Barron testified that its single occupant, a light skinned, kind of tall, African-American, got out, and pointed a gun at Barron. (RT 9013-9019.) Barron ran and heard a shot and then approximately two more shots. (RT 9014, 9019.) Gentry was shot three times in

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defendants or making the statements attributed to him by Officer Tucker in the latter's report. (RT 8828-8829, 8833-8837, 8839-8840, 8858-8859.)

[6] At trial, Benny Ward denied that he knew what had transpired before the shooting. (RT 8926-8931, 8939, 8985-8986.) However, he made the statements attributed to him in a recorded interview in 1992. (People's exh. 216, CT3 10619-

the head and twice in the upper torso as he was getting out of the driver's side of his car. (RT 8803-8804, 9832-8933.)

Barron Ward, Benny Ward, and Sofina Newsome saw the Volkswagen reach the corner of Pierce and Glenoaks. (RT 8934-8936, 9020-9022, 9035-9036, 9164.) Then Barron Ward and Sofina Newsom saw Jeff Bryant drive by in a green Cadillac. (RT 9020-9022, 9166-9167, 9183.) The green Cadillac was joined by a second Cadillac at the corner of Pierce and Borden. (RT 9023-9024.) Barron later told Officer Hernandez that Stanley Bryant was driving the other Cadillac. (RT 9042.) Barron told Hernandez that he saw the Bryant brothers talk to each other, and then drive off in different directions. (RT 9042.)[7]

Rhonda Miller, another occupant of the apartments, heard the gunshots from her kitchen. (RT 9065-9066.) After the shots stopped, she peered out her window and saw Gentry lying in the parking lot in front of his car and the driver of the Volkswagen was standing in the open door of the Volkswagen. (RT 9068-9070.) She noted the license number as he backed out of the parking lot. (RT 9071-9072, 9143.) She later identified Armstrong as the driver of the Volkswagen from a photographic lineup that she was shown. (RT 9090-9092, 9091, 9143.)

10620.) The tape of that interview was played for the jury. (RT 9001, 9004-9005.)

G.T. Fisher, Winifred Fisher's brother, told Officer Tucker that he and his brothers went to Neighborhood Billiards at 13179 Van Nuys Boulevard, the pool hall operated by the Bryants,[8] and told Stanly Bryant that if there was any attempt to hurt their sister, their family would retaliate.[9] (RT 8902-8903, 9341-9342.) Stanley responded that he would have to talk to his brother, Jeff. (RT 8903.)

Jeff Bryant, John Roscoe Bryant, Stanley Bryant, and Andre Armstrong were arrested. (RT 8808, 9144-9145, 9324-9325, 9330.) Armstrong was apprehended as he was riding a motorcycle that Stanley Bryant had been observed riding earlier. (RT 9327, 9330.)

Sometime thereafter, Jeff and Stanley Bryant's girlfriends, Rochelle and Tannis, respectively, came to Rhonda Miller's apartment. (RT 9093-9097, 9101-9102, 9341.) They gave her an envelope that contained $1,000. Rochelle said "Here. This is from my boyfriend" or "old man." (RT 9099, 9100, 9102.)

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[7] At trial, Barron Ward testified that he did not remember saying that Stanley Bryant was the occupant of the brown Cadillac and he had not said that they stopped and talked with each other. (RT 9025-9026, 9028, 9033-9035.)

[8] Officer Brown testified that he interviewed Stanley Bryant in 1985 and Stanley told him that he was a part owner of Neighborhood Billiards. (RT 9895-9896.)

[9] During appellants' trial, Fisher was interviewed in the prosecutor's officer. It was surreptitiously recorded. Fisher denied in his testimony that he told the prosecutor that he (Fisher) could be killed for testifying or that it was his voice on the audio tape of that interview. (RT 8887-8888, 8892, 8899, 8906, 8957-8963, People's exh. 216, CT3 10581-10600.) A tape of that interview was played for the jury. (RT 8954.)

Rhonda Miller later admitted to Reynard Goldman that she had gotten some money not to testify. (RT 9262-9263.)

A joint preliminary hearing was had for both the Goldman and Gentry shootings. The defendants were Stanley Bryant, Jeff Bryant, and Armstrong. At the preliminary hearing, Rhonda Miller testified falsely that Armstrong was not the man she had seen driving the Volkswagen. (RT 9104-9105, 9130-9131, 9337.)

Armstrong was ultimately convicted and sentenced for his role in the Gentry homicide, which placed him on a path to James Brown. Those facts follow.

ARMSTRONG: Only Armstrong's case went to trial. (RT 9344.) In 1983 he was convicted of first degree murder, but his conviction was reversed on appeal. Thereafter, he pled guilty to voluntary manslaughter and assault with a deadly weapon and received a sentence of nine years in state prison. (RT 9398-9402.)

In 1983, Detective Harley interviewed Armstrong while he was in prison and Armstrong told him that the Bryants hired him and he was paid $2,000 for the Goldman shooting and $15,000 for the Gentry shooting. (RT 9405-9408, 9413, 9439-9440, 9442.)[10] Armstrong told them that "the Bryants" were going to take

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[10] A tape of the interview was played to the jury. (RT 9414-9415, 9417-9418, People's exh. 216, CT3 10473-10545.)

care of his wife and child while he was in custody. (CT3 10505, 10518.) "They have to. 'Cause I, see I'm holdin' threats on them, you know." (CT3 10506.) "The fact that I can tell on them any day, and the fact that I can have them killed any day." (CT3 10506, 10519.) Armstrong told them that the Bryants had provided his wife with money to move out to Southern California. (CT3 10518.) Armstrong told them that the Bryants were lightweights and that anyone could come and take what they had away from them. (CT 10512.) Armstrong said he intended to bring his people out there and "squeeze them" (CT 10512), letting the Bryants know to save some for when Armstrong got out (CT 10512-10513.)

While in custody, Armstrong made frequent collect telephone calls to Mona Scott. (RT 9493, 9495.) Finally, she told him to stop calling because she could not pay the bills. He told her not to worry, if she needed cash he would take care of it. (RT 9495.) He told her a friend owed him, and he would make arrangements to get her money for her telephone bill. (RT 9495.) On one occasion he arranged a three-way telephone call with her and Stanley Bryant, who sent her to a residence on Judd Street to pick up the money. (RT 9496-9497.) Stanley invited her into the house, introduced himself, and gave her $400 in a brown paper bag. (RT 9497-9501, 9523.) A second time, he brought her $2,500 so she could visit Armstrong on a holiday weekend in January or February 1988. (RT 9501-9504, 9523-9526.)

Francine Smith went to school with the Bryants. (RT 9446-9447.) Either Stanley or Jeff asked her to write Armstrong while he was in prison (RT 9447-9448, 9454, 9463-9464) and provided her the funds so that she could visit him (RT 9448, 9457.) She also visited Armstrong once or twice while he was in the local county jail. (RT 9447-9448.) Armstrong told her that when he got out of prison, Jeff and Stanley would take care of him with money, a place to stay, and a car. (RT 9453.)

Records from Folsom State Prison indicated that while Armstrong was incarcerated there, Stanley Bryant, with an address of 12719 Judd Street, Pacoima, had sent him the following sums: $500 on October 4, 1983, $150 on January 31, 1984, $100 on August 17, 1984, $50 on December 7, 1984, $100 on March 5, 1985, and $100 on July 5, 1985. (RT 9476-9485.) Later in 1985, the prison employed a new system that no longer recorded from whom funds were received. (RT 9485-9486.) In 1988, Armstrong's sister also received funds from Stanley on four occasions that her brother said were to reimburse her for the collect calls she had taken from Armstrong. (RT 10516-10525, 10528-10533.)

Armstrong was released on parole on July 16, 1988 into the custody of St. Louis law enforcement officers who transported him to Missouri. They released him a few days later. (RT 9403-9404, 10472-10473.) He stayed with his sister Debora Marshall in St. Louis, Missouri for a couple of weeks. (RT 10471-10473.)

He told her he was going back to California. (RT 10473-10474.) Twice while he was staying with her, she picked up money for him from Western Union that had been sent in her name. (RT 10476-10478.)

BROWN, AKA HULL: Andrew Greer had been in prison in Missouri with Armstrong and James Brown. (RT 11567-11570, 11573.) The three of them became friends. (RT 11571-11574.) Brown escaped from a medium security work house in 1987. (RT 11572, 11574.)

In March 1988, Brown was using the name Tommy Hull and was living in a motel in Marina, California, near the Fort Ord Army base. (RT 11366-11368, 11375, 11575, 10500-10501.) Valerie Mitchell, Rodney Wiley, Lavonne Web, Albert Owens, and Andrew Greer[11] testified about this period at appellants' trial. Brown changed his residence a couple of times, with his last abode in an apartment in Salinas in June 1984. (RT 11369-11371, 11382, 11384-11387, 11431, 11433, 11435, 11526-11527, 11604-11605.) Homicide victim Loretha Anderson, nicknamed Kitty, and her two children, Chemise and Carlos English, moved in with him. (RT 11451-11452, 11527-11528, 11587-11588, 11615.) Brown earned his income from the sale of cocaine. (RT 11382-11383, 11431,

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[11] Greer received immunity for his involvement in this case. (RT 11649-11650, 11662-11663.)

11466.) He gave Valerie Mitchell a list of names to contact if he were ever arrested. Stanley Bryant's name was on the list. (RT 11372-11375.)

Rodney Wiley, who was the maintenance man at the motel in Marina where Brown had been staying, occasionally drove Brown in a borrowed vehicle. (RT 11383, 11431-11432.) Albert Owens, who was in the Army at the time, also drove for Brown in exchange for cash and/or cocaine. (RT 11475.) He drove Brown to Los Angeles. Just before they left, he heard Brown say on the telephone, "Stan, we're on our way down." (RT 11466-11467.) They drove to an apartment building on Laurel Canyon Boulevard, about a block from Saticoy, where they met a young male and female inside the apartment. (RT 11468-11470, 11561.) Brown then telephoned a pager and when a return call was received, Owens heard Brown say, "Stan, we're down here now." (RT 11470.) A short time later, Andrew Settle arrived and gave Brown about nine ounces of cocaine and Brown gave him $4,500. (RT 11471-11472, 11474-11475.) Owens made three more similar trips with Brown each separated by about 10 days. (RT 11476-11479.) Owens made the next trip by himself. (RT 11479-11482, 11508-11059.) He spoke by telephone with a man he believed to be Stanley Bryant who told him to watch for a red Volkswagen with a white convertible top, which he did, and Andrew Settle arrived a short while later and they consummated their transaction. (RT 11511-11515.)

After Andrew Greer was released from custody, he joined Brown in Salinas. (RT 11574-11578.) Owens made two more trips to Los Angeles with Greer, who had been introduced to him as Brown's brother from East St. Louis. (RT 11518-11521, 11537, 11581-11582, 11590-11591, 11598.) Again, they consummated the transaction with Andrew Settle who was driving the red Volkswagen. (RT 11523, 11538, 11582-11584.)

Owens and Greer made trips with Brown to the Western Union to send to or receive money from Stanley Bryant. (RT 11541-11542, 11599-11602, 13037-13038.) A former girlfriend of Brown received two sums from Western Union that had been sent by Stanley Bryant, whom she had never met. (RT 10500-10506.) Brown's mother testified that Brown had told her just before he was killed that some people in Los Angeles owed him a lot of money, and once he collected it, he was going to buy her a house. (RT 10724.) According to Loretha Anderson's brother, Brown had told her that he had money coming from an accident settlement. (RT 11458.)

ARMSTRONG AND BROWN/HULL: In July 1988, Armstrong arrived in Salinas. (RT 11528-11529, 11604-11605.) Prior to that, Owens had spoken with Armstrong several times when he called collect from Folsom prison. (RT 11529.) When Armstrong arrived, he was upset because Brown was supposed to have waited until Armstrong arrived before starting the cocaine operation. (RT 11530-

11531.) Armstrong thought Brown was dealing on too small a level, and Armstrong did not like the area. He wanted to go to Los Angeles, but not too close to Stanley because they wanted to operate on their own. (RT 11530-11531, 11547-11548.)

Armstrong had a sexual relationship with Stanley Bryant's former wife, Tanis Babineaux. (RT 10737-10738, 10741-10742, 11606-11609, 11631.) Greer testified that Armstrong said that Stanley Bryant owed him money for a hit he had committed for Bryant. (RT 11607.) Armstrong said he was going to get the money and that he was tired of being "nickel and dimed" by Stanley. (RT 11675.)

Just before the homicides in the instant case, Reynard Goldman heard a conversation with Codefendant Jon Settle present that Armstrong was making demands on the organization and that he was not going to be around too much longer. Jon Settle repeated that he would not be around much longer. (RT 9277-9278.)

Greer testified that Stanley made arrangements for an apartment for Armstrong and Brown on Laurel Canyon. (RT 11611.) At the end of August 1988, Armstrong, Brown, Greer, Loretha Anderson and her two young children, Chemise and Carlos, made the move to Los Angeles and arrived at Tanis' apartment after midnight. (RT 11611-11613.) They stayed in a hotel that night. (RT 11616.) They found that the apartment that had been arranged for them was

dirty and Armstrong wanted Stanley Bryant to pay for its cleaning. (RT 11619-11620.) That morning, Brown, Loretha, the children, and Greer went to the pool hall to try and meet Stanley, but were told that he was out of town. (RT 11617-11622, 11653, 11661-11662.)

Mona Scott testified that she met Armstrong and his friends for lunch. (RT 9511-9512.) Armstrong seemed anxious and frustrated. (RT 9515.) He talked about what Stanley owed him and that he only had so much time to produce. (RT 9515.)

Greer testified that the next morning, Brown and Loretha picked him up and they went to Tanis' apartment at about 11:00 a.m. (RT 11623-11625.) They discussed whether it was wise for Armstrong to be having a relationship with Tanis. (RT 11625.) They all smoked some "weed." (RT 11629.) Armstrong paged Stanley who called back. (RT 11629-11630.) Armstrong reported that they would meet Stanley at about 4:00 p.m. to pick up $500 to buy cleaning materials and paint so that they could clean the apartment. (RT 11630-11631.) Armstrong asked Tanis to get her pistol in case "the dude" did not give Armstrong the money. (RT 11631-11632, 11635, 11668-11670, 11672-11673.) She complied. (RT 11631, 11635, 11680-11681.) At about 4:00 p.m., Loretha, the children, Brown, and Armstrong left the apartment to meet Stanley to get the money. (RT 11635,

11653.) Greer was afraid and remained at the apartment. (RT 11634-11635, 11668-11670.)

b. 1986 and 1987 Keith Curry Incidents

Tannis Curry testified after being granted immunity. (RT 11840, 13050.) She confirmed that she had been married to Stanley Bryant, but stopped living with him in 1985. (RT 13080-13081.) Keith Curry testified that he met her in 1984 and started seeing her while she was still living with Stanley Bryant. (RT 11315-11317, 11328-11329.) In 1985, she moved into an apartment. (RT 11317, 13081.) Curry started spending three to four nights a week in her apartment. (RT 11317-11318, 11329, 13081.) At this point, he was open about his relationship with her. (RT 11327.) He had a 1972 Porsche. On the morning of March 15, 1986, after he had spent the night in her apartment, he came out to his car that had been parked in her parking stall. (RT 11318, 13081-13082.) He backed his car out, pulled forward a few feet and the car exploded. (RT 11319, 13081-13082.) A pipe bomb had been placed in the spokes of a wheel so that it would explode as the car began moving. (RT 11786, 11789.) Curry injured his left thigh that left an eight inch scar. (RT 11319.) He later married Tannis. (RT 11323.)

Gwendolyn Derby testified that she was getting her hair done in April 1986 at an establishment also used by Tannis. (RT 13095-13096, 13110.) She saw Tannis there and Tannis seemed agitated. Tannis told her that her ex-husband

placed a pipe bomb underneath her current boyfriend's car. She said her husband admitted it to her. (RT 13097-13098.) He told her that he would do it again until he was dead. (RT 13098.)[12]

On September 28, 1997, Curry was driving by himself from Tannis' mother's home in Lake View Terrace in Tannis' car. (RT 11320, 11337, 11339, 13660-13661.) Someone behind him was flashing his lights. (RT 11321.) Curry pulled over and the other car pulled alongside. (RT 11321, 11338. 11340.) The driver of the other car was Appellant Donald Smith, Curry's brother-in-law, married to Tannis' sister Elaine. Curry had met him a couple of times at Tannis' mother's house. (RT 11322-11323.) Smith's demeanor was calm and they were exchanging small talk. (RT 11324, 11328.) Then Curry heard two shots coming from Smith's car. He was shot in the neck and in the back of the arm. The bullet passed through his spine. (RT 11324-11325, 11342.) The shots came as a complete surprise. (RT 11354.) Curry did not know what happened thereafter and was taken to a hospital. (RT 11325.) He was in the hospital for six months. (RT 11325.) Shortly thereafter, he and Tannis separated. (RT 11325.)

Curry testified that he never met or spoke with Stanley Bryant. (RT 11329.)

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[12] At trial, Tannis denied making these statements attributed to her. (RT 13082-13083.)

Pierre Marshall, who at the time of his testimony was serving a 30 year sentence on a federal drug offense (RT 11748, 11757), testified that he knew both Curry and Stanley Bryant (RT 11749.) Marshall had a meeting with Stanley at a Burger King restaurant. (RT 11750, 11780.) Marshall arrived with seven guys with him (RT 11751, 11767) and Marshall was armed (RT 11782-11783.) Detective Vojtecky testified that he interviewed Marshall in May 14, 1992 (RT 11791, 11793) and the interview was recorded (RT 11796.) Marshall told him that when he walked into the Burger King, Stanley was already seated. As Marshall sat, Stanley held his (Stanley's) hands in a deformed shape around his (Stanley's) head, laughed, and said, "Remember how that nigger got paralyzed." (RT 11791.) Marshall said Stanley was referring to Keith Curry.[13] (RT 11792.) There were two reasons for Marshall's meeting with Stanley. Marshall's cousin, Derrick Johnson, owed the family for a half kilo and Marshall had slept with Jeff Stanley's wife a couple of years before. (RT 11792.) Word was on the street that there was a hit on Marshall. (RT 11792, 11805.)

c. Appellant Smith's 1987 Arrest

On September 29, 1987, Appellant Smith was observed at 2:00 a.m. driving on the Ventura Freeway near Reseda. He was weaving and exceeding the speed

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[13] At trial, Marshall denied making the statements attributed to him about Stanley's reference to Curry. (RT 11752, 11754-11756, 11765.)

limit. (RT 10099-10102, 10115.) A highway patrol officer turned on his red light and initiated a traffic stop. (RT 10101.) Appellant Smith resisted and was pursued for 45 minutes during the course of which he was observed to throw plastic baggies out of the window. (RT 10101-10110, 10123-10126.) When he was apprehended, a .357 magnum handgun and 18 small bags containing a substance resembling rock cocaine were found in his car. (RT 10112-10114, 10121, 10126-10127.) The revolver had no live rounds in it and one expended casing. (RT 13655-13657.) Smith was under the influence of some stimulant, like cocaine. (RT 10121-10122.)

It was stipulated that Smith was not in Los Angeles County when Curry's car was bombed. (RT 13656-13657.)

On December 3, 1987, a $200,000 bond was posted for Appellant Smith's release after the attempted murder of Keith Curry. (RT 11399, 11404-11405.) Five properties were given as security for the bond. Among them, Wilbert and Dessie Babineaux put up 11673 Kismet Street, Lake View Terrace, and Jon Settle put up 13574 Corcoran Street and 11516 Vanport Avenue. (RT 11403-11405, 11410-11417, 13024, 13026-13027.)

d. The Bryants' Organization

A great deal of the appellants' trial was devoted to evidence about the Bryants' cocaine sales business. Officer Dumelle testified that in 1984 the Bryant

family became the focus of the Northeast San Fernando Valley Division's attention. (RT 9627-9631, 9635-9636, 9663.) In his opinion, the organization's members were Jeff Bryant, Stanley Bryant, Roscoe Bryant, Eli Bryant,[14] Antonio (Tony) Johnson, and members of the Settle family, but he did not know which members. (RT 9635-9636, 9703-9704.) The organization was headed by Jeff Bryant and the organization was alternatively called the Jeff Bryant Family. (RT 9662-9663.)

In 1985, Officers Lambert, Dumelle, and five other officers formed a squad to target the "Black dopers" in the Pacoima area. (RT 9874-9877.) Officer Lambert testified that in 1988 there were between 125 to 150 people in the organization. (RT 9891.) In his opinion, the organization was still operating at the time of appellants' trial. (RT 9914.) The organization used a pool hall owned by the Bryants to inform customers where they could buy drugs. (RT 9950.) A code was used, for example, "The boys are playing ball at Hansen dam," The ballgame is at Adelphia," etc. (RT 9950.) They would set up operation at one of these locations for six to eight hours, shut it down, and go to another location. (RT 9950-9951.) That went on for a period. Then they bought residences and fortified them. (RT 9951.)

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[14] Eli Bryant was a deputy sheriff employed at the custody division of the men's central jail. (RT 9583, 9670.)

ORGANIZATION PROPERTIES: Officer Uribe and Officer Dumelle testified that the Bryant family was associated with well-fortified rock houses in the Lake View Terrace, Pacoima area. (RT 9536-9537, 9657.) They had wrought-iron enclosed entries with electronically activated locks that controlled ingress and egress. The buyer was "buzzed" in and out. (RT 9537.)

Over the course of four years and prior to the offenses in the instant case, search warrants were executed on six dates. The first was on June 27, 1984 on four residences located at 13031 Louvre Street, 10731 and 10743 DeHaven, and 12719 Judd. (RT 9582-9583, 9636-9637.) The latter three addresses were the residences of Eli, Jeff, and Stanley Bryant, respectively. (RT 9583, 9636-9637, 10624-10625, 10645-10646.)

At 13031 Louvre Street, in front of the wooden door was a steel frame with a black screen with a mail drop in the center of the door. They pried the door open. (RT 9588-9589.) All the windows were barred as was the back door. (RT 9591.) Later, they found that keys seized from Jeff Bryant fit the Louvre Street residence. (RT 9590, 9596-9597.) It was stipulated that the residence was owned by Jeff and his wife, Rochelle. (RT 9597-9598, 9669.) In the bathroom was a crock pot with hot oil. Approximately 75 individual bindles were in the oil. (RT 9591, 9593.) It was tipped over and the bindles were recovered. (RT 9591.) The substance resembled cocaine. (RT 9591.) A shotgun with barrels shortened and

loaded with .00 buck was near the front door. (RT 9591.) A police scanner tuned to West Valley Police frequencies was in the living room. (RT 9592.) The residence had only a small amount of furniture and no clothes, food, or cooking utensils. (RT 9593.) The occupant, Danny Miles, was arrested. (RT 9594.) He had been locked in the residence with no ability to get out. (RT 9594, 9598.)

Next, the officers went to the residences on DeHaven. At 10743, Jeff's residence, they recovered a small amount of substance resembling cocaine, a half kilo of white powder used in cutting narcotics, close to $6,500 in currency, and tax documents and payment books for three houses at 13031 and 13037 Louvre Street and 11442 Wheeler Avenue. (RT 9594, 9598, 9638-9640.) At Eli's residence at 10731 DeHaven they found a safe in Eli's bedroom containing $20,000.[15] (RT 9596, 9598.) Nothing of note was seized at Stanley's residence on Judd. (RT 9639, 9671, 9705.)

On January 22, 1985, a search warrant was executed on the residence at 11442 Wheeler. (RT 9983.) The front door was equipped with an electronically controlled steel-grated door and there were bars on all of the windows. (RT 9983, 9986-9987.) A SWAT team assisted in gaining entrance by prying open the front door. (RT 9984.) After passing through the front door, there was a second steel-

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[15] Eli was not arrested and at the time of appellants' trial was still employed by the sheriff's department. (RT 9599.)

grated door with a slot through which a sale could be consummated. (RT 9985-9988.) In the bathroom 46 bindles of a substance resembling cocaine were found in the toilet bowl. (RT 9985, 9987-9988.) There was a 12 gauge shot gun in the living room and $300 were found. (RT 9985, 9988.) It was apparent that nobody was living there. (RT 9986.)

On February 6, 1985, a search warrant was executed on the residence at 13037 Louvre Street. At the front door there was a wrought-iron enclosure with remotely activated electric locks that controlled ingress and egress. (RT 9641.) The door had blackout mesh so that you could not see in, but the occupants of the residence could see out. (RT 9642.) There was a second steel door at the front door. (RT 9643.) A SWAT team used the Police rescue vehicle, better known as a battering ram, to put a hole into a front bedroom of the house and the team gained entry through that hole and arrested the occupants. (RT 9642.) The room that they punched into had a solid core door with double cylinder dead bolts locking it off from the rest of the house. (RT 9644.) Equipment for converting powder cocaine to rock cocaine was found as well as apparent evidence of recorded transactions and a grant deed in the name of Jeff Bryant. (RT 9644-9646, 9662, 9665.) Shortly thereafter, Antonio Johnson arrived and said the house and the car in the driveway were his. (RT 9647, 9665.)

On March 5, 1985, a search warrant was executed on the residence at 13031 Louvre Street. (RT 9604, 9610-9612, 9668-9669.) A SWAT team was again employed to remove portions of the enclosure at the entry and some of the barred windows to gain entry. (RT 9548, 9550-9552.) Kenny Reaux was arrested there. (RT 9552, 9555, 9604, 9668-9669.) A crock pot was found containing a pound or pound and one-half of cocaine. (RT 9553-9554, 9613.) It was used to destroy the contraband. (RT 9613.) There was no indication that anyone was living there. (RT 9553.) Evidence of recorded transactions and a receipt for a locksmith in the name of Jeff Bryant were found there. (RT 9554, 9556.)

In March 1985, Officer Dumelle conducted surveillance of Neighborhood Billiards and conducted several searches of the business. (RT 9660-9661.) There was not much traffic to the business and it did not appear that they were making their money by shooting pool. (RT 9661.) On March 18, 1985, when Dumelle went into the pool hall, Stanley Bryant was behind the counter and there was no one else was in the pool hall. (RT 9661-9662.)

On March 22, 1985, a search warrant was executed on the residence at 11442 Wheeler. (RT 9647, 9610-9612.) A battering ram was used on the entrance enclosure. (RT 9651-9652.) Two crock pots with warm oily substance likely holding cocaine were found as well as a notebook with recorded transactions. (RT 9652-9653, 9656-9657, 9660.) Kenny Reaux was there and

again arrested. (RT 9631, 9652-9653, 9669.) The house was sparsely furnished and there was no indication that anyone was living there. (RT 9653.) Two bedrooms had iron grates with black mesh and dead bolt locks that closed these rooms off from the rest of the house. (RT 9654-9655.) In one of the bedrooms there was plywood over the window. (RT 9655.) There was a box of shotgun shells and a one gallon bottle of Wesson oil on the floor of the living room. (RT 9656.) Officer Dumelle testified that the use of hot oil for destruction of contraband was a unique. (RT 9657.)

Kenny Reaux told the officers he had been recruited by Stanley Bryant at the pool hall and was told that he would be paid approximately $200 for working an eight hour shift. (RT 9632.) While he was in custody, the Bryant family was taking care of his bills and family. (RT 9719-9720.) He said Stanley had driven him to the house that day at about 2:30 p.m. in his white Audi. (RT 9632.) He said he did not want to talk anymore because Jeff Bryant would kill him. (RT 9632, 9702, 9706.) Jeff was not yet in prison. (RT 9702.) Officer Dumelle testified that Jeff would continue to control the organization from prison and that Stanley would be in charge on the street. (RT 9702-9703, 9707.)

Two locksmiths and a carpentry contractor testified that Antonio Johnson and/or Stanley Bryant hired them to enhance the security at the Louvre Street and Wheeler Avenue residences. (RT 9676-9681, 9683-9692.)

On April 18, 1985, a search warrant was executed on Stanley Bryant's residence at 12719 Judd Street, Pacoima. (RT 9538-9539.) Nine one-gallon Wesson Oil containers were seized; oil had been found in crock pots at two of the residences that had been searched earlier. (RT 9541, 9544.) Two items bearing the address of 11442 Wheeler were found (RT 9545-9548) as well as a receipt for locksmith work at 13031 Louvre Street (RT 9548-9549) and some weapons (RT 9560-9562.)

The court took judicial notice that in 1985, in felony case A810867, narcotic charges were filed against Jeff and Stanley Bryant and Kenny Reaux. (RT 9706.) Ultimately Jeffrey was convicted by his plea of operating a house wherein narcotics were dealt at 11442 Wheeler Avenue and selling or transporting cocaine. Stanley was convicted by his plea to conspiracy to sell or transport cocaine. In that plea he admitted the following acts: he recruited Kenny Reaux to work in the rock house that he and Jeff were running, that he told Reaux that he would receive $200 for working an eight-hour shift selling cocaine there, that Reaux had 137 grams of cocaine in his possession there, and that Reaux attempted to destroy the cocaine by putting it in a crock pot containing hot oil. (RT 9706, 9730-9732.)

Jon Settle owned a house at 11516 Vanport Avenue. (RT 10661-10662, 11403-11405, 11410-11417.) It had a steel front door and bars on the doors and

windows. (RT 9107-9108.) Drugs were sold there through a slot in the front door. (RT 9742-9743, 9771.) In 1987, Una Distad, a drug user, had a sexual relationship with Jon Settle. (RT 9738-9741, 9744-9742, 9770.) He paid her to transport for him oil cans or tennis cans containing drugs from his residence to the Vanport house. (RT 9748-9749, 9757-9758, 9771-9773.)

According to the records of the Southern California Gas Company for the timeframe in question, persons listing their employer as neighborhood billiards were the applicants for utilities at 11442 Wheeler Avenue. (RT 10625-10627.) Florence Bryant and Nash Newbill were the applicants for 13031 Louvre Street. (RT 10628-10630.) Antonio Johnson was the applicant for 13037 Louvre Street. (RT 10630-10631.) According to the records of the County Recorder's Office, real estate division for the timeframe in question (RT 10639-10641), the title to the real estate where Neighborhood Billiards is located as well as 11442 Wheeler Avenue and 13031 and 13037 Louvre Street were in the name of Jeff Bryant. (RT 10644-10645, 10650, 10652-10655.)

ORGANIZATION CONSUMERS: After he was shot, Goldman started using drugs again and bought them from some of the same sources that he had used before. (RT 9266.) He was familiar with Family or Neighborhood Billiards on Van Nuys Boulevard. Goldman testified that you could find out there where you could buy drugs. (RT 9266-9267, 9297.) Goldman had seen Jon Settle in

Family Billiards a couple of times. (RT 9267.) He bought drugs from Settle a couple of times at a house in the town of Lake Guiterrez. (RT 9267, 9279-9280, 9311, 9313.) Settle did not personally hand him the drugs. (RT 9312.) Other people were there, but he did not remember who they were, or was unwilling to identify them. (RT 9312-9313, 9318-9319.)

Francine Smith unsuccessfully tried to buy drugs with a $10 bill she had altered to look like a $100 bill. (RT 9449-9450.) Thereafter, she went to a party in December, 1986. While there, she went outside and was beaten about the head and neck with a two sticks with a chain in the middle. (RT 9450-9451.) She did not know the person that beat her. (RT 9450.) Stanley was standing there as this was being done. (RT 9451-9452, 9470.) A few days later, she saw Stanley and he said that she was lucky to be alive because if they had not know her so well she would be dead now. (RT 9452-9453, 9459, 9462.)

ORGANIZATION DISTRIBUTORS: Alonzo Smith testified that he began distributing cocaine for Stanley Bryant in 1986. (RT 10883-10888.) Smith delivered the drug to St. Louis to associates of James Brown (aka Tommy Hull.) (RT 10889-10896.) The money Smith made he sent to Stanley. (RT 10901, 10965, 10975.) Then, Smith went up to Monterey, California where he apparently had a brief role in James Brown's cocaine sales there. (RT 10902-10903, 10905-10908, 10910, 10972, 10974-10975, 10979.)

William Anthony Johnson, nicknamed Amp, testified that he distributed drugs in 1987 or 1988 for Stanley and Jeff Bryant. (RT 9990, 9993, 10085.) In 1987 he was arrested at a family run rock house. (RT 10009-10010.) He was sentenced to prison and was released in 1993. (RT 10086-10087, 10091-10092.) In an interview in 1994, Johnson expressed his fear about testifying. An audio tape of that interview was played to the jury. (RT 10215-10218, 10220, People's exh. 216, CT3 10601-10617.)

Haywood Kemp testified that he distributed cocaine to the Midwest. He got the drug from Ladell Player or Billy Fields. (RT 10054, 10056-10057, 10061-10062.) Player confirmed the relationship. (RT 10244, 10253, 10319, 10321, 10348.) In August 1988, Kemp made arrangements for the purchase of a kilo of cocaine powder for $14,500 to be delivered to Fields' apartment. (RT 10062-10065.) Kemp was at the apartment when it arrived. The product was delivered by Jon Settle. (RT 10063-10065.) Kemp was ultimately convicted for his involvement in the distribution of cocaine and at the time of appellants' trial, he was serving a sentence in another state. (RT 10055, 10071-10072.)

Ladell Player testified that he was selling narcotics in 1988, and he purchased in nine ounce quantities from the Bryant organization. (RT 10234-10236, 10239, 10247, 10337.) He said he could buy it cheaper elsewhere, but he got it from them because if he got it elsewhere Jeff or Stanley Bryant would kill

him. (RT 10338-10339.) Player made the purchases from Stanley. (RT 10236-10237.) He repackaged them and sold them on the street. (RT 10315-10316.) The arrangements were made at the Wheeler Avenue house in Lake View Terrace. (RT 10239.) Player would drop the money off at the house where he would see Antonio Johnson, Amp Johnson, Nash Newbill, and James Williams, whose nickname was Jay Baby.[16] (RT 10241, 10249, 10254, 10259-10260, 10316, 10586-10587, 10590.) Player would spend about 15 minutes at the house. (RT 10243.) He never saw anyone at the Wheeler house with a gun. (RT 10318.) Then, Player would go home and the drugs would later be delivered to him by Amp Johnson, Darrell Blaylock, or Andrew Settle. (RT 10242-10243, 10255, 10341-10342.) Player was ultimately convicted of a federal trafficking offense and faced a maximum life sentence without the possibility of parole. (RT 10245, 10270, 10305-10306, 10313.) The minimum possible sentence was 10 years. (RT 10306.) He got no guarantees for cooperating in this case, but he believed he would decrease his ultimate sentence by providing information. (RT 10270-10271, 10306, 10313-10314.) He was currently in a half-way house and released every day so that he could go to work. (RT 10344-10345.) In an interview in 1994, Player expressed his fear about testifying. An audio tape of that interview was played to the jury. (RT 10488-10492, People's exh. 216, CT3 10546-10570.)

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[16] Player also saw Appellant Wheeler there, as discussed in Part 2, below.

ORGANIZATION EMPLOYEES: Three of the organization's employees testified, Laurence Walton, George Smith, and James Williams. Laurence Walton went to prison for his activities in September 1988 at the Fenton Avenue residence and got out in 1990. (RT 9699, 10545.) Walton's account was provided through his testimony, through an account of an unrecorded interview by Officer Lambert, and through a recorded interview made at the time of appellants' trial, a tape of which was played for the jury. In the latter interview, Walton expressed his fear about testifying. (RT 10681-10682, 10688-10689, 10698-10700, People's exh. 216, CT3 10468-10472.)

Walton told Officer Lambert that the organization was made up of the Bryant and Settle brothers and was known as the Family. (RT 10689, 10691.) Stanley was the boss. (RT 10689, 10696, 10716-10717.) Walton testified that he probably met Stanley at the Neighborhood Billiards and he saw Stanley once or twice at the Wheeler house. (RT 10551.)

Walton said he operated one of the roving sales locations at Filmore Park, Hansen Dam, and others. (RT 10691-10692.) When he would move the location he would call the pool hall and tell them where the new location was. (RT 10560, 10692.) When he ran out of narcotics, either Anthony Johnson or Frank Settle would meet him with his supply. (RT 10692.) The narcotics were fronted him and he returned the income. (RT 10692.) When Walton worked at the Fenton

house, he took money in exchange for slips of paper that buyers would then take to a residence on Adelphia and exchange the paper for narcotics.[17] (RT 10547-10550, 10690.) Walton said he was paid $1,000 per week for this assignment. (RT 10696.) Walton admitted that he (Walton) had delivered large quantities of narcotics, up to a kilo, to particular people, like Billy Fields. (RT 10584.) He sometimes met Tony Johnson or William Settle at Hansen dam to get the drugs. (RT 10584.) They would tell him where to make the delivery. (RT 10584.) A little red company Toyota was used for the deliveries. (RT 10584-10585.)

George Smith's account was principally provided through the testimony of Officer Hernandez who had known George Smith for several years and had arranged his interview in April 1992 with Detective Vojtecky, Officer Lambert, and one of the prosecutors.[18] (RT 10837-10840, 11212-11213, 11226-11230, 11254-11257.) George Smith was offered immunity from everything except a homicide. (RT 11230.)

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[17] Anthony Arceneaux was the applicant for the utilities at the Adelphia residence and Eddie Barber was the applicant for the Fenton house. (RT 10634-10636.) Eddie Barber listed his employer as Neighborhood Billiards. (RT 10635.)

[18] At trial, George Smith denied making any of the statements attributed to him and denied that he had any relationship with the Family organization. (RT 10791-10800, 10801-10805, 10810-10815, 10847-10848, 10849-10850.)

Sometime between October 28, 1988 and November 29, 1988, Stanley held a meeting at the pool hall and established a schedule for those who had been assigned to staff the pool hall. (RT 10553, 10595, 10604, 10704.) James Williams, William Blaylock, Darrell Blaylock, Appellant Smith, and others were there.[20] (RT 10690, 10704.) The pool hall was kept open 24 hours a day during that period. (RT 10553-10554.) An earlier schedule was found at the Wheeler house crime scene. (RT 10713, 10758.)

Walton saw James Williams, Stanley, William Settle, Darrell Blaylock, Anthony Johnson and others working at the Wheeler Avenue house.[21] (RT 10591, 10598-10599, 10691.) Walton testified that Andrew Settle drove a red Volkswagen Rabbit convertible and Antonio Johnson drove a white El Camino with a burgundy top. (RT 10583.)

George Smith told his interviewers that Stanley hired him to work for the Bryant family. (RT 11214.) Bryant told him that nobody would fuck with him while he sold drugs, and if he got arrested, they could get him an attorney. (RT 11215.) Bryant told him that if Smith crossed Bryant or the family he would be in bad shape. (RT 11216.) Smith sold for them at Filmore Park. (RT 11214.) He said that Stanley Bryant or his brother Ross would circle Filmore Park to keep the

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20 Smith also saw Appellant Wheeler there, as discussed in Part 2, below.
21 Walton also saw Appellant Wheeler there, as discussed in Part 2, below.

competition away. They also hired some Inglewood and Los Angeles hoodlums to do the enforcing and they would rob the competitors. (RT 11217.) Smith said that Bryant had a .45 caliber automatic and a long barrel .44 magnum revolver that he kept either in his waistband, shoulder holster, briefcase, or in the console of his car. (RT 11217.)

George Smith was arrested in 1987 with a pound of cocaine. (RT 10811, 10834, 10865.) His case was ultimately dismissed. (RT 10866.) Stanley got an attorney for him, but George Smith owed the family approximately $9,000 and had to work it off. (RT 10867-10868, 11217-11218.) Thereafter, he worked at the pool hall directing buyers to the rock houses. (RT 11218-11219.) He also worked at the Wheeler Avenue house until his debt was paid, some time in April of 1988. (RT 11218, 11237-11238.) Officer Hernandez testified that George Smith told them that the family also used what they called poor houses, where they paid the occupant $100 or $200 a day to sell narcotics out of the house. (RT 11218-11219, 11244.)

George Smith said Codefendant Settle had sold narcotics to him on three occasions. (RT 11221.) Settle had numerous locations where he was selling drugs. At one point, Settle and his (Settle's) brothers branched out on their own and Stanley had a contract out to kill Settle. (RT 11245, 11250.) Settle paid $35,000 back to the family and returned to their good graces. Thereafter, they

worked together selling dope. (RT 11245, 11255.) At the time of the homicides, Settle's function for the family was that he handled kilos of cocaine and was described as being big time in the family. (RT 11221, 11255.)

Officer Hernandez testified that George Smith told him that Antonio Johnson worked the pool hall and that Johnson's primary job was to bail out family members that had been arrested. (RT 11221.) George Smith said that in 1988, Stanley Bryant ran the operations on the street for the family. (RT 11222.) The overall head was Jeff, who was in custody. (RT 11222.) George Smith said that Stanley let the power go to his head and that any time somebody in the family would screw up, he would say, "Oh, well, we'll have to kill them." (RT 11223.) The people that worked the rock houses were paid $1,000 per week, got a company car, and paid vacations. (RT 11242-11243.) George Smith said he had seen as many as nine or ten weapons at the Wheeler/cash house that included shotguns, an Uzi, and automatics. (RT 11251.)

2. PROSECUTION'S CASE THAT APPELLANT WHEELER WAS AN EMPLOYEE OF THE ORGANIZATION

Ladell Player testified that in 1986, he met Appellant Wheeler, who was selling drugs around some apartments. (RT 10253, 10308.) Appellant Wheeler's nickname was Slim. (RT 10241, 12112.)

The charged homicides occurred in 1988. According to organization employee Laurence Walton, Appellant Wheeler was first employed by the

organization in about June of 1988. Appellant was not so employed in 1986 or 1987. (RT 10588-10589.) Walton did not know what Wheeler's tasks for the organization were. (RT 10588-10589.)

Sometime in 1988, after Appellant Wheeler was hired, Stanley held a meeting at the pool hall and established a schedule for those who had been assigned to staff the pool hall. (RT 10553, 10595, 10604, 10704.) Appellant Wheeler was there along with numerous other organization employees. (RT 10690, 10704.) An earlier schedule was found at the Wheeler Avenue house, the scene of charged homicides. (RT 10713, 10758.) Player and Walton said that they saw Appellant Wheeler working at the Wheeler Avenue house. (RT 10241, 10259-10260, 10691.)

George Smith's account was principally provided through the testimony of Officer Hernandez. The latter testified that George Smith told him that Stanley treated Appellant Wheeler like a brother. Stanley got Appellant Wheeler some gold rimmed glasses and a bunch of gold chains. (RT 11219-11220, 11241, 11253.) Hernandez testified that George Smith told him Wheeler carried a .357 magnum, four inch, blue steel revolver with rubber grips. He also had an Uzi. (RT 11220.)

A photograph of Appellant Wheeler was displayed at least four times during the trial showing him wearing a cardboard crown and holding hundred

dollar bills. (RT 10574, 10870-10872, 11190, 12261, People's exh. 116.) Walton, George Smith, and James Williams said Appellant Wheeler drove a white Audi. (RT 10693, 10798, 10867, 12111.)

3. PROSECUTION'S CASE FOR THE CHARGED HOMICIDES

JAMES WILLIAMS: James Williams was the prosecution's only eyewitness to the events and their precursors that testified. He testified under a grant of immunity that he would not be prosecuted for anything having to do with his activities from April 1988 through the events on August 28, 1988. (RT 12278, 12387-12388, 12520, 12653.) At the time of appellants' trial, Williams was serving a five year sentence in federal custody for drug trafficking and possession of a firearm. (RT 12109, 12277-12278, 12595-12596.)

Williams first met Appellant Wheeler in the seventh grade; they went to school together. (RT 12111-12112.) Then he did not see him for a period of five or six years, until Williams was about 18 or 19. (RT 12112.) Williams was 19 at the time of the homicides. (RT 12112-12113.) Appellant Wheeler was about the same age. (RT 12113.) Detective Vojtecky testified that in October 1988 there were some similarities in the appearance of Appellant Wheeler and Williams. (RT 10614.) The principal difference between them was that Williams was substantially heavier. (RT 10615.)

Williams testified that he joined the Family organization on April 1, 1988. (RT 12109-12110.) He was hired by Nash Newbill. (RT 12117-12118.) Williams had sold rock cocaine in small quantities for two or three years prior to that. (RT 12110.) Stanley Bryant was the boss of the organization. (RT 12111.)

Williams worked at the pool hall a month or two, until he was promoted. (RT 12120.) His job at the pool hall was to direct addicts that they knew to where they could pick up drugs (RT 12120, 12124-12125), a location that changed (RT 12126.) They used Filmore Park, Hansen Dam, Poor Boys', and others. (RT 12126-12127.) He also kept the tables clean and sold chips and soda. (RT 12120.) He was paid $233 per week by Nash Newbill. (RT 12123, 12224.) There was only one person working in the pool hall during each shift. (RT 12124.) Williams never saw any of the drugs. (RT 12129.)

In a couple of months, Nash Newbill promoted Williams to the count house on Wheeler Avenue and a new salary of $500 per week. (RT 9822, 12130-12131, 12137, 12139, 12224.) The house was in a quiet residential neighborhood. (RT 12133.) There were bars on the doors and windows. (RT 12133.) Williams never saw drugs there. (RT 12130.) They received money that they counted, straightened, and bundled. (RT 12140, 12147.) They had a calculator and a money counting machine that could pick out counterfeit bills. (RT 12141.) The money was kept in a safe at the house. (RT 12225-12226, 12228.) He was taught

to bundle the one's with a rubber band in stacks of 25 and the other bills in stacks of 50. (RT 12228.) On paydays, there would be stacks of money with other people's names on them and, during the day, they would come by for their stack. (RT 12229.) Among them was Appellant Donald Smith, but prior to the homicides, Williams did not know what Smith did for the organization. (RT 12230-12231, 12234-12235.) Smith was paid a $1,000 per week. (RT 12231-12233.)

Williams worked at the Wheeler Avenue house continuously until August 28, 1988, the date of the homicides. (RT 12130.) Williams' lifetime and best friend, Lamont Gillon, also got promoted at the same time to the count house. (RT 12115, 12117-12118, 12120, 12131, 12663-12664.) Anthony Arceneaux, whose nickname was Ant Man, and Appellant Wheeler also worked shifts with Williams and Gillon. (RT 9959-9960, 10160-10161, 12132.) The four worked in the bedroom at the front of the house, the last door at the end of the hall. (RT 12141, 12145-12146, 12240, People's exh. 34.) Williams started on the 7:00 a.m. to 3:00 p.m. shift. (RT 12131.) He worked this shift all of the time. (RT 12137.) Gillon worked the 3:00 p.m. to 11:00 p.m. shift. (RT 12138.) Appellant Wheeler worked the 11:00 p.m. to 7:00 a.m. shift. (RT 12138.) They worked for three weeks and then had a week off. (RT 12137-12138.) Anthony Arceneaux took the shift of the

person who was off. (RT 9965-9966, 12138-12139.) Officer Lambert testified that Arceneaux was short and not heavy. (RT 10162.)

Williams testified that a company car would pick him up at the pool hall and drop him off at the house. (RT 12177-12178.) He would enter the house through the garage, using a garage door opener that was kept in the car. (RT 12282-12283.) Then he would use a key to enter the house from the garage. (RT 12283.) There was a steel door over this door. (RT 12283.) The man dropping him off would give him the key. (RT 12283.) When his shift ended, the car would pick him up. (RT 12177-12178.) Williams would give the house key to the next person. (RT 12283.) There was somebody there 24 hours a day. (RT 12131-12132.)

Williams testified that if somebody wanted to purchase drugs, they would give Williams the money. He would count it, make a telephone call, and have the buyer meet the person for the drugs. (RT 12149-12150, 12153.) Williams never knew where the other location was. (RT 12153.) He was shown the telephone number and told to memorize it. (RT 12153-12154.) The buyer was asked where he wanted the drugs delivered. (RT 12154-12155.) The person would call back and confirm that the drugs had been picked up. (RT 12149.) Williams would make a record of the transaction on a preprinted form. (RT 12149, 12157-12158.) The smallest amount sold from the house was about nine ounces, a quarter key.

(RT 12158-12159.) A quarter key was $4,500. (RT 12159-12160.) Williams never saw the drugs. (RT 12159.)

Williams testified that they would not answer the door at the house if they did not recognize the customer. (RT 12150.) For those that they recognized, Williams would push a button and they would step into the cage. An iron door would shut behind them. (RT 12151.) Then the front door would open and they would be let inside and they would go to the living room. (RT 12151.) Initially the procedure was to answer the door unarmed, but at some point he was instructed to go to the door armed. (RT 12235.) Stanley gave Williams a .45 to take to the door. (RT 12235-12236.) Usually the gun was on a table in the living room. (RT 12238.) Williams never had to use the gun. (RT 12237.)

Williams testified that Ladell Player and Billy Fields were regular customers. (RT 12158, 12166.) Stanley Bryant gave Williams his orders everyday. (RT 12141-12142, 12148.) Stanley came by usually on Sundays at 2:00 p.m. (RT 12148.) Stanley's barber would come over to the house and cut his hair. (RT 12148, 12698-12699.)

Williams testified that two or three weeks prior to August 28, 1988, he attended a meeting run by Stanley at the Wheeler Avenue house to discuss changing their operation. (RT 12243, 12247.) They were going to shut down the pool hall. (RT 12243.) Stanley said the police were close to catching on to what

they were doing. (RT 12243-12244.) Thereafter, the customer would have to take their money to the Fenton Avenue house, turn in the money, get a slip with a number on it, and go to get their drugs from another house. (RT 12244-12245.) When they had more than $1,000 at the Fenton house, they would call the Wheeler Avenue house and Williams would go pick up the money. (RT 12246-12247.)

THE INSTANT CHARGED OFFENSES: Williams testified that on Sunday, August 28, 1988, Appellant Wheeler picked him up in his white Audi, because the company car was not running at the time, and took him to the Wheeler Avenue house. (RT 12179-12180, 12282-12284, 12422.) Wheeler had the garage door opener. (RT 12284.) It was hot and Williams was wearing a white T-shirt. (RT 12376-12377, 12380.) Williams entered the house and sat down and watched television, as he normally did. (RT 12284-12285.)

At about 2:00 p.m., Stanley drove his blue Hyundai into the garage. (RT 12241-12242, 12285-12287.) Williams closed the garage door. (RT 12287.) Stanley entered the house, sat in the living room, and they engaged in small talk briefly, as they normally did. (RT 12287-12288.) Shortly thereafter, Stanley took the portable telephone and went to the bedroom with the safe. Williams stayed in the living room. (RT 12288.) At some point, Stanley came out and told Williams to page Anthony Arceneaux. (RT 12289.) Arceneaux was his 3:00 relief that day because Lamont Gillon was on vacation. (RT 12289, 10761.) Stanley told

Williams to tell Arceneaux to not come in. (RT 12290.) Williams relayed the message to Arceneaux and Arceneaux complied. (RT 12290.) Between 2:30 and 3:00 p.m., Appellant Wheeler arrived even though it was not his normal shift. (RT 12292, 12430.) He was driving a red Jeep. (RT 12314, 12423.) He was dressed nice like he usually dressed. (RT 12432-12433.) Appellant Wheeler was not carrying anything in his hands. (RT 12293.) Wheeler went to the back of the house with Stanley. (RT 12296, 12999-12300.) Donald Smith showed up sometime later. (RT 12294.) That was unusual. (RT 12294.) Smith was not carrying anything. (RT 12294.) Smith went straight to another room of the house. (RT 12300-12301.) All three were out of Williams' sight. (RT 12301.)

At some point, Stanley carried the money, counting machine, and the adding machine into the garage. (RT 12242, 12294.) Only the Hyundai was in the garage. (RT 12294.) When Stanley came back in he was carrying a green duffel bag that appeared to be heavy that he carried to the back of the house. (RT 12295.) Later, Stanley came out of the back of the house and said, "Where's Johnny? He's late." He did this more than once. (RT 12301.) Eventually, Appellant Jon Settle arrived. It was still daylight. (RT 12302.) Williams noted that these were not normal events, but he did not know what was going to happen. (RT 12302-12303.) Williams had never seen Jon Settle in the house before (RT 12303) and did not really know Smith or Settle (RT 12113-12114.) He had

crossed paths with Smith on two or three occasions, but had not been formally introduced. (RT 12113-12114.) He had heard of Settle and knew other members of his family. (RT 12114.) Williams at this point had not seen any other guns. (RT 12303.)

At some point, Williams heard a gunshot in the back of the house. (RT 12304.) Then, Stanley came out and asked him if he heard that, was it loud, did he think the neighbors would have heard it. (RT 12304-12305.) Stanley walked back to the back of the house. (RT 12305.) Later, Settle came into the living room and Williams heard him cock a shotgun. (RT 12305-12306.) It startled Williams. (RT 12306.) Williams turned and saw Settle kneeling down on the floor with the shotgun in his hand. (RT 12306.) Williams asked no questions, he figured it was none of his business. (RT 12307.) Williams saw that Wheeler had a pistol in his waist. (RT 12310-12311.)

Eventually, all three of them came out of the back of the house. (RT 12308-12309.) Wheeler asked Stanley if he was going to tell Williams. (RT 12310.) Stanley then told Williams that he wanted him to stand in the kitchen, near the buzzer by the window. When men walked up to the front of the house, he wanted Williams to holler out that they are here. (RT 12309-12310.) Stanley told him that someone else would let them in the house. (RT 12309.) He told Williams to wait for him to tell Williams to let him out with the kitchen buzzer

and once he could see Stanley was out of the house, he was to let go of the buzzer. (RT 12309, 12311, 12315-12316.) The small front porch was surrounded by a wrought iron enclosure with a metal door. There was a second metal door into the house. There were locks on both doors. (RT 8603-8604, 12279.) The outer most steel door was opened electronically from two places inside the house. One was at the front door and the other was in the kitchen. (RT 12279-12281.)

Williams was told to then exit through the garage, when he got to the end of the driveway, there would be a green car sitting there with a key in it. He told Williams to back the car into the garage. (RT 12311-12312, 12319.) Then, Williams was to walk off the property, down the driveway, turn left, walk to a bus stop, and take a bus to the pool hall. (RT 12317, 12319-12320.) Williams was to look around and see who was watching. (RT 12321.) Williams did not hear Stanley give instructions to Wheeler or Settle. (RT 12323-12324.) Williams testified that he had never seen a green car parked at the house before. (RT 12320.) One could only get out of the house if he had a key and exited through the garage. (RT 12315-12316.) Williams testified that at this point, he did not want to be there. (RT 12321-12322.) But, Williams believed he was in too deep, it was too late to back out. (RT 12322-12323, 12326-12327.) Williams did not have a gun. (RT 12327.) Williams saw them put on heavy, workman's gloves. (RT 12329, 12619-12622.) Williams was not given a pair. (RT 12330.)

Eventually, someone other than Williams shouted that they were here. (RT 12328.) A red Toyota Camry had parked at the curb and two men got out of the car and walked to the front door. (RT 12330-12336.) Williams did not see that they were carrying anything. (RT 12341.) Williams could not see the driveway. (RT 12330.) Williams heard someone let them in. (RT 12332-12333.) Then Williams lost sight of them because the entryway could not be seen from the kitchen. (RT 12328, 12333.) Williams heard them exchange greetings. (RT 12333-12334.) Williams heard no threats. (RT 12341.) Then he heard Stanley say, "All right, Jay. Let me out." (RT 12334-12335.) He said he was going to get some groceries. (RT 12334.) Williams pushed the button and saw Stanley leave the house. (RT 12335-12336, 12627-12628.) Williams began walking towards the kitchen door and heard one shot, a scream, and then two shots. (RT 12336-12337, 12433.) Williams went into the garage. (RT 12337-12338.) The blue Hyundai was in the garage. (RT 12338.) As he came out of the garage he almost ran into Wheeler. (RT 12338-12339.) Wheeler was holding a shotgun and moving pretty fast. (RT 12339.) Williams turned right to a big, old green car. He had never seen the car before. (RT 12340-12341, 12345) The key was in the ignition. (RT 12340-12341, 12434.) Williams backed the car into the garage. (RT 12342.) Wheeler turned to the left. (RT 12340.) To Wheeler's left was a gray truck and behind it was the red Toyota Camry. (RT 12999, 12581, People's

exhs. 22, 37.) He heard Wheeler holler, "A bitch in the car. Get out of the car, bitch." (RT 12342, 12581-12582.) Williams did not remember hearing gunshots, but he heard glass break.[22] (RT 12343, 12434.) The Hyundai was still in the garage. (RT 12343.) As Williams got out of the car, he saw Stanley standing next to the Hyundai. (RT 12343-12344.) Stanley said, "All right, Jay." (RT 12344.) Williams never saw Smith outside during this period. (RT 12344.) Williams then saw Wheeler pull in front of the driveway in the red car that the people had arrived in. (RT 12347-12348.) Wheeler stopped in front of the driveway. He looked at Williams and then drove west, straight up the street to Williams' right. (RT 12348-12350, People's exh. 22.)

Williams then left as he had been told. (RT 12346.) He turned left from the driveway and walked east toward Fenton Avenue. (RT 12347, People's exh. 22.) Williams looked for and saw people watching. They looked at him. He walked right past the lady that lived next door who was standing in her doorway with her kids. (RT 12346-12347, 12350-12351.) He walked down Fenton to Kagel Canyon Road. The bus stop was at Eldridge near the intersection of Eldridge and Kagel Canyon. (RT 12351-12353.) As Williams neared the

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[22] When he was arrested, he told the officers that he saw Appellant Wheeler with a shotgun break the window and shoot into the car, but that was not the truth; he did not know whether he shot. (RT 12642-12643, 12792, 12801, 12803.)

intersection of Wheeler and Fenton, he saw Appellant Wheeler in the red car coming down Fenton towards Kagel Canyon. Wheeler stopped, looked at Williams, and took off. (RT 12352.) As Williams was walking down Fenton, he saw Stanley drive by in the Hyundai. (RT 15353-12354) As Williams was walking up Kagel Canyon, he saw the green car with Settle and Smith in it. (RT 12355-12356.) As Williams approached the bus stop, he saw Stanley again in his Hyundai. (RT 12357.) He was coming from the direction of the 7-11. (RT 12358-12359.)

Lucila Esteban, a neighbor, lived at 11433 Wheeler Avenue, on the south side of Wheeler Avenue, two houses east of the crime scene. (RT 8436, People's exh. 22.) She testified that from her kitchen window she saw a tall, thin black man between the ages of 25 and 30 running from the house wearing gloves and holding a rifle (RT 8436-8440, 8444, 8446, 8449, 8467, 8477.) He was a little taller and had a little darker complexion than Codefendant Settle, but he was about as thin as Settle. (RT 8485-8486.) He ran towards the red car on the passenger side and when he got close he immediately started shooting at the back seat area of the car. (RT 8444-8445, 8480-8481.) She saw no one else in the yard at that time and saw no one walk from the garage area and down the street past her house. (RT 8481.) The man then ran to the driver's door of the car. It was locked and he could not open it. He shot the window away, pulled up the lock, got in the car, and drove

away. (RT 8445-8446.) She later apparently identified Codefendant Settle from a photograph as the man she saw. (RT 8478, 8490-8491, 8769-8770.) However, at the trial, she was unable to identify any of the defendants as that man. (RT 8362, 8467, 8473-8475, 8478.)

Manuel Contreras, who was in a house next to Ms. Esteban's and closer to the red car, heard a noise that he attributed to a tire on the adjoining freeway, until he heard four more shots that sounded to him like they came from a shotgun. He looked outside briefly and saw a black male, 20 to 30 years old, over six feet tall, wearing thin leather gloves, with short hair, and medium build holding a short shotgun in his right hand[23] and was at the right side of the vehicle. (RT 8501-8506, 8508B.)

Ms. Esteban testified that almost immediately after the red car drove away, an El Camino type car, white or beige, with a burgundy top, came and stopped almost where the red car was. (RT 8447, 8479-8480.) She saw an overweight black man that appeared to be in his forties exit the vehicle. (RT 8448-8449. 8487, 8493) He walked to the house and came back with some packages under his arm. He did not appear to be in a hurry. He put them in the car. (RT 8448, 8493-8494.) When Mr. Contreras again looked out to the street, he saw the heavy man

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[23] Williams testified that he was left-handed. (RT 12215, 12699.)

walk to the El Camino. Both Ms. Esteban and Mr. Contreras saw the man drive away. (RT 8448, 8493, 8506-8508, 8253-8524, 8526-8527.) Williams testified that Antonio Johnson is a heavy set guy and drives an El Camino. (RT 12609-12610.) However, Williams never saw his vehicle at the scene. (RT 12610.)

Both Ms. Esteban and Mr. Contreras saw the green car coming out of the garage of the house and drive away. (RT 8449-8550, 8508B, 8512, 8524, 8527-8528.) She saw a man driving it, but did not recall what he looked like, except that he was black. (RT 8469, 8487.) He had a little darker complexion than Codefendant Settle. (RT 8487.) Mr. Contreras saw two people in the front of the car and two people in the back; the latter two appeared to be leaning on each other. (RT 8508C, 8513.)

A third neighbor, Jennifer Daniel, who lived on the same side of Wheeler Avenue as the crime scene and three houses to the west, (RT 11847-11848, People's exh. 22), heard three muffled shots and gathered her children and took them inside her house (RT 11849-11851.) Within a minute, she heard shots fired that seemed louder. (RT 11851-11852.) From her porch, she looked down the street and noticed that there were people moving and cars leaving. (RT 11852-11853.) She believed she saw one car backing out of the driveway and a red car come towards her house. (RT 11853-11855.) As the car started to pass her house, the driver appeared to look in her direction. (RT 11856.) She left her porch and

ran down to the fence towards Wheeler Avenue so she could see the car better. (RT 11856-11858.) As he drove past her house, he looked right at her and started to duck down and speed up. (RT 11858, 11860.) She got a good look at him. He was a black man with very short hair and he was wearing a T-shirt and off-white or tan gloves on. (RT 11858-11859, 11921.) He was skinny and 18 to 30 years old. (RT 11858-11859, 11886-11887.) She then ran in the house and dialed 911. (RT 11863, 11909-11910, 11924.) A tape of her call was played for the jury. (RT 11863-11864, 11868, People's exh. 216, CT3 10576-10577.) Although she identified a photograph of Appellant Wheeler (People's exh. 113, #2) as depicting the driver of the car, in court she identified Stanley Bryant as the driver. (RT 10539-10544, 11862-11865, 11875-11876, 11892-11893, 11922, 11939-11943, 11951-11952, 11959, 13711-13712.) The second person she saw out there she described as husky or big. (RT 11893, 11916.) He could have closed the passenger door of the red car. (RT 11893-11894, 11899-11900, 11916.)

Williams took the bus to the pool hall. (RT 12364.) Anthony Arceneaux was there. (RT 12364.) Not long after he arrived, Stanley called the pool hall and asked to speak to Williams. (RT 12365.) He asked if Williams noticed anybody looking around. Williams told him that he had. (RT 12365-12366.) Stanley told him not to go over there ever again and not to talk about what happened. (RT 12366.) Stanley told him to call Provine McCloria and tell him to go to the scene

and see what People are telling the police. (RT 12600, 12608.) Williams made the call. (RT 12600, 12608-12609.) Stanley told him that he did not have to come to the pool hall that night and to get in touch with Antonio Johnson for something to do. (RT 12610-12611.)

While the neighbor, Jennifer Daniel, was out on her street comparing notes with her neighbors, a neighborhood boy pointed her out to a man that she later identified as Provine McCloria and said, "She's the one." (RT 11871-11874, 11910-11911, 11940-11941.)

The police received the first report of the incident at 5:15 p.m. (RT 8533-8534.) When the police arrived at the Wheeler Avenue house, the garage door was closed. (RT 8537.) On the walkway to the front door there was a large pool of blood and drag marks back toward the house. (RT 8537-8541, 8597, 8601.) The front steel door was open and a large chunk of what appeared to be someone's scalp could be seen inside. (RT 8539-8541, 13584-13586.) The inner door was locked. (RT 8539.) Later inspection revealed bloody shoe prints and drag marks in blood from the front door, through the house, and on to the garage floor. (RT 8599, 8601-8603.) Three expended shotgun casings were lying on the floor in or near the entryway. (RT 8600, 8622.) An expended shotgun casing and expended .45 caliber casing were found in the trash can in the kitchen. (RT 8633-8634.) It was determined that the five casings had been fired through three different guns.

(RT 13163-13166, 13175-13177, 13185-13186.) The lock on the door in the wrought iron enclosure on the front porch was broken and the damage appeared to be fresh (RT 8604); the damage was not inconsistent with being struck with .00 buck (RT 13215-13216.) Blood spattering in the entryway was consistent with shotgun wounds. (RT 8605-8606.) A safe in one of the bedrooms was open and empty. (RT 8600, 8755.) All the windows and doors of the house were barred. There were only two ways to enter the house, through the front door and through the garage. (RT 8613.) A scale model of the house was displayed to the jury. (People's exh. 32, RT 8618, 8635.) It was stipulated that the stationary bicycle found at the crime scene had been purchased by Stanley Bryant on April 2, 1988 (RT 12033-12034) and junk mail addressed to Jeff was found there (RT 8696, 8750.) At that time, Jeff Bryant was in Donovan State Prison serving a year for a parole violation. (RT 8750.) The only paper currency found in the residence were two counterfeit bills in a desk drawer. (RT 8754-8755.) There were no narcotics found or pots of oil. (RT 8755.)

Shortly after the first call was received by the police, the red Toyota Camry was found abandoned in an alley about seven blocks and seven-tenths of a mile from the Wheeler Avenue house. (RT 8543, 8549, 8566-8572, 8578-8579, 8591-8592.) Two children were restrained by seat belts in the backseat and were not moving. (RT 8571-8572.) The little boy, Carlos English, was on the passenger

side of the back seat, lying to his left, Chemise English was on the driver's side. (RT 8572.) Their mother, Loretha Anderson, was on the floor. (RT 8572-8573.) When one of the neighbors looked into the car and screamed, the little boy awoke and began crying. (RT 8573.)

Chemise died of a gunshot wound to the posterior base of her neck. (RT 8287-8288, 8384-8385, 8406.) There was stippling around the wound made by the impact of unburned gun powder grains and indicated that the shot had been fired from a distance of less than 12 inches. (RT 8288-8293, 8295-8300, 8380-8383, 8404, 13144-13145.) The wound was made by a handgun. (RT 8294-8295, 9299, 8381.) Loretha had been struck by 21 buck shot pellets, likely from two shots from a shotgun, and two bullets from a handgun. (RT 8295, 8301-8305, 8316-8321, 8324-8328.) They struck her in the abdomen, lung, and upper body. (RT 8324-8328, 8334-8335.) The muzzle of the shotgun must have been within four feet of her. (RT 13156-13157.) She also had blast abrasions on the right arm and right side of her face likely caused by the automobile window blasted upon her. (RT 8305-8306, 13154-13155.) The right rear window of the car was blown out. Cardboard wadding from a shotgun round was found on the rear floorboard. (RT 8674.) Three copper jacketed .38 or .357 caliber rounds were found on the floorboard and rear seat area of the car. (RT 8674.)

POST-HOMICIDES EVENTS: About two nights later, William Settle came by James Williams' apartment at about midnight. (RT 12367.) He said that Stanley suggested that he leave town for about six months. (RT 12367-12368.) Settle told Williams that he had been identified at the scene. (RT 12368.) Settle said they would pay him the money they owed him for the month, $2,000, and if Williams needed anything he could just call them. (RT 12368-12370.) Settle had someone bring the money to him at a convenience store on Laurel Canyon. (RT 12369.) Provine McLoria took him to the airport. (RT 12370.)

Williams flew to Harrisburg, Pennsylvania. (RT 12366-12367.) While in Harrisburg, he called McCloria a couple of times and was sent $500 via Western Union. (RT 12371-12373, 12382-12383, 12436.)

On August 29, 1988, Appellants Bryant and Wheeler visited Jeff Bryant at Donovan State Prison.[26] (RT 12831-12832.) Stanley attempted a visit a few days later, but was denied admittance. (RT 12839.) Appellant Wheeler visited again on September 22, 1988. (RT 12839.)

Ladell Player testified that it was possible that he told Detective Vojtecky about seeing Appellant Bryant a couple of days after the homicides and asking

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[26] It was stipulated that Jeff Bryant was released from prison on July 6, 1989. (RT 12837-12838.)

him what had happened and that Bryant responded that they had some problems, "'But we took care of them.'" (RT 10262-10266.)

On September 1, 1988, Armstrong and Brown's bodies were found in the Lopez Canyon area, 4.7 to 4.9 miles from the Wheeler Avenue residence. (RT 8712-8713.) The bodies were about 65 feet off the road under a packing cloak and were badly decomposed. (RT 8713-8714.) Armstrong had an injury to the right rear skull. (RT 8714, 8340-8342.) There was burned carbon in the wound indicating that the shot was fired with the muzzle of the shotgun from zero to twelve inches from his head. (RT 8340-8342.) Armstrong had a second shotgun wound in the chest. (RT 8344-8347.) He had a third wound from a handgun. (RT 8347-8348.) Armstrong was carrying a prison identification card with his photograph and name and an address book that had Stanley Bryant's name and the address of the Wheeler Avenue house. (RT 8746-8754.)

Brown had a shotgun wound to his right posterior rib cage fired from more than four feet away and another shotgun wound to the right side of his head that removed a portion of his scalp. (RT 8352-8357, 8362-8368, 8373-8374, 8393, 13584-13586.) He was also struck by two handgun wounds to the center of the chest and the right anterior abdominal wall below the rib cage. The latter wounds appeared to have been fired with the muzzle of the weapon within a very close range. (RT 8354, 8368-8372, 8390-8391, 8399.) Brown was carrying a piece of

paper bearing the address of the Wheeler Avenue house written in the handwriting of Stanley Bryant. (RT 13036, 13038-13041.)

On September 3, 1988, Antonio Johnson and Appellants Bryant and Wheeler went to an auto dealer and traded a blue 1988 Hyundai in for a 1988 Toyota Corolla. (RT 12845-12850, 12853-12855, 12867.) Johnson executed the sales documents. (RT 12864.) The Hyundai was subsequently examined by a criminalist, who applied a chemical in the trunk and floorboards to detect blood and in the area of the floorboard between the driver's pedals he got a positive reaction to the chemical, but none anywhere else. (RT 12872-12881.) The test did not determine if it was human blood and the chemical also reacts to plant material. (RT 12878-12879.)

The green car was never recovered. (RT 8772, 10760.) Williams and Appellants Bryant and Wheeler's fingerprints were found in the Wheeler Avenue house (RT 13266-13280, 13295-13299), but Appellant Smith and Codefendant Settle's were not (RT 13301-13303.)

On September 25, 1988, Detective Vojtecky interviewed Appellant Wheeler. (RT 8243-8244, 13535.) It was recorded without Appellant Wheeler's knowledge. (RT 13536.) After the interview, Appellant Wheeler was placed in a room with his girlfriend, Tavia Givens. (RT 11016, 13536.) Their conversation was also surreptitiously recorded. (RT 11041, 13536.) These tape recordings

were played for the jury. (RT 13537-13538, People's exh. 216, CT3 10621-10660.) Vojtecky was able to determine where Appellant Wheeler's residence was with the assistance of Ms. Givens. (RT 13548-13549.) Newspaper articles about the Wheeler Avenue homicides were found in his possession. (RT 13549.) Appellant Wheeler told Vojtecky that Ms. Givens drove a red Jeep. (CT3 10635-10636, 10653-10654.) Appellant Wheeler said he had been to the Wheeler Avenue house one time and that it belonged to his friend, Nash. (RT 13549, CT3 10642-10647.) Appellant Wheeler denied knowing an organization called the Family (RT 13551) or dealing drugs (CT3 10623-10624, 10638, 10654.)

Ms. Givens' apartment was searched with her and Appellant Wheeler's permission. (RT 11017-11018, 11027, 11037.) Appellant Wheeler told the officers that he did not live there. (RT 11017.) There was male clothing in the apartment and it appeared that someone more than her was living there. (RT 11024.) They found a loaded, chrome .357 magnum handgun in a hall closet, $1,000 in her purse (RT 11018-11019, 11023, 11044), newspaper articles dated August 29 and 30, 1988 about the Wheeler house homicides (RT 11019-11023), a calendar book for 1988 with the name "$limm" written on it (RT 11024-11027), a photo album with numerous photographs of Appellant Wheeler (People's exh. 131, RT 11028-11029, 11190-11192), a notebook containing what was described as a pay owe list (RT 11029-11031), and $7,560 in cash stored in a vent above the

water heater (RT 11036-11038, 11044.) In the calendar book were written the addresses 13031 Louvre, 7654 Laurel Canyon, telephone numbers of the pool hall and the Wheeler Avenue house. (RT 11192-11196.) It was determined that the subscriber for utilities for the apartment was Vercillia Reese who listed her employer as Neighborhood Billiards, in Pacoima. (RT 11051-11052, 11054, 11130, 11131, 11955-11957, People's exh. 141.)

It was determined that the subscriber for utilities for Neighborhood Billiards, in Pacoima, was John Bryant. (RT 11957-11958.)

Appellant Wheeler's white 1984 Audi was searched with his consent. (RT 11126-11128, 11130, People's exh. 139.) There were two apparent bullet holes in the vehicle that appeared to have been fired from the inside to the outside of the car (RT 11126-11127) and a car phone (RT 11127-11128.)

On September 29, 1988, a search warrant was executed on Stanley Bryant's residence at 12719 Judd Street. (RT 12908, 12918.) It was conducted simultaneously with the searches of other residences, all within a three or four square mile area. (RT 9811, 12909.) Stanley was arrested. (RT 12909, 12912, 12925-12926, 12935.) A loaded .45 caliber pistol, People's exhibit 152, was in plain view within a few feet of the front door and was seized. (RT 12926-12929.) It was determined that this weapon had fired the casing found in the kitchen trash can at the Wheeler Avenue house (RT 13166-13172), but did not inflict any of the

wounds on the victims (RT 13181.) Keys found at the residence fit the lock at the Wheeler Avenue house. (RT 12909-12915, 13553, 13557-13558.)

That same day at 4:30 a.m. a search warrant was executed at a residence at 11236 Adelphia. (RT 9784-9785, 9787.) The residence was fortified. (RT 9787.) Entry was made with a battering ram employed with a SWAT team. (RT 9788-9789.) The SWAT team pulled bars off the windows and secured the residence before narcotics Officer Lambert entered. (RT 9783, 9789-9790.) There was a wrought iron caged area at the front with a wrought iron door covered with a metal fabric. (RT 9790-9791.) All of the exterior openings were secured with wrought iron. (RT 9791-9793.) The house was in the name of Eddie Barber, a member of the organization. (RT 9835, 9915.) A metal pot containing oil was in the kitchen area, although it was not heated when they served the warrant. (RT 9794.) There was a triple beam scale. (RT 9794.) In a closet of a bedroom was a cup with five rounds of ammunition. (RT 9795.) Seven Ziploc bags containing a half ounce of cocaine and 36 one-gram bags of presumably cocaine were recovered. (RT 9799-9800.)

At the same time, a search warrant was executed on the residence at 11649 Fenton Avenue. (RT 9695, 9784-978510547, 10588.) A SWAT team was employed and equipment was used to take off the metal bars obstructing the windows and doors. (RT 9696.) This residence also had a metal enclosure at the

front door with electronically activated locks that controlled ingress and egress. (RT 9697-9698.) A revolver was found near the front door and $1,407 dollars were seized. (RT 9698-9699, 9798-9799.) Plastic baggies found in the kitchen contained residue of cocaine. (RT 9832.) Laurence Walton was inside and he was arrested. (RT 9699, 9831-9832.)

Officer Lambert testified that the buyer would give his money at the Fenton residence and pick up the drugs at the Adelphia house. The buyer was given a post-it note with the destination. Such notes were recovered at Adelphia. (RT 9801-9805, 9813.) Someone at Adelphia would call back to Fenton and verify the transaction. (RT 9813.) The paper work tied out pretty well with the quantity of drugs found at Adelphia and the amount of money found at Fenton. (RT 9804.) Fenton was referred to as a slip house; large amounts of money were never kept there. (RT 9823.)

At 4:45 a.m., a search warrant was executed on 13037 Louvre Street, Pacoima, where Antonio Johnson and others were found inside. (RT 10766-10771.) At 5:00 a.m., a search warrant was executed on 13031 Louvre street where Nash Newbill was found inside. (RT 10773-10779.)

On October 5, 1988, Williams was arrested in Pennsylvania and had been dealing cocaine there. (RT 12373, 12397, 12531-12532, 12775-12776.) No Los Angeles officers were present. (RT 12373-12374.) He was told that Los Angeles

authorities wanted to talk to him about the homicides. (RT 12373, 12776-12777.) He believed that it was possible that he had been identified as the shooter, because he looked like Appellant Wheeler (RT 8246-8248, 12397-12398, 12412-12414, 12452, 12792 People's exhs. 1-2; 113, 2 [Appellant Wheeler's photograph] & People's exhs. 3; 117, 3 [Williams' photograph]), they were both tall and black, and the only difference between them was that Williams was a little heavier (RT 12791, 12393-12395.) On the date of Williams' arrest, his height was recorded at six foot, four inches, and his weight at 260 pounds. (RT 12820.) Williams described Appellant Wheeler's weight at about 200 pounds and height at six foot two or three inches. (RT 12804-12805, 12808.) They were both born in March 1969. (RT 8255-8256.)

There had been discussion with Williams that the death penalty was being sought in this case[27] (RT 12457) and he was being arrested for these homicides. (RT 12373-12374.) Williams testified that this prompted him to agree to talk to the officers. (RT 12373-12374.) He told them that he had not killed anyone and that Appellants Stanley Bryant, Wheeler, Don Smith, and Codefendant Johnny Settle were involved. (RT 12374, 12780-12781.) He agreed to cooperate because he knew that witnesses are often given leniency. (RT 12778, 12695-12696.) He

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[27] In a 1988 hearing, Williams testified that he would lie to avoid the death penalty. (RT 12457-12461.)

testified that he did not believe he would have gotten immunity if he had been one of the shooters. (RT 12552.) Williams provided the officers with an account generally consistent with his subsequent testimony at appellants' trial. (RT 12781-12800, 12809-12813-12819.)

On October 14, 1988, a search warrant was executed on 11943 Carl Street with the assistance of a SWAT team. (RT 9806, 9813-9814, 9816, 13557.) The residence was fortified. (RT 9814-9815, 9835.) It was owned by James Settle, Jr., the father of Jon, Frank, and William Settle. (RT 9835, 9922-9925, 10177, 10182, 10186-10187.) An adding machine and money counter were found in one of the bedrooms. (RT 9833-9834.) There was a safe in the closet. (RT 9833-9834.) A closet contained documents that included contracts for the Hyundai and Toyota Corolla, a gas bill for the house at 11442 Wheeler Avenue, and a telephone disconnect notice for the Wheeler Avenue house that had been mailed to William Settle. (RT 9840-9842, 9864-9865, 10141, 10145-10146.) A notebook with financial records was found. (RT 10138-10139.) It provided a daily accounting of money taken in by the organization from rock cocaine sales and distribution for the period from June 1, 1988 through August 27, 1988. (RT 9816-9820, 9955-9956, 9955-9957.) James Williams' initials were on one of the records and the amount of $1,400 is alongside his name. (RT 9884-9885, 9887-9888.) The same initials appear another two or three times. (RT 9888-9891.) The records reflect

total revenue in excess of one million dollars. (RT 9818-9819.) The initials S.L.M., which stand for Slim or Appellant Wheeler, were on the records with a minus sign and $400, indicating he took a draw. (RT 9828.) The initials S.B., which stood for Stanley Bryant, with a minus sign and $1,000, indicating that he took out that sum. (RT 9830.) There were similar entries for other individuals. (RT 9828, 9830-9831.) Officer Lambert testified that this residence had apparently become the new count house. (RT 10138-10139, 10173.)

On October 11, 1988, an arrest warrant was issued for Codefendant Settle (RT 13594-13595), but he was not arrested until August 1991. (RT 13660, 13667.) He was carrying a check cashing card with his photograph and the name Henry Long. (People's exh. 206, RT 13649-13650.) He was told that they were going to execute a search warrant on the location where he had been staying and asked him who was there. (RT 13667.) Settle replied, "I'm the one who did it. I'm the one you want. They didn't do nothing." (RT 13668, 13671, 13676-13677.)

Detective Vojtecky testified that many members of the organization sold properties in the area and relocated to Palmdale/Lancaster and set up operation there. (RT 13641.)

4. DEFENSE'S CASE

With the exception of Appellant Smith, all the defendants put on a defense. The order of their presentation began with Appellant Wheeler, through the testimony of himself and his wife; followed by Codefendant Jon Settle's defense, without Settle testifying; Appellant Stanley Bryant's defense, including Bryant's testimony; and concluding with a return to Settle's defense with Settle testifying.

a. Appellant Donald Smith's Defense

Appellant Smith rested without calling any witnesses. (RT 13910-113911.)

b. Appellant Leroy Wheeler's Defense

Appellant Leroy Wheeler testified that he did not commit these murders. (RT 13911, 13973-13974, 14065, 14302.) He was 19 years old at the time of the instant offenses. (RT 13912.) He is not related in any way to Appellant Bryant. (RT 13914.) Appellant Wheeler was the oldest of his mother's four children. (RT 13917.) He was only in the Pacoima/Lake View Terrace area for a brief period when he was in junior high school and living with his mother's sister. (RT 13912-13913.) Commencing in the summer of 1983 through the summer of 1984, he lived with his grandmother in South Central, Los Angeles. (RT 13915-13916.)

He was never in the Pacoima or Los Angeles area from October 1985 through November 1987 and thus he had not been selling drugs in the Teresa Apartments in 1986 (as reported by Ladell Player (RT 10253, 10308).) (RT 13915.) In 1985, he was sent to Camp Aflabaugh in San Dimas, California. (RT

13914.) In mid 1986, he was sent to a boy's school, El Paso de Robles, in Paso Robles, California where he stayed until November 1987. (RT 13914-13915.) He returned to his grandmother's home in South Central Los Angeles. (RT 13916-13917.)

His mother was ill at the time with breast cancer and was then living in Las Vegas. In February 1988 she died. (RT 13916-13917.) His young twin half-sisters went to live with his aunt in Pacoima and he and his younger brother stayed with his grandmother. (RT 13917-13918.) At the beginning of 1988, he was employed as a janitor at the University of California at Los Angeles and as a shipping clerk for a jewelry company in Alhambra, California until his mother's death. (RT 13918.)

After his mother died, he was introduced to Eddie Barber by a friend and began working for the organization. (RT 13919-13920, 14012-14013.) The organization was like one big circle encircling a number of small circles. (RT 13919.) Different individuals controlled the small circles and Jeff Bryant controlled the big circle. (RT 13919, 13983.) Appellant Wheeler belonged to Eddie Barber's circle and worked for him. (RT 13919, 13924-13925.) Ted Edmonds, James Williams, Billy Fields, William Settle, Levi Lack, and Antonio Johnson controlled other small circles. (RT 13919-13920, 13924.)

The job required that he move from Los Angeles to the Valley and Eddie Barber gave him an apartment in the name of Vercillia Reese[28] on Foothill Boulevard in Sylmar that already had the utilities and telephone turned on. (RT 13927-13928.) Appellant Wheeler paid the rent with money orders that he put in the manager's mail box. (RT 13927-13928.)

Eddie Barber liked Appellant Wheeler and took him under his wing. (RT 13920.) Appellant Wheeler sold drugs with Barber and was making quite a bit of money. (RT 13928, 14068.) He bought his Audi on his birthday with a small down payment and with the help of his grandmother who cosigned for him. (RT 14010, 14015-14016, 14293-14294.) He was saving his money to buy a home so that he could bring his sisters and brother back together. (RT 13930.) By the time of his arrest, he had saved $82,000, $7,000 seized in the search of his apartment and the remainder stored in the trunk of a vehicle owned by Eddie. (RT 13930, 14110, 14017-14018, 14076.) Bills and attorney fees later consumed all of it. (RT 13930-13931, 14110.)

In late May or early June 1988, Eddie Barber started Appellant Wheeler working at the Wheeler Avenue house, that Williams ran, and Williams trained him. (RT 13931-13932, 14070.) Williams' mother used to sell drugs. Williams

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[28] During the People's case, evidence was introduced that Vercillia Reese was an employee of Neighborhood Billiards, Pacoima. (RT 11051-11052.)

had had his own employees, among them were Lamont, Provine, Ant man, and his own customers and negotiated his way into the organization. (RT 13986, 13932-13933.) Williams was paid $1,500 per week and was usually there between 7:00 a.m. to 3:00 p.m. (RT 13933, 13986.) That was the busiest time of the day and the operation needed his attention. (RT 13933.) However, he did not have a shift, and the 7:00 a.m. to 3:00 p.m. shift belonged to Ben Provine. (RT 13986, 14140.) A pager list was maintained at the Wheeler Avenue house. Appellant Wheeler's name was on the list, but not Williams' name, because Williams ran the house. (RT 13934, 13954)

Williams additional position in the organization was that of the enforcer. (RT 13933.)

Appellant Wheeler worked the 11:00 p.m. to 7:00 a.m. shift. At 7:00 a.m., he locked the house and picked up Williams in the company car; usually Williams instructed him to pick him up at the pool hall. (RT 13934-13935, 13941.) Then Williams would drive Appellant Wheeler home and take the car back to the count house. (RT 13935.) The company car was kept at the count house with the person on duty. (RT 13957.)

On August 27, 1988, Appellant Wheeler began his 11:00 p.m. shift and worked until 7:00 a.m. Sunday, August 28, 1988. (RT 13941.) At the end of his shift, he went to the pool hall and picked up Williams in the company car. (RT

13941.) Williams dropped Appellant Wheeler off at Appellant Wheeler's apartment on Foothill. (RT 13941.) Appellant Wheeler had to work at 9:00 a.m. at the pool hall, so he drove his Audi to the pool hall and worked until 10:30 a.m. He then went back to his apartment, picked up his girlfriend, Tavia, and went to Los Angeles. (RT 13941-13942.) His normal pattern was to spend Sundays with his and her family. The two families lived next door to each other. (RT 13942.) Tavia's mother owned a facility for the mentally retarded. (RT 13942, 13944.) Her mother was ill, so they helped her out with the patients. (RT 13943-13944.) Tavia worked during the week at Security Pacific Bank. (RT 13943.)

At 3:00 p.m. that Sunday, he was paged from the count house. He called back from his cellular telephone and talked to Williams. (RT 13945.) Williams told him not to come to work. (RT 13945.) At around 10:45 p.m., Williams paged him again to remind him not to come to work. (RT 13945.)

Appellant Wheeler testified that he first heard about the homicides the next day when he visited Jeff at Donovan State Prison. (RT 13958.) Appellant Wheeler went to see Jeff on August 22 and 29 and the last time on September 22, 1988. (RT 13938-13939.) Appellant Wheeler sometimes acted as a messenger for Eddie Barber to Jeff Bryant. (RT 13938.) Jeff always kept a buffer between himself and the organization. Thus, if Appellant Wheeler had been more greatly involved in the organization, he would not have gone to see Jeff because that

could have jeopardized Jeff. (RT 13960-13961.) The organization considered Appellant Wheeler a safe person to communicate with Jeff. (RT 13961.) Unbeknownst to Appellant Wheeler, Stanley was also at the prison and asked Appellant Wheeler what happened and Appellant Wheeler told him that he did not know. Stanley said that he heard on the news that there was a shooting at the count house. (RT 13958-13959.)

Stanley's position in the organization was to arrange bail for their staff. (RT 13939.) The July 1988 cellular telephone calls on Appellant Wheeler's car to Stanley were bail related or the result of calls made by others in his car. (RT 14040-14042.)

When Appellant Wheeler got back to Los Angeles, he got a newspaper to learn what happened and kept it and another on the following day. (RT 13959-13960.) Appellant Wheeler went on vacation on August 29, 1988. (RT 13963.) When he returned, he worked at the Carl Street house. (RT 13964-13965.) He spoke with Williams when Williams called the Carl Street house. (RT 13965.) After Williams left, William Settle paid the organization's employees. (RT 14296-14297.)

Appellant Wheeler did not flee as Williams had done, although Appellant Wheeler had the cash to do so, because he had no reason to do so. (RT 13962.)

On the day of Appellant Wheeler's arrest, he was paged by the police and asked to come to the police station, which he did. (RT 13943, 13965-13966.) Before he went, Appellant Wheeler paged Bryant to try and set up bail. (RT 13968.) Tavia drove him to the police station. (RT 13966.) He gave the officers permission to search his apartment and told them he had nothing to hide. (RT 13967.) When he was arrested, he contacted Eddie Barber to arrange to get him an attorney. (RT 13922, 13968-13969) His booking slip indicates that he called Tavia Givens, Eddie Barber, his grandmother, and the Carl Street house. (RT 13968-13969, Wheeler's exh. 5.)

The album of photographs seized from his apartment contained no photographs of Stanley or Jeffrey Bryant. (RT 13920-13921.) There are photographs of Eddie Barber and his crew. (RT 13921-13922, 13924.) The crew was Keith Masters, Wilbert "Bam", big daddy, Deskin, Rick Miller, Pearl, Ant, Snake Tongue, and Darrell. (RT 13922-13923.) There is also a photograph in the album of Gigolo V, a rap artist. The cash depicted in the photograph of Appellant Wheeler with a crown on his head was $2,500 that the members of the crew had given him for his 19th birthday and the photograph was to be used for Gigolo V's album cover. (RT 13925-13926, 14009, 14126-14127.)

Appellant Wheeler testified that the first time he saw Jon Settle was in court at one of their hearings. (RT 13939-13940.) Appellant Wheeler knew his

brothers Andrew and William. (RT 13940.) William Settle was like the accountant for the organization and came to the count house. (RT 13940.)

None of the neighbors of the Wheeler Avenue house that testified at Appellant Wheeler's preliminary hearing identified him. (RT 13971-13972.) When he was arrested, he was 6 foot 2 inches tall and weighed about 185 pounds. (RT 13973.) There were other people in the organization that were as tall or taller. (RT 13972-13973.)

Tavia Wheeler testified. She was 28 years old at the time of appellants' trial and was married to Appellant Wheeler from September 1989 until June 1992. (RT 14333.) She first met him in December 1987. (RT 14333, 14367.) She was living with her mother in South Central Los Angeles in a residence next door to the apartment where Appellant Wheeler lived with his grandmother. (RT 14333-14334.) Tavia's mother owned a home for mentally retarded adults. (RT 14335.) She helped run the business on the weekends. (RT 14335.)

When Appellant Wheeler was arrested on Sunday, September 25, 1988, she was working at Security Pacific Bank. (RT 14334.) She now works for the Federal Reserve Bank. (RT 14335.) Sometime that evening, Appellant Wheeler told her that he had to go see the police. (RT 14336.) They had both of their cars with them at her mother's and his grandmother's adjoining residences. She drove him out to the police station in the valley in her Jeep Wrangler because Appellant

Wheeler's car had to go into the shop. (RT 14336-14337, 14351.) Appellant Wheeler told her that he had some money in the house, but she had not known anything about it before. (RT 14337.) She tried to find the money when she got home, but could not. (RT 14338.) Later, two officers came to search the apartment and asked her to come to the station to verify his story. (RT 14338-14340.) She pointed out to the officers where Eddie Barber lived around the corner. (RT 14340-14341.) She told them that he was the only friend of Appellant Wheeler's that she knew that lived in the valley. (RT 14341.) Eddie had been to their apartment. (RT 14341.)

She gave the police a statement. (RT 14344.) She talked with Appellant Wheeler at the station and he asked if they found the money and she told him that they had not. (RT 14344-14345.) After that, the police searched the apartment and found the money. (RT 14345.) Appellant Wheeler had been working nights at the time. (RT 14345.) They spent Sundays together. (RT 14345-14346.) At that time, she did not know anything about the homicides. (RT 14346.) She did not know he was a drug dealer, although she had suspicions. (RT 14348, 14366-14367.) She had never met Jeff Bryant. (RT 14348.)

It was stipulated that on the date of the shootings at the Wheeler Avenue house, the police made a list of all the license plate numbers of all the cars on Wheeler Avenue. A 1970 Toyota Corolla, license number 245AYC, was parked

across the street and over one house from the crime scene. During the People's case, evidence was introduced that the car was registered to Larry Bradley and it contained a repair receipt in the name of Antonio Johnson. (People's exh. 177, RT 13010-13012, 14373-14377.) Larry Bradley was a member of the organization, had worked at the Adelphia and Fenton houses, and distributed for them. (RT 9953-9954, 10692-10693.) Williams had testified that Bradley was one of the organization's people that handled drugs and his pager number was among a list of pager numbers found in the kitchen of the Wheeler Avenue house. (RT 12222-12223, 12233.)

c. Codefendant Jon Settle's Defense[29]

Through the testimony of friends and family, witnesses testified that Jon Settle had been employed as a mechanic at MTA in 1984 through 1986. (RT 14527-14535, 14698, 14700, 14810.) Thereafter, he worked as a mechanic on the property where he lived on Ralston and bought, repaired, and resold used cars. (RT 14628-14635, 14680-14681, 14685, 14701-14702, 14725, 14771-14772, 14811.) The cars were sold through newspaper advertisements that required him to be home on the weekend so that he could receive telephone calls from prospective buyers. (RT 14702, 14812.) Settle did not sell cocaine. (RT 14635,

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[29] Settle's defense is only very briefly summarized here as the details of this part of his defense are not germane to Appellant Wheeler's appeal.

14698-14699, 14704, 14714.) Settle leased the property on Vanport to a tenant in June 1988 and Settle was not using the house to sell cocaine. (RT 14614-14615.)

d. Appellant Stanley Bryant's Defense[30]

Detective Vojtecky testified that on October 3, 1988 he filed murder charges against Williams, Anthony Arceneaux, Appellants Wheeler and Bryant, Levi Slack, and Tony Johnson. (RT 15064.) When Detective Vojtecky first saw Williams, he eliminated him from his list of suspects for the shooters because of his large size. (RT 15059.) Detective Vojtecky contacted the prosecution in Pennsylvania about Williams' legal problems. (RT 14886-14889, 14964-14967.) Williams told Vojtecky that he had carried a gun for a few months in 1988. (RT 14896-14897.)

Detective Vojtecky testified that on October 7, 1988, Williams told him that he had a key to the Wheeler Avenue house that permitted him to come and go. (RT 15046-15047.) He said Lamont was to take the shift after him. (RT 15047.) He asked Williams about the color of the bag carried into the Wheeler Avenue house by Stanley Bryant on the day of the homicides, and Williams said that he did not see it. (RT 15048-15049.) Later, as he testified, it became a green army type duffle bag. (RT 15049-15050.) Williams told Vojtecky that he did not see

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[30] Bryant's defense is only very briefly summarized here except for those portions of his defense that are germane to Appellant Wheeler's appeal.

the victims coming up to the door. (RT 15050.) Williams told him that he got some of his information from the newspaper and some from some of the other players that were involved. (RT 15051, 15057.)

The partial shoe print found at the scene appeared to have the word Reeboks in it. (RT 14900-14901.) Williams may have told Vojtecky that he had worn Reeboks before leaving Los Angeles. (RT 14949.) Vojtecky asked him how many pairs of Reeboks that he owned, and he said one. Vojtecky asked him where they were and he said he did not know. (RT 15052.) He said that he did not have them on that day. (RT 15052.) He said they were his basketball shoes and he only wore them once. (RT 15052-15053.)

Investigator Duncan testified that Williams told him that based on what he had seen and heard on the day of the shooting, he believed somebody was going to die. (RT 14914, 14919.) He was asked why he did not walk away, and he replied that he planned to cooperate only until he could safely get himself out of the house. (RT 14914.) Williams told Duncan that he, Appellant Wheeler, Anthony Arceneaux, and Lamont Gillon worked at Wheeler Avenue; and that either Arceneaux or Lamont was the rotator. (RT 15060-15061.)

Detective Vojtecky testified that when he interviewed George Smith, he had an open narcotics case against him and was granted immunity for anything he provided them except murder. (RT 14874-14877.) Vojtecky agreed to affirm the

assistance Smith was providing and to put him into a witness protection program. (RT 14877, 14941-14942.) Smith told Vojtecky that he referred to Stanley Bryant as Peanut Head. (RT 14881-14882, 14884-14885.)

Vojtecky made contacts in Missouri in assist Andrew Greer with his legal problems there. (RT 14889-14890, 14961.)

Detective Vojtecky testified that Provine McLoria lived on Wheeler Place, a cul-de-sac off of Wheeler Avenue and about a dozen houses north of the crime scene. (RT 15055-15056.)

Appellant Bryant testified. (RT 15157.) He was 37 years old at the time of the trial, and thus about 30 at the time of the instant offenses. (RT 15158.) He denied participating in any way in the murder of Gentry or in the bombing of Keith Curry's car. (RT 15162, 15164-15165.) He began his involvement in the distribution of drugs in February 1982. (RT 15158.) He worked for his brother Jeff who ran the organization. (RT 15176.) Nobody worked for Stanley. (RT 15263-15264.) In September 1985, Jeff was arrested and they were in debt. (RT 15174, 15291.) In November 1985, William Settle took control. (RT 15173-15176.) William Settle ran it from then through August 1988. (RT 15226-15228.) From 1986 through 1988 Stanley earned $1,500 per week for William Settle's use of the pool hall. (RT 15170, 15179, 15266.)

Appellant Bryant testified that on Sunday August 28, 1988 he was not at the Wheeler Avenue residence at all that day. (RT 15165, 15181.) Although, he was there daily, generally in the evening, all he did was count money. (RT 15181, 15222-15223, 15333, 15489-15490.) William Settle was operating the Wheeler house. (RT 15222.) Appellant Bryant first heard about the shooting on the 11:00 p.m. news. (RT 15166-15167.) He was not involved with the murders in any way. (RT 15167.) He was arrested in September 1988 and has been in custody ever since. (RT 15168.)

Appellant Bryant testified that he did not bail anybody out and Appellant Wheeler was uninformed, although there were very few times when somebody was not in jail and almost everybody called Stanley. (RT 15177, 15332.)

e. Codefendant Jon Settle's Testimony[31]

Jon Settle testified that he worked on cars at his residence on Ralston. (RT 15537.) He sold four to six cars a month and was always home on the weekends. (RT 15537.) He parked the cars that he had for sale a block or two from where he lived and waited for telephone calls. That is what he did on August 28th. (RT 15538-15539.) He was not a drug dealer. (RT 15619.)

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[31] At the conclusion of Appellants Wheeler and Bryant's defenses, Settle's request to testify was granted. Settle's defense is only very briefly summarized here except for those portions of his defense that are germane to Appellant Wheeler's appeal.

Settle testified that at about 3:00 p.m. on August 28, he got a telephone call from Stanley Bryant who told him that he needed brakes on the red Toyota (bearing license 245AYC.) (RT 15539-15541, 15553, 15557-15558.) Settle agreed to do the job. (RT 15539.) Bryant asked him what he had for sale, that he wanted a big car. Bryant settled on a 1970 Pontiac Bonneville that Settle had for sale. (RT 15539, 15601.) Bryant told Settle that Frank Settle would be over to get it. (RT 15539.) Frank arrived with the Toyota in about 15 minutes and took the Pontiac. (RT 15539, 15553-15554.) The Pontiac was registered in the name of Goodwill Motors. Settle gave him the D.M.V. power of attorney and the pink slip for the car. (RT 15555.) Settle fixed the brakes on the Toyota within an hour. (RT 15539.) About an hour and one-half later, Frank and Appellant Wheeler arrived in the Jeep, depicted in Appellant Wheeler's photo album (People's exh. 131,) picked up the Toyota, and paid Settle. (RT 15540-15541, 15556-15558.)

Settle testified that he had never been to the Wheeler Avenue house. (RT 15541.) His brother Frank Settle was involved in drugs and worked for Stanley Bryant. (RT 15544, 15691-15692.) Frank owned the house on Carl Street and another house in Van Nuys. (RT 15544.) Settle said that Frank told him that the Pontiac was the same green car that was used in the murders. (RT 15572-15582.) Frank said his role was that he took the machines out of there prior to the

homicides and took them over to his house on Carl Street. (RT 15579-15581, 15714.)

5. PROSECUTION'S REBUTTAL[32]

Robert Saurman testified that on September 26, 1988, he interviewed Tavia Givens. A handgun was recovered from their apartment that belonged to Appellant Wheeler and she indicated he owned a second gun, but it was gone. She did not know where it was. (RT 15959-15960.) The money found in the apartment was in a hole adjacent to the water heater vent in the ceiling. (RT 15961.)

Detective Vojtecky testified that Williams told him in his first interview that he did not have a telephone at his residence at the time of the murders. (RT 15757.) Williams never asked for protection from William Settle. (RT 15767-15768.) The one person he wanted protection from was Stanley Bryant. (RT 15768.) Vojtecky assisted Williams to move to another state and arranged for his things to be moved. He did not appear to have a lot of things worth a whole lot of money. (RT 15771.)

Walter Hampton testified that on June 30, 1992 he interviewed Renard Tillman who told them that he used to live with Jon Settle. (RT 15806-15807.)

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[32] The prosecution's rebuttal is only very briefly summarized here except for those portions that are germane to Appellant Wheeler's appeal.

He said Settle used to buy his dope from the Bryants. (RT 15807.) Hampton showed Tilman 170 photographs of people in the organization. (RT 15807-15808.) Hampton testified that Tilman identified Eddie Barber and Appellant Wheeler from the photographs. (RT 15813-15814, 15816.) He said Wheeler was heavily involved with the Bryants (RT 15814-15815) and that Jeff Bryant ran the family organization. Stanley was up in the hierarchy. (RT 15815.)

David Harris, a narcotic user, testified that he made a controlled purchase on April 27, 1987 from Jon Settle at the house at 11516 Vanport. (RT 16042-16047.)

Officer Lambert testified that he did not assist George Smith in getting Smith's cocaine case dismissed. (RT 15909.) It was dismissed to protect the identity of the informant. (RT 15910-15911, 15913-15920.) The street value of the cocaine in the case was $60,000 to $80,000. (RT 15915.)

Detective Vojtecky testified that on August 6, 1991, he and Jan Maurizi interviewed Codefendant Settle after he was arrested by Detective Hughley. (RT 16052-16053.) An audiotape of a portion of the interview, People's exhibit 217, was played for the jury. (RT 16053-16054, 16110-16111.) The jury heard Codefendant Settle's repeated evasive replies and ultimately outright refusal to provide the address of his residence or residences during the last 15 years. He told

the detective that he had been "in transit" for those years. Settle denied that he ever used or sold narcotics. (People's exh. 217.)

6. APPELLANT WHEELER'S REBUTTAL

Frank Settle testified that prior to August 28, 1988, he did not know Appellant Wheeler and was not in Wheeler's company or at the Wheeler Avenue house on August 28, 1988. (RT 15841-15842, 15858.) Frank Settle testified that he did not drive to his brother's residence on that date. (RT 15842.) Frank Settle bought the red Toyota (depicted in People's exh. 163) in 1987 and sold it about a week later to Larry Bradley. (RT 15847.)

The court took judicial notice that a complaint was filed on October 5, 1988 against Jay Williams and others charging him with four murders. A formal grant of immunity from those charges was issued on November 21, 1988 by the Los Angeles Superior Court. The charges against Williams were dismissed on November 30, 1988. (RT 16093-4-5.) A tape of f the October 7, 1988 Pennsylvania interview of Williams by Vojtecky was played to the jury. (RT 16086-16092.)[33]

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[33] The jury was not provided transcripts of the tape, but were told that if they wanted to rehear the tape during deliberations a transcript would then be ready for them. The tape is Wheeler's exhibit 8. (RT 16086-16092.) The transcript is Wheeler's 8A (RT 16561-16562) and is in the supplemental clerk's transcript, CT4 24-142.

B. Penalty Phase

1. PROSECUTION CASE AGAINST APPELLANT WHEELER

The prosecution's case consisted principally of incidents Appellant Wheeler had been involved in while in custody.

JUVENILE RECORD: It was stipulated that Appellant was in juvenile custody from March 1985 through October 1987 as the result of an attempted robbery. (RT 17299-17300.)

1987 CYA FIGHT: Peter Ephraim, an employee at the El Paseo de Robles Juvenile facility in 1987 testified that he witnessed a fight between Appellant Wheeler and another juvenile. (RT 17306, 17311-17312.) Ephraim saw Appellant Wheeler swing a chair at the other juvenile in a manner that could have caused serious injury, although only slight damage was caused to some equipment in the room. (RT 17310-17311.) Thereafter, the two wards wrestled on the floor. (RT 17314.)

1988 ASSAULT: Jackie Macon, James Macon, and Brian Brown testified about an incident in September 1988 at Tommy's Burgers in which, during an argument between Appellant Wheeler and Brian Brown, Appellant Wheeler brandished a revolver and then drove away in his Audi. (RT 17384-17391, 17394-17395, 17398-17400.)

1989 COUNTY JAIL INCIDENTS: A jail employee testified that on June 1, 1989, he searched Appellant Wheeler, who was working as a trustee, and found a metal object, about four inches long, sharpened to a point on one end, and wrapped with a piece of tape on the other end. It was concealed in his crotch area between two pairs of underwear. (RT 17366-17369.) The witness acknowledged that they often found shanks on inmates during random searches; the jail was a dangerous place. (RT 17374.) As a result, Appellant Wheeler pled guilty to possession of a weapon while in jail. (RT 17299-17300.)

The same employee testified that on November 4, 1989, Appellant Wheeler struck another inmate when the inmate attempted to change the channel on the television set in the unit. (RT 17369-17372.)

1991 COUNTY JAIL INCIDENTS: A state prison inmate and a jail employee testified that on March 13, 1991, Appellant Wheeler, who was working as a trustee, was involved in a fight with the inmate. The employee reported that Appellant Wheeler was the victim in the incident. (RT 17404-17416, 17420-17424.)

Richard Wright testified that he was an inmate in the county jail on October 10, 1991 and Appellant Wheeler was a trustee on his row. (RT 17322-17323.) After a verbal dispute between them, Wright testified that Appellant Wheeler told him he was going to rip his face off. (RT 17324.) Wright was in the hall leaning

against the cell wall. (RT 17324-17325.) Wright was hit twice and when he was on the ground he was kicked a couple of times in the face. (RT 17324.) There were other inmates present. (RT 17334-17337, 17341-17343.) After he was hit and down, he had his hands over his face and could not see his assailant. (RT 17334-17336.) Wright testified that Appellant Wheeler told him he was going to fuck him in the ass. (RT 17325.) It could have been someone other than Appellant Wheeler. (RT 17334-17336.) Wright screamed and the guard came and found Wright with his pants down to his ankles and was halfway inside someone else's cell. (RT 17324-17325, 17332, 17346.) The deputy that responded to the incident did not know if any charges were filed or if any disciplinary action was taken. (RT 17345-17349.)

1992 COUNTY JAIL INCIDENT: Tyrone Smith, a state prison inmate, testified that in February 1992, he got into a dispute with Appellant Wheeler that escalated into a fight. Appellant Wheeler was working as a trustee at the time. As the fight began, Appellant Wheeler told him he was going to kill him. (RT 17212-17221, 17223-17225, 17290) Smith did not see a weapon and did not have a weapon himself. (RT 17221.) During the fray, Smith was stabbed under his armpit with a shank, it went through his lung within a half inch of his heart and he was also struck in five or six places on his upper arm. (RT 17223-17224.) Deputy Sheriffs intervened. (RT 17222, 17261-17262.) Two deputies testified that

Appellant Wheeler swung the shank at one of them that resulted in a minor laceration to the deputy's forearm. Appellant Wheeler dropped the shank after a sergeant threatened to shoot him with a taser. (RT 17263-17268, 17275-17276-17279, 17282.)

2. APPELLANT LEROY WHEELER'S CASE

The few moments in Appellant Wheeler's young life when there was any assurance of a roof over his head and food on the table were during brief periods when he was in the care of one of his grandmothers, when he was in the care of his mother's physically abusive boyfriend, Charlie Luster, or when he was in juvenile camp. Appellant Wheeler's truncated childhood was developed through the testimony of his father, Leroy Wheeler, Senior (RT 17803); Appellant Wheeler's brother, Forrest (RT 17783); Appellant Wheeler's mother's two sisters, Priscilla Gray (RT 17717) and Mamie Trimble (RT 17730); his paternal grandmother, Norma Skaggs (RT 17763); his father's sister, Carzet Wheeler McKenzie (RT 17769); and one of Appellant Wheeler's mother's boyfriends, Charlie Luster (RT 17744.)

Appellant Wheeler's mother was a high school dropout and a runaway teenager when Appellant Wheeler's father picked her up off the street. (RT 17717-17719, 17769-17770, 17813, 17855.) She was addicted to drugs and used reds and whites with Appellant Wheeler's father, and continued taking them while

she was pregnant with Appellant Wheeler. (RT 17717-17719, 17773.) Appellant Wheeler's mother was only 17 years old and his father was 19 years old when Appellant Wheeler was born. (RT 17717-17718, 17809-17810.) She married his father shortly thereafter. (RT 17771.) Appellant Wheeler's younger brother, Forrest, was born within the following two years. (RT 17728, 17785, 17804, 17807-17808.)

Appellant Wheeler's mother continued to "party" and Appellant Wheeler's father could not handle it and would disappear from time to time. (RT 17772-17773.) He was very violent with her and their children saw this. (RT 17805-17806, 17808.) Appellant Wheeler's father left them when Appellant Wheeler was almost two. (RT 17803-17806, 17855-17856.)

Both of Appellant Wheeler's aunts reported that their sister, Appellant Wheeler's mother, had difficulty coping. (RT 17719, 17734.) Her children suffered as a result and were often without food. (RT 17719, 17734-17735, 17785-17786.) Appellant Wheeler's mother frequently was forced to change residences, usually the result of eviction, and frequently stayed in residences that were not her own. (RT 17718, 17721-17722, 17731, 17734-17735, 17774, 17778, 17785-17786, 17791-17792.) Appellant Wheeler and his brother were moved from one school to another. (RT 17735, 17785-17786.) Forrest testified that he

attended nine or ten different elementary schools. (RT 17792-17793.) This was the constant theme of Appellant Wheeler's life. (RT 17856-17857.)

Appellant Wheeler's father visited Appellant Wheeler occasionally between the ages of four and six. (RT 17805.) These visits sometimes led to further fights between Appellant Wheeler's parents and ultimately his mother told his father not to come any more. (RT 17805, 17813-17814.) When Appellant Wheeler was six years old, his father told him not to call him anymore. (RT 17720-17721, 17804-17805.) Appellant Wheeler had no further contact with his father. (RT 17804, 17807-17808.)

Appellant Wheeler and his brother stayed briefly with their paternal grandmother, who initially intended on keeping them with her in Perris California, but testified that she returned them to their mother because the boys got sick from the warmer climate there. (RT 17763-17764.) On another occasion when Appellant Wheeler was four years old, their grandmother came and got them and applied for food stamps or county aid for them. (RT 17764.) Their mother told her that if she had to do that, she wanted the children herself. So, their grandmother brought them back to her. (RT 17764.) Thereafter, their paternal grandmother had no further contact with them. (RT 17765.)

Appellant Wheeler's mother had to have a male in her life, so there were a lot of men in and out of her life, but none were appropriate role models for her

sons. (RT 17736.) In 1977 or 1978, Charlie Luster moved in with Appellant Wheeler's mother and maintained a five-year relationship. (RT 17744-17745, 17857.) They never married, but produced twin daughters, Tanisha and Tenika. (RT 17728, 17744-17745.) They initially lived in Los Angeles and then moved to West Covina to a town-home and then to a single-family residence. (RT 17747.) Appellant Wheeler and his brother perceived this as a positive period because it provided for the first time regular meals and a roof over their heads. (RT 17786.) But, Mr. Luster went to prison for a year and one-half during 1978 and 1979, fulfilling the theme in Appellant Wheeler's life that the positive influences did not last long. (RT 17857-17858.)

Charlie Luster also came with a negative side. He was a self-described hustler and compulsive gambler that led to serious arguments between him and Appellant Wheeler's mother. (RT 17747-17748, 17859.) In Mr. Luster's own words, Appellant Wheeler would have seen him as a person that "ripped and ran the streets, played the horses, and basically hung out." (RT 17749.)

In addition, Mr. Luster was also quite abusive to Appellant Wheeler and his brother. He beat them and was indiscriminate where he hit Appellant Wheeler. (RT 17748, 17786-17787, 17860.) Forrest testified that it was a constant thing and Appellant Wheeler got more of it than Forrest did. (RT 17787.) Luster made them stand in front of him with no clothes on. He would get a limb from the

Peach tree in the yard and hit them on their backside, legs, and back. If they were loud, he would hit them on the head and tell them to "Shut up." He beat them until he got tired. (RT 17793.) Their mother would be in the other room and do nothing. (RT 17793.)

When Appellant Wheeler was 12 or 13 years old, he decided that he had to rely upon himself and moved back and forth between his mother's house, his maternal grandmother's house, and his aunts' houses until he finally got his own place when he was 15. (RT 17719, 17725, 17787-17788, 17866, 17866.) He was still just a child, but in his own mind, he thought he was ready to make this kind of move to prove himself. (RT 17866.) His Aunt Priscilla Gray testified that he interacted well with her children. (RT 17719, 17725.) During the brief period he was with Priscilla Gray, he attended Macklay Junior High School for one semester and expressed a desire to be in the drama class. (RT 17719-17720.)

Appellant Wheeler visited and counseled his brother and assured him that he would help him do what he wanted to do. (RT 17789-17790, 17796.)

Appellant Wheeler's aunt, Mamie Trimble, testified that he was a very smart and industrious child. (RT 17731.) He had a paper route, raised cherry tomatoes, and worked at the Y.M.C.A. (RT 17731-17732.) He was very ambitious and was always doing something to earn money. (RT 17732.)

At 15, Appellant Wheeler came into contact with the juvenile justice system. (RT 17787-17788.) In November 1986, Appellant Wheeler was sent to the Youth Authority's El Paso de la Robles school for his participation in a robbery. (RT 17696-17697, 17708-17709, 17714-17715.) Although he had some minor altercations when he first arrived, his prompt successful adjustment permitted his transfer to the school's San Simeon Cottage, whose residents were enrolled in a college program to further their education. (RT 17697-17702.)

Bernard Lavender was a youth counselor at the facility during Appellant Wheeler's stay and had prepared a four-page report summarizing his assessment of Appellant Wheeler. (RT 17697-17700, 17706, 17709, Wheeler's exh. 9.) Appellant Wheeler did pretty well in school and earned A's and B's in his classes. (RT 17704.) He was one of the workers on the Cottage, and did these jobs very well. (RT 17704-17705.) He was a polite, determined kid and was respected by the counselors that knew him. (RT 17704.) He had no gang affiliation and that occasionally got him into altercations with other juveniles who wanted him to pick a side; but he rejected gang activity. (RT 17705-17706.)

Mr. Lavender learned from Appellant Wheeler that his mother was very ill with cancer, and Appellant Wheeler was understandably very saddened and discouraged by this. (RT 17703-17704.) He told Appellant Wheeler that he would do his best to get him home early. (RT 17704.) Mr. Lavender

recommended that be placed in a halfway house after he left the facility and it was contemplated that he would thereafter stay with his mother. (RT 17703.)

After Appellant Wheeler was paroled from the Youth Authority, he lived with his maternal grandmother. (RT 17725.) His mother lived in Pacoima at the time, but later she moved to Las Vegas. (RT 17725-17726.)

Appellant Wheeler's mother died in 1988 (RT 17717) and his grandmother died on Christmas day, 1992. (RT 17735.)

Appellant Wheeler's half-sister, Tenika Luster, testified and brought letters and cards that Appellant Wheeler had sent her. (RT 17757-17758.) All of Appellant Wheeler's family members and Charlie Luster asked the jury to permit Appellant Wheeler to live. (RT 17726, 17738, 17750-17751, 17761, 17767-17768, 17807.)

Adrienne Davis, a clinical psychologist and former staff psychologist at CYA evaluated Appellant Wheeler and testified for the defense. (RT 17846-17847, 17850.) She had been appointed in over 60 capital cases. (RT 17849.) She interviewed Appellant Wheeler on 12 or 15 occasions, reviewed some school records and probation records, conducted psychological testing, and interviewed his biological father, his stepfather Charles Luster, his three aunts, his uncle, and his brother Forrest Wheeler. (RT 17851-17855.)

Dr. Davis testified that the first section of Appellant Wheeler's life was brought to a close by the early departure of Appellant Wheeler's father. The turmoil of this period culminated in the loss of his father. This was a period when the child's foundation was being laid for developing a sense of security, trust, and predictability in their environment. (RT 17856.)

The second section of his life was the next five years until Charlie Luster came into his life. This again was a period with little or no security or constancy as they moved from place to place. His mother was neglectful and was not always able to feed them. (RT 17856-17857.)

The third section came with the arrival of Charlie Luster that Appellant Wheeler and his brother noted for the regular presence of food, but with it came domestic abuse, and violence. (RT 17857-17860.) Dr. Davis attributed this experience with Appellant Wheeler's mood, attitude, truancy, involvement in delinquency, and ultimately criminal behavior. (RT 17860.) There were no protective factors in his life to offset these risk factors. (RT 17864-17865.) The help that came from his grandmother and aunts was too brief and inconsistent. (RT 17865.)

From the tests she administered, Dr. Davis found that Appellant Wheeler was intelligent, articulate, and capable of doing well academically, although his records did not reflect that. (RT 17867.) There were elevations on one or two

scales that indicated he was suggestive, capable of being creative and being goal oriented, had a lot of energy with racing thoughts, but had difficulty focusing that energy constructively. He was essentially manic. (RT 17868-17869.) He was not suffering from any gross cognitive deficits. (RT 17903.)

From his CYA records, she recounted that on occasion he lost his temper when he was minimally provoked and that no medical or neurological reason had been addressed, even though it was known that he had suffered a serious head injury in a vehicle accident when he was eight or nine years old. (RT 17894-17895.) The other theme she noted was that although he initially had trouble adjusting, after a couple of weeks he became one of the harder working wards. This demonstrated his potential when he had structure and the expectations were made known to him. (RT 17870.)

Dr. Davis recounted that a psychiatrist at the institution had the conflicting opinion that he needed psychotherapy, even after he was released, but he did not feel that he could really benefit from it. (RT 17870.) However, the people in the program found that he did benefit from psychotherapy, although he had initially resisted it. Unfortunately, it was not followed up after his release. Dr. Davis believed that psychotherapy should have been recommended and he probably would have benefited from it. (RT 17870-17871, 17901-17902.)

Dr. Davis testified that Appellant Wheeler's experience drove him to desperately align himself with adult males who he felt liked him, would protect him, take care of him, and provide him the secure environment he had not had. (RT 17863.) He was predisposed by his early years to inappropriate values and this led him to his involvement in criminal behavior that had the potential for becoming violent. (RT 17873.)

Dr. Davis acknowledged that there were major discrepancies between Appellant Wheeler's testimony on the witness stand and what she learned from interviewing him. (RT 17871.) The main discrepancy was when he met his codefendants; he had been friends with Stan Bryant since he was 15, in 1984 or 1985. (RT 17872, 17889.) He admitted to her his involvement in the offenses in an indirect kind of way; his words were "commitment, loyalty." (RT 17887-17888.)

ARGUMENT

I. THE TRIAL COURT FAILED TO SEVER APPELLANT WHEELER'S CASE FROM THAT OF HIS CODEFENDANTS

Appellant Wheeler, an adolescent and relatively new employee of the Bryant organization at the time of the homicides, was improperly required to be tried with the organization's founders and principal lieutenants and his trial was thereby tainted by evidence of his codefendants six year reign of terror on the community of Pacoima and Lake View Terrace.

Appellant Wheeler's confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court deprived appellant of an unbiased jury determination by forcing him to trial joined with the highly inflammatory evidence, for the most part, relevant only to the cases of his codefendants.

As detailed below, counsel for Appellant Wheeler made several unsuccessful efforts before and during the trial to sever his case from Codefendant Jon Settle as well as Appellants Bryant and Smith.

A. Procedural History of Appellants' Efforts to Sever Their Cases

On June 24, 1994, Codefendant Settle's case was joined with appellants' cases. (RT 4950-4951, CT 13472-13473.) On November 10, 1994, Codefendant Settle's request to represent himself was granted. (CT 13744, RT 6071-6088.)

On December 12, 1994, Appellant Bryant filed a motion seeking to sever his case from that of Appellants Wheeler and Smith and especially Codefendant Settle. (CT 14084, RT 6128-6131, 13896.) On December 21, 1994, at a hearing on the matter, it was apparent that all parties were aware that Codefendant Settle's defense would be that he was not at the crime scene during the homicides. (RT 6140-6141.) He told the court, "My defense is extremely antagonistic. ¶ ... ¶ I didn't do it. It is antagonistic. I intend to assign the proper responsibility to the

respective defendants. ¶ In doing so, that may deprive them of their right to a fair trial because of the antagonistic nature of my defense." (RT 6143-6144.) Defense counsel complained that Codefendant Settle would be another prosecutor at the table. (RT 6144-6145.) Defense counsel argued that they were governed by ethical guidelines that limit what they can do in court, limitations that Codefendant Settle did not have. (RT 6147-6148.) Counsel for Appellant Bryant complained to the court that there was a recent article in which Codefendant Settle told the press that "'he was innocent and all the other baby killers were all guilty.'"[34] (RT 6137, 6139.) Counsel was concerned that Codefendant Settle would misperceive his codefendants' defenses as "pointing the finger at him and somehow [trigger] a statement that alluded to that 'I will take everybody to the gas chamber with me if necessary.'" (RT 6137-6138.)

Deputy District Attorney McCormick stated that the suggestion Codefendant Settle would create an inconsistent defense was not well founded, because it is something that could not be known until later. (RT 6145-6146.)

Counsel for Appellant Wheeler joined in the motion to sever from Codefendant Settle. (RT 6144.) The court denied Appellant Bryant's motion to sever from Appellants Wheeler and Smith and took under submission appellants' motion to sever from Codefendant Settle. (RT 6151.)

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[34] Counsel repeated this point at a subsequent hearing. (RT 6369.)

On January 18, 1995, at the commencement of appellants' trial and prior to jury selection, the court returned to appellants' motion to sever their case from Codefendant Settle and Codefendant Settle's motion to sever his case from theirs. (RT 6192.) Among the considerations proffered by appellants in support of the motion was that Codefendant Settle would likely choose a course of action detrimental to his codefendants. (RT 6195-6196.) The court found that was an allegation not borne out by any concrete evidence presented to the court. (RT 6196.) The court expressed the view that it had not seen any proof that Codefendant Settle would somehow hurt his codefendants and the court was not convinced that it was "tremendously likely that that will happen." As a palliative, the court offered that if its estimate turned out to be overly optimistic, the court could remedy the situation at any time, even after the case had gone to the jury. (RT 6196.)

The court denied the motion, reasoning that joint trials were judicially efficient, and avoided the burden on the prosecution and witnesses of multiple proceedings, especially in large conspiracy cases. (RT 6192-6193, 6196.) The court also noted that joint trials have been viewed as serving the interest of justice "by avoiding inconsistent verdicts," which the court noted was particularly important in capital cases. (RT 6193.)

On January 24, 1995, six days after the severance issue had been ruled upon, Codefendant Settle informed the court that he had the right to testify and that his testimony was not going to be favorable to his codefendants. (RT 6342.) In addition, he advised the court that he had been threatened. (RT 6342-6343.) Defense counsel renewed their motion to sever Codefendant Settle arguing that in his pro per status, he could not be controlled and was free to make such allegations that would not be subject to cross-examination. Counsel argued that if the allegations were true, they were entitled to cross-examine him to learn who the witnesses were. If the allegations were not true, they were also entitled to know because it would support their position that Codefendant Settle would do anything, including fabricating evidence, to convict appellants. The court responded that it could control him and once again denied the motion. (RT 6342-6343, 6379-6382.)

On January 25, 1995, during the voir dire of the jury, counsel for Appellant Bryant expressed concern over Codefendant Settle's input in joint juror challenges, stating that since Codefendant Settle did not appear to know what he was doing it would hinder the process for the other defendants. Counsel requested that the court allow Mr. Leonard, Codefendant Settle's standby counsel, to be involved in jury selection. The court stated that it would love to have Mr. Leonard involved, but it was not going to have Mr. Leonard involved in a "quasi-active

role." The Court further noted that Codefendant Settle was pro per, and the court could not bring stand-by counsel into the proceeding. (RT 6588-6589.)

On February 9, 1995, the date the alternate jurors were impaneled, Codefendant Settle advised the court that he would testify and that "it may be damaging to ... the co-defendants." (RT 7834-7835.) Whereupon, counsel for appellants renewed their motion to sever from Codefendant Settle, but the court refused to consider it unless it was in writing. (RT 7837-7838.)

On March 14, 1995, confronted with the introduction of the testimony of Keith Curry,[35] counsel for Appellant Wheeler advised the court that they would seek to sever Appellant's case from that of Appellants Bryant and Smith. (RT 10951, 13896.)

On April 25, 1995, Counsel for Appellants Wheeler and Bryant again sought to sever their cases from Codefendant Settle's case, citing his incompetence in his cross-examination of Appellant Bryant on the preceding day that damaged their defense. (RT 15471-15472.) The motion was denied. (RT 15472.) Later in the day, when Codefendant Settle was permitted to reopen his

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[35] Mr. Curry was the former husband of Tannis Bryant, who was the former wife of Appellant Bryant, and was twice attacked, first by a bomb attached to his car, allegedly arranged by Appellant Bryant, and later shot by Appellant Smith. (See, Statement of the Facts, A, 1, b, *supra*.)

case and testify after all of appellants had rested,[36] counsel for appellants once again sought to sever their case from that of Codefendant Settle, but their request was denied. (RT 15472, 15543.)

On May 9, 1995, after Codefendant Settle's closing guilt phase argument, defense counsel renewed their motion to sever Codefendant Settle's case from theirs and moved for a mistrial based on his conduct in the case, particularly his testifying after appellants had rested. (RT 16634-16635.) Both motions were denied. (RT 16635.)

On October 16, 1995, counsel for Appellant Wheeler challenged as a basis for his motion for new trial the fact that he had been required to be jointly tried with Appellants Bryant and Smith. (CT 16124-16127.) The court denied the motion on October 19, 1995. (RT 18781.)

B. The Trial Was Remarkable by its Length, the Extraordinary Security Employed, and The Case's Complexity

1. THE TRIAL WAS REMARKABLE BY ITS LENGTH

On February 9, 1995, the jury and 12 alternates were impaneled. (CT 14535.) On February 14, 1995, opening statements began, and the following day the first witness was sworn and the trial began. (CT 14620, 14635.) On May 2,

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36 This deviation from the orderly presentation of the case is the topic of Argument II, *infra*.

1995, after forty-five court days and 120 witnesses,[37] the evidentiary portion of the guilt phase ended. The jury deliberated for 20 court days until verdicts had been

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[37] The 120 witnesses, in the order of their appearance, are identified in the table below.

RT	Name	RT	Name
8238, 8649 9369, 9766 10608, 10722 11187, 11560 11791, 12098 13535, 14868 14940, 15043 15920, 16052	Vojtecky, J	11133	Robertson, L
8277	Ribe, J	11167	Woods, B
8434	Esteban, L	11315	Curry, K
8500	Contreras, M	11365	Mitchell, V
8352	Blees, L	11378	Webb, L
8566	Brown, Dwayne	11398	Lopez, R
8639	Stachowksi, D	11429	Wiley, R
8785 9002 9352	Kirk, T	11450	Anderson, S
8826	Flowers, M	11463, 11508	Owens, A
8856, 8900 9336	Tucker, L	11497	Owens, S
8882, 8954	Fisher, G	11567	Greer, A
8922	Ward, Benny	11747	Marshall, P
8982	Alfred, D	11786	Slack, P
9009	Ward, Barron	11814	Brockbank
9038, 9324 11212	Hernandez, R	11820	Curry, T
9045	Sambar, S	11846	Daniel, J
9065	Miller, R	12001, 15805	Hampton, W
9147	Newsom, S	12005	Daniels, D
9227	Allen, J	12033	Spradley, S

9242	Goldman, R	12277	Williams, J
9347	Papayoanou, S	12775	Curtis, R
9405	Harley, K	12821	Burke, R
9446	Smith, F	12845	Macarelli, M
9475	Schmitt, K	12862	Seals, K
9491	Scott, M	12871	Lewellen, W
9532	Uribe, C	12909	Keil, T
9581	Taylor, G	12924	Benga, W
9601	Reaux, K	12944	Whelchel, K
9627, 9701	Dumelle, J	13024	Greenwood, B
9676	Kadar, E	13080	Curry, T
9683	Scanlon, R	13095	Derby, G
9690	Barneck, W	13112	Paul, A
9693	Voelker, L	13225	Sexton, R
9717	Thurston, W	13258	Banuelos, F
9737	Distad, U	13338	Sutton, L
9780, 10138 10688, 11494 11709, 12007 13365, 15908 16013	Lambert, D	13657	Hughley, G
9894	Brown, M	13911	Wheeler, L
9982	Guzman, E	14332	Wheeler, T
9990, 10083	Johnson, W	14526	Gonzalez, J
10053	Kemp, H	14536	Settle, Keith
10099	Lofton, C	14572	Settle, Kisha
10122	Vandemark, J	14584	Settle, Kendra
10234	Player, L	14610	Marshall, C
10436	Dalton, J	14625	Tillman, F
10470	Marshall, D	14679	Bell, James Sr.
10484	McCleve, B	14700	Bell, James Jr.
10498	Wilbon, V	14723, 15841	Settle, F
10508	Brown, Delores	14809	Settle, N
10515	Armstrong, Angela	14856	Kisk, S
10534	Walton, L	14905	Duncan, W
10618, 11054	Patterson, E	15003	Morse, M
10639	Kamn, P	15014	Derby, T

reached on all appellants (CT 15206-15207; CT2 836; CT 15221, 15246; CT2 837-838; CT 15285-15286, 15289-15290, 15295-15296; CT2 839; CT 15309, 15316-15317, 15376-15377, 15381, 15385, 15394, 15403-15408) and an additional 3 court days until they reached an impasse on Codefendant Settle and his mistrial was declared (CT 15445-15446, 15570-15571.) During the deliberations, two jurors were excused and alternates substituted, and the deliberations were ordered to begin anew. (CT2 839, CT 15290.) This was the longest trial that the presiding judge had been involved in (RT 18626), and he had 20 years of experience (RT 9568.)

2. THE TRIAL WAS REMARKABLE BY THE EXTRAORDINARY SECURITY PRECAUTIONS EMPLOYED[38]

Extraordinary security precautions were taken throughout the trial. Although the jury was permitted to go home at night, during the court day from the moment they parked their cars they were not free to be outside the company of

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10680	Johnson, S	15022	Flowers, K
10764	Cherry, P	15066	Renfrew, D
10773	Warren, J	15141	Atkins, M
10781	Smith, G	15157, 15486	Bryant, S
10883	Smith, A	15476	Stephens, D
11012, 15956	Saurman, R	15530	Settle, J
11048	Scott, D	15875	Kelly, M
11059	Lundquist, E	16042	Harris, D
11124, 13007	Oppelt, M		

the bailiffs or leave or even roam the courthouse. They had to take their breaks in a special room that was provided and park in a secret location and were escorted by bailiffs to and from the courtroom by way of a route known only to the jurors and court personnel. They were not permitted to leave the courthouse for lunch, but were fed in the building at the court's expense. (RT 6194-6196, 6365, 6651-6653, 7980-7988, 8057-8072, 9567-9577.)

The courtroom was modified with structural changes in the courtroom as well as the installation of twice the normal number of tables to accommodate the four defendants and six counsel representing appellants. (RT 16867.) The courtroom was on the ninth floor of the courthouse and had its own metal detector in addition to the one at the entrance of the courthouse, and spectators, witnesses, and counsel had to pass through both. (RT 6442, 6567, 6651, 7468-7469.) In addition, the court informed the parties at the commencement of the trial that he was considering the likely installation of another metal detector at the entrance to the courtroom, although it is unclear from the record on appeal whether that was done. (RT 6296-6299.) There were six to seven deputies in the courtroom at all times and nine at the commencement of jury deliberations. (RT 6194-6195, 6202, 6298, 16865, 18782.)

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[38] The impropriety of the security employed and its impact on Appellant Wheeler are the subject of Argument IV, *infra*.

During the course of the trial, Detective Vojtecky was permitted to testify over defense objection that during a portion of the period pretrial, he took varying routes between the San Fernando Courthouse and the Foothill police Station because of security concerns that he had. (RT 10755-10757.)

Because of the number of defendants in the case and allegations of witness intimidation by the Bryant organization, the defendants were told that they would be required to wear a leg brace and shackles throughout the trial, unless they elected to wear a "REACT" belt. (RT 6200, 6205, 6297.) The later device was in itself an extraordinary measure and the bailiffs had had little experience using it. (RT 6200-6202.) The belt was the size of a belt used to protect the back when lifting and was worn under the shirt. (RT 6200-6202.) In addition, there was a square box that was worn and could be covered by a sweater or other garment. (RT 6202.) Deputies had access to a control unit that would shock and immobilize the wearer if the deputy activated the control. (RT 6200-6201, 6205-6206.) The defendants were told that when the device was activated, it would pump about 50,000 amps of electricity into the kidneys of the wearer. (RT 6344-6345.)[39]

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[39] The device was recently described by the Ninth Circuit in *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897.

> A stun belt is an electronic device that is secured around a prisoner's waist. Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. When activated remotely, "the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds." Upon activation of

The defense complained that the enhanced security and required anonymity of the jury created an aura of guilt over appellants. (RT 6359-6366.) It troubled defense counsel so that they implored the jury not to consider it in their deliberations. (RT 8213, 16640.) The trial court acknowledged that he had never taken such extreme security measurers in any other case. (RT 1871-18792.) None of the reasons given as support for such measurers were attributable to Appellant Wheeler. (RT 18793-18795.)

3. THE TRIAL WAS REMARKABLE BY ITS COMPLEXITY

Repeated instances of the introduction of inflammatory and highly prejudicial evidence admissible only against a codefendant or codefendants exacerbated the aura of guilt over Appellant Wheeler and required the jury to somehow compartmentalize highly prejudicial evidence that they could consider against one or two of Appellant Wheeler's codefendants, but not all of the defendants.

> the belt, an electrical current enters the body near the wearer's kidneys and travels along blood channels and nerve pathways. The shock administered from the activated belt "causes incapacitation in the first few seconds and severe pain during the entire period." "Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal." [Citations omitted.] (*Id.* at p. 899.)

A survey showed that 11 out of 45 total activations of the device (24.4%) were accidental, but noted the low percentage of accidental activations on general usage. (*Ibid*, citing *Unites States v. Durham* (N.D.Fla. 2002) 219 F.Supp.2d 1234, 1239.)

During the course of the guilt phase, there were ten instances when the jury was told that certain testimony was only admissible against Codefendant Settle or Appellants Bryant and Smith. In most of those instances, the court attempted to restrict the jury's use of such evidence to the applicable defendant as it was presented to the jury, as will be noted below, as well as at the end of the guilt phase of the trial.[40]

In three of those instances the evidence was only admissible against Codefendant Settle. One instance, limited to Codefendant Settle, was a statement attributed to Codefendant Settle that Mr. Armstrong, one of the four homicide victims, would not be around much longer. (RT 9278.)[41]

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[40] Among the jury instructions given at the end of the guilt phase, the jury was told:

> Several times during the trial, evidence was admitted against one or more of the defendants, and not admitted against the others. ¶ At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants. ¶ Do not consider such evidence against the other defendants.
>
> Evidence has been received of a statement made by a defendant after his arrest. ¶ At the time the evidence of this statement was received you were told that it could not be considered by you against the other defendants. ¶ Do not consider the evidence of such statement against the other defendants.
>
> Certain evidence was admitted for a limited purpose. ¶ At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. ¶ Do not consider such evidence for any purpose except the limited purpose for which it was admitted. (RT 16386-16387, CT 15473-15475.)

[41] The defense requested a limiting instruction. The court instructed the jury: [T]hat statement may be considered by you only as to Mr. Settle. ¶ The court is ruling that the statement is not admissible as to the other

A second instance, limited to Codefendant Settle, was a portion of the testimony of San Fernando Police Detective George Hughley. (RT 13660, 13682-13683.) He testified that in August 1991, he was in a narcotics enforcement task force that encompassed from South Central Los Angeles to Ventura and Kern County, and the Bryant family was a focus of the task force. (RT 13660-13661.) He detailed the steps that led him to the arrest of Codefendant Settle. (RT 13662-13667.) After Codefendant Settle's arrest, they told him they were going to execute a search warrant where he had been staying and asked him who was there. (RT 13667.) Detective Hughley testified that Settle replied, "I'm the one who did it. I'm the one you want. They didn't do nothing." (RT 13668, 13671, 13676-13677.)[42]

A third instance, limited to Codefendant Settle, was a portion of the testimony of Detective Vojtecky. (RT 16053-16054, 16110-16111.) He testified that on August 6, 1991, at 4:00 p.m., he and Jan Maurizi interviewed Codefendant Settle after he was arrested by Detective Hughley. (RT 16052-16053.) An

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three defendants at this point in time until further notice. (RT 9281-9283.)

[42] The defense requested a limiting instruction. The court acknowledged that it had slipped the court's mind and instructed the jury:

> [L]et's back up. The testimony you heard from Detective Hughley other than the statement that Detective Hughley attributed to Jon Settle, that evidence ... is limited to Mr. Settle only. That statement cannot be considered as to the other three defendants.... (RT 13682-13683.)

audiotape of a portion of the interview, People's exhibit 217, was played for the jury. (RT 16053-16054, 16110-16111.) The jury heard Codefendant Settle's repeated evasive replies and ultimately outright refusal to provide the address of his residence or residences during the last 15 years. He told the detective that he had been "in transit" for those years. (People's exh. 217.)[43]

There were six instances in which the evidence was limited to Appellant Bryant. The first three came from statements made by Ladell Player during his recorded interview on December 28, 1994. He testified at the trial, but denied making several statements attributed to him.[44] However, a video tape of the interview was played for the jury, and the jury was provided a transcript of a

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[43] The court instructed the jury:

> This evidence is admissible only as to Mr. Settle and not any other defendant. ¶ And, further, the use as to which you may put this evidence is limited. In other words, you may only consider this evidence as to how it may tend to bear upon the credibility of Jon Settle in the sense that it may or may not turn out to have bearing on any of his statements made on the witness stand. ¶ It is, there for credibility only, and you cannot utilize them for the truth of any matter asserted on the tape. You understand? (RT 16053-16054.)

[44] Following these denials, and at the defenses' request for a limiting instruction, the court gave the jury the following two instructions:

> [A]t this point the answers of the witness having to do with the last couple of questions indicate no statement was made, but if you do hear any evidence by way of impeachment that would tend to give a contrary answer, you are instructed that the statement of Stanley Bryant or anything along the lines just suggested by the D.A. is limited to Mr. Bryant only and to be considered only as to Mr. Stanley Bryant and not as to any of the other three defendants in the case. (RT 10258.)

portion of the interview. (CT3 10546, RT 10486-10492, People's exh. 216.)[45] Mr. Player was unaware that the interview was being recorded. (RT 10484, 10486-10487.) During the interview, he affirmed that he ran into Appellant Bryant three days after the homicides and Appellant Bryant told him that they had some problems at the Wheeler house, and they took care of them. (CT3 10552-10553, RT 10263-10264.)

The next instance in the recorded interview was Mr. Player's statement that testifying against Appellant Bryant was for him like it would be to testify against John Gotti, he was the last person he would want to testify against. (CT3 10565.)

In the third instance, Mr. Player denied that Appellant Bryant told him that if he (Player) had a problem with someone, Appellant Bryant would smile, shake their hand, and then have someone take care of or kill them. (RT 10256-10258, CT3 10563, People's exh. 216.)

A fourth instance was provided by Alonzo Smith who related a conversation he had with Appellant Bryant about Tommy Hull (aka James Brown,

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> [I]f there is evidence on that issue now or later, this evidence will be limited to Stanley Bryant, not as to the other three defendants." (RT 10263-10264.)

[45] Immediately prior to playing the video tape, the court instructed the jury that the statements Mr. Player attributed to Appellant Bryant could "only be considered as to Mr. Bryant, not to any of the other three defendants in the case." (RT 10488.)

one of the homicide victims) being untrustworthy and Appellant Bryant stating in substance, "Yeah, he had to go." (RT 10912-10916.)[46]

A fifth instance was a statement attributed to George Smith who said that if he ever crossed Appellant Bryant, he would be in bad shape. (RT 11214-11216.)[47]

A sixth instance involved the car bomb placed in the car of Keith Curry, injuring him as he left the apartment of Appellant Bryant's former wife, Tannis, after spending the night. (RT 13080-13082, 13086, 13106.) She testified, but denied that Appellant Bryant admitted responsibility for the incident (RT 13082-13083) or that she talked about it while getting her hair done at Mis Liz in Moorpark (RT 13083-13085.) However, Gwendolyn Derby testified that she was a weekly customer of the salon, knew Tannis, and heard her say that her ex-husband placed a pipe bomb underneath her current boyfriend's car and Tannis said her husband admitted it to her. (RT 13095-13098, 13110.) He told her that he would do it again until he was dead. (RT 13098.)[48]

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[46] The defense requested a limiting instruction. The court instructed the jury that this was limited to Stanley Bryant and could not be considered as to any of the other defendants for any purpose. (RT 10913.)

[47] The defense requested a limiting instruction and the court instructed the jury as noted in the preceding footnote. (RT 11215-11216.)

[48] Following Tannis' testimony, but prior to that of Ms. Derby, the court instructed the jury:

> The testimony that you heard, and I believe the testimony of who may be the next witness, [Ms. Derby ¶], will be limited as to Mr. Bryant and may be considered only as to Mr. Bryant, not any of the other three defendants. (RT 13086.)

The final instance involved evidence that the jury was told they could only consider against Appellants Bryant and Smith. (RT 11313-11314.) This instance also involved Keith Curry, this time through his own testimony about the bomb attack and his subsequent shooting by Appellant Smith, detailed in the Statement of the Facts, Part A, 1, b, and incorporated herein.

C. The Relevant Law

Section 1098[49] provides that when two or more defendants are jointly charged with an offense, they must be tried jointly, unless the court, in its discretion, orders separate trials. In determining whether a motion to sever (or consolidate) has been properly denied, a reviewing court must initially look at the facts as they were developed when the motion was heard. (*People v. Isenor* (1971) 17 Cal.App.3d 324, 334 [94 Cal.Rptr. 746], see, e.g., *People v. Johnson* (1989) 47 Cal.3d. 1194, 1230 [255 Cal.Rptr. 569].) The statute, however, does not provide any guidelines for the exercise of the court's discretion.

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[49] Penal Code section 1098 provides:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial.

The guidelines for the implementation of section 1098 come from this Court in *People v. Massie* (1967) 66 Cal.2d 899 [59 Cal.Rptr. 733]. (*People v. Johnson, supra,* 47 Cal.3d at p. 1230.) There the Court provided that separate trials should be ordered "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie, supra,* at p. 917.) These factors are not exclusive. (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938 [104 Cal.Rptr.2d 903].) Cases also should be severed when there is a danger of prejudice to a defendant resulting from association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or evidence admissible only against a codefendant. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286 [18 Cal.Rptr.2d 796].)

In regard to the latter factor,

> Thoughtful judicial opinions have voiced misgivings as to jurors ability to segregate evidence into separate intellectual boxes, each containing single defendant. [Citation.] Unconscious motivations, psychologists tell us, are pervasive. They slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged. Exposed to the realities of depth psychology, judicial cliches carving jurors' minds into autonomous segments may waiver and fail. At the minimum, the admission of damaging evidence applicable to less than all the defendants calls for firm judicial supervision and strong, carefully drawn instructions. A trial judge may find it advisable, sometimes essential, to comment on the evidence, carefully segregating that directed at one defendant or

another. (*People v. Chambers* (1964) 231 Cal.App.2d 23, 33 [41 Cal.Rptr. 551].)

Indeed, this Court has recognized the impossibility of a juror's obliteration from his mind of that which he already knew. (*People v. Massie, supra*, at p. 916; see also *People* v. *Clark* (1965) 62 Cal.2d 870, 885, fn. 13 [44 Cal.Rptr. 784].) "'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.'" (*Jackson* v. *Denno* (1964) 378 U.S. 368, 388 fn. 15 [12 L.Ed.2d 908, 378 S.Ct. 368], quoting *Delli Paoli v. United States* (1957) 352 U.S. 232, 248 [1 L.Ed.2d 278, 77 S.Ct. 294].)

Moreover, joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452 [204 Cal.Rptr. 700]; *Calderon v. Superior Court* , *supra*, 87 Cal.App.4th at p. 939.)

Regardless of any statutory preference for joint trials, a court retains the power to sever cases, otherwise properly joined, "in the interests of justice." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285 [24 Cal.Rptr.2d 34].) Thus,

Severance is not required where there is no showing at the time of the hearing why prejudice would result from a joint trial (*People v. Johnson, supra*, 47 Cal.3d at p. 1230) or where the prosecution has assured the court that it would not

use the evidence upon which the defendant requesting the severance had based his motion (*People v. Turner* (1984) 37 Cal.3d 302, 312 [208 Cal.Rptr. 196].)

Although the standard of review of a trial court's ruling on a motion for severance is whether the trial court abused its discretion based on the showing made at the time of the hearing of the motion (*People v. Johnson, supra,* 47 Cal.3d at p. 590), on appeal reversal will be required where the joinder actually resulted in gross unfairness amounting to a denial of due process even if severance was not initially warranted at the time the motion was made (*People v. Mendoza* (2000) 24 Cal.4th 130, 162 [99 Cal.Rptr.2d 485]; *People v. Arias* (1996) 13 Cal.4th 92, 127 [51 Cal.Rptr.2d 770].)

Like its California counterpart, Federal Rules of Criminal Procedure, rule 14,[50] does not provide any guidelines for severance in federal criminal proceedings. Its guidelines come from the Supreme Court in *Zafiro v. United States* (1993) 506 U.S. 534 [122 L.Ed.2d 317, 113 S.Ct. 933]. The Court held:

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[50] Rule 14 provides:

> (a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
>
> (b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

> [A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See *Kotteakos* v. *United States*, 328 U.S. 750, 774-775, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton* v. *United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. [Citation.] The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson* v. *Marsh*,[51] less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S. at 211. (*Id.* at p. 539.)

In *Zafiro,* the Court rejected a per se rule requiring reversal based solely upon mutually antagonistic defenses, but acknowledged a range of circumstances in which, severance may be required because the inconsistent defenses suggested a heightened risk of prejudice. (*United States v. Mayfield* (9th Cir. 1999) 189 F.3d

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51 *Richardson* v. *Marsh* (1987) 481 U.S. 200 [95 L.Ed.2d 176, 107 S.Ct 1702].)

895, 904, citing *Zafiro* at p. 539.) Where defendants maintain mutually exclusive defenses there is a heightened danger of prejudice. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1083.) A prototypical example of mutually exclusive defenses is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime. (*Id.* at pp. 1080-1081; accord *United States v. Holcomb* (5th Cir. 1986) 797 F.2d 1320, 1324.)

> Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. (*United States v. Tootick, supra,* at p. 1082; accord *Zafiro v. United States, supra,* 506 U.S. at p. 544, fn. 3, Stevens, J., concurring.)

This concern is doubly true when one of the defendant's is representing himself.

In mammoth conspiracy cases, there will be multi-defendant cases where separate trials would be not only more reliable, but also more efficient and manageable than if left unsevered. (*Zafiro v. United States, supra,* 506 U.S. at p. 545, Stevens, J., concurring.) Such cases bear serious risks, for as noted by Justice Jackson in *Krulewitch* v. *United States* (1949) 336 U.S. 440 [93 L. Ed. 790, 69 S. Ct. 716], "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." (*Id* at p. 454, Jackson, J., concurring.)

Where there are specific circumstances that suggest a heightened risk of prejudice, reversal is required (*United States v. Mayfield, supra,* 189 F.3d at p. 904, citing *Zafiro* at p. 539), such as where the jury could not have been able to assess the guilt or innocence of the defendants on an individual and independent basis. (*United States v. Tootick, supra,* at p. 1083.)

There is no need to assess whether the error is harmless. Since *Zafiro*, severance cases generally have framed the inquiry as whether there was prejudice and whether that prejudice was in turn cured by appropriate jury instructions, but have not applied a separate harmless error inquiry. (*United States v. Mayfield, supra,* at p. 906, citing, e.g., *United States v. Cruz* (9th Cir. 1997) 127 F.3d 791, 798-800; *United States v. Baker* (9th Cir. 1993) 10 F.3d 1374, 1386-1388; *United States v. Arias-Villanueva* (9th Cir. 1993) 998 F.2d 1491, 1506-1508.) If harmless error analysis applies, the test is whether the error was harmless "beyond a reasonable doubt." (*United States v. Mayfield, supra,* at p. 906, citing *United States v. Peterson* (9th Cir. 1998) 140 F.3d 819, 822.) "'Whether an error is harmless depends on a variety of factors, including whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of the cross-examination, and of course, the overall strength of the prosecution's case.'" (*United States v. Mayfield, supra,* at p. 906, quoting *United States v. Peterson, supra.*)

D. Appellant Wheeler was Denied a Fair Trial and Due Process by Forcing Him to Be Tried with His Codefendants

1. APPELLANT WHEELER WAS A SHORT-TERM BIT PLAYER IN THE ORGANIZATION

Appellant Wheeler was a mere short-term, bit player in the Bryant organization. He was a relatively new employee of the organization at the time of the homicides. By his own testimony, he began working for Eddie Barber sometime after appellant's mother died in February 1988. (RT 13919-13920, 13924-13925, 13927-13928, 14012-14013.) The prosecution did not refute this fact in their rebuttal. Prosecution witness Laurence Walton placed the date in June 1988. (RT 10588-10589.) Appellant Wheeler was not included in Detective Lambert's organizational chart of the Bryant organization. (RT 8142-8143, CT 2595-2600.) Similarly, Detective Dumelle, who had investigated the Bryant organization and supervised undercover officers, identified a number of people associated with the organization. Of the people that came to his attention, Appellant Wheeler is not mentioned. (RT 9627-9631, 9635-9636, 9662-9664, 9670, 9703-9704, 9952-9953, 9949.) William Anthony Johnson, who distributed for the organization in 1987 and 1988, told his interviewer that he did not know Appellant Wheeler. (RT 9993, 10041, 10088-10089.) Appellant Wheeler's name is not on the trail of deeds related to any of the properties associated with the Bryant business. Appellant Wheeler's name is not associated with the utility bills

or telephone bills associated with those properties. He was never picked up in or arrested in any of the numerous drug raids that dominated the prosecutorial theme during the trial.

Although the prosecution theory was that Appellant Wheeler and Appellant Bryant were close, the latter does not appear in the photo album seized from Appellant Wheeler's apartment, although there are photographs of Eddie Barber (People's exh. 131, RT 11028-11029, 12009-12011, 13920-13922, 14342-14344), who had hired him (RT 13919-13920, 13924-13925, 14012-14013.).

George Smith, a cocaine dealer recruited by Appellant Bryant who sold cocaine for the organization and had worked at the Wheeler Avenue house (RT 10797, 10801, 10806, 1808-10809, 10855, 11214, 11218), testified that Eddie Barber, who ran Appellant Wheeler's group (RT 13919-13920, 14012-14013), and Antonio Johnson, who ran the pool hall (RT 11221), described Appellant Wheeler's relationship to the organization as a person who "wasn't shit;" he was stupid. (RT 11239-11241.)

Appellant Wheeler is much younger than his codefendants, he was 19 years old at the time of the instant offenses (RT 13912), and as demonstrated by their photographs on the top row of People's exhibit 113 (Appellant Bryant is #1,

Appellant Wheeler is #2[52], Appellant Smith is #3, and Codefendant Settle is #4 (RT 10539-10544)), the others appear old enough to be his father.

The prosecution's evidence of telephone traffic readily demonstrates that appellant was not in the loop with these men. People's exhibits 138, 142, and 143 are telephone records from various telephones and cellular phones. (RT 13455.) The records did not record local calls. (RT 13505.) The records' significance was summarized on 10 posters that made up People's exhibit 199. (RT 13455-13456.) One of the posters documented a high volume of traffic between Appellant Smith's residence and Appellant Bryant's residence during the period January 1988 through September 1988. (RT 13456-13459, People's exh. 199.) The victim, Andre Armstrong, was released from prison in July 1988 and the number of telephone calls between Appellants Smith and Bryant increased significantly that month. (RT 13459-13460, People's exh. 199.) The last telephone call between their residences in August was on August 27th, the day before the homicides, and the next telephone call was on September 12th. (RT 13460-13462.) There were no telephone calls from Appellant Bryant's residence to anywhere between August 28th at 10:41 a.m. until September 9th. (RT 13462-13466.)

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[52] A larger copy of this photograph is People's exhibit 160. (RT 11942-11943.)

Another of the posters detailed nine telephone calls between August 26 and 28, 1988 between Appellant Bryant's residence and Appellant Smith's residence or between Smith's residence and the Wheeler Avenue house. The last call was at 12:44 a.m. from Appellant Smith to the Wheeler Avenue house. (RT 13489-13492, People's exh. 199.)

Another of the posters summarized the frequent telephone calls between Appellant Smith's residence and the Wheeler Avenue house between February and August 1988. The last call from the Wheeler Avenue house was on the 27th at 8:39 p.m. The last call to the Wheeler Avenue house in August was made on the 28th at 12:44 a.m. Appellant Wheeler worked the 11:00 p.m. to 7:00 a.m. shift. (RT 13466-13469, People's exh. 199.) Two of the calls were made when either Lamont Gillon or Anthony Arceneaux would have been on duty. (RT 13510.) There were no telephone calls in September or October 1988.

Another of the posters summarized the infrequent telephone calls from Appellant Smith's residence to the house at 11943 Carl Street between January and October 1988, a residence in the name of James Settle, Jr., where a subsequent search produced records of drug transactions. (RT 13469-13474, People's exh. 199.) The same poster also summarized the telephone calls from the Carl Street house to Appellant Smith's residence from May through October 1988, averaging 19 calls a month from May through August, and no calls thereafter. The last call

to Appellant Smith's residence was made on August 25th. The last call made to any number was on September 29th. On that latter date, search warrants were served on the Fenton and Adelphia houses. (RT 13471-13474, People's exh. 199.)

Another of the posters summarized the infrequent telephone calls from Appellant Wheeler's girl friend's cellular telephone to Appellant Bryant, Neighborhood Billiards, and miscellaneous other "family" members. In July and August there were 33 and 10 calls respectively to the Wheeler Avenue house. The last call from her cellular phone to the Wheeler Avenue house was made on August 28th at 3:05 p.m. (RT 13474-13480, People's exh. 199.) The cellular telephone records reflected a decrease in contact between Appellant Wheeler and Appellant Bryant from 11 calls in July, 7 in August, and 3 in September, 1988. (RT 13508.)

Another of the posters details five telephone calls from Appellant Bryant's residence and one from the Wheeler Avenue house on July 21, 1988 to members of Andre Armstrong's family. It also reflected a telephone call from Appellant Bryant's residence to Appellant Smith's residence on the same date. (RT 13480-13481, 13484-13486, People's exh. 199.) Another of the posters listed eight telephone calls between July 23rd and August 11, 1988 between Appellant Smith's residence and locations where Armstrong was staying. (RT 13486-13489, People's exh. 199.)

Two of the posters summarized telephone calls from 11313 Oxnard Street, Apartment 313 beginning on August 28, 1988 at 5:55 p.m. Detective Lambert testified that this was a "safe house" for the organization and was in the name of Andrew Settle. There were approximately 90 calls made in the next 16 hours including six calls to the residence of the father-in-law of Appellant Smith, six to the apartment where Appellant Wheeler lived with his girlfriend, two to the residence of Jon Settle, two to the residence of Eddie Barber, two to the residence of Anthony Arceneaux,, and three to the residence of Anthony Johnson. (RT 13492-13498, People's exh. 199.) One of the calls to Appellant Wheeler was about 16 minutes before his normal 11:00 p.m. shift began. (RT 13510-13511.)

The prosecution did not produce the telephone records of James Williams, Provine Mcloria, or Lamont Gillon. (RT 13506-13507.)

Appellant's insignificance to the organization was exemplified by the prosecution's closing and rebuttal arguments where Appellant Bryant's role and that of the organization were the principal focus. In the 164 pages of the reporters' transcripts of those arguments (RT 16469-16565, 16783-16851), only 33 of the pages bear any reference to the prosecution's case against Appellant Wheeler (RT 16481-16482, 16486, 16501-16505, 16508-16509, 16523-15531, 16795, 16825-16834, 16838-16841, 16848-16850.) Indeed, in the Statement of the Facts, Prosecution's case, of the 23 pages required to recite the facts leading up to the

homicides, 22 pages addressed the codefendants' role (pp. 4-26) and only 1 page was required to summarize Appellant Wheeler's role (pp. 25-26, above.)

2. APPELLANT WHEELER'S DEFENSE WAS INCONSISTENT WITH THAT OF HIS CODEFENDANTS

Appellant Wheeler's defense was inconsistent with that of his codefendants. He was not contending that he did not work for the organization, and in fact admitted that he had the night shift at the Wheeler Avenue house on the night of the homicides. Appellant Wheeler had been willing to stipulate that the organization was selling drugs. (RT 10535-10538.) The trial court noted that the other defendants were denying that there was an organization and that it was "tough to be in trial with" the other defendants. (RT 10781-10789.)

It was particularly tough being tried with Codefendant Settle. He had warned the court and all the parties from the very beginning that his defense would be antagonistic to his codefendants.[53] This should have put the court on notice that it was required to grant Appellant Wheeler's severance motion. (See, e.g., *United States v. Mayfield, supra,* 189 F.3d at p. 900, fn. 1].) Yet, Settle was permitted to testify after all of his codefendants had presented their defenses and he had rested,

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[53] The facts for this point are more detailed in Argument II, and incorporated herein, wherein appellant raises as error the trial court's failure to control the order of the trial by permitting Codefendant Settle to testify after he and all of his codefendants had rested their cases.

during which through his narrative he wove a tale that was consistent with the prosecution's facts, but directly contradicted that of Appellants Wheeler and Bryant and provided circumstantial evidence of their guilt.

As one of the prosecutors observed during opening argument, with Codefendant Settle's testimony, the jury did not need Williams' testimony. (RT 16501.) The prosecutor repeatedly pointed out to the jury the value of Settle's testimony to the prosecution's case against Appellants Bryant and Wheeler. (RT 16526-16527, 16531, 16542.)

3. APPELLANT WHEELER WAS "MARKED AS A BAD MAN" BY HIS MERE ASSOCIATION WITH HIS CODEFENDANTS AND THE INCULPATORY EVIDENCE LIMITED TO HIS CODEFENDANTS FURTHER WEAKENED HIS ABILITY TO DEFEND HIMSELF

There were many other reasons it was "tough" to be on trial with his codefendants. All of the extraordinary security precautions taken by the court because of the number of defendants would not have been necessary had Appellant Wheeler been tried alone. Those precautions were detailed in Part B, 2 above. They included an anonymous jury cloistered from all contact with non-court personnel during their stay in the courthouse, a structurally modified courtroom, multiple metal detectors that all had to pass through, six to nine deputies in the courtroom at all times, and the requirement to wear a "REACT" belt or otherwise be shackled throughout the trial. Collectively, these precautions created an aura of guilt over appellant.

Security at this scale created the same negative impact as would dressing appellant out in prison garb or requiring him to wear shackles that all could see. No one should be so tried except as a last resort. (*Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636, citing *Illinois v. Allen* (1970) 397 U.S. 337, 344 [25 L.Ed. 2d 353, 90 S. Ct. 1057].) Such an aura of guilt provides "'the constant reminder of the accused's condition implicit in such distinctive'" circumstances and "'may affect a juror's judgment.'" (*Rhoden, supra*, quoting *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [48 L.Ed. 2d 126, 96 S.Ct. 1691].) Such an aura "is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. (*Rhoden, supra,* citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [89 L.Ed. 2d 525, 106 S.Ct. 1340].) Appellant was entitled not to be marked "as an obviously bad man" with the suggestion "that the fact of his guilt is a foregone conclusion." (*Rhoden, supra,* quoting *Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492, 497.) Due process would permit such an aura only as a last resort. (*Rhoden, supra,* citing *Stewart v. Corbin, supra,* 850 F.2d 492, 497-498.)

The aura of guilt was further enhanced by the prosecution's theme that paralleled the bulk of their case. As noted by counsel for Appellant Wheeler, the

prosecution used a series of witnesses[54] to ostensibly testify about the drug business of the organization, but that provided a much more damaging theme that their lives were in danger by their role in the prosecution's case against Stanley Bryant and his organization. This was a prevalent theme of the prosecution's arguments to the jury at the close of the guilt phase. (RT 16430T, 16448-16449, 16458-16459, 16474-16480, 16483-16491, 16783-16789, 16793, 16804, 16807-16809, 16824, 16845.) The jury was constantly reminded that this was a very bad organization made up of bad guys doing bad things. This theme undoubtedly spilled over to how the jury would view Appellant Wheeler by his association in the organization. However, there were no drug charges in this case, this was a murder case, and Appellant Wheeler had been willing to stipulate that the organization was selling drugs to prevent, or at least limit, this highly prejudicial theme. (RT 10535-10538.) Otherwise, the witnesses' fear of Appellant Bryant

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[54] These witnesses were G.T. Fisher (RT 8887), Barron Ward (RT 9027), Rhonda Miller (RT 9077), John Allen RT 9228-9233, 9337-9339, 9348-9350), Reynard Goldman (RT 9264), Francine Smith (RT 9455-9456), Una Distad (RT 9726, 9741-9742), William Johnson (RT 10215-10218, 10220-10222, People's exh. 216, CT3 10601-10617), Ladell Player (RT 10233, 10248, 10252-10253, 10338-10339, 10488-10492, People's exh. 216, CT3 10546-10570), Laurence Walton (RT 10681-10682, 10688-10689, 10698-10700, People's exh. 216, CT3 10468-10472.), George Smith (RT 10781-10791, 10836-10837), Alonzo Smith (RT 10986-10987), Pierre Marshall (RT 11773, 11781-11782), James Williams (RT 12494, 12604, 15768).

was completely irrelevant to Appellant Wheeler's role in the organization or the homicides.

The dangerousness of the organization was further exemplified by the tactics the police employed in their innumerable raids of organization properties employing battering rams and SWAT teams, both before and after the homicides, as detailed in the Statement of the Facts, *Prosecution's Case*, parts 1, d and 3 and incorporated herein. This was completely irrelevant to Appellant Wheeler's role in the organization or the homicides.

The dangerousness of Appellant Bryant and the organization was bound to color the jury's view of Appellant Wheeler even though attempts were made to limit the application of some of the evidence to defendants other than Appellant Wheeler. As detailed in Part B, 3, above, there were 10 instances in which the jury was told that certain evidence was only admissible against Appellant Wheeler's codefendants. It was completely unreasonable to assume that the jurors would be able to properly compartmentalize this evidence over the course of a 45 day trial with 120 witnesses, particularly given the inflammatory and prejudicial nature of the evidence.

Amongst these instances was the prosecution's evidence attributable to Ladell Player and Alonzo Smith that provided the prosecution's only evidence that Appellant Bryant (or anyone else other than Williams) acknowledged his

responsibility for the homicides. (CT3 10552-10533, RT 10263-10264, 10912-10916.) Prosecutor Davidson twice made the point to the jury during his opening argument that Player and Smith's evidence provided Bryant's admissions of his guilt. (RT 16482-16483, 16495.) In addition, there was the statement attributed to Codefendant Settle that Mr. Armstrong, one of the four homicide victims, would not be around much longer. (RT 9278.) The content of these admissions provided circumstantial evidence that the homicides were planned and that Appellant Bryant's subordinates were acting in his behalf. It was completely unreasonable to believe that the jury could, let alone would, forget or not use this information in resolving the guilt or innocence of Appellant Wheeler and in determining the degree of his culpability as to each count, that is, first or second degree murder or voluntary manslaughter.

In addition, amongst these 10 instances were the accounts of two witnesses' fear of Appellant Bryant (RT 10256-10258, 11214-11216; CT3 10563, 10565; People's exh. 216) and thereby his organization and the force Appellant Bryant could exert through his employees, of which Appellant Wheeler was one. This too was a prevalent theme of the prosecution's arguments to the jury at the end of the guilt phase of the trial. (RT 16430T, 16430U-V, 16458-16459, 16472, 16476, 16480, 16483-16484, 16490-16491, 16783-16789, 16793, 16804, 16807-16809, 16824, 16845.)

To this the jury was asked to also compartmentalize the two attempts on the life of Keith Curry and use them only against Appellants Bryant and Smith. The trial court noted the highly prejudicial nature of Curry's testimony and that it indicated that Appellant Smith had a relationship with Appellant Bryant that the former commits violent acts at the latter's behest either out of loyalty for Appellant Bryant or because that is Appellant Smith's job in the organization. (RT 11294-11295.) The prosecution repeatedly made this point in their argument to the jury. (RT 16549, 16552, 16795-16796, 16804.) This was completely irrelevant to Appellant Wheeler's role in the organization or the homicides. It improperly suggested that if Appellant Bryant had such power over Appellant Smith, a peer, at least as far as their comparable ages was concerned (see People's exh. 113, photographs 1 and 3), Appellant Bryant would likely have had considerable sway and influence over the much younger Appellant Wheeler (see People's exh. 113, photographs 1 and 2) when it came to acquiring another shooter to aid in the homicides. (RT 10937-10938, 11150-11151.)

Moreover, the prosecution used the attack on Curry to demonstrate what Appellant Bryant did to a paramour of his former wife Tannis. This provided an additional motive for the killing of Armstrong, another paramour of his former wife. It also provided circumstantial evidence that Appellant Bryant played a dominant role in Armstrong's death, that the homicides were planned in advance,

and that Appellant Bryant's subordinates were acting in his behalf. As Prosecutor Davidson argued to the jury,

> We know what happens to men that fool around with Stan Bryant's ex-wife. We know that from Keith Curry. And there is Andre Armstrong, who wasn't as smart as he thought, he was messing around with Tannis Bryant. ¶ The number to call back to when they are setting up to go there, the situation is that Andre beeped Stan Bryant before he is going over there to set the meeting up at Wheeler and the call back number he leaves is Tannis Curry's number, that that is the number that Stan calls back and talks to him about and sets this meeting up there. ¶ That is how smart he was. Greer sits there and looks at this and Greer is looking at these guys who are talking about moving on this operation, taking a piece of it, and Andre Armstrong is fooling around with Stan Bryant's ex-wife who others have already attempted to kill over and he decides, "Hey, you guys go over there. I'm not going over there." ¶ His testimony, if you look back on it, was they kidded him. Brown and Armstrong kidded him about "Well, you're afraid." He said "Maybe so, but I'm not going over there." (RT 16430M-N.)

Later in his jury argument, Prosecutor Davidson returned to the attacks on Curry:

> Curry is very important, and that has got to be talked about. Keith Curry, when you look at the similarity of what happens with Curry and what happens with Armstrong, I don't think anybody can be totally blind to that. ... ¶ ... [N]obody else had any motive to do what happened to Keith Curry in the way it happened [by bomb]. ... (RT 16492.)

Then, Mr. Davidson recounted the incident when Curry was shot by Appellant Smith (RT 16492-16493):

> Don Smith does not have one motive in the world to shoot Keith Curry except he is Stan Bryant's friend. ... [H]e is proved to

be a hit man because there is no other reason for that kind of shooting. (RT 16493.)

Thus, the prosecution's portrayal of Appellant Wheeler was vastly different than it would have been had his trial been severed from that of his codefendants and the prosecution's case for first degree murder by premeditation and deliberation or lying in wait would have been substantially weakened.

4. THROUGH THE COURT'S ACQUIESCENCE TO CODEFENDANT SETTLE'S GAMESMANSHIP, SETTLE WAS PERMITTED TO CONCOCT A TALE THAT EXTRICATED HIMSELF FROM CULPABILITY AT THE EXPENSE OF APPELLANT WHEELER

Codefendant Settle repeatedly assured the court that he had rested and would not testify and then waited until all parties had presented their cases. Once their defenses had all been displayed, the court permitted Codefendant Settle to weave a tale that extricated him from culpability while directly refuting the defenses of Appellants Wheeler and Bryant. This was doubly damaging to Appellant Wheeler, since the jury likely associated Appellant Wheeler's guilt with that of Appellant Bryant, as discussed in Part C, 3, above. The subterfuge Codefendant Settle employed was calculated to obstruct justice in his case while tipping the scales of justice against his codefendants. This deviation from the orderly presentation of the case and the prejudice flowing to Appellant Wheeler therefrom is the topic of Argument II, *infra,* and is incorporated herein.

5. THE PROSECUTION'S CASE AGAINST APPELLANT WHEELER WAS WEAK

Prosecutor McCormick argued to the jury at the close of the guilt phase that the fortified nature of the Wheeler Avenue house and the limited number of organization staff that were authorized to enter limited to a few who could have committed the homicides. (RT 16790-16791.) Appellant Wheeler was the least likely of the Wheeler Avenue staff to have been present at the house at the time of the shooting. The Wheeler Avenue house was normally staffed as follows:

- Williams (as depicted in his photograph, People's exh. 3 [RT 8245-8248, 12808]) on the 7:00 a.m. to 3:00 p.m. shift;

- Lamont Gillon (as depicted in his photograph, People's exh. 113, number 10 [RT 10539-10544]), Williams lifelong best friend (RT 12115, 12117-12118, 12120, 12131, 12139, 12663-12664), on the 3:00 p.m. to 11:00 p.m. shift;

- Appellant Wheeler (as depicted in his photographs, People's exhs. 102, 113, number 2, and exh. 160 [RT 8245-8248, 10539-10544]) on the 11:00 p.m. to 7:00 a.m. shift; and

- Anthony Arceneaux (as depicted in his photograph, People's exh. 113, number 9, and exh. 122 [RT 10539-10544, 10745]) who covered for the others when they were off. (RT 9959-9960, 9965-9966, 10160-10161, 12130-12132, 12138-12139, 12141, 12145-12146, 12240.)

Detective Vojtecky testified that on the day of the homicides, Mr. Arceneaux was scheduled to work the 3:00 p.m. to 11:00 p.m. shift. (RT 10753, 10761.) Appellant Bryant, by his own testimony, made daily appearances at the house, generally in the evening. (RT 15181, 15222-15223, 15333, 15489-15490.) These

were the five individuals most likely to be found at the house at some point during the day. Since appellant was assigned the swing shift, he was the least likely to be there at the time the victims arrived.

There was an additional organization member who was likely at the house at the time of the homicides, Larry Bradley. It was stipulated that on the date of the shootings at the Wheeler Avenue house, the police made a list of all the license plate numbers of all the cars on Wheeler Avenue. A 1970 Toyota Corolla, license number 245AYC, was parked across the street and over one house from the crime scene. During the People's case, evidence was introduced that the car was registered to Larry Bradley and it contained a repair receipt in the name of Antonio Johnson. (People's exh. 177, RT 13010-13012, 14373-14377.) Larry Bradley was a member of the organization, had worked at the Adelphia and Fenton houses, and distributed for them. (RT 9953-9954, 10692-10693.) Williams testified that Bradley was one of the organization's people that handled drugs and his pager number was among a list of pager numbers found in the kitchen of the Wheeler Avenue house. (RT 12222-12223, 12233.)

The only non-organization witnesses to the shooting were three neighbors of the Wheeler Avenue house. With the exception of one of the neighbor's late identification of Appellant Bryant, their testimony provides no dispositive

identifications, yet they do provide descriptions that are inconsistent with Appellant Wheeler, but consistent with other members of the organization.

Lucila Esteban lived at 11433 Wheeler Avenue, on the south side of Wheeler Avenue, two houses east, and across the street from the crime scene. (RT 8436, People's exh. 22.) She testified that from her kitchen window she saw a tall, thin black man between the ages of 25 and 30 running from the house wearing gloves and holding a rifle (RT 8436-8440, 8444, 8446, 8449, 8467, 8477.) Appellant Wheeler was only 19 years old at the time of the incident (RT 13912) and his photographs demonstrate that he looked like an adolescent. (People's exhs. 102, 113, number 2.) She said the man was a little taller and a little darker complected than Codefendant Settle, but he was about as thin as Settle. (RT 8485-8486.) Comparison of photographs of Appellant Wheeler and Codefendant Settle show that the latter appears substantially thinner and lighter complected than Appellant Wheeler. (People's exh. 113, photographs 2 and 4 [RT 10539-10544].) Her description appears consistent with Anthony Arceneaux as he appears in his photographs, People's exhibits 113, photograph number 9, and exhibit 122, although the record does not reflect how his height compared with that of Codefendant Settle. She saw the man run towards the red car on the passenger side and when he got close he immediately started shooting at the back seat area of the car. (RT 8444-8445, 8480-8481.) The man then ran to the driver's door of the

car. It was locked and he could not open it. He shot the window away, pulled up the lock, got in the car, and drove away. (RT 8445-8446.) From a photograph she later apparently identified Codefendant Settle as the man she saw. (RT 8478, 8490-8491, 8769-8770.) However, at the trial, she was unable to identify any of the defendants as anyone she had seen. (RT 8362, 8467, 8473-8475, 8478.) Although Ms. Esteban saw the green car come out of the garage and drive away, she was unable to describe its occupants, except that the driver was black and a little darker complected that Codefendant Settle. (RT 8449-8550, 8469, 8487.)

Manuel Contreras was in the house next to and west of that of Ms. Esteban, which placed him one house closer to the crime scene. (RT 8482-8483, 8501-8502, 8505-8506.) After he heard several shots, he went out the front door of the house and peered around the side of his garage at the house across the street. (RT 8501-8502, 8521-8523, People's exhs. 21-22.) He testified that he saw a black male, medium build, over six feet tall, with short hair, and between 20 and 30 years old carrying a short shotgun. (RT 8503-8505, 8508B, CT3 10573.) Once again, Appellant Wheeler was only 19 years old at the time of the incident (RT 13912) and his photographs demonstrate that he looked like an adolescent. (People's exhs. 102, 113, number 2.) Mr. Contreras saw no one else in the area. (RT 8503.) He returned into the house and called the police. (RT 8526.) Then from a window in the house he saw the El Camino arrive as the red car left. The

El Camino and the green car, exiting the garage, left at about the same time. (RT 8508B, 8512, 8524, 8527-8528.)

A third neighbor, Jennifer Daniel, who lived on the same side of Wheeler Avenue as the crime scene and three houses to the west, (RT 11847-11848, People's exh. 22), heard three muffled shots and gathered her children and took them inside her house (RT 11849-11851.) Within a minute, she heard shots fired that seemed louder. (RT 11851-11852.) From her porch, she looked down the street and noticed that there were people moving and cars leaving. (RT 11852-11853.) She believed she saw one car backing out of the driveway and a red car come towards her house. (RT 11853-11855.) As the car started to pass her house, the driver appeared to look in her direction. (RT 11856.) She left her porch and ran down to the fence towards Wheeler Avenue so she could see the car better. (RT 11856-11858.) As the car drove past her house, the driver looked right at her and started to duck down and speed up. (RT 11858, 11860.) She got a good look at him. He was a black man with very short hair. (RT 11858-11859, 11921.) He was skinny and 18 to 30 years old. (RT 11858-11859, 11886-11887.) She then ran in the house and dialed 911. (RT 11863, 11909-11910, 11924.) In 1988 at the preliminary hearing, she testified that she had not gotten a good look at the driver and was unable to identify him. (RT 11891-11892.) However, apparently for the first time at trial, she identified a photograph of Appellant Wheeler (People's exh.

113, photograph 2) as depicting the driver of the car, but when asked if she saw him in the courtroom, she immediately identified Stanley Bryant as the driver. (RT 10539-10544, 11862-11865, 11875-11876, 11892-11893, 11922, 11939-11943, 11951-11953, 11959, 13711-13712.)

The photograph of Appellant Wheeler that Ms. Daniel was shown, was very small and apart of a 12-pack of other organization personnel, People's exhibit 113. (RT 10539-10544.) She apparently was not shown the enlargement of the same photograph, People's exhibit 160. In the courtroom, she was of course far better able to see both Appellants Wheeler and Bryant, and would have been able to better discern their substantial age difference. Thus, with her implicit prompt courtroom rejection of appellant as the person she saw, all that remains is her late hour identification of Appellant Bryant.

Comparing Williams and Appellant Wheeler's actions after the homicides, it is Williams behavior that suggests a consciousness of guilt. Williams left his upscale, gated apartment on Tobias (RT 11613, 12136, People's exh. 154) and fled to Pennsylvania while appellant took a brief vacation and returned to work at the Carl Street house. (RT 13962-16365.). Williams was forcibly taken into custody in October 1988. (RT 12373.) Appellant, on the other hand, voluntarily came to the police station when asked. (RT 13943, 13965-13966.)

Williams was interviewed by Detective Vojtecky on October 7, 1988 in Pennsylvania. (CT4 24-25.) At the time of the interview, he was charged with the same offenses as appellants. (CT4 100.) Detective Vojtecky accused Williams of being the shooter; Williams knew that he faced the death penalty. (RT 12385, 12410, 12457.) He feared that he had been identified at the scene (RT 12452, 12792) and he readily admitted that he would lie to avoid the ultimate sanction. (RT 12459-12461.) He knew that if he cooperated, he could be given leniency. (RT 12695-12696.) He was in fact given a grant of immunity. (RT 12387-12388.)

Williams account at the trial differed substantially from what he told Detective Vojtecky in that first interview. Williams told Vojtecky that he did not know what kind of car Appellant Wheeler was driving when he arrived. (CT4 53.) However, at the trial, Williams testified that Appellant Wheeler arrived in his red Jeep. (RT 12314, 12423.) In that first interview, Williams said he did not see the bag that Appellant Bryant brought in, because he was counting money at the time. (CT4 55.) However, at trial, Williams testified that Bryant carried in a green duffel bag that appeared to be heavy. (RT 12295.) In that interview, Williams repeatedly denied to Vojtecky that he ever saw the "dudes" that got killed. (CT4 31, 60, 77, 106.) He never looked out the window and looked at them. (CT4 77.) However, at trial, he described their arrival in the red Toyota Camry and saw them

walk up to the house. (RT 12328, 12330-12336, 12341.) In the interview, he told Vojtecky that he was on the way out the garage door when he heard the shots. (CT4 31.) However, he testified at trial that he was still in the house and on his way to the kitchen door when he heard the first shots. (RT 12336-12337, 12433.)

None of the neighbors corroborated Williams' account about the backing of the large green car into the garage or Williams walking down the street to the bus stop, even with Ms. Esteban watching continuously. (RT 8481, 12346-12347, 12350-12351.)

Although Williams identified Appellant Wheeler as one of the participants, there was substantial evidence that their similar appearance, a fact Williams raised on his own in his interview following his arrest, provided Williams a convenient scapegoat. (RT 8257-8258, 12172, 12393-12395, 12397-12398, 12414, 12691, 12718, 12787-12789, 12791-12792, 12804-12805, 12807-12808, 12820, CT4 26-27, 95.) And, they were both 19 years old. (CT4 27, RT 13912.) Williams told Detective Vojtecky that Appellant Bryant told him that a lady had given a description that sounded like Williams. (CT4 67-69.)

Williams knew Dwayne Brown and that he lived across the street from the 7-11 where the bodies of Loretha Anderson and her children were found. It was quite a coincidence that it was Mr. Brown who found the bodies. (RT 8566-8567, 8569-8571, 12324-12325.)

Other traditional indicia of the closeness of the case are also present in this case. The jury plainly considered the case a close one. The guilt phase of the trial concluded on May 10, 1995. (CT 15204.) At 9:05 a.m. the following morning, the jury began their deliberations. (CT 15206.) Jurors were excused and alternates substituted on May 17 and May 23, 1995. (CT2 837, CT 15289-15290, RT 16950, 16956-16957.) Each time, the jury was instructed to begin their deliberations anew. (CT2 839, CT 15290, RT 16958, 16970.) It was not until June 8, 1995 at 5:05 p.m., after 12 days of deliberation by the final group of 12 (May 23 through June 8, 1995), that the jury returned its verdicts on Appellant Wheeler. (CT 15291, 15295-15296, 15309, 15316-15317, 15376-15377, 15381, 15385, 15394, 15403-15406, 16090.)

Lengthy deliberations, such as these (12 days of deliberations following 45 days of trial (see Part B, above), are an indication that the evidence was not overwhelming. (*Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, 588 [three days of deliberations following a five day trial].) Furthermore, the jury requested a read-back of portions of the testimony of James Williams as well as two of the neighbors, Linda Esteban and Manuel Contreras. (RT 162877, RT 17038, CT 15380, 15384.) Williams was the prosecution's case against Appellant Wheeler. Esteban and Contreras were two of the three non-participant witnesses to the shootings. Jury questions during deliberations are strong indicia of prejudice,

especially when related to crucial issues. (See, e.g., *People v. Markus* (1978) 82 Cal.App.3d 477, 482 [147 Cal.Rptr. 151].)

6. THE RECORD MANIFESTS THAT APPELLANT WHEELER WAS DENIED A FAIR TRIAL BY HIS FORCED TRIAL WITH HIS CODEFENDANTS

As the litany of Parts D, 1 through 5, above, demonstrates, joinder of appellant's trial with that of his codefendants resulted in a gross unfairness amounting to a denial of due process whether or not severance was warranted at the time motions were made. (See, e.g., *People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 127.) Appellant Wheeler's case meets on numerous grounds the guidelines for a grant of severance. There was his prejudicial association as a bit player in the organization with the organization's founder and chief lieutenants. (*People v. Massie, supra,* 66 Cal.2d at p. 917.) "When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." (*Zafiro v. United States, supra,* 506 U.S. at p. 539.) Such mammoth,[55] multi-defendant cases bear serious risks that an individual will not be able "to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." (*Krulewitch v. United States, supra*, 336 U.S. at p. 454, Jackson, J., concurring.) Where, as here, the jury is unable to

assess appellant's guilt or innocence or level of culpability on an individual and independent basis, there is a heightened risk of prejudice and reversal is required. (*United States v. Mayfield, supra,* 189 F.3d at p. 904; *United States v. Tootick, supra,* 952 F2d. at p. 1083.)

There was the confusion resulting from evidence on multiple counts and, particularly, the need for the jury to repeatedly segregate evidence admissible only against one or more codefendants when often that evidence was so prejudicial that its segregation could not be reasonably expected, like for example the prosecution's only evidence that Appellant Bryant acknowledged his responsibility for the homicides and the attacks on Keith Curry that provided an additional motive for the homicides and evidence of the sway that Appellant Bryant had over Coappellant Smith and, by analogy, Appellant Wheeler. (CT3 10552-10533, RT 10263-10264, 10912-10916; *Jackson v. Denno, supra,* 378 U.S. at p. 388, fn 15 ["'{t}he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds'"]; *People v. Massie*, *supra*, 66 Cal.2d at p. 916 [it is an impossible task for a juror to obliterate

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[55] As noted in Part B, 1, above, this was the longest trial that the presiding judge had been involved in (RT 18626), and he had 20 years of experience (RT 9568.)

from his mind of that which he already knew]; *People v. Cummings, supra,* 4 Cal.4th at p. 1286; *People v. Chambers, supra,* 231 Cal.App.2d at p. 33.)

There was Appellant Wheeler's defense, inconsistent with that of his codefendants and particularly that of Codefendant Settle that heightened Appellant Wheeler's risk of prejudice. (*United States v. Mayfield, supra*, 189 F.3d at p. 904; *United States v. Tootick, supra,* 952 F.2d at pp. 1080-1081; *United States v. Holcomb, supra*, 797 F.2d at p. 1324.)

The compelling conclusion is that Appellant Wheeler's joinder with Appellants Bryant and Smith and Codefendant Settle resulted in a gross unfairness amounting to a denial of due process and a fair trial in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments and requiring reversal of his convictions and judgment of death. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Arias, supra*, 13 Cal.4th at p. 127.)

II. THE TRIAL COURT FAILED TO CONTROL THE ORDER OF THE TRIAL AND IMPROPERLY ACQUIESCED TO CODEFENDANT SETTLE'S REQUEST TO TESTIFY AFTER SETTLE HAD RESTED HIS DEFENSE

Codefendant Settle defended himself without the assistance of counsel. He had no legal training. He was not guided by or limited by the canons of ethics that control the conduct of counsel at trial. His conduct of his defense was

unpredictable and ultimately very prejudicial to Appellant Wheeler's defense.[56] As will be detailed below, Settle engaged in gamesmanship with the court and his codefendants that the trial court failed to control. The court permitted Settle to manipulate the order of the trial and ultimately testify after all of the defendants, including himself, had rested their cases, and after repeatedly assuring the court that he did not intend to testify.

The result denied Appellant Wheeler a fair trial and due process of law. As a result, his confinement and sentence are illegal and unconstitutional under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

A. The Facts

Prior to jury selection, Codefendant Settle informed the court that he would testify and it would not be favorable to appellants. (RT 6342.) During jury selection, Codefendant Settle requested to exercise juror challenges independent of appellants because his interests were different. (RT 6807.) Later, the court chided counsel for appellants for passing a note to Codefendant Settle during jury selection, noting that since Codefendant Settle believed he had a conflict with appellants, that it was inappropriate for appellants' counsel to advise him. (RT 7518-1519, 7522-7523.) On the date the alternate jurors were impaneled,

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[56] The impropriety of the denial of the defense request to sever Settle's case was a topic of Argument I, above.

Codefendant Settle advised the court that he would testify and that "it may be damaging to ... the co-defendants." (RT 7834-7835.)

During a discussion on the order in which the parties would make their opening statements, the court asked Codefendant Settle if he concurred in the agreement that Mr. McKinney would go first for Appellant Wheeler, followed by Codefendant Settle, and then counsel for Appellants Smith and Bryant. Codefendant Settle replied that he would go in any order as long as he went last during the closing arguments, a bargain the court did not accept. (RT 7989-7990.)

Within the first few lines of the prosecution's opening statement, Mr. McCormick cautioned the jurors that nothing prevented the parties from lying during their opening statements, obviously directing his comments to Codefendant Settle. (RT 8083.) Mr. McCormick reminded the jury of this point immediately after a brief recess taken during his opening statement. (RT 8115.)

Codefendant Settle, in his opening statement, told the jury that he would testify. (RT 8158.) A substantial part of his opening statement was a preview of that testimony, and the court ultimately admonished him for it. (RT 8178.)

The prosecution completed the presentation of their case on April 4, 2003. (CT 13681.) Two days earlier, the court inquired of Codefendant Settle how long he believed his defense might take. In responding, Codefendant Settle stated that it partially depended upon how long the prosecution took in cross-examining him.

(RT 13435.) The next day, Codefendant Settle, in an account of who his witnesses would be, informed the court that he would testify. (RT 13754-13755.)

Throughout the course of the guilt phase of the trial, defense counsel repeatedly expressed their concern that Settle would prejudice their case. (RT 6306, 9905, 11549.)

At the conclusion of the People's case, Codefendant Settle renewed his motion to sever his case from that of appellants. (RT 13763-13764.) In denying the motion, the court stated:

> The massive conflict that was pointed out and envisioned has not materialized. Based on what I'm hearing, I don't believe it is going to. ¶ I don't know that we have defenses that are necessarily inconsistent. (RT 13764.)

The jury had a five day break after the People rested before the commencement of the defense cases. (CT 14948-14949.) Upon their return, the court told them that the parties had agreed that the defense cases would be presented in the following order: Appellant Smith, Appellant Wheeler, Codefendant Settle, and Appellant Bryant. (RT 13910.) Thereafter, Appellant Smith immediately rested without calling any witnesses. (RT 13910-13911.) Appellant Wheeler, over the course of April 10th through April 12th, put on his defense. (RT 13911-14377.) His defense is detailed above in the Statement of the Facts, Defense Case, Part A, 4, b, and incorporated herein. His defense did not inculpate Codefendant Settle.

Codefendant Settle then put on his defense, calling nine witnesses over the course of April 13th through April 18th. (RT 14526-14847.) His defense is detailed above in the Statement of the Facts, Defense Case, Part A, 4, c, and incorporated herein. On April 17th, Codefendant Settle told the court that he intended to testify. (RT 14774-14775.) The court advised him that he had the absolute right not to testify and that his testimony might help, but could also devastate his case. (RT 14774-14775.) Codefendant Settle said that he would like to see what Mr. Leonard, his assisting counsel, thought. (RT 14775.) Later in the day, Codefendant Settle told the court that he had decided not to testify. (RT 14786-14788.) The court again cautioned him about his decision and asked whether he had any questions. (RT 14787.) Codefendant Settle replied:

> Should the co-defendant testify and raise issues that after I have rested that would make me want to testify?
>
> The Court: I would let you.
>
> Defendant Jon Settle: All right.
>
> The Court: I think it would be error for a court to refuse a defendant's request to testify, basically at any point in the case. I don't think I could do that.
>
> Defendant Jon Settle: Okay.
>
> The Court: Unless the case had been argued to the jury. You know what I am saying? While we are still taking testimony, if you change your mind and decided you had to get up there, yeah I would.
>
> Defendant Jon Settle: Okay. In that case, --

The Court: But I'd kind of like you to do this—again, I have told you the truth, but what I would like you to do is if you know for sure that you are going to, let's do it now.

Defendant Jon Settle: At this point, I'm not. And I just have one more witness, my wife. (RT 14787-14788.)

At the end of the day, Mr. Jones, Appellant Bryant's counsel, expressed his concern to the court that Codefendant Settle said he might testify:

We had agreed upon a rotation, so to speak, and the only concern I have was that we not go in front of Codefendant Settle.

The Court: Well, there is only so much I can do, and I gave him an honest answer to this question, and I think he is being honest with me. Has been throughout most of the trial. He has indicated that his intention is not to testify in the case.

Am I correct on that?

Defendant Jon Settle: Yes.

The Court: And he was inquiring if somebody got up and dumped on him or said something about him that he disagreed with would he be allowed to rebut that, and I gave him, again, the honest answer, the only answer I could, that I would allow. I cannot prevent, no more than I could if Mr. Wheeler changed his mind and decided now he—or Mr. Smith changed his mind. It was an agreement, but if he does change his mind, I have to let him testify. (RT 14805.)

The following day, Codefendant Settle rested without testifying. (RT 14847.)

Appellant Bryant then put on his defense, beginning on April 18th and concluding on April 25th. (RT 14856-15523.) His defense is detailed above in the Statement of the Facts, Defense Case, Part A, 4, d, and incorporated herein. His defense did not inculpate Codefendant Settle.

At the end of the court day on April 24th, the court asked Appellant Wheeler's counsel if they would have any additional evidence and was informed that they would not. Counsel for Appellant Smith reminded the court that they had rested. (RT 15463.) The court asked Codefendant Settle if he had decided if he was going to testify. Codefendant Settle responded, "Yes, I am." (RT 15463.)

The following morning, counsel for Appellant Bryant objected to Codefendant Settle testifying. (RT 15472.) He argued that Codefendant Settle was violating the original agreement on the order of the defenses and that he had maneuvered the situation so that he could present his account last. (RT 15472.) The Court affirmed from Codefendant Settle that he wanted to testify. (RT 15473.) The court mused:

> I don't believe, as I indicated, trying to be honest with the defendant. I don't believe the court has the authority to preclude a defendant from testifying in the guilt phase, notwithstanding he made that decision after he has passed the first time around and rested. And later he was waiting in the wing to see what Mr. Bryant did and what he testified to. Perhaps, that is what was going on. Perhaps, he made the decision to testify whether Mr. Bryant did or not. I don't know. But for sure he has the constitutional right to testify as all defendants do, and I am not going to preclude him from testifying in this case. (RT 15473.)

Codefendant Settle's testimony, imparted though his narrative and cross-examination by counsel for Appellants Wheeler and Bryant and the People, consumed a substantial part of the court day on April 25th and April 26th. (RT 15487-15782.) The substance of that testimony is detailed in the Statement of the

Facts, part A, 4, e, *supra*, and is incorporated herein. In short, Settle provided the explanation for how the large green car, described by Williams as the vehicle he was asked to back into the garage at the Wheeler Avenue house, was acquired on the afternoon of homicides by Appellant Bryant. Jones on cross-examination of Jon Settle elicited that Frank Settle told him that the Pontiac was used in the murders. (RT 15572-15582.) Settle wove Appellant Wheeler into his tale and placed him with Frank Settle an hour after Frank Settle had taken possession of the green car. This also provided evidence that Appellant Wheeler was involved in organization business at a time when he normally would not have been on duty and near the time of the homicides. It contradicted his testimony that he was with his girlfriend, Tavia Givens, at their families' homes in Los Angeles.

Defense counsel argued that Codefendant Settle's vacillation about whether he would testify was a subterfuge. The court agreed. (RT 15800-15801.)

Counsel for Appellants Wheeler and Bryant informed the court that a defense investigator as well as counsel for Appellant Bryant spoke with Frank Settle on the evening after Codefendant Settle testified, and Frank said that he did not know Appellant Wheeler, he had not been with him on August 28th, he had not picked up a car at Codefendant Settle's residence on that date, he did not take Codefendant Settle a car for repair on that date, and he had never been to the Wheeler Avenue house. The court appointed counsel for Frank Settle who shortly

thereafter advised that Frank would assert his constitutional right not to testify if asked about the green car transaction. (RT 15784-15785, 15793-15794, 15798-15799.) Counsel complained that this was the first time they had heard these purported facts in the seven years that they had been on the case. (RT 15792-15793.)

Frank Settle was ordered to return on the following morning. (RT 15803-15804.) He ultimately testified and confirmed the facts alleged by counsel above. (RT 15841-15870.)

After Codefendant Settle's closing guilt phase argument, defense counsel renewed their motion to sever Settle's case from theirs and moved for a mistrial based on his conduct in the case, particularly his testifying after appellants had rested. (RT 16634-16635.) Both motions were denied. (RT 16635.)

B. The Relevant Law

The trial judge must preserve order in the courtroom. (*People v. Hill* (1992) 3 Cal.4th 959, 999 [13 Cal.Rptr.2d 475].) This includes the responsibility to guard against "any conduct calculated to obstruct justice." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883 [125 Cal.Rptr. 442].) The statutory authority is in Penal Code section 1044 which provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to

the expeditious and effective ascertainment of the truth regarding the matters involved. (§ 1044.)

Penal Code section 1093 sets forth the normal order of trial.[57] However, section 1094 permits the court in its discretion to depart from that order.[58]

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[57] Section 1093 provides:

> The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:
>
> (a) If the accusatory pleading be for a felony, the clerk shall read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with.
>
> (b) The district attorney, or other counsel for the people, may make an opening statement in support of the charge. Whether or not the district attorney, or other counsel for the people, makes an opening statement, the defendant or his or her counsel may then make an opening statement, or may reserve the making of an opening statement until after introduction of the evidence in support of the charge.
>
> (c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense.
>
> (d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.
>
> (e) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

Nonetheless, the judge has the duty to stop introduction of highly prejudicial matter. (*People v. Arends* (1957) 155 Cal.App.2d 496, 508 [318 P.2s 532].)

There are other limitations on the court's discretion. After the parties have presented their cases in chief, only rebuttal evidence is allowed unless the trial court allows otherwise for good reason. (§ 1093, subd. (d); Witkin, *California Evidence, Presentation at Trial 3* (4th ed. 2000), § 71, p. 102.) In *People v. Carter* (1957) 48 Cal.2d 737 [312 P.2d 665] this Court explained the need for the rule:

> The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has

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> (f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

58 Section 1094 provides:

> When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from. (§ 1094.)

> met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. (*Id.* at p. 753.)

Evidence code section 778 provides:

> After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion. (Evid. Code, § 778.)

This rule is particularly true after each party has presented its entire case in chief. (Witkin, *California Evidence, Presentation at Trial 3, supra,* § 78, p. 112; see *People v. Thomas* (1992) 2 Cal.4th 489, 542 [7 Cal.Rptr.2d 199]; *People v. Cooks* (1983) 141 Cal.App.3d 224, 327 [190 Cal.Rptr. 211]

Juxtaposed to the court's role in controlling the proceedings, is an accused's right to testify in his defense, a "constitutional right of fundamental dimension." (*United States v. Joelson* (9th Cir. 1993) 7 F.3d 174, 177; *Rock v. Arkansas* (1987) 483 U.S. 44, 51 [97 L.Ed.2d 37, 107 S.Ct. 2704].)

> The right stems from several provisions of the Constitution, including the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's privilege against self-incrimination. *Rock,* 483 U.S. at 51-52.... The right is personal, and "may only be relinquished by the defendant, and the defendant's relinquishment of the right must be knowing and intentional." *Joelson*, 7 F.3d at 177. (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1094; accord *People v. Robles* (1970) 2 Cal.3d 205, 214 [85 Cal.Rptr. 166].)[59]

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[59] "This ... is a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial." (*Rock v. Arkansas,*

However, the waiver need not be explicit. (*United States v. Pino-Noriega, supra,* at p. 1094.)

Yet, a defendant's right to testify is circumscribed by procedural and evidentiary rules, when the rules are neither arbitrary nor disproportionate to the purposes they are designed to serve. (*Rock v. Arkansas, supra,* 483 U.S. at pp. 55-56.) The right "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Rock*, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [35 L.Ed.2d 297, 93 S.Ct. 1038].)

For one, a defendant's demand to testify must be timely made. (*United States v. Pino-Noriega, supra,* at p. 1095 [too late after verdict has been reached, even though verdict had not been announced].) "Hence, a defendant does not have an unrestricted right to testify at any point during trial. Generally, if he wishes to testify, he must do so before he rests his case; otherwise, he can move the trial court to reopen the evidence, but the choice whether to reopen is left to the court's

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supra, 483 U.S. 44, 49.) "[I]t came to be recognized that permitting a defendant to testify advances both the '"detection of guilt"' and '"the protection of innocence"', thus by the second half of the nineteenth century, "all States except Georgia had enacted statutes that declared criminal defendants competent to testify." (*Ibid.*) "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." (*Ferguson v. Georgia* (1961) 365 U.S. 570, 582 [5 L.Ed.2d 783, 81 S.Ct. 756].)

sound discretion." (*United States v. Peterson* (1st Cir. 2000) 233 F.3d 101, 106, citing *United States v. Santana* (1st Cir. 1999) 175 F.3d 57, 64.) "Such a rule serves to ensure that the trial proceeds in a fair and orderly manner, with the defendant's testimony occurring when the judge, jury, and prosecution reasonably expect it. (*Peterson, supra,* citing *United States v. Jones* (8th Cir. 1989) 880 F.2d 55, 59- 60.)

The Fifth Circuit in *United States v. Thetford* (5th Cir. 1982) 676 F.2d 170 enumerated the factors a district court must consider in deciding whether to reopen the evidence to allow a defendant to testify:

> In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not "imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered." (*Thetford, supra*, at p. 1177, quoting *United States v. Larson* (8th Cir. 1979) 596 F.2d 759, 778; accord *United States v. Walker* (5th Cir. 1985) 772 F.2d 1172, 1177; *United States v. Peterson, supra,* at p. 106.)

In *Peterson, supra,* the court upheld the refusal to permit the defendant to reopen and testify where he had given the court hardly any indication as to what he wished to testify about, where there was the strong possibility that he planned

to commit perjury, and where he had offered no excuse for not testifying during his case-in-chief where he had had ample time to offer testimony. (*Id.* at p. 107.)

There is abundant authority illustrating that the right to testify is not absolute. (*People v. Reynolds* (1984) 152 Cal.App.3d 42, 46-47 [199 Cal.Rptr. 379] [defendant's testimony properly struck after he refused to answer prosecution's questions on cross-examination]; *United States v. Ramone* (10th Cir. 2000) 218 F.3d 1229, 1235-1236 [defendant's testimony properly refused where he failed to provide the fourteen-day notice required under federal rules to introduce evidence of specific instances of sexual behavior by the alleged victim to prove consent]; *United States v. Miller* (7th Cir. 1994) 13 F.3d 998, 1002 [same]; *United States v. Petrosian* (9th Cir. 1997) 126 F.3d 1232, 1234-1235 [defendant properly prohibited from testifying without the aid of an interpreter where his ability in English was not adequate to provide reliable testimony]; *United States v. Gonzalez-Chavez* (8th Cir. 1997) 122 F.3d 15, 18 [defendant's testimony properly refused where it was not relevant to any issue in the case]; *United States v. Moreno* (9th Cir. 1996) 102 F.3d 994, 998-999 [same];. *State v. Chapple* (Wash. 2001) 36 P.3d 1025, [defendant properly prohibited from testifying by his expulsion from the courtroom for disruptive conduct]; *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332 [defendant properly prohibited from testifying in a narrative form after his counsel indicated that he had no

further questions]; *State v. Mitchell* (S.D. 1992) 491 N.W.2d 438, 446-447 [defendant's testimony properly limited in surrebuttal to issues raised in rebuttal where he had not testified in the defense case-in-chief]; *United States v. Blum* (8th Cir. 1995) 65 F.3d 1436, 1444 [defendant's testimony properly refused where she chose not to testify but then after the close of the evidence and then she sent a message to the court that she had changed her mind]; *United States v. Stewart* (1994) 20 F.3d 911, [defendant's testimony properly refused where he unequivocally stated his desire not to introduce evidence after the government rested and requested to testify only after the court informed the jury that they would hear closing statements]; *People v. Collier* (Ill. App. 2002) 738 N.E.2d 267, 271-274 [same, because the justification for the defendant's repeated "change of heart" appeared to be a manipulation of the trial process]; *Comm. V. Moore* (Mass. App.Ct. 2001) 751 N.E.2d 901, 903-906 [same, where did not request to testify until both he and his codefendant had rested their cases]; *State v. Barnett* (Wash. App. Div. 2001) 16 P.3d 74, 78-79 [same, defendant's change of mind after he rested was too late]; *Smith v. Campbell* (M.D. Tenn. 1991) 781 F.Supp. 521, 532-533 [defendant's testimony properly refused where request to testify made after the prosecution's rebuttal evidence and where the defendant knew of the importance of his testimony during his case-in-chief, chose to remain silent for strategic reasons, and his proffered testimony was not offered as rebuttal]

There are other illustrations. Applying *Rock*, the Eighth Circuit in *United States v. Jones, supra,* 880 F.2d 55, 60 upheld the lower court's decision not to allow the defendant to testify where he had not asserted his right to testify during the evidence-taking stage of the trial, but sought to assert his right to testify before the case had been argued or sent to the jury. (*Id.* at p. 60, fn. 5.) In *Neuman v. Rivers* (6th Cir. 1997) 125 F.3d 315, the Sixth Circuit denied habeas relief to a defendant who had moved to reopen the evidence and testify regarding self-defense after the judge denied a requested jury instruction at the close of defendant's case. (*Id.* at pp. 318-319.)

C. Appellant Wheeler Was Denied a Fair Trial and Due Process by the Court's Failure to Control the Order of the Trial and Acquiescence to Codefendant Settle's Manipulation of that Order to His Advantage and at Appellant's Expense

Codefendant Settle repeatedly assured the court that he had rested and would not testify and then waited until all parties had presented their cases. Once their defenses had all been displayed, Codefendant Settle wove a tale that extricated him from culpability while directly refuting the defenses of Appellants Wheeler and Bryant. This was doubly damaging to Appellant Wheeler, since the jury likely associated his guilt with that of Appellant Bryant, a subject of Argument I, above. The subterfuge Codefendant Settle employed was calculated to obstruct justice in his case while tipping the scales of justice against his codefendants.

This issue does not present merely a review for abuse of discretion, because the trial court did not know that it had the power, let alone the obligation, to exercise discretion and prevent Codefendant Settle from manipulating the proceedings to his advantage at the expense of his codefendants. (RT 15473, 15800-15801; *People v. Slocum, supra*, 52 Cal.App.3d at p. 883 [trial judge has the responsibility to guard against "any conduct calculated to obstruct justice"]; *People v. Carter, supra,* 48 Cal.2d at p. 753 [trial judge has the obligation "to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence"]; *Rock v. Arkansas, supra*, 483 U.S. at pp. 55-56 [a defendant's right to testify is circumscribed by procedural and evidentiary rules]; *United States v. Pino-Noriega, supra*, 189 F.3d at p. 1095 [a defendant's demand to testify must be timely made]; *United States v. Peterson, supra,* 233 F.3d at p. 106 [generally a defendant must testify before he rests his case]; *United States v. Thetford, supra,* 676 F.2d at p. 1177 ["[t]he belated receipt of such testimony should not 'imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered."].)

The trial court's acquiescence to Codefendant Settle's late testimony produced a trial that was fundamentally unfair, and the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307 [113 L.Ed.2d 302, 111 S.Ct. 1246] [the *Chapman*[60] standard applies to "ordinary trial errors" implicating the federal constitution].) For, as one of the prosecutors observed during jury argument, with Codefendant Settle's testimony, the jury did not need Williams' testimony. (RT 16501.) The prosecutor repeatedly pointed out the value of Settle's testimony to the prosecution's case against Appellants Bryant and Wheeler. (RT 16526-16527, 16531, 16542.)

The result produced a gross unfairness amounting to a denial of due process and a fair trial in violation of appellant's rights under the Fifth, Eighth, and Fourteenth Amendments and requiring reversal of his convictions and judgment of death.

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60 *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].

III. APPELLANT'S CONVICTIONS ARE UNCONSTITUTIONAL AS THEY ARE IMPERMISSIBLY BASED ON INSUFFICIENT EVIDENCE, AS THEY ARE SUPPORTED SOLELY BY THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE, THE RESULT OF THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT WILLIAMS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THAT HIS TESTIMONY REQUIRED CORROBORATION AND THE TRIAL COURT'S REFUSAL TO ORDER THE JURY TO RECONSIDER THEIR VERDICT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THEIR INSTRUCTIONS

Appellant Wheeler's confinement and sentence are illegal and unconstitutional under state statute and constitutional law and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution because his conviction is based solely on the uncorroborated testimony of James Williams, an accomplice as a matter of law. This outcome was the result of the trial court's improper refusal of the defense request to instruct the jury that Williams' was an accomplice as a matter of law and that his testimony had to be corroborated. This outcome was also the result of the trial court's improper refusal to order the jury to reconsider their verdicts when it became apparent that they had not understood their task in several fundamental and critical ways.

A. The Facts and Procedural History

As detailed in the Statement of the Facts, Part A, 3, and incorporated herein, the prosecution had only one witness that placed Appellant Wheeler at the place and time of the homicides, and that was James Williams, a participant in the offenses. As detailed in Argument I, Part D, 5, and incorporated herein, none of the three neighbors to the Wheeler Avenue house who testified were able to

identify any of the participants, with the exception of Ms. Daniel, who nearly seven years after the offenses made her first identification of anyone, a courtroom identification of Appellant Bryant as the driver of the red car that carried the victims, Loretha Anderson and her children.[61]

On the afternoon of the homicides, by the point Williams had received Appellant Bryant's instructions on Williams' role in the upcoming confrontation, there are three consistent accounts from Williams in the record on appeal of Williams' state of mind. The first, chronologically, Williams provided during his interview by Detective Vojtecky and two Harrisburg police officers on October 7 1988, nine and one-half weeks after the homicides. (RT 16086-16092, 16561-16562; Wheeler's exh. 8A, CT4 24.) In the interview, Detective Vojtecky asked Williams:

Did you know what was going down?

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[61] In 1988 at the preliminary hearing, she testified that she had not gotten a good look at the driver and was unable to identify him. (RT 11891-11892.) However, in 1995, apparently for the first time at trial, she identified a photograph of Appellant Wheeler (People's exh. 113, photograph 2) as depicting the driver of the car, but when asked if she saw him in the courtroom, she immediately identified Stanley Bryant as the driver. (RT 10539-10544, 11862-11865, 11875-11876, 11892-11893, 11922, 11939-11943, 11951-11953, 11959, 13711-13712.) The photograph of Appellant Wheeler that Ms. Daniel was shown, was very small and apart of a 12-pack of other organization personnel, People's exhibit 113. (RT 10539-10544.) She apparently was not shown the enlargement of the same photograph, People's exhibit 160. In the courtroom, she was of course far better able to see both Appellants Wheeler and Bryant, and would have been able to better discern their substantial age difference. Thus, with her implicit prompt courtroom rejection of appellant as the person she saw, all that remains is her late hour identification of Appellant Bryant.

W: I had an idea.

V: How?

W: When, uh, first thing, they put gloves on and went in that back room and I heard all the guns, people cocking the guns. (Wheeler;s exh. 8, CT4, 45.)

Williams told them that he assumed that the reason he was instructed to back the green car into the garage was so that the bodies could be put in the trunk. (RT 15766-15767.)

The second account Williams provided during his interview by two Deputy District Attorneys, Messrs. McCormick and Seki, and District Attorney Investigator William Duncan on January 25, 1993. (RT 14905, 14907.) The stated purpose of the interview was to review William's prior statements. (People's exh. 207, p. 1.) At the conclusion of the interview, Mr. Duncan summarized what was learned in a five page report. (People's exh. 207, RT 14915.) Mr. Duncan had 20 years of experience as a police officer and investigator. (RT 14924.) Williams told them about Appellant Bryant removing the money counting machine from the house, taking the handgun that was normally kept in the living room, the sound of a gunshot from a bedroom in the house, being asked whether the neighbors could have heard the shot, Bryant bringing a heavily laden duffle bag into the house, the sound of Codefendant Settle racking a shotgun, the appearance of Appellants Wheeler and Smith alongside Settle, a handgun in Appellant Wheeler's waistband, and then being advised that

"some people were coming to the house." (People's exh. 207, pp. 3-4.)

Investigator Duncan continued:

> Williams said that at approximately 4:30 p.m., he looked through the kitchen window and saw a group of people park a red car in front of the counthouse. Williams saw "Slim" and Don Smith put gloves on their hands. Bryant asked "Slim, Smith and Wheeler if they were ready." Everyone nodded yes. Williams said that it was at this time, he believed someone was going to die. Williams did not believe Bryant would kill anyone in the house. Williams was asked why he did not walk away, if he had a strong belief that Bryant was planning to kill someone. Williams explained that he believed that if he did not go along with the group, they would eliminate him as a potential witness. Williams said that he planned to cooperate with Bryant so he could safely get himself out of the house. (People's exh. 207, p. 4, RT 14914-14915.)

Mr. Duncan testified that in mid February 1993, Mr. McCormick talked with Mr. Duncan and told him "to write another report to clear up the problems in the first report. (RT 14916-14918.) Mr. McCormick convinced Mr. Duncan that the former's notes were more accurate than the latter's notes. (RT 14919-14920.) Mr. Duncan's supplemental report is dated April 22, 1993 and begins with a "synopsis of facts" that states, "Last report February 16, 1993. D.D.A. Kevin Cormick reviewed the report of the James Williams interview and determined certain statements made by Williams were omitted." (People's exh. 208, p. 1.) The report then added two paragraphs of facts among which are the following:

> Leroy Wheeler, Don Smith, John Settles arrived at the counthouse after Bryant and Williams became suspicious. Bryants' employees were not permitted at the counthouse if they were not working.

> It was Williams understanding that Bryant owned the House on Wheeler Ave. It was Williams belief Bryant would never have permitted anyone to be killed at the counthouse because it would have connected the event to Bryant. Bryant told Williams that he was expecting people at the house later that afternoon. Bryant gave Williams instructions to push the buzzer that opened the front door when the people arrived and he, Bryant, would exit the house. Bryant was the boss and Williams had to follow orders. Williams had no idea Bryant and the others were going to kill anyone. Williams had no intention of participating in the murders. Williams gave the same explanation for moving the car from the street into the garage. (People's exh. 208.)

Williams provided the third account of his state of mind at appellants' trial. Williams testified that he did not want to be there (at the house.) (RT 12321-12322.) He planned to cooperate in Appellant Bryant's plan only until he could safely get himself out of the house. (RT 14914.) Of course by that point the plan would be substantially executed.

And, that is what Williams did, he cooperated. As he had been instructed by Appellant Bryant (RT 12309, 12311-12312, 12315-12317, 12319-12321), Williams watched for and saw Messrs. Armstrong and Brown arrive (RT 12330-12336), he heard them buzzed in through the first set of doors (RT 12332-12333), and then he listened for and acted upon Appellant Bryant's request to let him out of the house, by activating the electronic lock (RT 12334-12336, 12627-12628.) As Williams was walking towards the kitchen door, he heard one shot, a scream, and then two shots. (RT 12336-12337, 12433.) Williams went into the garage. (RT 12337-12338.) The blue Hyundai was in the garage. (RT 12338.) He

continued outside and turned right to a big, old green car. (RT 12340-12341, 12345) The key was in the ignition. (RT 12340-12341, 12434.) Williams backed the car into the garage. (RT 12342.) As Williams got out of the car, he saw Stanley standing next to the Hyundai. (RT 12343-12344.) Stanley said, "All right, Jay." (RT 12344.) Williams then left as he had been told (RT 12346) and walked to the bus stop, while looking about for witnesses to the shooting (RT 12321.)

On October 3, 1988, a complaint for four counts of murder and one count of attempted murder were filed against Williams as well as Anthony Arceneaux, Appellants Wheeler and Bryant, Levi Slack, Antonio Johnson, and Tannis Bryant Curry. (RT 15064, CT 4836-4845.) Four days later the complaint was amended to add John [sic] Settle, Nash Newbill, and William Settle as defendants. (CT 4968-4972.) Four days later, Provine McCloria was added as a defendant. (CT 5013-5023.)

On November 21, 1988, Williams preliminary hearing began joined with that of Appellants Wheeler and Bryant, Antonio Johnson, Tannis Curry, and Nash Newbill. (RT 14447, CT 3380, 3397.) Williams was given a formal grant of immunity from those charges on that date by the Los Angeles Superior Court. The charges against Williams were dismissed on November 30, 1988. (RT 16083, 16093-4-5.)

The prosecution argued that, according to Williams' testimony, he did not have sufficient knowledge of what the four defendants were going to do to be an accomplice. (RT 14452.) At the most, he would be an accessory after the fact. (RT 14452.) Alternatively, and in regard to Appellant Smith, the prosecution argued that there would be sufficient corroboration through the telephone records and Appellant Smith's relationship with Appellant Bryant in that he would attempt a homicide for Appellant Bryant. (RT 14453.) The court expressed the view that an accomplice is somebody who is guilty for the same offense, not merely might be guilty. (RT 14448.) The court found no nexus to the issue if only criminal charges had been filed. (RT 14448-14449.) The court concluded that it could not be said that as a matter of law Mr. Williams was an accomplice. (RT 14455.) As the court put it:

> [T]here is circumstantial evidence from which the jury could find him to be an accomplice, or they could find him to be an innocent dupe who does not quite know what's going on. He—according to him, he knows that there are guns, he does not know the people that are coming over, or what is going to happen, but he knows it could be dangerous. He knows Mr. Bryant is to leave and his job is to buzz him out and then get on back to the pool hall after he brings the car in. Does that add up to he must have known there would be a murder and, therefore, must have aided and abetted in one or more murders and shared that intent to kill and so forth? No, that does not necessarily dictate that result.[62]

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62 Three court days later (RT 14331, 14808), came the testimony of District Attorney's Investigator Duncan with his two 1993 reports of the interview he

> The jury may well find that he is not to be believed and that he knew from the beginning what was going to happen in this situation, and he was part and parcel of planning to kill some people that were coming in. They could very well find that. Why would you let a guy listen to murders that are going to happen unless you knew quite well this guy was not going to tell anybody because he was part of the deal. And I don't know if the jury will find that or not. But they may believe him; he was up on the stand for a couple of days. If they believe everything he said, I would submit he is not an accomplice, at least as a matter of law. (RT 14455-14456.)

At a later point, the court stated that the substance of Williams' testimony that his actions were without the specific intent to kill was "certainly very disputable." (RT 15953.) Ultimately, the court refused the defense request to instruct the jury that Williams was an accomplice as a matter of law. (RT 16207-16209.)

At the close of the guilt phase, the jury was instructed on the use that may be made of the testimony of a single witness. Using CALJIC 2.27 (1991 Revision) the jury was instructed:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of such fact depends. (RT 16393, CT 15487.)

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participated in with Williams, recounted above at the beginning of this Part. In that interview Williams admitted that by 4:30 in the afternoon of the homicides, Williams believed by what he had seen and heard in the Wheeler Avenue house that somebody was going to die. (RT 14914, 14919, 14923, 14928-14929.) Williams said that he only planned to cooperate until he could safely get himself out of the house. (RT 14914.)

In regard to accomplice testimony, the jury was provided a definition of an accomplice using the language of CALJIC 3.10 and 3.14:

> An accomplice is a person who is or was subject to prosecution for the identical offense charged against the defendant on trial by reason of aiding and abetting. (RT 16406, CT 15510.)
>
> Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in, the commission of a crime without such knowledge and without such intent or purpose is not an accomplice in the commission of such crime. (RT 16408-16409, CT 15515.)

In regard to the meaning of "aiding and abetting," the jury was instructed using the language of CALJIC 3.00 and 3.01:

> The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:
>
> 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission or attempted commission of the crime.
>
> A person aids and abets the commission or attempted commission of a crime when he or she,
>
> (1) with knowledge of the unlawful purpose of the perpetrator and
>
> (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission or attempted commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not itself assist the commission of the crime does not amount to aiding and abetting,

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (RT 16404-16405, CT 15507-15508.)

Thereafter the jury was explained that an aider and abettor was liable for the natural and probable consequences of the crime committed by a principal.[63]

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[63] The jury was instructed using the language of CALJIC 3.02:

One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime or crimes originally aided and abetted.

In order to find a defendant guilty of a crime under this theory, you must be satisfied beyond a reasonable doubt that:

1. The crime of murder was committed,
2. The defendant aided and abetted such murder,
3. Thereafter, a co-principal in such crime committed additional charged murders, and
4. Those additional murders were a natural and probable consequence of the commission of the murder or murders which the defendant initially aided and abetted.

Taken together, these instructions mean that a defendant may be found guilty of a charged offense if the evidence shows beyond a reasonable doubt that said defendant:

1. Actively and directly committed such offense, or
2. Was an aider and abetter of such offense, as those terms are defined in the previous two instructions, or
3. Was an aider and abetter in another charged crime or crimes, and the offense under consideration was a natural and

In regard to the limitations placed on the use of an accomplice's testimony the jury was instructed using the language of CALJIC 3.11, 3.12, 3.13, 3.18, and 3.19:

> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.
>
> Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated was true.
>
> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

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probable consequence of the commission of that other crime or crimes. (RT 16405-16406, CT 15509.)

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.

Evidence to corroborate an accomplice may be direct or circumstantial. It is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration.

Corroborative evidence does not need to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the defendant with the commission of the offense.

A defendant's own testimony and inferences therefrom may be sufficient corroboration of an accomplice as to that defendant only.

Likewise, false or misleading statements to authorities regarding the charged offenses may constitute corroborative evidence or as part of the circumstances supporting a finding of corroboration as to the defendant making the false or misleading statement. ... ¶ ...

The testimony of an accomplice insofar as it tends to incriminate any defendant ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

You must determine whether any witness was an accomplice as I have defined that term.

The defendant has the burden of proving by a preponderance of the evidence that such witness was an accomplice in the crimes charged against the defendant.

> You should consider all of the evidence bearing upon this issue, regardless of who produced it. (RT 16406-16410; CT 15511-15514, 15516-15517; CALJIC 3.11, 3.12, 3.13, 3.18, 3.19.)

During Prosecutor Davidson's opening argument, he pressed that Williams was not an accomplice. Mr. Davidson explained to the jury, "and the reason he is not an accomplice in this case, and the reason he is not an accomplice is he has to be subject to prosecution for exactly the same crimes, meaning he has to be guilty of these crimes." (RT 16505.) This prompted a defense objection that he was misstating the law. The court responded, "Well, he has to be shown to be an accomplice by the evidence, I think within, the confines of the court." (RT 16505.) Mr. Davidson resumed:

> I tried to explain aiding and abetting. But to be an aider and abettor, you have to have knowledge of the unlawful purpose of perpetrators and know what is going to happen. Know that somebody in the house is going to be murdered. You have to have the intent, the intent to encourage, instigate, to aid those murders. You have to intend to aid those murders, and you have to do so. You have to aid them. And the problem with Jay Williams while he is technically, legally not an accomplice here, even though he was there, he was not privy to the planning of killings in the back of the house. (RT 16505-16506.)

As an illustration of Williams lack of knowledge, Mr. Davidson argued that Williams believed that he was backing the green garage into the car so that the bodies could be put in the trunk, whereas in fact the bodies were placed in the back seat. (RT 16506-16507.)

Mr. Davidson asked the jury to consider in corroboration of Williams' testimony the fact that Appellant Wheeler was evasive when questioned by the police, that his fingerprints had been found in the Wheeler Avenue house, that he visited Jeff Bryant in prison, that he telephoned the Wheeler Avenue house, and that newspaper clippings about the homicides were in his apartment. (RT 16508-16509, 16524-16525.)

The jury began their guilt phase deliberations on May 11, 1995. (CT 15206.) Jurors were excused and alternates substituted on May 17 and May 23, 1995. (CT2 837, CT 15289-15290, RT 16950, 16956-16957.) Each time, the jury was instructed to begin their deliberations anew. (CT2 839, CT 15290, RT 16958, 16970.) On June 8, 1995 at 5:05 p.m., after 12 days of deliberation (May 23 through June 8, 1995), the jury returned its verdicts on Appellants,[64] but had not reached agreement on Codefendant Settle. (CT 15291, 15295-15296, 15309, 15316-15317, 15376-15377, 15381, 15385, 15394, 15403-15406, 16090.)

On June 12, 1995, the jury asked the following seven questions:

> [1.] Please clarify page 23 of jurors [sic] instructions [CALJIC 2.13], in regards to inconsistent or consistent of a [sic] testimony. (CT 15438, RT 17100-17101.)

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[64] On May 17, 1995, the jury had returned guilty verdicts on counts three and four against Appellant Bryant. (RT 16952-16956.)

[2.] If more than one witness has made inconsistent statements, how do we weigh their "credibility" and "truth of facts" between them? (CT 15439, RT 17101.)

[3.] If one is charged with the same crime but not brought to trial is he automatically an accomplice?

[4.] Can there be aiding and abetting after the crime was committed? (CT 15440, RT 17101.)

[5.] We would like to have some clarification as to doubt. ¶ Reasonable—Possible—Imagined ... maybe an example of each??? (CT 15442, RT 17101.)

[6.] ... Page 56 of the instructions states "A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence." Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind?

[7.] ... If you have reasonable doubt, you are required to vote not guilty. Is that the law? (CT 15441, RT 17102.)

In discussing the appropriate responses to questions 3 and 4, the court stated:

It is a fact that if you are charged with a crime it does not make you an accomplice. I believe the law is that one must be properly chargeable with a crime to be an accomplice, which means there has to be some proof of a person's criminal culpability, certainly not proof beyond a reasonable doubt, but if you are properly chargeable with the crime, then you are an accomplice.

As to the [question 4], you can't aid and abet a crime after it was committed and be guilty of the underlying crime. ... We have to be careful here because as to No. 3, they may be asking whether Mr. Williams—in effect, could Mr. Williams for example, would be an accomplice simply by driving the green car back into the driveway. That is one way to look at it.

The other is, I'm trying to see if they could be trying to apply that to Mr. Settle in some way. Is there any evidence of an accomplice, well, I guess so. It could be this: There is some

testimony that Mr. Settle was in one of the vehicles seen leaving the scene, I think the vehicle with two victims in it. There was some testimony that the jury could find that to be the case, though. They may be wondering, for example, well, would that act in and of itself make one guilty even though they are not a hundred percent sure that the guy was there firing the shots, let's say. ... (RT 17105-17105a.)

The court adjourned and continued the discussion the following morning. (RT 17105b-c.) When the court asked for the input from counsel for appellants, Mr. Novotney moved pursuant to section 1161[65] that the deliberations be reopened because the jury's questions demonstrated that they misunderstood the law and the instructions they had been provided. (RT 17105e.) The Court immediately denied the motion.[66] (RT 17105e.)

Returning to the appropriate response to question number 4, the court pondered:

> In terms of Mr. Williams, ... they may be asking again in a roundabout way, we want to know if Mr. Williams is a accomplice, and the reason we are asking about aiding and abetting is we think

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65 Section 1161 provides in pertinent part:

> When there is a verdict of conviction, in which it appears to the Court that the jury may have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered..... If the jury render a verdict which is neither general nor special, the Court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the Court.

66 This denial is the subject of Argument VIII, below.

> he is an aider, Mr. Williams, and therefore, we have worked out in this circumstance it is possible that simply by driving the green car in, which is after the homicide, at least after a couple of homicides, and arguable even after all four, ... ¶¶ [d]oes that fact make one an aider even though something arguably occurred after the murder. The answer is technically, "NO." But the answer is "certainly" if he agreed to do it beforehand and that facilitated and encouraged to get this ball rolling. (RT 17105j.)

In the court's responses to the jury, in regard to question number 4, the court provided two hypothetical sets of facts. In one a defendant agreed before a murder to permit a body to be buried in his yard to facilitate the commission of a murder. In the second, the defendant agreed after the murder. The court instructed the jury that in the first scenario, the defendant, "in all likelihood, [is] an aider and abettor in the crime of murder." In the second scenario he would not be. (RT 17105s-u.) Whereupon, juror 247 inquired, "In that second scenario, would he be an accomplice?" (RT 17105u.) The court clarified that the juror meant an accomplice to murder. (RT 17105u-v.) The court reminded the juror that an accomplice "is a person who is a principal or aider and abettor shown by the preponderance of the evidence in the commission of a crime." (RT 17105v.)

Shortly thereafter, Juror 113 inquired, "Now, you still are saying, no, that the juror has the—the final decision as to whether or not they consider someone to be an accomplice or an accessory? (RT 17105y.) The court replied that "accessory" is not a word that the court had used. (RT 17105z.) Juror 113 replied, "I think that was part of the problem we were having." (RT 17105z.) The

juror then asked, "What if someone has decided that someone is an accomplice? (RT 17105z.) The court then clarified that the juror's question was whether it was up to them to determine whether somebody is or is not an accomplice. (RT 17105z.)

Immediately thereafter, juror 412 asked, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty." (RT 17105aa.) Juror 261 then asked, "what if the jurors don't agree whether or not someone is an accomplice or not? (RT 17105aa.)

At the conclusion of this exchange, Mr. Novotney argued that it was painfully clear that at the time the jury rendered its verdicts, it did not understand the law of accomplice, and again moved pursuant to section 1161 that the deliberations be reopened. (RT 17105bb-cc.) The court denied the motion. (RT 17105cc.) The court explained:

> I don't see a misunderstanding. What I see is the fact as to Mr. Settle, one defendant, one juror is apparently having problems with the issue of whether there is sufficient corroboration, assuming Mr. Settle is an accomplice. And that in no way exists with any verdict re your client's case, and does not evidence a confusion as to the law regarding accomplices whatever as to render a verdict against your client mildly suspect. (RT 17105cc-dd.)

B. Accomplice Testimony Must Be Viewed With Distrust

Distrust of accomplice testimony is as an important component of a defendant's right to a fair trial and to a reliable jury verdict. (*People v. Guiuan* (1998) 18 Cal.4th 558, 564-569 [76 Cal.Rptr.2d 239].) Thus, Penal Code section 1111 proscribes basing a conviction upon the uncorroborated testimony of an accomplice. The section provides in relevant part:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. (§ 1111.)

The due process roots for safeguards in the use of accomplice testimony are deep and well documented. (*People v. Guiuan, supra,* 18 Cal.4th at pp. 565-567.) As Justice Kennard explained in her concurring opinion:

> "A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony." (*People v. Guiuan, supra,* 18 Cal.4th 558, 570, conc. opn. Kennard, J., quoting *Phelps* v. *United States* (5th Cir. 1958) 252 F.2d 49, 52.)

There are good reasons for such skepticism. First, accomplices, because they are liable to prosecution for the same offense, have a powerful built-in motive to aid the prosecution in convicting a defendant, with the hopeful expectation that the prosecution will reward the accomplice's assistance with immunity or leniency. (*Id.* at p. 572.) "A person arrested in incriminating circumstances has a

strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation." (*Williamson v. United States* (1994) 512 U.S. 594, 607-608 [129 L.Ed.2d 476, 114 S.Ct. 2431], conc. opn., Ginsburg, J.) "There is solid historical justification for an accomplice's expectation that, even in the absence of an explicit agreement, the prosecution will reward testimony that results in a conviction by granting the testifying accomplice immunity from prosecution or at least leniency in charging or sentencing." (*People v. Guiuan, supra,* 18 Cal.4th at p. 572, conc. opn. Kennard, J.) Accomplices are rarely persons of integrity whose veracity is above suspicion. An accomplice's participation in the charged offense is itself evidence of bad moral character. (*Id.* at p. 574.) As the Ninth Circuit put it in *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109:

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. (*Id.* at p. 1124.)

The danger of relying on testimony from people who are receiving a deal for that testimony was brought to light by a study of the Actual Innocence Project which illustrated the high incidence of reliance on informants in cases where the defendant was later exonerated as innocent by DNA tests. (*Id.* at p. 1124, fn. 6.)

A second reason for such skepticism is the accomplice's obvious interest in minimizing his own role in the charged offense.

> Quite apart from any hope that the prosecution will grant the accomplice immunity or leniency as a reward for testimony that results in the defendant's conviction, it is in the accomplice's interest to persuade the prosecution that the offense is less serious than the charge indicates or that the accomplice's own role in its commission is relatively insignificant. (See Alarcon, *supra*, 25 Loyola L.A. L.Rev. 953, 960.) For this reason, accomplice testimony may falsely minimize the seriousness of the crime or the accomplice's culpability for it. Testimony portraying the offense as less serious than charged necessarily would favor the defense, but testimony minimizing the accomplice's role could favor either the prosecution (by shifting primary blame to the defendant) or the defense (by shifting primary blame to other individuals).
>
> Finally, special caution is warranted because an accomplice's firsthand knowledge of the details of the criminal conduct allows for the construction of plausible falsehoods not easily disproved. This court has previously described the problem in these words: "[A]ccomplice testimony is frequently cloaked with a plausibility which may interfere with the jury's ability to evaluate its credibility. '"[A]n accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."' (Heydon, *The Corroboration of Accomplices* (Eng. ed. 1973) Crim.L.Rev. 264, 266; see also Note, 54 Colum.L.Rev. 219, 234.)" (*People v. Tewksbury* [1976] 15 Cal.3d 953, 967 [127 Cal.Rptr. 135]; also Note, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards* (1990) 100 Yale L.J. 785, 787 ["Since the accomplice alone knows about the pattern of criminal events, he can manipulate the details of those events without blatant discrepancies."]; Hughes, [*Agreements for Cooperation in Criminal Cases* (1992) 45 Vand. L.Rev. 1, 33 ["Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their

> liberty may depend on it."].) (*People v. Guiuan, supra,* 18 Cal.4th at p. 575, conc. opn. Kennard, J.)

In *People v. Tewksbury, supra,* 15 Cal.3d 953, 967 this Court affirmed the Legislature's mandated skepticism for accomplice testimony:

> Juries are now compelled rather than cautioned to view an accomplice's testimony with distrust, for while his testimony is always admissible and in some respects competent to establish certain facts (see *People v. McRae* [(1947)] 31 Cal.2d 184, 157 [187 P.2s 741] [probable cause to hold defendant to answer at preliminary hearing]), such testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated. (*People v. Tewksbury, supra,* 15 Cal.3d 953, 967.)

Thus, whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury must be instructed, *sua sponte*, that the accomplice's testimony should be viewed with caution. (*People v. Guiuan, supra,* 18 Cal.4th at p. 569.) The jury must also be informed that an accomplice's testimony must be corroborated by other evidence that tends to connect the defendant with the commission of the offense. (§ 1111.)

Where a witness is an accomplice as a matter of law, the trial court must in addition instruct the jury that the accomplice's testimony *must be* corroborated. (*People v. Robinson* (1964) 61 Cal.2d 373, 394-396 [38 Cal.Rptr. 890]; *People v. Dailey* (1960) 179 Cal.App.2d 482, 485-486 [3 Cal.Rptr. 852].)

C. James Williams Was an Accomplice as a Matter of Law

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is give." (Pen. Code, § 1111; accord Witkin, *California Evidence*, *Presentation at Trial 3, supra,* § 97, pp. 132-133.) "In order to be chargeable with the identical offense, the witness must be considered a principal under section 31." (*People v. Fauber* (1992) 2 Cal.4th 792, 833 [9 Cal.Rptr.2d 24].) Section 31 defines who principals are. It provides in pertinent part:

> All persons concerned in the commission of a crime... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission... are principals in any crime so committed. (§ 31.)

Thus, an accomplice is a principal (§ 1111) and a principal includes an aider and abettor (§ 31; *People v. Beeman* (1984) 35 Cal.3d 547, 554 [179 Cal.Rptr. 100].)

An explication for the latter was provided by this Court in *Beeman, supra*:

> [T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Emphasis in orig.] (*People v. Beeman, supra*, at p. 560, citing *People v. Terry, supra*, at p. 402; *People v. Yarber* (1979) 90 Cal.App.3d 895, 915-916 [153 Cal.Rptr. 875]; *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87 [105 Cal.Rptr. 181].);

A defendant need not himself commit the acts requisite to the crime to be an aider and abettor, his peripheral assistance may be sufficient to make him an

accomplice as a matter of law. (See, e.g., *People v. Dailey, supra,* 179 Cal.App.2d at p. 486.) In addition one does not necessarily have to have the intention of enjoying the fruits of the crime to be an aider and abettor. (*People v. Beeman, supra,* at pp. 557 & 560, quoting *People v. Terry* (1970) 2 Cal.3d 362, 401 [85 Cal.Rptr. 409; e.g., *People v. Lewis* (1952) 113 Cal.App.2d 468 [248 P.2d 461] [encouraging statutory rape].)

Furthermore, and aider and abettor is not only guilty of the offense he intends to assist, but also of any offense that is a natural, foreseeable, and probable consequence of that offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260 [58 Cal.Rptr.2d 827].) Thus, in *People v. Solis* (1993) 20 Cal.App.4th 264 [25 Cal.Rptr.2d 184], the defendant, a gang-member, after a confrontation with some rival youths, went driving around the area where the confrontation had occurred. As they drove past some youths, appellant's accomplice, whom appellant knew was armed, leaned out the window and fired three shots, killing one person. The court found Solis was properly convicted of second degree murder based on a theory of aiding and abetting, where he admitted knowing that the shooter had a gun, even though Solis denied knowing or expecting that the shooter would use it for any purpose other than to shoot in the air to scare the opposing gang. (*Id.*, at p. 267-269.)

Where there is no dispute as to either the facts or the inferences to be drawn therefrom that the witness was an accomplice, the witness is an accomplice as a matter of law and the jury must be instructed that the witness' testimony must be corroborated by other evidence that tends to connect the defendant with the commission of the offense. (*People v. Robinson, supra,* 61 Cal.2d at p. 394; *People v. Valerio* (1970) 13 Cal.App.3d 912, 924 [92 Cal.Rptr. 82]; *People v. Fauber, supra,* 2 Cal.4th 792, 833-834; *People v. Zapien* (1993) 4 Cal.4th 929, 982 [17 Cal.Rptr.2d 122].) Thus, a witness' extrajudicial confession to the charged crime makes the witness an accomplice as a matter of law. (*People v. Robinson, supra,* 394.) A witness who "was the person with whom appellant was charged with conspiring" was "obviously an accomplice" to the crime of conspiracy. (*People v. Tatman* (1993) 20 Cal.App.4th 1, 12 [24 Cal.Rptr.2d 480].)

In the instant case, as detailed in Part A, above, James Williams was an accomplice as a matter of law. Irrefutably, Williams was a principal in the target offense of drugs sales from a fortified house, stocked with firearms, and during the course of an upcoming armed confrontation.[67] Although fully aware of all of these factors, he did nothing to extricate himself from the looming events. In fact, he

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[67] Appellants had been jointly charged for conspiracy (§ 182, subd. (1)) to operate a major narcotic sales distribution organization. (CT 4764, 4784, 4865, 4879, 4892, 4918, 4928, 4947, 4962, 4965, 4821, 7623.)

agreed to assume the role in those events Appellant Bryant had assigned him. This alone made him liable for murder as a principal to murder under the natural, foreseeable, and probable consequences of the target offense he aided and abetted, narcotic sales. (*People v. Solis, supra.*)

Moreover and irrefutably, Williams was aiding and abetting the target offense of murder. By Williams own account, from the preparations being made, he knew that someone was going to be killed. He may not of known who or why, but the imminentness of the criminal purpose was clear. Nevertheless, he facilitated the murders by playing his role as he was instructed. He understood that he was going to back the green car into the garage so that the bodies could be put into the trunk. The prosecution made this very point in their opening argument. (RT 16506-16507.) Williams watched for the arrival of the victims. After they had entered the outer most steel door and had been greeted by Appellant Bryant, Williams electronically reopened the door on Appellant Bryant's request and let Appellant Bryant out of the front door. Even if by that point he had had any doubt in what he was aiding and abetting, that doubt was removed by the first shots and screams he heard as he walked through the kitchen. Yet, he continued to provide his assistance to the venture and went out to the street and backed the green car into the garage as the victims in the car at the curb were

shot. Thereafter, he walked to the bus stop, looking about for witnesses to the homicides.

The prosecution believed that he was a principal in the homicides and charged him just as they had appellants and several others. But, that is not the dispositive fact. The dispositive fact is that Williams admitted sufficient facts that collectively confessed his role as a principal to murder under both of the aiding and abetting theories detailed above. There is no dispute as to either these facts or the inferences to be drawn therefrom. That is what made him an accomplice as a matter of law. (*People v. Robinson, supra,* 61 Cal.2d at p. 394; *People v. Valerio, supra,* 13 Cal.App.3d 912, 924; *People v. Fauber, supra,* 2 Cal.4th 792, 833-834; *People v. Zapien, supra,* 4 Cal.4th 929, 982.)

Williams' proffer that he was assisting only because he believed that it was too late for him to back out did not relieve him of criminal liability for the multiple murders. Not even the threat of future danger of loss of life is a defense (*People v. Otis* (1959) 174 Cal.App.2d 119, 125-126 [344 P.2d 342]; *People v. Lewis* (1963) 222 Cal.App.2d 136, 141 [35 Cal.Rptr. 1]) and the defense of coercion is not available at all when the charged offense is punishable by death (*People v. Petro* (1936) 13 Cal.App.2d 245, 248 [56 P.2d 984.].) The authority for excluding wrongdoers from accomplice liability in the context of a "feigned accomplice" is limited to those acting under the direction of an officer of the law and where the

accomplice's feigned complicity in the commission of the crime is merely for the purpose of detecting or prosecuting the perpetrator. (*People v. Griffin* (1950) 98 Cal.App.2d 1, 22 [219 P.2d 519]; *People v. Hensling* (1962) 205 Cal.App.2d 34, 39-40 [22 Cal.Rptr. 702]; *People v. Hoover* (1974) 12 Cal.3d 875, 881 [117 Cal.Rptr. 672]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191-193 [120 Cal.Rptr. 136]; Witkin, *California Evidence 3, supra,* § 101, p. 137.)

As detailed in Part A, the trial court refused appellants' request that the jury be instructed that Williams was an accomplice as a matter of law and that his testimony had to be corroborated by other evidence, evidence exclusive of other accomplice-testimony. Appellant's jury was instructed that they could not find appellant guilty based on the testimony of an accomplice unless that testimony was corroborated by other evidence that tended to connect him with the commission of the offense. However, the instructions left it to the jury to resolve whether Williams was an accomplice. Moreover, the jury was told that the burden was on appellants to prove by a preponderance of the evidence that Williams was an accomplice. (See pages 179-181, above.)

As a result, the jury was permitted to speculate upon whether James Williams was an accomplice, and impliedly and erroneously authorized to find that he was not an accomplice, and thereby they could convict appellants on his uncorroborated testimony. In fact, the prosecution argued to the jury that

Williams was not an accomplice merely because "he was not privy to the planning of killings in the back of the house." (RT 16505-16506.) That was not a determinative factor. As detailed in Part A, above, Williams was certainly privy at the point he described when Codefendant Settle was racking the shotgun, Appellants Wheeler and Smith were alongside Settle, some of them were putting on gloves, Appellant Wheeler had a handgun in his waistband, and Williams was instructed that "some people were coming to the house." He believed someone was going to die and their bodies were going to be put in the trunk of the green car that he was going to back into the garage. The failure to inform the jury that Williams was an accomplice as a matter of law had the effect of depriving appellant of a jury determination as to his guilt or innocence. The failure to properly instruct the jury to make a factual determination necessary for guilt violates the Sixth Amendment right to a jury trial. (*In re Winship* (1970) 397 U.S. 358, 361 [25 L.Ed.2d 368, 90 S.Ct. 1068].)

The failure to instruct on accomplice testimony is only harmless if there is sufficient corroborating evidence in the record. (*People v. Tatman, supra,* 20 Cal.App.4th at p. 12; *People v. Miranda* (1987) 44 Cal.3d 57, 100 [241 Cal.Rptr. 594].) However, as will be demonstrated in Part D, below, there was no corroborating evidence that Appellant Wheeler participated in the charged offenses, let alone sufficient evidence.

D. There Was No Corroborating Evidence that Appellant Was Involved in the Homicides

1. GENERAL PRINCIPLES OF APPELLATE REVIEW

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 433 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) In making this determination the appellate court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact could reasonably deduce from the evidence. However, the appellate court must resolve the issue of sufficiency of the evidence in light of the *whole* record. Furthermore, the reviewing court must judge whether the evidence of each of the essential elements of the offense of which the defendant stands convicted is *substantial* and of *solid value*. (*People v. Johnson, supra; People v. Barnes* (1986) 42 Cal.3d 284, 303 [228 Cal.Rptr. 228]; *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346 [253 Cal.Rptr. 199]; *People v. Ochoa* (1994) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23].) That is, the evidence must reasonably inspire confidence and be of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193].)

A finding based on conjecture or surmise cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 695 [214 Cal.Rptr. 832].) This is because suspicion is not evidence; it only raises a possibility, which will not support an inference of fact. Even a strong suspicion is insufficient to support a conviction. (*People v. Thompson* (1980) 27 Cal.3d 303, 324 [165 Cal.Rptr. 289].)

Furthermore, the evidence must be capable of supporting a finding as to every fact required for conviction *beyond a reasonable doubt*. "[T]he trier of fact must be reasonably persuaded to a near certainty" (*People v. Hall* (1964) 62 Cal.2d 104, 112 [41 Cal.Rptr. 284]) or "evidentiary certainty" (*Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed. 2d 339, 111 S.C. 328].) It is therefore *not* enough that there is *some* evidence based upon which a trier of fact might *speculate* that the defendant is in fact guilty. (*People v. Thomas, supra,* 2 Cal.4th 489, 545, Mosk, J. dissenting.)

These same standards apply to accomplice testimony. (Witkin, *California Evidence, Presentation at Trial 3, supra,* § 103, pp. 141; *People v. Malone* (1947) 82 Cal.App.2d 54, 60 [185 P.2d 870].) The reviewing court determines whether there is any substantial corroborative evidence, and whether, when error is found, the error committed has led to the verdict reached. (*People v. Malone, supra,* at p. 60; *People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012 [127 Cal.Rptr. 6]; Witkin, *California Evidence, Presentation at Trial 3,* § 103, p. 141.)

In this process, the Eighth Amendment requires a greater degree of accuracy and fact-finding than in noncapital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 96 S.Ct. 2978]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334 [124 L.Ed.2d 306, 113 S.Ct. 2112].)

2. THE TESTIMONY OF AN ACCOMPLICE MUST BE CORROBORATED

To prevent convictions from being based solely upon evidence from the inherently untrustworthy source of an accomplice, the legislature enacted section 1111 to require corroboration whenever an accomplice provided the evidence upon which a conviction is sought. (*People v. Belton* (1979) 23 Cal.3d 516, 525 [153 Cal.Rptr. 195].) It places upon the prosecution the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Cooks, supra,* 141 Cal.App.3d at p. 258 .) The section provides:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such proper evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances. (§ 1111.)

Moreover, in order to corroborate the testimony of an accomplice, the prosecution must produce independent evidence that without aid or assistance from the testimony of the accomplice tends to connect the defendant with the crime charged. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206 [249 Cal.Rptr. 71].) If the corroboration merely raises a suspicion of guilt, however grave, it is

insufficient. (Witkin, *California Evidence*, *Presentation at Trial 3,* § 103, p. 140; *People v. Robinson, supra,* 61 Cal.2d 373, 399; *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652].) Likewise, it is insufficient to show mere suspicious circumstances. (*People v. Robbins* (1915) 171 Cal. 466, 476 [154 P. 317].)

"Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1228 [283 Cal.Rptr. 144].) In determining whether an accomplice's testimony is sufficiently corroborated, the court must examine the testimony of the other witnesses to determine whether there is any inculpatory evidence that tends to connect the defendant with the offenses in question. If the remaining evidence requires interpretation and direction by the accomplice's testimony to give it value, the corroboration is not sufficient. (*People v. Reingold* (1948) 87 Cal.App.2d 382, 392-393 [197 P.2d 175]; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543 [248 Cal.Rptr. 60].)

Corroboration of an accomplice's testimony as to non-inculpatory facts is also insufficient because "if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." (*People v. Lohman* (1970) 6 Cal.App.3d 760,

766 [86 Cal.Rptr. 221], quoting *People v. Morton* (1903) 139 Cal.719, 724 [73 P. 609].).

An accomplice cannot corroborate himself (*People v. Andrews* (1989) 49 Cal.3d 200, 214 [260 Cal.Rptr. 583]) nor can the testimony of one accomplice corroborate another accomplice (CALJIC No. 3.13; *People v. Clapp* (1944) 24 Cal.2d 835, 837 [151 P.2d 237]; *People v. Dailey, supra,* 179 Cal.App.2d at p. 486.)

While the evidence does not need to corroborate every fact to which an accomplice testifies, still it has to connect the defendant with the commission of the offense without requiring interpretation and direction from the accomplice testimony itself. (*People v. Garrison* (1989) 47 Cal.3d 746, 773 [254 Cal.Rptr. 257] citing *People v. Hathcock* (1973) 8 Cal.3d 599, 617 [105 Cal.Rptr. 540].) In this regard, the evidence must connect the defendant with the crime, not simply with its perpetrators. (*People v. Falconer, supra,* 201 Cal.App.3d at p. 1543; *People v. Robinson, supra,* 61 Cal.2d at p. 400; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111 [146 Cal.Rptr. 828].)

To determine if sufficient corroboration exists, the accomplice's testimony should be eliminated from the case. The evidence of other witnesses must then be examined to determine if there is any inculpatory evidence tending to connect

appellant with the offense. (*People v. Shaw* (1941) 17 Cal.2d 778, 803-804 [112 P.2d 241]; *People v. Falconer*, *supra*, 201 Cal.App.3d at p. 1543.)

3. THERE IS NO CORROBORATION THAT APPELLANT WHEELER PARTICIPATED IN THE HOMICIDES

In the instant case, once James Williams' testimony is eliminated from the case, there is no evidence that Appellant Wheeler was at or in the Wheeler Avenue house during the homicides[70] or that he in any way aided and abetted their commission. All that remains is that Appellant Wheeler was one of the four employees in addition to Appellant Bryant that worked at the Wheeler Avenue house and that Appellant Wheeler's shift was 11:00 p.m. to 7:00 a.m. He was one of some 150 employees of an organization that was headed by Appellant Bryant and his family that had a motive to kill Messrs. Armstrong and Brown. As the Court in *Falconer, supra,* explained, the evidence must connect the defendant with the crime itself, not simply with its perpetrators. (*People v. Falconer, supra*, 201

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[70] Ms. Daniel's momentary misidentification of Appellant Wheeler for the first time, nearly seven years after the homicides, was discussed in Part A, above, and at footnote 61, p. 170. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. (*United States v. Langford* (9th Cir. 1986) 802 F.2d 1176, 1182; *United States v. Wade* (1967) 388 U.S. 218, 228 [18 L.Ed.2d 1149, 87 S.Ct. 1926]; *Jackson v. Fogg* (2d Cir. 1978) 589 F.2d 108, 112 ["Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness [are] highly suspect."].)

Cal.App.3d at p. 1543; see also *People v. Robinson, supra,* 61 Cal.2d at p. 400; *In re Ricky B, supra,* 82 Cal.App.3d at p. 111.)

Falconer, supra, is illustrative of the application of this rule. There an accomplice testified that the defendant was among four or five intruders who planned and participated in a burglary of a residence to steal marijuana. All the intruders wore stockings, masks and bandanas and the victim was unable to identify any of the intruders. The accomplice testified that not only did the defendant participate, but that the defendant had planned the raid, purchased the stockings ahead of time, and had even cased the place the morning before the burglary. (*Id.* at p. 1542.) The Court of Appeal found there was insufficient corroboration of accomplice testimony. The court emphasized:

> Excluding [the accomplice's] testimony we are left with these pertinent facts established by the evidence: [the defendant] is the father of one of the intruders; that he visited the [victim's] residence eight or nine months before the incident and knew [the victim] was a marijuana grower. This evidence is not enough to corroborate [the accomplice's] testimony. Although corroborating evidence need only be slight and may be entitled to little consideration when standing alone [citations], it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. (*Id.* at p. 1543.)

Similarly, in *People v. Martinez* (1982) 132 Cal.App.3d 119, 126-127 [183 Cal.Rptr. 256], an accomplice was the sole witness linking the defendant to an armed robbery. In reversing the defendant's conviction, the court observed:

> Although certain testimony by [two police officers] corroborated [the accomplice's] testimony, it did nothing more than show "the commission of the offense or the circumstances thereof." [Citations omitted.] (*Id.* at p. 133.)

All of Appellant Wheeler's actions after the homicides were equally consistent with his role as an employee of the organization in its drug distribution business. Appellant Wheeler's lack of cooperation or evasiveness during his subsequent police interrogation was also equally consistent with that role. (*People v. Robinson, supra,* at p. 398 [defendant's statements to the police merely indicated that he had something to hide from the police, but did not afford a reasonable inference of concealing a connection with the particular crime].)

Thus, once William's testimony is eliminated from the case, there is no evidence, let alone substantial evidence, corroborating that testimony regarding Appellant Wheeler's involvement in the homicides.

Moreover, from the subsequent input from the jury detailed in Part A, above, it is certainly clear that they had not figured out on their own that Williams was an accomplice as a matter of law and that Appellant Wheeler could not be convicted without substantial evidence corroborating Williams' testimony. As discussed in Part A, after the jury had returned their verdicts in Appellants' cases, they continued their deliberations on Codefendant Settle's case. In the process, they submitted seven questions to the court (detailed at pages 183-184, above.) From their content it is clear that one or more of the jurors had yet to resolve

whether Williams was an accomplice, despite the fact that that had been part of their charged duty.[71] One or more had not understood their role once they concluded that Williams was an accomplice.[72] And, even more troubling, one or more jurors had not understood their role once they had arrived at a reasonable doubt of the defendant's guilt.[73]

4. APPELLANT WHEELER'S CONVICTIONS MUST BE REVERSED

From a review of the entire record and with Williams' testimony removed, a rational trier of fact could not have found appellant guilty beyond a reasonable doubt, and, as a result, appellant's convictions must be reversed. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 433 U.S. 307,

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[71] The jury asked, "If one is charged with the same crime but not brought to trial is he automatically an accomplice?" (CT 15440, RT 17101.)

[72] The jury asked, "Page 56 of the instructions states 'A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence.' Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind? (CT 15441, RT 17102.)

During the subsequent exchange with the jury, one of the jurors inquired, "What if someone has decided that someone is an accomplice?" (RT 17105z.) Another juror added, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty. (RT 17105aa.) A third juror asked, "Now what if the jurors don't agree whether or not someone is an accomplice or not?" (RT 17105aa.)

[73] The jury asked, "If you have reasonable doubt, you are required to vote not guilty. Is that the law?" (CT 15441, RT 17102.)

During the subsequent exchange with the jury, one of the jurors inquired, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty. (RT 17105aa.)

318-319.) Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141],) the trial court should be directed to dismiss these offenses from the accusatory pleading with prejudice.

The result here effectively lightened the state's burden of proof and violated appellants' constitutional right to federal due process. (*Carella v. California* (1989) 491 U.S. 263 [105 L.Ed.2d 218, 109 S.Ct. 2419].) Furthermore, misapplication of a state law that leads to a deprivation of a liberty interest, here that no conviction shall be had on uncorroborated accomplice testimony (§ 1111), may violate the Due Process Clause of the 14th Amendment to the federal constitution. (*Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.; *Vitek v. Jones* (1980) 445 U.S. 480 [63 L.Ed.2d 552, 100 S.Ct. 1254].)

In addition, the court's failure to properly instruct the jury has arbitrarily denied appellant's application of this state's own domestic rules in violation of Fourteenth Amendment due process principles. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851 [55 Cal.Rptr.2d 347].) This too was reversible error. (*People v. Robinson, supra* (1964) 61 Cal.2d 373, 394; *People v. Zapien, supra,* 4 Cal.4th 929, 982.)